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Sobriety Checkpoints: A Constitutional Faux Pas - Michigan Department of State Police v. Sitz

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SOBRIETY CHECKPOINTS: A CONSTITUTIONAL FAUX PAS

Michigan Department of State Police v. Sitz, 110 S. Ct. 2481 (1990)

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I. INTRODUCTION

The problems and tragedies attributable to drunken driving[1] have been well-documented since before the advent of motorized vehicles as a mode of personal

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1. The United States Senate enacted a Joint Resolution in 1989 designating Labor Day weekend as "National Drive for Life Weekend" wherein the Senate catalogued the many problems attended with drunken driving:

> Whereas drunk driving is the most frequently committed crime in the United States, with arrests for driving while intoxicated totaling more than three times the number of arrest for all violent crimes combined;
> Whereas one individual in the United States was killed every twenty-two minutes in a drunk-driving-related crash in 1988, an average of sixty-five individuals each day;
> Whereas more than twenty-three thousand individuals were killed in the United States in drunk-driving-related crashes in 1988;
> Whereas two out of every five individuals in the United States will be involved in a drunk-driving-related crash at some point in their lives;
> Whereas the estimates of the economic costs of drunk driving in the United States are as high as $24 billion . . . .

S.J. RES. 127, 101st Cong., 1st Sess., 103 Stat. 561 (1989).

The following statistics compiled by the United States Department of Commerce in 1989 support these findings: (1) driving while intoxicated was the most frequently arrested for offense in 1988 (1,294,000 persons arrested); (2) there was a 55 percent increase in the arrest rate for driving under the influence between 1975 and 1985; (3) 20,208 drunken drivers were involved in fatal accidents in 1988, nearly one-third of the total licensed drivers involved in fatal accidents in 1988. U.S. Dep't of Commerce, *Statistical Abstract of the United States 1990* Nos. 298, 1040, 1041 (1990).

A commission composed of industrial leaders, citizen action groups, the media, law enforcement officials, doctors, and congressional and administrative members established by President Ronald Reagan in 1982 to confront the issue of drunken driving elucidated the realities of these statistical findings:

1. Each year 25,000 people are killed in alcohol related deaths.
2. Each year 1 million drunken driving collisions occur.
3. Over 65 percent of all fatal single-car accidents are alcohol related.
4. Relatively few problem drinkers (about 7 percent of the driving population) account for over 66 percent of all alcohol related fatal accidents.
5. It is estimated that one out of two Americans will be involved in an alcohol related accident in his or her lifetime.
6. Motorcyclists and drivers of light vans and trucks are more likely to be DUI than are automobile drivers.
7. Male drivers with previous convictions for DUI are more likely to be drinking than are drivers without such records.
8. The average drunken driver arrested on the highway has an 0.20 percent blood alcohol concentration level – fifteen drinks of 86-proof, or a comparable consumption of beer or wine, in four hours for a 180-pound person – double the level for illegal per se intoxication in forty-one of fifty states.
9. Every year 708,000 persons are injured and 74,000 of these people suffer serious injuries in alcohol related accidents.
10. Alcohol related collisions are the leading cause of death for young Americans between ages sixteen and twenty-four.

11. Although those between ages sixteen and twenty-four comprise only 22 percent of the total population licensed to drive, they cause 44 percent of all fatal nighttime alcohol related accidents.
12. Of all fatal alcohol related auto crashes, 80 percent occur between 8:00 p.m. and 8:00 a.m. On weekends as many as 10 percent of all drivers are impaired or drunk. The most dangerous hours are those between 12:00 a.m. and 4:00 a.m.
13. The cost in damages of alcohol related accidents is estimated to be $21 to $24 billion a year. In 1981 serious crimes such as murder, assault, and robbery were estimated to cost $12 to $13 billion.
14. Most Americans drink, and over 80 percent admit to driving after drinking.
15. When drinkers are at the presumed level of intoxication, their risk of causing an accident is six times greater than that of nondrinking drivers.
16. An accident caused by drunken driving is the most frequent violent crime in the United States today.

J.A. VOLPE, *Alcohol and Public Safety,* in ALCOHOLISM AND RELATED PROBLEMS 110, 121-22 (1984) [hereinafter Volpe].

The executive, legislative, and administrative branches of government have not been alone in their recognition of the drunken driving problem. The judiciary has evidenced cognizance of the problem for several decades. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553, 558 (1983) ("The carnage caused by drunken drivers is well documented and needs no detailed recitation here."); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (noting "traffic irresponsibility and the frightful carnage it spews upon our highways"); Perez v. Campbell, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars.") (footnote omitted); 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."); Burg v. Municipal Court, 673 P.2d 732, 734 (1983), *cert. denied,* 466 U.S. 967 (1984) ("[T]he drunk driver cuts a wide swath of death, pain, grief, and untold physical and emotional injury across the roads of . . . the nation.").

See also Jerome O. Campane, *The Constitutionality of Drunk Driver Roadblocks,* FBI LAW ENFORCEMENT BULLETIN, July, 1984, at 24 [hereinafter Campane] ("It has been estimated that on Friday and Saturday nights, 1 out of every 10 motor vehicle operators is intoxicated.").

But see Michigan Dep't of State Police v. Sitz, _____U.S._____, 58 U.S.L.W. 4781, 4787 n.7 (June 14, 1990) (Stevens, J., dissenting) (noting that the statistics compiled by the National Highway Traffic Safety Administration in 1988 of traffic fatalities involving intoxicated individuals "include any accidents that might have been caused by a sober driver but involved an intoxicated person. They also include accidents in which legally intoxicated pedestrians and bicyclists were killed; such accidents account for 2,180 of the 18,501 total accidents involving legally intoxicated persons."). Justice Stevens also pointed out that the statistics of drunken driving fatalities were inclusive of the intoxicated driver and were thus not merely a reflection of the deaths of innocent citizens at the hands of the drunken driver:

> [I]n 1988 there were 18,501 traffic fatalities involving legally intoxicated persons. If one subtracts from this number the 10,210 legally intoxicated drivers who were *themselves* killed in these crashes, there remain 8,291 fatalities in which somebody other than the intoxicated driver was killed in an accident involving legally intoxicated persons (this number still includes, however, accidents in which legally intoxicated pedestrians stepped in front of sober drivers and were killed).

Id. at 4789 n.17. J. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS: DRINKING, DRIVING AND THE SYMBOLIC ORDER (1981) (cited in Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks,* 18 U.C. DAVIS L. REV. 595, 635 n.182 (1985)) ("discussing how myths, such as 'the killer drunk,' have grown up around drunk driving, and how limited is the data base underlying what the public and policymakers think they know about drunk driving"); James B. Jacobs & Nadine Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks,* 18 U.C. DAVIS L. REV. 595, 637 (1985) [hereinafter Jacobs & Strossen] ("[D]runk drivers are unlikely to cause more than a small number of deaths or injuries over the course of a year in any particular area."); Bureau of Justice Statistics, U.S. Dep't of Justice, *Special Report: Drunk Driving* 1, 2 (1988) [hereinafter *Special Report*] (evidencing that the arrest rate for driving under the influence has fallen from 1.8 million in 1986 to approximately 1.3 million in 1988) (*see Statistical Abstract of the United States 1990, supra,* this note) (copy is on file with the Mississippi College Law Review); Geoffrey P. Alpert, *Establishing Roadblocks to Control the Drunk Driver—Michigan Department of State Police v. Sitz,* 27 CRIM. L. BULL. 51, 53 (1991) [hereinafter *Establishing Roadblocks*] (suggesting that research on highway safety has not uncovered the exact effects that alcohol has on driving); *Id.* at 54 (" '[P]ublic opinion and public policy on drunk driving have been shaped more by perceptions and imagery than by facts.' ") (quoting J. B. Jacobs, *Drunk Driving: An American Dilemma* at 40 (1989)); *Alcohol and Public Safety, supra* this note, at 139 ("It is heartening to report that 5,580 fewer Americans were victims of highway accidents in 1982 compared to 1981 . . . which marks the best record in forty years . . . . These figures are encouraging, but they indicate that the anti-drunken driving movement cannot be allowed to stall."); Stacey, *Drunken Driving Arrests Have Dropped Since '83,* USA Today, Feb. 29, 1988. at 5A, col. 1.

transportation in the United States.[2] Indeed, the United States Supreme Court has deemed the problems attendant with drunken driving worthy of judicial notice.[3] In laudable efforts to combat the many problems associated with drunken driving, new laws have been promulgated[4] and new practices implemented[5] at both the federal and state levels. One practice implemented in an effort to curb drunken driving – highway sobriety checkpoints[6] – however, resulted in substantial discord

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2. *Alcohol and Public Safety, supra* note 1, at 111. The author observes:

> Drinking and driving is by no means a modern-day social happening. Legislative records show that the combination of the two prompted early laws regarding the manner in which a man drove his horse after overindulging at the local public house. Furthermore, as early as 1904, one published report cited drinking as the cause of nineteen to twenty-five accidents involving the novel horseless carriages. Fifteen people were killed and nearly as many more were injured in these collisions.

Id.

3. "The carnage caused by drunk drivers is well documented and needs no detailed recitation here." South Dakota v. Neville, 459 U.S. 553, 558 (1983).

4. *See* Highway Safety Act of 1982, 96 Stat. 1738, 23 U.S.C. § 408 (1982) which conditioned receipt of certain basic and supplemental federal grants upon states imposing minimum penalties for drunken driving violations. Illustrative is subsection (e)(1):

> For purposes of this section, a State is eligible for a basic grant if such state provides –
>
> (A) for the prompt suspension, for a period of not less than ninety days in the case of a first offender and not less than one year in the case of any repeat offender, of the driver's license of any individual who a law enforcement officer has probable cause under State law to believe has committed an alcohol-related traffic offense, and (i) to whom is administered one or more chemical tests to determine whether the individual was intoxicated while operating the motor vehicle and who is determined, as a result of such tests, to be intoxicated, or (ii) who refuses to submit to such a test as proposed by the officer;
>
> (B) for a mandatory sentence, which shall not be subject to suspension or probation, of (i) imprisonment for not less than forty-eight consecutive hours, or (ii) not less than ten days of community service, of any person convicted of driving while intoxicated more than once in any five-year period;
>
> (C) that any person with a blood alcohol concentration of 0.10 or greater when driving a motor vehicle shall be deemed to be driving while intoxicated; and
>
> (D) for increased efforts or resources dedicated to the enforcement of alcohol-related traffic laws and increased efforts to inform the public of such enforcement.

For a representative sample of federal and state legislation see Richard A. Ifft, Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457 nn.1-3 (1983) [hereinafter *Curbing the Drunk Driver*].

See also Special Report, supra note 1, at 3 (discussing effect of ratification of the 26th Amendment and federal highway funds legislation on changes of alcohol-related legislation); *Alcohol and Public Safety, supra* note 1, at 139 ("[In 1983] over 763 bills on alcohol legislation were introduced and 129 enacted in 39 states – almost double the 378 introduced in 1982.").

5. *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 n.3 (1986) (noting the recent trend of new law enforcement strategies and describing a drunken driving program utilizing sobriety checkpoints) [hereinafter *Exploring the Constitutional Limits*]. *See generally Alcohol and Public Safety, supra* note 1, at 139 ("In fiscal year 1983, some 38 percent of Section 402 highway funds . . . was allocated to drunken driving programs.").

6. Highway sobriety checkpoints are also classified as intoxication roadblocks, sobriety roadblocks, drunk driving roadblocks, drunken driving roadblocks, alcohol safety action program roadblocks, DUI roadblocks, and DWI roadblocks. For purposes of this note, all roadblocks established to apprehend drunken drivers will be referred to as "sobriety checkpoints."

among the states.[7] States invalidating use of sobriety checkpoints by law enforcement officials viewed ulitization of these checkpoints[8] as unreasonable seizures in violation of the strictures of the Fourth Amendment of the United States Constitution,[9] while states permitting employment of the checkpoints found the checkpoints on a constitutional par with both the respective state and federal

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7. Among those jurisdictions having considered the constitutionality of sobriety checkpoints, the following jurisdictions found the checkpoints violative of constitutional standards: State ex rel. Ekstrom v. Justice Court, 663 P.2d 992 (Ariz. 1983); Jones v. State, 459 So. 2d 1068 (Fla. Dist. Ct. App. 1984); State v. Henderson, 756 P.2d 1057 (Idaho 1988); State v. McLaughlin, 471 N.E.2d 1124 (Ind. Ct. App. 1984); State v. Parms, 523 So. 2d 1293 (La. 1988); State v. Crom, 383 N.W.2d 461 (Neb. 1986); State v. Koppel, 499 A.2d 977 (N.H. 1985); State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984); Commonwealth v. Tarbert, 502 A.2d 221 (Pa. 1985); State v. Olgaard, 248 N.W.2d 392 (S.D. 1976); City of Seattle v. Mesiani, 755 P.2d 775 (Wash. 1988), *rev'g* Fury v. City of Seattle, 730 P.2d 62 (Wash. 1986).

Compare with Ingersoll v. Palmer, 743 P.2d 1299 (Cal. 1987); State v. Golden, 318 S.E.2d 693 (Ga. 1984); People v. Bartley, 486 N.E.2d 880 (Ill. 1985), *rev'g*, 466 N.E.2d 346 (Ill. 1984); State v. Garcia, 481 N.E.2d 148 (Ind. Ct. App. 1985); State v. Deskins, 673 P.2d 1174 (Kan. 1983); Kinslow v. Commonwealth, 660 S.W.2d 677 (Ky. Ct. App. 1983); State v. Church, 530 So. 2d 1235 (La. Ct. App. 2d Cir. 1988); Little v. State, 479 A.2d 903 (Md. 1984); Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985); State v. Coccomo, 427 A.2d 131 (N.J. 1980); City of Las Cruces v. Betancourt, 735 P. 2d 1161 (N.M. 1987); People v. Scott, 473 N.E.2d 1 (N.Y. 1984); Nelson v. Lane County, 743 P.2d 692 (Or. 1987); State v. Martin, 496 A.2d 442 (Vt. 1985); Lowe v. Commonwealth, 337 S.E.2d 273 (Va. 1985).

8. For a discussion of various methods utilized in employing sobriety checkpoints see *Curbing the Drunk Driver, supra* note 4, at 1460 n.16.

A safety study conducted by the National Transportation Safety Board found that the typical sobriety checkpoint consisted of the following features:

1) Police agencies select the times of operation and locations of checkpoints, based on empirical evidence of high DWI activity or alcohol-related crashes.

2) Checkpoint sites are established with high visibility, including warning signs, flashing lights, flares, police vehicles, and the presence of uniformed officers.

3) Police officers conducting the checkpoint either stop all traffic or use some preestablished, nonbiased formula to decide which vehicles to stop; for example, every tenth vehicle.

4) After being stopped, a motorist may be requested to produce a driver's license or vehicle registration and is asked questions while the officer looks for signs of alcohol impairment. In some cases where license/registration checks are not made, the stop is very brief (15 to 30 seconds).

5) Based on his or her observations, the police officer either waves the motorist on or directs him or her to a secondary area for further investigation. In the latter case, a roadside psychomotor test (e.g., walking a straight line) or a breath-alcohol test is usually requested.

6) If the driver fails these tests and the officer has probable cause, the motorist is arrested for DWI.

7) The arrested driver is then transported to the station for booking and is requested to submit to an evidential breath-alcohol test. Refusal to submit to such a test invokes the State's implied consent penalties.

National Transportation Safety Board. *Safety Study, Deterrence of Drunk Driving: The Role of Sobriety Checkpoints and Administrative License Revocations.* Washington, D.C.: U.S. Government, 1984 [hereinafter *Safety Study*]. Copy is on file with the Mississippi College Law Review.

9. The Fourth Amendment guarantees:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no 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.

constitutions.[10] These divergent views among the jurisdictions were only amplified by scholars addressing the issue.[11]

In *Michigan Department of State Police v. Sitz*,[12] the United States Supreme Court considered the constitutionality of highway sobriety checkpoints and decided that randomly-selected highway sobriety checkpoints did not violate the Fourth Amendment.[13] This note will focus on the Court's constitutional analysis of sobriety checkpoints and the foundation upon which its opinion rests. The note will consider whether sobriety checkpoints should be deemed an additional exception to the traditional requirements of the Fourth Amendment and will also address the alarming repercussions which further erosion of basic Fourth Amendment guarantees may have upon individual liberties.

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10. *See supra* note 7.

11. For a representative sample of scholars supporting the constitutionality of sobriety checkpoints see Ann M. Overbeck, Comment, *A Sobering Look at the Constitutionality of DUI Roadblocks*, 54 U. CIN. L. REV. 579 (1985) [hereinafter *A Sobering Look*] (the Fourth Amendment balancing analysis supports the constitutionality of sobriety checkpoints); *Curbing the Drunk Driver, supra* note 4 (sobriety checkpoints are an effective and constitutional tool for DWI enforcement); Carol Gibson Westendorf & Roger Westendorf, Comment, *The* Prouse *Dicta: From Random Stops to Sobriety Checkpoints?*, 20 IDAHO L. REV. 127, 152 (1984) [hereinafter *The Prouse Dicta*] (sobriety checkpoints may be invalid and unconstitutional as applied by enforcement agencies but are not per se invalid under the Fourth Amendment); Mark R. Soble, Comment, *Clearing the Roadblocks to Sobriety Checkpoints*, 21 U. MICH. J.L. REF. 489 (1988) [hereinafter *Clearing the Roadblocks*] (sobriety checkpoints are constitutional as adminstrative searches under Camara v. Municipal Court); M.A. Berenson, Note, State v. Parms: *The Constitutionality of DWI Checkpoints in Louisiana—A Roadblock for Roadblocks*, 63 TUL. L. REV. 734 (1989) (roadblock should be constitutional if conducted according to established guidelines); Scott R. Phillips, Comment, *DWI Roadblocks: Are They Constitutional in North Carolina?*, 21 WAKE FOREST L. REV. 779 (1986) [hereinafter *DWI Roadblocks*] (sobriety checkpoints satisfy the test established in Brown v. Texas); Jeffrey Eugene Jones, Note, *The Constitutionality of Sobriety Checkpoints*, 43 WASH. & LEE L. REV. 1469 (1985) (sobriety checkpoints are constitutional); Note, *Designing Constitutional Sobriety Roadblocks: A Comparative Study Using the Model in* Fury v. City of Seattle and State v. Deskins, 24 WILLIAMETTE L. REV. 129 (1988) [hereinafter *Designing Constitutional Sobriety Roadblocks*] (sobriety checkpoints would be constitutional if operated in adherence to certain criteria).

Compare with Jacobs & Strossen, *supra* note 1 (regardless of the procedures utilized in operating the sobriety checkpoint, the checkpoint may still be violative of the Fourth Amendment); Randall J. Fons, Comment, *The Constitutionality of Drunk Driving Roadblocks*, 58 U. COLO. L. REV. 109 (1986) (DUI roadblocks fail the objective balancing test established in Brown v. Texas because of their intrusiveness and the availability of alternative methods to control drunken driving); *Exploring the Constitutional Limits, supra* note 5 (sobriety checkpoints are unconstitutional because there are more effective alternative methods); Lazaro Fernandez, Comment, *DUI Roadblocks: Drunk Drivers Take a Toll on the Fourth Amendment*, 19 JOHN MARSHALL L. REV. 983, 986 (1986) [hereinafter *Toll on the Fourth Amendment*] ("[B]ecause there exist methods to advance the public interest without the wholesale seizure of thousands of motorists, DUI roadblocks unduly interfere with the traveling public's right under the fourth amendment to be free from unreasonable seizure."); Clark H. Cameron, Note, Ingersoll v. Palmer: *Have Sobriety Checkpoints Driven the Fourth Amendment Too Far?*, 17 SW. U.L. REV. 261 (1987) [hereinafter *Have Sobriety Checkpoints Driven the Fourth Amendment Too Far?*] (sobriety checkpoints ignore the standard of reasonable suspicion required for governmental intrusion and are, therefore, unconstitutional); Steven P. Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protection*, 12 AM. J. CRIM. L. 123 (1984) [hereinafter Grossman] (sobriety checkpoints are unconstitutional because the absence of requiring particularized suspicion causes the checkpoints to fail the Fourth Amendment's test of reasonableness); William P. Weiner & Michael D. McCullough, *Sobriety Checkpoints in Michigan: Balancing Sobriety and Propriety Under the Fourth Amendment*, 4 COOLEY L. REV. 247, 271 (1987) [hereinafter Weiner and McCullough] ("[A] blanket inspection of every driver, or every third driver, is an unreasonable search and seizure.").

12. _____U.S._____, 110 S. Ct. 2481 (1990).

13. *Id.* at 4784.

II. FACTS AND PROCEDURAL HISTORY

The State of Michigan established the Michigan Drunk Driving Task Force in the Department of State Police[14] and charged the Task Force with studying all aspects of the drunk driving problem in Michigan.[15] Included in the recommendations of the Task Force's final report submitted in September, 1985, was the implementation of sobriety checkpoints on public highways.[16] The State Police chose not to implement the sobriety checkpoints at that time, however, because of existing legislative opposition.[17]

After being directed by Governor Blanchard in his State of the State Address on January 29, 1986, to implement a sobriety checkpoint program,[18] the director of the Michigan Department of State Police appointed a Sobriety Checkpoint Advisory Committee[19] to establish guidelines[20] for the operation of these checkpoints, site selection, and publicity of the checkpoints.[21]

The first and only sobriety checkpoint[22] implemented under this program prior to the challenge to the constitutional validity of sobriety checkpoints was conducted at Dixie Highway and Gretchen Road in Saginaw County on May 17 and 18, 1986.[23] During the one hour-and-fifteen-minute operation, in which the Saginaw County Sheriff's Department cooperated, 126 vehicles passed through the checkpoint with each vehicle being detained for approximately twenty-five seconds or less.[24] Two drivers were further detained for field sobriety testing which resulted in the arrest of one of the two drivers for driving under the influence.[25] A third driver, who had driven through the checkpoint without stopping and was subsequently pulled over by an officer in an observation vehicle, was also arrested for driving under the influence.[26]

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14. MICH. COMP. LAWS § 257.625j; MICH. STAT. ANN. § 9.9325(10). Sitz v. Dep't of State Police, 429 N.W.2d 180, 181 (Mich. 1988).

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

16. *Id.*

17. *Id.*

18. *Id.*

19. The Committee consisted of representatives of the state and local police forces, state prosecutors, and the University of Michigan Transportation Research Institute. *Id.*

20. The guidelines also included "briefing, scheduling, safety considerations, motorist contact, staffing and assignment of duties." *Id.*

21.

> Under the program, checkpoints would be established at certain sites along state highways. All motorists would be stopped upon reaching a checkpoint and would be examined for signs of intoxication. Should the examining officer find indications of intoxication, the officer would direct the driver to an out-of-traffic location, check the driver's license and car registration, and possibly conduct further sobriety tests, including a Breathalyzer test. If the officer concluded that the driver was intoxicated, the officer would have discretion to arrest the driver; should the officer conclude the driver was not intoxicated, the driver was to be released.

Id.

22. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2484 (1990).

23. Sitz v. Department of State Police, 429 N.W.2d at 181.

24. *Id.*

25. *Id.*

26. *Id.*

The plaintiffs/respondents, licensed drivers in the State of Michigan,[27] commenced this action in the Circuit Court of Wayne County[28] on May 16, 1986,[29] seeking declaratory and injunctive relief from potential subjection to the sobriety checkpoints.[30] During pre-trial proceedings, the Michigan State Police Department agreed to delay further implementation of the sobriety checkpoint program until resolution of the case.[31] The circuit court found that, although there was statutory authority permitting implementation of the sobriety checkpoints,[32] the checkpoints violated the Fourth Amendment of the United States Constitution[33] and article 1, section 11 of the Michigan Constitution.[34] Petitioners – the Michigan State Police Department and its Director – appealed this decision to the Michigan Court of Appeals challenging both conclusions of the trial court regarding the constitutional infringements.[35]

The Michigan Court of Appeals affirmed the trial court's determination that the sobriety checkpoints were violative of the Fourth Amendment but found it unnecessary to consider whether the sobriety checkpoints violated the Michigan Constitution.[36] The court, noting that the trial court applied the appropriate test to determine the constitutionality of the sobriety checkpoints,[37] held that the trial court's findings[38] of fact were not clearly erroneous.[39]

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27. The Plaintiffs/Respondents were not detained or in any way directly involved with the operation of the challenged sobriety checkpoint. The Respondents' standing was evidently based on the allegation that each "is a licensed driver in the State of Michigan . . . who regularly travel[s] throughout the State in [their] automobile[s]." Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2484 (citing Complaint, App. 3a-4a).

28. 110 S. Ct. at 2484.

29. 429 N.W.2d at 181.

30. 110 S. Ct. at 2484.

31. 429 N.W.2d at 181.

32. *Id.* The opinion of the Court of Appeals of Michigan does not reveal the basis of the statutory authorization.

33. *See supra* note 9.

34. 429 N.W.2d at 181-82.

35. *Id.* at 182.

36. *Id.* at 185 ("We find it unnecessary to consider this issue because art. 1, sec. 11 offers at least the same protection as accorded by the Fourth Amendment and we have already found the checkpoint program to be an unreasonable seizure under the Fourth Amendment.").

37.

> The trial court employed the *Brown* test, balancing the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual's privacy caused by the checkpoints. The parties to this appeal agree, as do we, that the *Brown* three-prong balancing test was the correct test to be used to determine the constitutionality of the sobriety checkpoint plan.

Id. at 182.

38.

> In concluding that sobriety checkpoints were not an effective means of combating drunk driving, the trial court found: (1) the degree to which a sobriety checkpoint program would deter drunk driving was directly related to the program's success in achieving actual arrests; (2) sobriety checkpoints were not an effective means of actually apprehending drunk drivers; and (3) the statistical data and testimony presented at trial demonstrated, at most, a short-term deterrent effect.

Id. at 183.

39. *Id.* (citing MCR 2.613(c)).

The United States Supreme Court granted a writ of certiorari[40] to determine "whether a State's use of highway sobriety checkpoints violates the Fourth and Fourteenth Amendments to the United States Constitution."[41] In reversing the Michigan Court of Appeals' decision, the Court agreed that *Brown v. Texas*[42] provided the appropriate analytical framework upon which to determine the constitutionality of sobriety checkpoints,[43] but found that the evidence adduced at the trial level, when utilized in the *Brown* analysis, supported upholding the sobriety checkpoints as reasonable seizures under the Fourth Amendment.[44]

III. History And Background

A. The Fourth Amendment

The purpose of the Fourth Amendment[45] is to protect the "privacy and security of individuals against arbitrary invasions by governmental officials."[46] A histori-

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40. Michigan Dep't of State Police v. Sitz, 110 S. Ct. 46 (U.S. Mich., Oct. 2, 1989) (No. 88-1897).

41. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2483 (1990).

42. 443 U.S. 47 (1979).

43. 110 S. Ct. at 2484.

44. *Id.* at 2485.

45. The text of the Fourth Amendment may be found *supra* note 9.

46. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

cal review of the actions prompting passage of the Fourth Amendment[47] and subsequent judicial decisions construing the Fourth Amendment[48] clearly reveals that

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47. There is general agreement that the foundation for the passage of the Fourth Amendment was laid by James Otis' oration in the case of "Writs of Assistance" (*Paxton's Case*) in 1761. Otis was retained by colonial merchants to contest the Crown's authorization of writs of assistance to royal customs officials to enforce revenue measures. *See* JULIUS MARKE, VIGNETTES OF LEGAL HISTORY (1965)[hereinafter MARKE]; 2 LEGAL PAPERS OF JOHN ADAMS (L. Wroth & H. Zobel ed. 1968) (General Correspondence and Other Papers of the Adams Statesmen No. 3)[hereinafter LEGAL PAPERS]. The colonists recognized that special writs issued upon probable cause were legal, LEGAL PAPERS, *supra* at 141, but contested the general exercise of arbitrary power authorized by the general writs of assistance:

> The *Writ* was particularly vicious in that it was so general and arbitrary. No special writ of search, issued on sworn testimony that the smuggled goods were concealed in a definite place, was needed. The *Writ* was not returnable to the court after execution but rather continued in effect indefinitely, until the demise of the reigning monarch and for six months thereafter, as a license to search and seize uncustomed goods anywhere. The official in possession of the writ therefore had absolute and unlimited discretion in its execution.

MARKE, *supra* at 246.

Perhaps the sentiment of the colonists towards these writs was most forcefully expressed by Otis before the Superior Court:

> And I take this opportunity to declare, that whether under a fee or not, (for in such a cause as this I despise a fee) I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villainy on the other, as this writ of assistance is. It appears to me . . . the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book.

LEGAL PAPERS, *supra* at 139-40 (footnotes omitted).

The position taken by Jeremiah Gridley, counsel for the Crown before the Superior Court, was "clear-cut. Parliament . . . empowered the Exchequer to issue 'writs of assistance'; authority showed these to be general writs . . . . If the practice seemed to infringe upon individual liberties, there were ample English and colonial precedents for such infringements in the name of the exigencies of collecting the revenue." *Id.* at 114. As history reveals through violent revolution, Gridley's position prevailed.

See also Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) ("An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed 'general warrants, whereby an officer . . . may be commanded to search suspected places without evidence of a fact committed.' ") (citation omitted); United States v. Chadwick, 433 U.S. 1, 7-8 (1977) ("It cannot be doubted that the Fourth Amendment's commands grew in large measure out of the colonists' experiences with the writs of assistance and their memories of the general warrants formerly in use in England.") id. at 7-8; United States v. United States Dist. Court, 407 U.S. 297, 328-29 (1972) (Douglas, J., concurring) ("[T]he tyrannical invasions [stemming from nameless warrants] have been recognized as the primary abuses which ensured the Warrant Clause a prominent place in our *Bill of Rights*."). Stanford v. Texas, 379 U.S. 476, 481 (1965) ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists."). Henry v. United States, 361 U.S. 98, 100 (1959) ("[T]he writs of assistance, against which James Otis inveighed, . . . perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required."). Boyd v. United States, 116 U.S. 616, 625 (1886) ("[T]he events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government.").

See generally Grossman, *supra* note 11; Paul Gronson, Note, *The Right of Privacy and Due Process of Law*, 3 BUFFALO L. REV. 283 (1954); Note, *The "Probable Cause" Requirement for Search Warrants*, 46 HARV. L. REV. 1307 (1933) [hereinafter *The "Probable Cause" Requirement*]; Wood, *The Scope of Constitutional Immunity Against Searches & Seizures*, 34 W. VA. L.Q. 1 (1927) [hereinafter Wood]; Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982) [hereinafter Grano].

48. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 8 (1977) ("Although the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those involving invasions of the home, it would be a mistake to conclude . . . that the Warrant Clause was therefore intended to guard only against intrusions into the home."); Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971) ("[T]he values [of the Fourth Amendment] were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusion by official

power."); Stanford v. Texas, 379 U.S. 476, 481 (1965) ("[The Fourth Amendment] reflect[s] the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant."); Henry v. United States, 361 U.S. 98, 101 (1959) ("[T]he early American decisions both before and immediately after [the adoption of the Fourth Amendment] show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principle has survived to this day.") (footnotes omitted); Carroll v. United States, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."); Boyd v. United States, 116 U.S. 616 (1886):

> While the framers of the constitution had their attention drawn . . . to the abuses of this power of searching private houses and seizing private papers, . . . it is obvious that they only intended to restrain the abuse, while they did not abolish the power. Hence it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants, because they authorized searches in any place, for any thing.

Id. at 641 (Miller, J., concurring).

the amendment was designed to limit all searches and seizures by government officials.[49] Significantly, "[t]his inestimable right of personal security belongs as much to the citizen on the streets . . . as to the homeowner closeted in his study to dispose of his secret affairs."[50] Thus, the Fourth Amendment encompasses *all* seizures of the person, including investigative seizures that involve only a brief detention and are not equivalent to a traditional arrest.[51] Furthermore, the warrant clause of the Fourth Amendment provides additional constitutional safeguards.[52]

Subsequent judicial decisions, however, have substantially reduced these limitations of the warrant and probable cause requirements of the Fourth Amendment by construction of a number of "jealously and carefully drawn"[53] exceptions[54] and recognition of "certain carefully defined classes of cases"[55] in which there is an exception to these requirements. The most famous of these "carefully drawn" exceptions is found in *Terry v. Ohio*[56] in the context of police encounters with private citizens and investigation through "stop and frisk."[57] The *Terry* Court recognized that "stop and frisk" was synonymous with "search and seizure" for Fourth

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49. *See generally* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED—PRETRIAL RIGHTS § 26, 177-78 (1972) [hereinafter COOK]; Grossman, supra note 11; *The "Probable Cause" Requirement, supra* note 47, at 1308-09; *Toll on the Fourth Amendment, supra* note 11, at 986.

50. Terry v. Ohio, 392 U.S. 1, 8-9 (1968).

51. Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). *See* Terry v. Ohio, 392 U.S. at 19.

52.

> Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task . . . . Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.

Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967) (citations omitted).

53. Jones v. United States, 357 U.S. 493, 499 (1958).

54.

> It is true that there have been some exceptions to the warrant requirement . . . . But those exceptions are few in number and carefully delineated . . . ; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the "police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . ."

United States v. United States Dist. Court, 407 U.S. 297, 318 (1972) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)) (citations omitted).

55. Camara v. Municipal Court, 387 U.S. 523, 528 (1967). In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Court opined that the liquor and firearms industries fell within this certain class of cases in which there was no "reasonable expectation of privacy" and, thus, no search warrant was required prior to a search of these businesses. "The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Id.* at 313.

56. 392 U.S. 1 (1968).

57. In *Terry,* a police officer approached three citizens whom the officer had observed engaging in conduct which the officer believed was a preface to a hold-up. Upon approaching the suspects, the officer identified himself and asked the suspects their names. After the suspects "mumbled something," the officer grabbed one of the men and patted down the outside of his garments. The officer felt what he believed to be a handgun, but he could not remove it so he ushered the men into a nearby store where he obtained the handgun from underneath the defendant's garments. The officer also found a handgun on one of the other suspects but did not have to breach his outer garments to obtain it. The two men were later charged with carrying concealed weapons and moved to suppress the evidence of the handguns on the grounds that the evidence was the fruit of an unlawful search. *Id.* at 5-8.

Amendment purposes.[58] The Court found, however, that police conduct necessitated by on-the-spot observations by the officer was not properly subject to the Fourth Amendment warrant procedure[59] but, rather, to be gauged by determining the reasonableness of the conduct by balancing the involved governmental interest with the severity of the attendant intrusion.[60] The Court then reasoned that the governmental interest in these police encounters was two-fold: (1) the investigation of crime, and (2) self-protection of the police officer.[61] In comparison, the Court found that the resulting intrusion on the individual citizen, given the "traditional limitations upon the scope of searches,"[62] was outweighed by the countervailing governmental interests.[63] However, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[64] The *Terry* Court explained that the existence of "specific and articulable facts" was *imperative* so that these facts could be judged against an objective standard[65] when the "reasonableness" of a particular search or seizure was later subjected to the detached, neutral scrutiny of a magistrate.[66]

The adoption by the *Terry* Court of a reasonableness balancing standard in lieu of probable cause or a warrant in reviewing police conduct illustrates but one of the numerous "jealously and carefully drawn" exceptions[67] which the Supreme Court has constructed to the warrant and probable cause requirements of the Fourth Amendment. Consideration of other exceptions and the reasoning underlying their development is necessary to ascertain the impact of these exceptions on "con-

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58. *Id.* at 16.

59. *Id.* at 20.

60. *Id.* at 21.

61. *Id.* at 23-24.

62. *Id.* at 25.

63. *Id.* at 27.

64. *Id.* at 21 (footnote omitted).

65. *Id.* The objective standard to be utilized in determining the "reasonableness" of a particular search or seizure is whether "the facts available to the officer at the moment of the seizure or the search [would] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate[?]" *Id.* at 21-22 (citations omitted) (footnote omitted).

66. *Id.* at 21. The *Terry* Court left no doubt as to whether a search or seizure based on less than probable cause must, nevertheless, at some point be subject to judicial review:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. (footnote omitted).

67. *See supra* notes 53-55 and accompanying text.

ventional"[68] Fourth Amendment analysis[69] and the role which these exceptions have played in the Court's continued development and enlargement of the reasonableness balancing test – the apparent touchstone of contemporary Fourth Amendment jurisprudence.[70]

B. Administrative Searches

"Inspection by administrative officials of private premises in order to determine their condition or use is a long-standing if not time-honored component of the American scene."[71] These searches, though initially utilized primarily for the prevention of fire and of the spread of disease, expanded in use by municipalities to enforce a myriad of municipal regulations deemed necessary for the public welfare. Inspections required for the effective enforcement of these regulations were typically performed by personnel of local agencies who were ordinarily provided authorization to enter private premises for purposes of the inspection through provisions in local ordinances and without prior judicial approval.[72] Additionally, "[t]he inspector's right of entry [was] usually buttressed by a city ordinance making refusal to admit an authorized inspector a violation punishable by fine or imprisonment."[73] This right of entry by public officials for inspection without prior judicial approval, however, was challenged in 1965.

1. The *Camara* Decision

In *Camara v. Municipal Court*,[74] an inspector of the Division of Housing Inspection of the San Francisco Department of Public Health, making a routine an-

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68. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 258 (1984) [hereinafter Wasserstrom].

69. A conventional analysis of the Fourth Amendment includes three essential elements:

> (1) the warrant requirement: that except in a few specifically established and well-delineated situations, the police must obtain a particularized warrant from a "neutral and detached" judicial officer before they search or seize, (2) the probable cause requirement: that the police must have a fixed quantum of evidence – enough to establish probable cause – to justify most searches and seizures, whether made with or without a warrant; and (3) a definition of "searches and seizures," the Fourth Amendment's critical triggering phrase[,] capacious enough to include non-trespassory invasions of privacy by wiretapping and electronic surveillance and the exercise by the police of even minimally coercive restraint over the person.

Wasserstrom, *supra* note 68, at 258-59 (footnotes omitted).

70. The birth of "reasonableness" as the touchstone for Fourth Amendment review of searches and seizures may be found in Camara v. Municipal Court, 387 U.S. 523 (1967). In *Camara*, the Court held that ascertaining the "reasonableness" of particular conduct under the Fourth Amendment could only be accomplished by balancing the need for the particular official conduct with the attendant intrusion upon individual liberties. *Id.* at 536-37. *See infra* notes 90-93 and accompanying text. The "balancing test" is best explicated in Brown v. Texas, 443 U.S. 47 (1979), in the consideration of a *seizure* under the Fourth Amendment: "Consideration of the constitutionality of such seizures involves a weighing of 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." *Id.* at 50-51. This reasonableness balancing test has similarly been applied to searches. Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (citing Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967)).

71. Wayne R. LaFave, *Administrative Searches and the Fourth Amendment: The* Camara *and* See *Cases*, 1967 SUP. CT. REV. 1 [hereinafter LaFave].

72. *Id.* at 1-2.

73. *Id.* at 2.

74. 387 U.S. 523 (1967).

nual inspection, was informed by an apartment building manager that Camara, a lessee in the building, utilized the rear portion of his apartment as a personal residence. Use of the apartment for residential purposes violated the building's occupancy permit, and the inspector demanded Camara to permit an inspection of his apartment. Camara refused entrance to the inspector, however, because the inspector did not have a search warrant. Police arrested Camara for his continued refusal to permit a lawful inspection. Camara then brought suit alleging that the ordinance authorizing the inspections was unconstitutional, an issue upon which the Supreme Court ultimately granted certiorari.

The *Camara* Court considered two proffered justifications[75] for these warrantless inspections and found neither persuasive. The first contention considered in defense of the warrantless inspections was that the inspections were authorized by ordinances containing sufficient safeguards for individual interests and, additionally, that an individual inspector's decision to enter a premise, even without a warrant, must satisfy the constitutional standard of reasonableness.[76] The Court, however, felt that this argument overlooked the "purpose behind the warrant machinery"[77] of the Fourth Amendment. The individual, upon demand of entry by the inspector, "has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, . . . the lawful limits of the inspector's power to search, and . . . whether the inspector himself is acting under proper authorization,"[78] all "questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area."[79] The Court found that the practical effect of such a system was to leave individual rights "subject to the discretion of the official in the field"[80] and concluded that "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of criminal penalty."[81]

The Court next considered the extent to which the public interest demands warrantless administrative searches[82] by virtue of the fact that there was no more effective means of enforcing necessary minimum public health standards other than by "routine systematized inspection of all physical structures."[83] The Court dispelled the "public interest" argument by noting that there was no question as to whether the searches may be made but, rather, whether the searches may be made

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75. A third, additional justification advanced for the warrantless inspections was appended to that portion of the opinion wherein the Court considered itself to be addressing the "first" argument in defense of these inspections. *Id.* at 530-31; *see infra* notes 76-81 and accompanying text. This justification was that "the warrant process could not function effectively in this field." *Id.* at 532. Though taking notice of this defense at this point of the opinion, the Court actually only addresses this defense later in the Court's consideration of the defendant's "second" argument, so enumerated by the Court. *Id.; see infra* notes 82-85 and accompanying text.

76. *Id.* at 531.

77. *Id.* at 532.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 533.

82. *Id.*

83. *Id.*

without a warrant. The Court held that determinative of this second, more relevant inquiry was whether "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[84] The Court concluded that there had been no evidence that these administrative searches could not be effectively performed within a reasonable search warrant requirement.[85] Nevertheless, the Court recognized that, because of the unique nature of these inspections, there may be required "some other accommodation between public need and individual rights . . . ."[86] The Court, rejecting the argument that the right of entry to inspect should be predicated upon a warrant issued only upon probable cause that a particular dwelling contained violations,[87] held that probable cause for these types of searches would be satisfied based upon reasonable standards including such factors as the "passage of time, the nature of the building, . . . or the condition of the entire area."[88] In reaching this conclusion, the Court noted that these administrative inspections of all structures were "the only effective way to seek universal compliance with the minimum standards required by municipal codes."[89] Having thus prefaced its test of reasonableness, the Court opined that the only test for determining reasonableness was "by balancing the need to search against the invasion which the search entails."[90]

Therefore, the Court rejected the notion that inspectors must have specific knowledge of violations in a particular building to establish probable cause for issuance of a warrant, and held that "reasonableness is . . . the ultimate standard"[91] for assessing probable cause. Thus, though yet requiring a warrant based upon probable cause for an administrative search absent the occupant's consent or exigent circumstances,[92] the *Camara* Court reduced the traditional standard of probable cause[93] to a test of "reasonableness" in the context of administrative searches.

2. *Camara's* Progeny – The Border Search Cases and Beyond

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84. *Id.*

85. *Id.*

86. *Id.* at 534.

87. *Id.*

88. *Id.* at 538.

89. *Id.* at 535.

90. *Id.* at 537. The "persuasive factors" utilized by the Court in its balancing test include:

> First, such programs have a long history of judicial and public acceptance . . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results . . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the . . . citizen's privacy.

Id.

91. *Id.* at 539.

92. *Id.* at 540.

93. Brinegar v. United States, 338 U.S. 160 (1949), has been frequently cited as providing elucidation of the traditional standard of probable cause: "Probable cause exists where 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Id.* at 175-76 (quoting in part from Carroll v. United States, 267 U.S. 132, 162 (1928)).

The *Camara* Court's reasoning has been utilized to examine the constitutionality of other regulatory programs involving both searches and seizures. The *Camara* test of reasonableness was first considered in the context of vehicular detentions in *Almeida-Sanchez v. United States.*[94]

The *Almeida-Sanchez* Court, while recognizing the serious problem of deterring the entry of illegal aliens,[95] held that searches conducted without consent or probable cause following a stop made by a roving border patrol[96] were unreasonable under the Fourth Amendment.[97] In so ruling, the Court rejected the government's contention that these searches were analogous to the *Camara* administrative inspections which could be made on less than a traditional showing of probable cause. The Court found that "[t]he search . . . was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent"[98] and that it was precisely this type of situation which the *Camara* Court sought to prevent in requiring a warrant prior to inspection.[99]

In *United States v. Ortiz,*[100] the Court considered the constitutionality of searches conducted at *fixed* immigration checkpoints removed from the border.[101] The government forwarded two grounds upon which to justify dispensing with the requirement of probable cause at these checkpoints despite the Court's decision in *Almeida-Sanchez:* (1) the location of the checkpoint was based upon specified criteria and determined by high-level officials, thus reducing the checkpoint officers' discretion in determining which vehicles to stop,[102] and (2) a checkpoint stop and search was far less intrusive than a roving border patrol stop because motorists could see that all vehicles were being stopped, there were visible signs of the officers' authority, and there was less likelihood that the motorist would become frightened or annoyed.[103] The *Ortiz* Court recognized that the distinction between a roving patrol and a checkpoint might be significant in determining the constitutionality of the "seizure" involved, but held dispositive the issue of "search," which the Court found indistinguishable in either context. Therefore, the *Ortiz* Court ruled, in accord with *Almeida-Sanchez*'s rejection of *Camara's* reasonableness analysis, *searches* may not be conducted at fixed immigration checkpoints without consent or probable cause.[104]

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94. 413 U.S. 266 (1973).

95. *Id.* at 273.

96. The roving border patrol stops in issue occurred approximately 25 miles north of the national boundary. *Id.* at 268. The ensuing search was conducted without consent or probable cause. *Id.* at 273.

97. *Id.*

98. *Id.* at 270.

99. *Id.*

100. 422 U.S. 891 (1975).

101. The immigration checkpoint under consideration was located on the principal highway between Los Angeles and San Diego and sixty-six miles north of the Mexican border. *Id.* at 893.

102. *Id.* at 894.

103. *Id.* at 894-95.

104. *Id.* at 896-97.

In *United States v. Brignoni-Ponce*,[105] the Supreme Court considered the constitutionality of random *stops* made by *roving border patrols*. Recognizing the strong public interest in deterring the entry of illegal aliens[106] and the "modest" intrusion of the investigative stops,[107] the Court nevertheless held that random stops by roving patrols were unreasonable under the Fourth Amendment.[108] The Court did, however, rule that because of the limited nature of the intrusion, these stops may be justified on facts amounting to less than probable cause for an arrest.[109] The Court then found that the sole fact that the occupants appeared to be of Mexican ancestry did not justify a reasonable belief that the occupants were illegal aliens and, thus, did not provide reasonable grounds upon which to stop the vehicle.[110]

United States v. Martinez-Fuerte[111] provided the Court an opportunity to resolve an issue which it did not address in *Ortiz*,[112] the constitutionality of the "seizure" at permanent immigration checkpoints without any individualized suspicion that a particular vehicle was transporting illegal aliens or without prior authorization by a judicial warrant.[113] The Court began its analysis by recognizing that "checkpoint stops are 'seizures' within the meaning of the Fourth Amendment."[114] In considering the necessity of reasonable suspicion as a prerequisite to a valid stop at a permanent checkpoint, the Court determined that this was to be decided by balancing the interests at stake.[115] In holding that reasonable suspicion was not a necessary predicate to routine stops at permanent checkpoints,[116] the Court found that such a requirement "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens."[117] Thus, given the public interest in detecting illegal aliens, the impracticality of a requirement of reasonable suspicion in protecting this interest, and the "limited" intrusion[118] on Fourth Amend-

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105. 422 U.S. 873 (1975).

106. *Id.* at 878-79.

107. The stops by the roving patrols lasted less than one minute, visual inspection was limited to that which could be seen by officers standing alongside the vehicle and no search of the vehicle nor its occupants was permitted, and the occupants were only required to answer a few questions and possibly produce documentation of their citizenship. *Id.* at 880.

108. *Id.* at 883.

109. *Id.* at 880. "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.* at 884.

110. *Id.* at 885-87.

111. 428 U.S. 543 (1976).

112. *See supra* notes 100-04 and accompanying text.

113. United States v. Martinez-Fuerte, 428 U.S. at 545.

114. *Id.* at 556.

115. *Id.*

116. The government in *Martinez-Fuerte* identified routine stops at permanent checkpoints "as the most important of the traffic-checking operations." *Id.*

117. *Id.* at 557.

118. The Court felt that the reasonableness of the procedural safeguards utilized at the checkpoints assured only minimal intrusion to motorists. *Id.* at 562.

ment interests,[119] the Court relied upon the *Camara* balancing test[120] and concluded that "the government interests outweighed those of the private citizen."[121]

The *Martinez-Fuerte* Court, however, was also confronted with the argument that *Camara* required an area warrant, absent consent, even though there was no requirement that cause exists to believe that there were violations in any particular building searched.[122] The Court dismissed this argument by differentiating between the "types" of seizures involved. First, the Court found that the degree of intrusion associated with the search of a house could not be equated to the "minor interference with privacy resulting from the mere stop for questioning . . . ."[123] Second, the Fourth Amendment protections which *Camara* sought to achieve in a warrant requirement[124] were adequately provided by the "visible manifestations of the field officers' authority at a checkpoint . . . ."[125] Third, the concern that hindsight may distort the reasonableness of the seizure was not present in checkpoint stops where reasonableness is dependent upon such factors as location and method of operation and "therefore will be open to post-stop review notwithstanding the absence of a warrant."[126] Fourth, the need to substitute the judgment of the seizing officer with the judgment of a neutral, detached magistrate is diminished when the decision to seize is made by higher ranking officials and not left to the discretion of the field officer.[127] Therefore, based upon the different interests sought to be served by a warrant requirement in *Camara* than those in relation to fixed checkpoint stops, the Court held that *Camara* is not an "apt model"[128] upon which to base a requirement of an area warrant upon permanent checkpoints. Thus, the Court held that the principal protection of Fourth Amendment rights at permanent checkpoints was a sufficient limitation on the scope of the seizure, and neither reasonable suspicion nor a judicial warrant was required.[129]

Following the series of border search cases, the Supreme Court next considered whether it was reasonable under the Fourth Amendment to stop a vehicle for a license and vehicle registration check without probable cause or reasonable suspicion that the vehicle was being operated in violation of any law or that any of the vehicle's occupants were subject to seizure in connection with any other violation.[130] In *Delaware v. Prouse*,[131] the Court analogized these stops to the roving

119. *Id.* at 557-58.
120. *See supra* notes 86-93 and accompanying text.
121. *Martinez-Fuerte*, 428 U.S. at 561.
122. *Id.* at 564.
123. *Id.* at 565.
124. *See supra* notes 77-79 and accompanying text.
125. *Martinez-Fuerte*, 428 U.S. at 565.
126. *Id.* at 565-66.
127. *Id.* at 566.
128. *Id.* at 564-65.
129. *Id.* at 566-67.
130. Delaware v. Prouse, 440 U.S. 648, 650 (1979).
131. 440 U.S. 648 (1979).

border patrol stops in *Brignoni-Ponce*[132] and found that the discretionary spot checks, given the existence of more effective alternatives for enforcing vehicle regulations,[133] were not sufficiently effective to outweigh the resulting intrusion on Fourth Amendment interests.[134] In dictum,[135] however, the *Prouse* Court opined that this ruling did not preclude states from developing other methods for spot checks of licensing and registration documents which involved less intrusion and were not dependent upon "unconstrained exercise of discretion."[136] Most significantly for the development of checkpoints was the *Prouse* Court's suggestion that "[q]uestioning of all on-coming traffic at roadblock-type stops is one possible alternative."[137]

The reasonableness balancing test is best explicated in *Brown v. Texas*[138] where the defendant was arrested for failure to identify himself in violation of a state code provision after being detained by officers who had no reasonable suspicion that the defendant was engaged in criminal activity.[139] Recognizing that the defendant had been "seized" for Fourth Amendment purposes when he was detained for the purpose of identification,[140] the Court ruled that the reasonableness of the seizure could only be determined by balancing the interests involved: "Consideration of

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132. *Id.* at 657. *See supra* notes 105-10 and accompanying text.

133. In discussing the alternatives to discretionary spot checks, the Court stated: "The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations." *Prouse*, 440 U.S. at 659. The Court pointed out that vehicles are stopped for traffic violations countless times every day, and these drivers are subject to inspection of their licensing and registration papers. The Court further reasoned that unlicensed drivers were presumably less safe drivers and that these propensities would be exhibited while driving, thus making it much more likely to find unlicensed drivers among those stopped for traffic violations than through random selection of drivers. *Id.*

134. *Id.*

135. *Id.* at 663. This portion of the *Prouse* Court's opinion has become generally recognized in the field of roadblock jurisprudence as "The *Prouse* Dictum." "The *Prouse* Dictum" was subsequently utilized by numerous jurisdictions to validate sobriety checkpoints. There has been substantial debate among scholars as to whether the *Prouse* majority indeed intended this brief passage to resolve the constitutionality of sobriety checkpoints. The overwhelming majority of those considering the issue were of the opinion that the *Prouse* Court did not intend such a result. *See Have Sobriety Checkpoints Driven the Fourth Amendment Too Far?*, *supra* note 11, at 276 ("[I]t is unlikely that the Supreme Court would impliedly affirm the use of sobriety checkpoints through the dicta found in *Prouse*."); *Toll On the Fourth Amendment*, *supra* note 11, at 1002 ("The [*Prouse*] Court proffered this suggestion merely to illustrate a less intrusive alternative, not to provide a necessarily constitutional one."); Weiner & McCullough, supra note 11, at 252 ("This *Prouse* dicta has been relied on by a number of state courts in determining the constitutionality of sobriety checkpoints. We believe that *Prouse* cannot be interpreted in this manner. The checklane issue is important enough that the . . . Supreme Court would not have resolved it so tersely."); Jacobs & Strossen, *supra* note 1, at 616 ("Proponents of drunk driving roadblocks do not rely on the *Prouse* holding, but instead seek support from [its] dictum . . . ."); *The Prouse Dicta*, *supra* note 11, at 146 (concluding that the *Prouse* Court did not intend its dicta to validate sobriety checkpoints "[b]ecause we believe first, that the . . . Supreme Court would not dismiss such issues summarily, and second, that the brief production of documents contemplated by the *Prouse* Court is less intrusive than the personal encounter of a sobriety checkpoint . . . ."); Grossman, *supra* note 11, at 124 ("[T]he dictum in *Prouse*, when viewed in its proper context, has no application to sobriety checkpoints."); Lance J. Rogers, *The Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion?*, 21 CRIM. L. BULL. 197, 199 (1985) [hereinafter Rogers] ("By suggesting . . . that the balancing scales would be tipped in favor of the state if the stops were systematic, the Court engaged in a curious analysis.").

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

137. *Id.*

138. 443 U.S. 47 (1979).

139. *Id.* at 49.

140. *Id.* at 50.

the constitutionality of such seizures involves a weighing of 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."[141] The *Brown* Court then held that "[i]n the absence of any basis for suspecting [the defendant] of misconduct, the balance between the public interest and [the defendant's] right to personal security and privacy tilts in favor of freedom from police interference."[142]

In *New Jersey v. T.L.O.*,[143] the Supreme Court utilized *Camara's* balancing test to validate the search of a high school student's purse on less than probable cause. The Court found that reasonableness was dependent "on the context within which [the] search takes place"[144] and that the *Camara* balancing test was the appropriate standard for this determination. In weighing the balance of student searches, the Court felt that a school setting required modification of the level of suspicion needed to justify a search[145] and apparently reduced the requirement of reasonable suspicion further to one of "common sense" in school settings:

> This standard [of reasonableness] will . . . neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of school children. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.[146]

The Court then found, based upon this standard, that it was reasonable for an administrator to search the student's purse for cigarettes, resulting in discovery of marijuana, upon a report by a teacher that the student had been smoking in the lavatory.[147] In concurrence, Justice Blackmun expressed his concern that the Court had implied that "the balancing test is the rule rather than the exception"[148] and opined that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[149] Curiously, this proposition would come to be utilized in later cases as further justification for application of the *Camara* balancing test in lieu of the traditional requirements of probable cause or a warrant.[150]

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141. *Id.* at 50-51.
142. *Id.* at 52.
143. 469 U.S. 325 (1985).
144. *Id.* at 337.
145. *Id.* at 340.
146. *Id.* at 342-43.
147. *Id.* at 343.
148. *Id.* at 352.
149. *Id.* at 351.
150. *See infra* notes 152, 159, & 163 and accompanying text.

In *Griffin v. Wisconsin*,[151] the Court found Justice Blackmun's proposition in *T.L.O.*[152] appropriate to determine the constitutionality of a search of a probationer's home for weapons.[153] The *Griffin* Court held that "[a] state's operation of a probation system . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements"[154] and, accordingly, held that the state regulation permitting such searches did not violate the Fourth Amendment.[155]

The Supreme Court decided the most recent administrative search cases on the same day: *Skinner v. Railway Labor Executives' Association*[156] and *National Treasury Employees Union v. Von Raab*.[157] *Skinner* considered the constitutionality of regulations promulgated by the Federal Railroad Administration mandating that employees who are involved in certain accidents or who violate certain safety rules submit to blood and urine tests.[158] Continuing to recognize Justice Blackmun's "special needs" concurrence in *T.L.O.*,[159] the *Skinner* Court held that it was reasonable to conduct these toxicological tests given the limited discretion exercised by the employer under the regulations, the compelling safety interests served by the tests, and the "diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees."[160]

In *National Treasury Employees Union v. Von Raab*,[161] the Supreme Court again utilized the administrative search concept and its balancing analysis in considering the constitutionality of the United States Customs Service's program requiring employees to submit to a urinalysis test before transfer or promotion to certain positions.[162] The *Von Raab* Court found that the "special needs" of the Service in preventing promotion of drug users to certain positions justified departure from the traditional requirements of a warrant or probable cause in determining the constitutionality of these tests.[163] Thus, utilizing the balancing analysis established in *Camara*, the *Von Raab* Court held that the compelling governmental interest in assuring that front-line interdiction personnel were not involved in drugs[164] outweighed the privacy interests of the concerned employees who, unlike most

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151. 483 U.S. 868 (1987).
152. *See supra* note 149 and accompanying text.
153. *Griffin*, 483 U.S. at 870.
154. *Id.* at 873-74.
155. *Id.* at 880.
156. _____U.S._____, 109 S. Ct. 1402 (1989).
157. _____U.S._____, 109 S. Ct. 1384 (1989).
158. Skinner v. Railway Labor Executives' Ass'n, _____U.S._____, 109 S. Ct. 1402, 1407 (1989).
159. *Id.* at 1414. *See supra* note 149 and accompanying text.
160. *Id.* at 1422.
161. _____U.S._____, 109 S. Ct. 1384 (1989).
162. *Id.* at 1387.
163. *Id.* at 1390-91.
164. *Id.* at 1393.

citizens and government employees, should expect a "diminished expectation of privacy"[165] when involved in drug interdiction.[166]

IV. INSTANT CASE

A. The Majority and Concurring Opinions

The most recent cause for application of the reasonableness balancing test established in *Camara* was found by the United States Supreme Court in *Michigan Department of State Police v. Sitz*[167] in considering the constitutionality of sobriety checkpoints. In reversing the findings of both lower courts, the *Sitz* Court relied on *Camara's* reasonableness balancing test as explained in *Brown v. Texas*[168] in deciding that seizures at sobriety checkpoints were reasonable under the Fourth Amendment, while explicitly avoiding the issue of the constitutionality of actions following the initial detention.[169]

Chief Justice Rehnquist, writing for the majority, first noted that both the trial and appellate courts properly employed the balancing test found in *Brown* in their respective analyses, but also added that *United States v. Martinez-Fuerte*[170] was among the "relevant authorities"[171] to be considered in resolving this issue. The Court summarily dismissed the Plaintiffs'/Respondents' contention that, in accord with the Court's earlier decision in *National Treasury Employees Union v. Von Raab*,[172] "there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate, and that petitioners [-Michigan State Police Department and its Director-] have demonstrated no such need;"[173] the *Sitz* Court pointed out that *Martinez-Fuerte* was cited with approval in *Von Raab* and, thus, "it is perfectly plain from a reading of *Von Raab* . . . that it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways."[174]

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165. *Id.* at 1394.

166. The cases discussed *supra* notes 94-166 should not be considered exhaustive of cases evidencing the Supreme Court's willingness to adopt a reasonableness balancing standard in lieu of the traditional requirements of probable cause or a warrant, but as merely providing a skeletal background of the development, acceptance, and enlargement of the reasonableness balancing test through use of many of the more significant decisions since its inception in *Camara*.

For example, in O'Connor v. Ortega, 480 U.S. 709 (1987), the Supreme Court held that government employers may conduct warrantless work-related searches of employees' desks and offices despite a lack of probable cause. Similarly, in Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court upheld body cavity searches of prison inmates based upon this same line of reasoning. Thus, it is obvious that the administrative search concept and its attendant reasonableness balancing test have been employed in a myriad of contexts to justify both searches and seizures without the traditional requisites of probable cause or a warrant.

167. _____U.S._____, 110 S. Ct. 4781 (1990).

168. 443 U.S. 47, 50-51 (1979). *See supra* notes 138-42 and accompanying text.

169. "It is important to recognize what our inquiry is *not* about. No allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint." Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2485 (1990).

170. 428 U.S. 543 (1976). *See supra* notes 111-29 and accompanying text.

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

172. _____U.S._____, 109 S. Ct. 1384 (1989). *See supra* notes 161-66 and accompanying text.

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

174. *Id.*

Having thus ordained the appropriate framework for the Court's analysis, Chief Justice Rehnquist commenced the application of the *Brown* balancing analysis to the relevant facts.

Stage one of this analysis "involves a weighing of the gravity of the public concerns served by the seizure."[175] In assessing the gravity of drunken-driving, the *Sitz* Court singly noted that "[m]edia reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical."[176]

Stage two of the *Brown* balancing test requires consideration of "the degree to which the seizure advances the public interest."[177] The Court first opined that the Michigan Court of Appeals misconstrued this balancing factor in that court's determination—"based on extensive testimony in the trial record"[178]—that the checkpoint was not "effective" and that this ineffectiveness "materially discounted [the State Police Department's] strong interest in implementing the program."[179] Finding that neither *Martinez-Fuerte* nor *Delaware v. Prouse*[180] "supports the searching examination of 'effectiveness' undertaken by the Michigan Court,"[181] the majority explained the appropriate construction of this factor of the *Brown* analysis:

> The actual language from *Brown v. Texas* . . . describes the balancing factor as "the degree to which the seizure advances the public interest." This passage from *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for 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.[182]

The *Sitz* Court then juxtaposed the empirical data gleaned from the single Michigan checkpoint[183]—reflecting a 1.5 percentage arrest rate for alcohol impairment[184]—against the .5 percentage of illegal aliens detected to vehicles stopped at

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175. Brown v. Texas, 443 U.S. 47, 50-51 (1979). *See supra* note 141 and accompanying text.

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

177. *Brown*, 443 U.S. at 51. *See supra* note 141 and accompanying text.

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

179. *Id.*

180. 440 U.S. 648 (1979). *See supra* notes 131-37 and accompanying text. As stated in the *Sitz* opinion, the Michigan Court of Appeals relied primarily upon *Martinez-Fuerte* and *Prouse* in its "effectiveness" review. *Sitz*, 110 S. Ct. at 2487. *See* Sitz v. Dep't of State Police, 429 N.W.2d 180, 183 (Mich. Ct. App. 1988).

181. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2487 (1990).

182. *Id.*

183. *Id.* This empirical data indicated that of 126 vehicles entering the checkpoint, two drivers were arrested for drunken driving.

184. *Id. See* Sitz v. Department of State Police, 429 N.W.2d 180, 181 (Mich. Ct. App. 1988).

the *Martinez-Fuerte* checkpoint which that Court deemed "effective,"[185] and reasoned that "[w]e see no justification for a different conclusion here."[186]

Stage three of the *Brown* balancing analysis requires consideration of "the severity of the interference with individual liberty."[187] The severity of this interference encompasses both the "objective" and "subjective" intrusion which the individual motorist might reasonably experience.[188] Affirming both lower courts' conclusions that the "objective" intrusion[189] on the motorist at the sobriety checkpoint was "minimal,"[190] the Court analogized the sobriety checkpoint seizure to the seizures considered in *Martinez-Fuerte*.[191] The Court found that there was "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."[192]

The *Sitz* Court, however, again found that the appellate court misconstrued the Supreme Court's prior decisions in finding the *subjective* intrusion on motorists at the sobriety checkpoint to be "substantial."[193] In explaining the lower courts' misinterpretation of "subjective intrusion,"[194] the Court noted that "[t]he 'fear and surprise' to be considered [in reviewing the subjective intrusiveness of a checkpoint seizure] 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."[195] The *Sitz* Court held that this distinction was made clear in *Martinez-Fuerte's* consideration of the different level of intrusiveness attendant with checkpoint seizures as compared to the intrusiveness accompanying roving patrol seizures.[196] In finding the subjective intrusive-

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185. *Id. See* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

186. *Sitz*, 110 S. Ct. at 2488.

187. Brown v. Texas, 443 U.S. 47, 51 (1979). *See supra* note 141 and accompanying text.

188. The requirement of an assessment of both the "objective" and "subjective" intrusion on the individual is found neither in Camara v. Municipal Court, 387 U.S. 523 (1967), which established the reasonableness balancing test, nor in *Brown*'s explication of *Camara* upon which the *Sitz* Court relies. The first evidence of any significant distinction between the "objective" and "subjective" intrusion on the individual is found in United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976), where the Court apparently imposed the "subjective" intrusion inquiry for consideration in determining the severity of the intrusion resulting from a permanent checkpoint stop in contrast and in addition to the mere "objective" intrusion emanating from roving patrol stops which the Court had previously considered in United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

189. The factors considered by the Court in its determination of the level of objective intrusiveness included the "duration of the seizure and the intensity of the investigation." Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2486. *See* Sitz v. Department of State Police, 429 N.W.2d 180, 184 (Mich. Ct. App. 1988).

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

191. *Id. See supra* notes 111-29 and accompanying text.

192. *Id.*

193. *Id. See* Sitz v. Department of State Police, 429 N.W.2d 180, 184-85 (Mich. Ct. App. 1988).

194. The subjective intrusiveness of a checkpoint seizure is deemed to involve consideration of the checkpoint's "potential to generate fear and surprise," Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2485; *see* Sitz v. Department of State Police, 429 N.W.2d at 184, and "the degree of discretion left to individual officers." Sitz v. Department of State Police, 429 N.W.2d at 184; *see* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2485 (1990).

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

196. *Id. See supra* notes 118-21 and accompanying text.

ness of the sobriety checkpoint "indistinguishable from the checkpoint stops . . . upheld in *Martinez-Fuerte*,"[197] the *Sitz* Court found significant that the location of the sobriety checkpoint was selected pursuant to certain guidelines and uniformed officers stopped each vehicle.[198]

Having thus applied the three factors of the *Camara* reasonableness test as explicated in *Brown* to the challenged sobriety checkpoint, the *Sitz* majority concluded 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"[199] and, thus, satisfies the Fourth Amendment. Concurring only in the judgment of the *Sitz* majority, Justice Blackmun noted the apparent "little genuine public concern"[200] over drunken driving in the previous twenty years[201] and stated, "I am pleased . . . that the Court is now stressing this tragic aspect of American life."[202]

B. The Dissenting Opinions

Justice Stevens, with whom Justices Brennan and Marshall joined in dissent in Parts I and II of Justice Stevens' opinion, prefaced his dissent with criticism of the majority's findings concerning both the intrusiveness of the sobriety checkpoint—"[s]urprise is crucial to its method"[203]—and the effectiveness of the sobriety checkpoint—"the net effect of sobriety checkpoints on traffic safety is infinitesimal and possibly negative."[204] Justice Stevens noted that the trial court had given substantial weight to Maryland's experience with sobriety checkpoints[205] and, upon review of this evidence,[206] concluded that any increase in arrest rate for drunken driving provided by sobriety checkpoints, if any, would be "insignificant" compared to the arrest rate resulting from conventional law enforcement mea-

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197. *Id.* at 2487.

198. *Id.* The significance which the Court accorded the location of the checkpoint and that each vehicle was stopped by a uniformed officer emanated from the following finding in United States v. Ortiz, which the *Sitz* Court approvingly quoted and cited: "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." United States v. Ortiz, 422 U.S. 891, 894-95 (1975) (cited in Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2486-87 (1990)).

199. *Sitz*, 110 S. Ct. at 2488.

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

201. Justice Blackmun reflected that in Perez v. Campbell, 402 U.S. 637, 657 (1971), "I noted that the 'slaughter on the highways of this Nation exceeds the death toll of all our wars,' and that I detected 'little genuine public concern about what takes place in our very midst and on our daily travel routes.' " *Sitz*, 110 S. Ct. at 2488 (Blackmun, J., concurring).

202. *Id.*

203. *Id.* at 2490 (Stevens, J., dissenting).

204. *Id.*

205. The Michigan sobriety checkpoint program was patterned on Maryland's sobriety checkpoint program. *Id.* at 2491 (Stevens, J., dissenting).

206. Results of Maryland's sobriety checkpoint program conducted over a period of several years reflected that 143 of 41,000 motorists (0.3%) being subjected to a total of 125 checkpoints operated in the state were arrested. *Id.* at 2491 (Stevens, J., dissenting).

sures;[207] additionally, the impact of sobriety checkpoints in reducing highway fatalities "is even less substantial than the minimal impact on arrest rates."[208]

Part I of Justice Stevens' dissent focuses on the distinctions between "mobile" or "temporary" sobriety checkpoints and the "permanent" checkpoints which the Supreme Court validated in *United States v. Martinez-Fuerte*.[209] First noting "the critical difference between a seizure that is preceded by fair notice and one that is effected by surprise,"[210] the dissent found significant that a *permanent* checkpoint provided sufficient advance notice to the motorist who, thus, might completely avoid the resulting search or at least have an opportunity to limit the attendant intrusion.[211] In contrast, the dissent reiterated its concern that a *temporary* checkpoint's effectiveness is dependent upon the element of surprise, and this factor would both startle and distress an innocent motorist who might correctly infer "that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point."[212]

A second distinction between permanent checkpoints and temporary checkpoints considered significant by the dissent was the obvious "permanence" of the permanent checkpoints as compared to the "mobile" nature of temporary checkpoints. "With respect to [permanent checkpoints], there is no room for discretion in either the timing or the location of the stop – it is a permanent part of the landscape."[213] In contrast, the dissent found that, though temporary sobriety checkpoints are employed most frequently at night, "the police have extremely broad discretion in determining the exact timing and placement of [a temporary] roadblock."[214]

The dissent next considered the difference in an officer's discretion at a permanent immigration checkpoint and a temporary sobriety checkpoint following the initial seizure.[215] The dissent found that routine document checks at an immigra-

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207. "[E]ven if the 143 checkpoint arrests were assumed to involve a net increase in the number of drunk driving arrests per year, the figure would still be insignificant compared to the 71,000 such arrests made by Michigan State Police without checkpoints in 1984 alone." *Id.* (Stevens, J., dissenting).

208. Justice Stevens noted the finding of the Michigan Court of Appeals regarding Maryland's experience with a similar sobriety checkpoint program:

> "Maryland had conducted a study comparing traffic statistics between a county using checkpoints and a control county. The results of the study showed that alcohol-related accidents in the checkpoint county decreased by ten percent, whereas the control county saw an eleven percent decrease; and while fatal accidents in the control county fell from sixteen to three, fatal accidents in the checkpoint county actually doubled from the prior year."

Id. at 2491-92 (Stevens, J., dissenting) (quoting Sitz v. Department of State Police, 429 N.W.2d 180, 184 (Mich. Ct. App. 1988)).

209. 428 U.S. 543 (1976). *See supra* notes 111-29 and accompanying text.

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

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. Though Justice Stevens' dissent briefly considered the extent of official discretion following the initial seizure at a checkpoint, the *Sitz* majority explicitly refused to address this issue in its opinion. *See supra* note 169 and accompanying text.

tion checkpoint were much more easily standardized than a search to detect signs of intoxication undertaken by an officer with "virtually unlimited discretion."[216]

The final distinction between the permanent immigration checkpoints of *Martinez-Fuerte* and the temporary sobriety checkpoints deemed important by the dissent was that many of the seizures at permanent checkpoints occurred during daylight while sobriety checkpoints were predominantly operated at night. The dissent noted this similarity of sobriety checkpoints to the random stops considered in *United States v. Ortiz*,[217] and concluded that "[a] seizure followed by interrogation and even a cursory search at night is surely more offensive than a daytime stop that is almost as routine as going through a toll gate."[218]

Part II of Justice Stevens' dissent centers on the majority's "misapplication" of the reasonableness balancing test found in *Brown v. Texas*.[219] Consideration is first given to the "gravity of the public concerns served by the seizure"[220] whereupon the dissent fails to find any distinction between the gravity of concern due drunken driving and the gravity accorded a similar problem of unsafe motorists found in *Delaware v. Prouse*[221] and the gravity of the illegal drug problem found in *Brown v. Texas*.[222] Yet in both of these decisions, the dissent points out, the gravity of the public concern was not deemed to outweigh the other two relevant factors[223] of the *Brown* balancing test. Thus, the dissent reasoned, the constitutionality of sobriety checkpoints must be found in consideration of the remaining two factors of the *Brown* balancing test.[224]

In consideration of "the severity of the interference with individual liberty,"[225] the dissent reasserted its earlier position that sobriety checkpoints, especially when operated at night, are accompanied by more individual intrusiveness than permanent checkpoints and added that the "unannounced investigatory seizures are . . . the hallmark of regimes far different from ours."[226] The dissent did, however, admit that this difference of opinion may be predicated merely upon a disagreement between the majority and dissent concerning the importance of individual liberty.[227] The dissent, however, found the majority's evaluation of *Brown's* final factor—"the degree to which the seizure advances the public interest"[228]—as "wholly indefensible."[229]

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216. *Sitz*, 110 S. Ct. at 2493 (Stevens, J., dissenting).

217. 422 U.S. 891 (1975). *See supra* notes 100-04 and accompanying text.

218. *Sitz*, 110 S. Ct. at 2493 (Stevens, J., dissenting).

219. 443 U.S. 47 (1979). *See supra* notes 138-42 and accompanying text.

220. Brown v. Texas, 443 U.S. 47, 50-51 (1979). *See supra* note 141 and accompanying text.

221. 440 U.S. 648 (1979). *See supra* notes 131-37 and accompanying text.

222. 443 U.S. 47 (1979).

223. *See supra* note 141 and accompanying text for discussion of the three factors utilized by the Supreme Court when employing the *Brown* balancing test.

224. *Sitz*, 110 S. Ct. at 2489 (Stevens, J., dissenting).

225. *Brown*, 443 U.S. at 51; *see supra* note 141 and accompanying text.

226. *Sitz*, 110 S. Ct. at 2495 (Stevens, J., dissenting).

227. *Id.*

228. *Brown*, 443 U.S. at 51. *See supra* note 141 and accompanying text.

229. *Sitz*, 110 S. Ct. at 2495 (Stevens, J., dissenting).

The dissent, in its critical analysis of the majority's evaluation of this final factor, considered the "effectiveness" evidence adduced at the trial court and determined:

> The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols. Thus, although the *gross* number of arrests is more than zero, there is a complete failure of proof on the questions whether the wholesale seizures have produced any *net* advance in the public interest in arresting intoxicated drivers.[230]

In support of this proposition, the dissent noted that neither the Michigan State Police nor the Maryland police officer who testified relied upon the number of arrests made at the sobriety checkpoints as justification for the checkpoint's use.[231] Rather, both asserted the position that the sobriety checkpoints served as a deterrent to drunken driving which, as a result, reduced the accident rate.[232] The dissent countered this position as justification for the sobriety checkpoints by stating that the deterrent value could only be ascertained by measuring the number of drunken driving crimes that were avoided as a result of the sobriety checkpoints; this, the dissent noted, was not addressed in the majority opinion.[233]

Additionally, the dissent noted the difference in success of detecting illegal aliens at the *Martinez-Fuerte* permanent immigration checkpoint[234] as compared to the arrest rate at sobriety checkpoints. The dissent also pointed out that drunken drivers may be more easily detected without sobriety checkpoints than illegal aliens could be detected without permanent immigration checkpoints.[235]

Part III of the dissenting opinion of Justice Stevens[236] encompasses "[t]he most disturbing aspect of the Court's decision."[237] Justice Stevens opined that the majority opinion failed to give any weight to the individual's "freedom from suspicionless unannounced investigatory seizures"[238] while placing great emphasis on the needs of law enforcement "by looking only at gross receipts instead of net benefits."[239] Justice Stevens admitted, however, that his opposition does not extend to

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230. *Id.* (footnotes omitted).

231. *Id.* at 2496.

232. *Id.*

233. *Id.*

234. The dissent noted that Justice Powell's opinion in *Martinez-Fuerte* not only relied upon the 17,000 arrests made at the checkpoint in 1973, but was also accompanied by an explanation as to the net benefit to law enforcement resulting from these arrests. *Sitz*, 110 S. Ct. at 2496 (Stevens, J., dissenting). *See* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

235. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2497 (1990) (Stevens, J., dissenting).

236. Justices Brennan and Marshall did not join in Part III of Justice Stevens' dissent.

237. *Sitz*, 110 S. Ct. at 2497 (Stevens, J., dissenting).

238. *Id.*

239. *Id.* This proposition alludes to an earlier finding of Justice Stevens that "[t]he Court's analysis of this issue resembles a business decision that measures profits by counting gross receipts and ignoring expenses." *Id.* at 2495.

all types of investigatory procedures[240] and suggested that requiring motorists to submit to a breathalyzer test at a permanent checkpoint might better serve the purpose of detecting drunken drivers while avoiding the constitutional pitfalls attendant with "[r]andom, suspicionless seizures designed to search for evidence of firearms, drugs, or intoxication."[241] Justice Stevens finally noted that sobriety checkpoints were utilized as publicity stunts[242] and warned that "symbolic state action [is] an insufficient justification for an otherwise unreasonable program of random seizures."[243]

Justice Marshall joined Justice Brennan in dissent against the majority's justification for application of the *Brown* reasonableness balancing test in the majority's consideration of the constitutionality of sobriety checkpoints. The dissent asserts that

> [t]he majority opinion creates the impression that the Court generally engages in a balancing test in order to determine the constitutionality of all seizures, or at least those 'dealing with police stops of motorists on public highways' . . . [because,] [i]n most cases, the police must possess probable cause for a seizure to be judged reasonable.[244]

The dissent notes that "[o]nly when a seizure is '*substantially* less intrusive' than a typical arrest is the general rule replaced by a balancing test"[245] and then agrees with the majority that the initial seizure at a sobriety checkpoint satisfies this "substantially less intrusive" requirement. The dissent, however, expresses concern that nowhere in the majority opinion may be found that "the *reason* for employing the balancing test is that the seizure is minimally intrusive."[246] Rather, the majority finds that the seizure is "slight" and then makes the unexplained finding that the balance favors the governmental interest.[247] The dissent then states that "[the Court has] generally required the Government to prove that it had reasonable suspicion for a minimally intrusive seizure to be considered reasonable [and] . . . [b]y 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."[248]

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240. An example of an investigatory procedure acceptable to Justice Stevens involved the practice of requiring airline passengers and visitors of public buildings to pass through metal detectors. *Id.* at 2497-98.

241. *Id.* at 2498.

242. Justice Stevens quoted Lieutenant Cotton of the Maryland State Police who had testified at the trial: " '[T]he media coverage . . . has been absolutely overwhelming . . . . Quite frankly we got benefits just from the controversy of the sobriety checkpoints.' " *Id.* (footnotes omitted).

243. *Id.* at 2499.

244. *Id.* at 2488-89 (Brennan, J., dissenting) (quoting *Sitz*, 110 S. Ct. at 2485) (citing Dunaway v. New York, 442 U.S. 200, 209 (1979)).

245. *Id.* at 2489 (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)).

246. *Id.*

247. *Id.*

248. *Id.* (citations omitted).

The dissent then *presumes* that the majority's decision upholding suspicionless seizures at sobriety checkpoints is predicated upon reliance on *Martinez-Fuerte*.[249] This reliance by the majority on *Martinez-Fuerte*, however, is criticized for the same reasons forwarded in Justice Stevens' dissent,[250] as well as upon the premise that *Martinez-Fuerte* excused reasonable suspicion as a predicate to seizure because " 'reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.' "[251] In contrast, however, the dissent points out that there has been no evidence that the same problem exists in detecting drunken drivers.[252] The dissent concluded that "[w]ithout proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, . . . the constitutional balance must be struck in favor of protecting the public against even the 'minimally intrusive' seizures involved in [sobriety checkpoints]."[253]

V. ANALYSIS

In *Michigan Department of State Police v. Sitz*,[254] the United States Supreme Court validated the use of sobriety checkpoints in detecting drunken drivers despite the absence of a judicially-issued warrant, probable cause, or even reasonable suspicion. The *Sitz* Court's holding that sobriety checkpoints did not violate the guarantees of the Fourth Amendment is based upon an application of the reasonableness balancing test as represented in *Brown v. Texas*[255] and upon the Court's previous decision in *United States v. Martinez-Fuerte*,[256] where the use of permanent checkpoints for detecting illegal aliens was held constitutional.[257] Neither of these decisions, however, nor the rationale underlying each decision, provide a sound basis for the *Sitz* Court's determination that sobriety checkpoints satisfy the strictures of the Fourth Amendment in the absence of probable cause or a warrant. Much to the contrary, the *Sitz* Court's validation of sobriety checkpoints may well foreshadow the Court's willingness to decide Fourth Amendment issues on an ad

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249. *Id.*

250. *See supra* notes 209-18 and accompanying text.

251. *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976)).

252. *Id.*

253. *Id.* at 2490.

254. _____U.S._____, 110 S. Ct. 2481 (1990).

255. 443 U.S. 47, 50-51 (1979). *See supra* note 141 and accompanying text. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2495 (1990). *See generally* Camara v. Municipal Court, 387 U.S. 523 (1967) (establishing the reasonableness balancing test).

256. 428 U.S. 543 (1976). *See supra* notes 111-29 and accompanying text. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2485 (1990).

257. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976). *See supra* notes 111-29 and accompanying text.

hoc public policy basis[258] without just consideration being afforded Fourth Amendment requirements. An analysis of the Fourth Amendment's applicability to sobriety checkpoints will demonstrate the errors in the *Sitz* Court's constitutional analysis of sobriety checkpoints[259] and clearly reveal the resulting potential for further infringement upon individual liberties. Factors relevant to this analysis include: (1) the inapplicability of the reasonableness balancing test and its concurrent reduction of the standard for probable cause to sobriety checkpoints, (2) the applicability of the Fourth Amendment warrant requirement to sobriety checkpoints, and (3) the elimination of an "effectiveness" review from the reasonableness balancing test.

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258. As corroborating evidence of the Court's movement in this direction, consider Justice Scalia's scathing words of dissent in National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384 (1989):

> I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program:
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> "Implementation of the drug screening program would set an important example in our country's struggle with the most serious threat to our national health and security." Or as respondent's brief to this Court asserted: "if a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends." 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 that war to this invasion of their privacy and affront to their dignity? To be sure, there is only a slight chance that [employee drug testing] will prevent some serious public harm resulting from Service employee drug use, but it . . . – most important of all – will demonstrate the determination of the Government to eliminate this scourge of our society! I think it 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- . . . cannot validate an otherwise unreasonable search.

Von Raab, _____U.S._____, 109 S. Ct. 1384, 1401 (1989) (Scalia, J., dissenting) (citations omitted). *See also id.* at 1398 ("While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been 'reasonable,' the answer depends largely upon the social necessity that prompts the search.").

259. There is yet another aspect of the *Sitz* Court's ruling worthy of critical analysis. One should consider the implication of the Court's explicit refusal to address the actions of law enforcement officials *following* the initial detention at a sobriety checkpoint. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2485 (1990). Though the Court declined to address this issue because there were "[n]o allegations- . . . before [the Court] of unreasonable treatment of any person after an actual detention at a particular checkpoint," *id.*, it is difficult to fathom how the Court may proceed to validate the use of sobriety checkpoints without careful consideration of this critical aspect of the sobriety checkpoints' *modus operandi*. Indeed, an essential factor for consideration in the reasonableness balancing analysis, purportedly utilized by the Court in its decision, is the "effectiveness" of the challenged activity in achieving its desired goal(s). *See* Brown v. Texas, 443 U.S. 47, 50-51 (1979). *See generally* Camara v. Municipal Court, 387 U.S. 523, 535 (1967) (establishing the reasonableness balancing test and, in its analysis, finding periodic inspections to be "the only effective way to seek universal compliance."). There is obviously a direct correlation between the methods employed by law enforcement officers for detecting drunken drivers following the initial detention and the overall "effectiveness" of the sobriety checkpoints in detecting drunken drivers. If this correlation were not self-evident, the Court's opinion would lead one to believe that the initial detention, without more, is the "effective" means by which drunken drivers are detected. The permeability of this reasoning is glaring. This note proposes that the *Sitz* Court did not, however, intend to found its opinion on such reasoning but, rather, merely eliminated the "effectiveness" review as a requisite consideration in the reasonableness balancing analysis. *See infra* notes 360-67 and accompanying text.

A. Camara *Not "Apt Model"*[260]

Though the *Sitz* Court relied upon the reasonableness balancing test as expressed in *Brown*[261] in upholding the constitutionality of sobriety checkpoints, this note reflects that the concept of applying a test of reasonableness in administrative search contexts in lieu of requiring a warrant or probable cause originated in *Camara v. Municipal Court*,[262] where the *Camara* Court reduced the traditional standard of probable cause to a test of "reasonableness" in administrative search contexts.[263] The *Sitz* Court's reliance upon the reasonableness balancing test must thus be viewed in light of the considerations, purposes, and interests sought to be served by formulation of the reasonableness test in *Camara*.

The *Camara* Court recognized that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails,"[264] and forwarded three factors which the Court deemed as "persuasive" evidence of "the reasonableness of area code-enforcement inspections:"[265] (1) "such programs have a long history of judicial and public acceptance,"[266] (2) "the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results,"[267] and (3) "because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."[268] Consideration of these "persuasive" factors, however, will reveal that these factors are not similarly present in *Sitz*, thus arousing doubt as to the precedential appropriateness of the *Sitz* Court's reduction of the traditional standard of probable cause to a standard of "reasonableness" in consideration of the constitutionality of sobriety checkpoints.

1. History of Judicial and Public Acceptance

The *Camara* Court found that code-related housing inspections "have a long history of judicial and public acceptance."[269] Sobriety checkpoints, however, have not enjoyed this same acceptance. Prior to *Sitz*, courts evidenced obvious dis-

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260. This language derives from the majority's opinion in United States v. Martinez-Fuerte, 428 U.S. 543, 564-65 (1976), where the Court held that *Camara* was not an "apt model" for requiring a warrant in the case of a permanent checkpoint utilized for detecting illegal aliens. Though this particular reasoning of the *Martinez-Fuerte* Court will be considered in greater detail *infra*, the same general reasoning—i.e., the inapplicability of *Camara*—is similarly pertinent in the *Sitz* Court's unwarranted utilization of the reasonableness balancing test in its analysis. For discussion of the warrant requirement to which specific reference was made in *Martinez-Fuerte*, see *supra* notes 122-28 and accompanying text.

261. *See supra* note 141 and accompanying text.

262. 387 U.S. 523 (1967).

263. *See supra* notes 74-93 and accompanying text.

264. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

265. *Id.* at 537.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

agreement as to both the effectiveness[270] and the constitutionality of sobriety checkpoints.[271] Additionally, there is little evidence to suggest that there has been general public approval of the use of sobriety checkpoints.[272] Sobriety checkpoints, therefore, are not worthy of the same deference afforded code-related housing inspections by *Camara* as justification for reducing the traditional standard of probable cause.

2. The Public Interest and Acceptable Results

Included among the factors deemed persuasive by the *Camara* Court in justifying a reduction of the traditional standard of probable cause to one of reasonableness was the Court's finding that "the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results."[273] The considerations inherent in this factor are more readily amenable to contemporary Fourth Amendment analysis when viewed as two distinct considerations: (1) the gravity of the public interest in preventing or abating the dangerous condition, and (2) the effectiveness of the method(s) employed in achieving this result when considered in light of available alternatives.[274]

The gravity of the public interest in preventing or abating drunken driving is virtually unquestionable.[275] Thus, the public interest may appropriately be

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270. *See infra* note 276 and accompanying text.

271. *See supra* note 7 and accompanying text. *Cf.* Carroll v. United States, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

272. *See 1,300 Oppose Sobriety Stops*, The Washington Post, Jan. 11, 1983, at B3, col. 6 ("More than 1,300 Harford County residents have signed a petition opposing the sobriety checkpoints set up recently by Maryland state police . . . ."); *Court Ruling to Give More Drivers Experience with Sobriety Checks*, N.Y. Times, June 17, 1990, at 1, col. 4 ("In a tavern a few miles from the roadblock here, patrons were unanimous in their opposition to such checks."). *But see Police Plan Attack on Drunk Drivers*, The Washington Post, Dec. 13, 1983, at A1, col. 2 ("According to Tom Crosby, spokesman for the American Automobile Association's Potomac division, 78.2 percent of AAA's area members said in a recent survey that they approved of the roadblocks."); *Sobriety Checkpoint Snares More Controversy than Suspects*, The Washington Post, Jan. 2, 1985, at D1, col. 4 and D8, col. 2 ("Most motorists didn't mind being stopped . . . . In spite of a delay of about five minutes, the overwhelming response from drivers and passengers was positive."); *800 Motorists Stopped in La Palma Drinking Crackdown*, L.A. Times, June 13, 1989, at 3, col. 2 (reporting that officers at checkpoint received "thank yous" from motorists).

The most vociferous support of sobriety checkpoints is found in national citizens' lobbies such as "Mothers Against Drunk Driving" (MADD) and "Remove Intoxicated Drivers" (RID). *See generally The Prouse Dicta*, *supra* note 11; *Have Sobriety Checkpoints Driven the Fourth Amendment Too Far?*, *supra* note 11; *Designing Constitutional Sobriety Roadblocks*, *supra* note 11. The effectiveness of these groups extends from the local, grass-roots level to the national level:

> The grass-roots organizations played a significant role in [President Reagan's] decision to establish the Presidential Commission on Drunk Driving (PCDD). Citizens for Safe Drivers (CSD), and Remove Intoxicated Drivers (RID) had prompted local, state, and federal officials to take a hard look at the problem and to propose some reasonable solutions.

Alcohol and Public Safety, *supra* note 1 at 119.

273. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

274. This restatement of the second factor found persuasive by the *Camara* Court in justifying the reduction of the traditional standard of probable cause in the context of administrative searches is strikingly similar to the first two factors found in the reasonableness balancing test of *Brown*. *See supra* note 141 and accompanying text. This further evidences that the reasonableness balancing test utilized by the *Sitz* Court originated in *Camara*.

275. *See supra* note 1.

deemed "persuasive" in consideration of whether sobriety checkpoints must satisfy the traditional standard of probable cause. The gravity of the public interest alone, however, is not sufficient to comport with the findings of the *Camara* Court. This public interest must be evidenced in tandem with a showing that the method(s) employed to achieve the desired result is effective as compared to other available alternatives. This caveat on the second "persuasive" factor found by the *Camara* Court reveals perhaps the most glaring weakness of sobriety checkpoints and the decision in *Sitz*.

The initial problem concerning sobriety checkpoints in this aspect of the analysis is the general "effectiveness" of sobriety checkpoints in detecting and deterring drunken drivers. Judicial decisions reflect general disagreement concerning sobri-

ety checkpoints' effectiveness.[276] This questionable "effectiveness" of sobriety checkpoints in detecting and deterring drunken drivers is further reduced when

276. The disagreement over the "effectiveness" of sobriety checkpoints is catalogued by decisions considering the issue. For evidence *supporting* the "effectiveness" of sobriety checkpoints see State v. Superior Court, 691 P.2d 1073, 1077 (1984); Ingersoll v. Palmer, 743 P.2d 1299, 1310 (Cal. 1987); People v. Bartley, 486 N.E.2d 880, 886 (Ill. 1985); People v. Bartley, 482 N.E.2d 437, 440 (Ill. 1985); State v. Garcia, 481 N.E.2d 148, 153-54 (Ind. Ct. App. 1985); Little v. State, 479 A.2d 903, 913 (Md. 1983); State v. Coccomo, 427 A.2d 131, 134-35 (N.J. 1980); People v. Scott, 473 N.E.2d 1, 5-6, (N.Y. 1984); State v. Martin, 496 A.2d 442, 447 (Vt. 1985); Lowe v. Commonwealth, 337 S.E.2d 273, 277 (Va. 1985).

Sobriety checkpoints have also been deemed "effective" by a limited number of scholars considering the issue. *See Clearing the Roadblocks, supra* note 11, at 502 ("As part of a comprehensive program to combat drunk driving, sobriety checkpoints serve to deter and detect drunk drivers. The fear of arrest often reduces the frequency with which occasional offenders drive under the influence of alcohol."); *id.* at 507 ("In measuring effectiveness . . . it is important to remember that the appropriate variable is not the number of arrests made, but rather the number of lives saved."); *DWI Roadblocks, supra* note 11, at 801 ("If . . . the state's goal is to deter drunk driving, most courts agree that a sobriety checkpoint is clearly an effective tool."). *See generally* Grossman, *supra* note 11, (suggesting that the effectiveness of sobriety checkpoints may be found in the checkpoints' deterrent effect).

But see Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2490 (1990) (Stevens, J., dissenting); State *ex rel.* Ekstrom v. Justice Court, 663 P.2d 992, 996 (Ariz. 1983) (en banc); State v. Henderson, 756 P.2d 1057 (1988); Little v. State, 479 A.2d 903, 920 (1984) (Davidson, J., dissenting); State v. Muzik, 379 N.W.2d 599, 604 (Minn. Ct. App. 1985); State v. Koppel, 499 A.2d 977, 982 (N.H. 1985); Webb v. State, 695 S.W.2d 676, 682 (Tex. Ct. App. 1985).

See also Designing Constitutional Sobriety Roadblocks, supra note 11, at 139 ("If roadblock effectiveness is judged solely by the number of resulting arrests, such results are dismal."); Grossman, *supra* note 11, at 157 (existing empirical data does not support finding that sobriety checkpoints increase either detection or deterrence of drunken drivers); *id.* at 160 ("[A] close analysis of the information available from government and other sources reveals that sobriety checkpoints have not been successful in curtailing drunk driving. In fact, the alleged deterrent effect of sobriety checkpoints cannot be supported either theoretically or empirically."); *Toll on the Fourth Amendment, supra* note 11, at 991 ("The available data indicate that DUI roadblocks are grossly ineffective at uncovering persons who are driving under the influence."); *Have Sobriety Checkpoints Driven the Fourth Amendment Too Far?, supra* note 11, at 279-80 ("[C]ourts which have attempted to examine the effectiveness of- . . . sobriety checkpoints have generally found no empirical data to support the argument that the checkpoints are productive enough to justify the intrusion on constitutional rights. The available statistics show that arrest rates at sobriety checkpoints are very low.") (footnotes omitted); Jacobs & Strossen, *supra* note 1 (doubting that sobriety checkpoints are sufficiently productive in detecting and deterring drunken drivers to satisfy the state's burden of proof in a Fourth Amendment balancing analysis). For consideration of relevant statistical evidence compiled by several police departments utilizing sobriety checkpoints see Grossman, *supra* note 11, at 157 n.190.

There are other decisions which did not consider "effectiveness" of the sobriety checkpoints relevant to their determination. *See, e.g.*, Commonwealth v. Trumble, 483 N.E.2d 1102 (1985) (finding decisive whether checkpoints were conducted in accordance with pre-determined guidelines); State v. Deskins, 673 P.2d 1174 (1983) (sobriety checkpoints are constitutional when there are sufficient safeguards present to insure minimal intrusion and the discretion of field officers is limited); Commonwealth v. McGeoghegan, 449 N.E.2d 349 (1983) (considering adequacy of procedural safeguards and degree of delay and arbitrariness present in operation of sobriety checkpoint); State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) (sobriety checkpoints found unconstitutional because not sufficiently analogous to "permanent" checkpoints in United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

recognition is given the proposition that the deterrent effect of sobriety checkpoints is substantially crippled by the lack of effect on problem drinkers.[277]

The *Sitz* Court, nevertheless, found the challenged sobriety checkpoint "effective" in detecting drunken drivers by engaging in an analysis of the empirical data gleaned from operation of the single challenged checkpoint.[278] In its analysis, the *Sitz* Court juxtaposed the findings of *Delaware v. Prouse*,[279] where there was no empirical evidence to support the requisite constitutional "effectiveness" of the stops in advancing the desired state interest,[280] against the empirical data gathered from operation of one sobriety checkpoint. The empirical evidence gathered from this checkpoint, apparently deemed most persuasive in the *Sitz* Court's review, was that two drunken drivers of the 126 vehicles (or approximately 1.5%) stopped were arrested for drunken driving. This rather small percentage evidently provides substantial reason to question the "effectiveness" of the sobriety checkpoint in advancing the "grave and legitimate" interest of the State.[281] The Court noted, however, that the requisite constitutional effectiveness was found in *United States v. Martinez-Fuerte*[282] where only 0.12% of the vehicles stopped resulted in uncovering illegal aliens.[283] This questionable reliance by the *Sitz* Court upon limited empirical evidence is, at best, unpersuasive.

Sobriety checkpoints must not only be "effective" in achieving the desired results, however, for this "effectiveness" must also be judged in light of other available alternatives for enforcement. The *Sitz* Court completely disregarded this consideration of *Camara*, however, apparently relying on a literal reading of the

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277. Studies of drunken drivers indicate that problem drinkers (alcoholics) are not capable of being deterred from drinking and driving because of their mental and physical dependence on alcohol. *See* Grossman, *supra* note 11, at 160-61. One scholar suggests that the deterrent effect of drunken driving laws is felt primarily by social drinkers who represent only a moderate traffic risk.

> The law has been a success with regard to the ordinary social drinkers. Most of these are people who also without the strict rules of the law would have been moderate consumers and have shown some feeling of responsibility while driving, in spite of being under the influence to some extent. Motorists driving with very high BAC levels, and therefore representing a high risk factor in traffic, more often than not are persons with serious alcohol problems, often aggravated by other social shortcomings. These people are poor targets for the deterrent and moral effect of the law . . . . In short, it is reasonable to believe that the law's motivating effect is strongest among those who would have represented only a moderate traffic risk even if they had consumed alcohol in excess of the legal limit.

ANDANEAS, *Drinking—And—Driving Laws in Scandinavia*, in SCANDINAVIAN STUDIES IN LAW 13, 21 (1984). *Cf. Alcohol and Public Safety*, *supra* note 1, at 138 ("[I]t is known that heavy or problem alcohol abusers account for a disproportionate share of drunken drinking incidents compared to the total drinking and driving population.").

278. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2487-88 (1990).

279. 440 U.S. 648 (1979). In *Prouse*, the Court utilized the balancing analysis in finding that discretionary spot checks, given the alternatives, were not sufficiently effective to outweigh the attendant intrusion on motorists. *Id.* at 658-61. *See supra* notes 131-34 and accompanying text.

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

281. *Id.* at 2484. *See Establishing Roadblocks*, *supra* note 1 at 56 ("Sufficient data are . . . available to demonstrate the ineffectiveness of sobriety checkpoints as they have been administered to date.") (footnote omitted). *See generally* 4 LAFAVE, SEARCH AND SEIZURE 73-74 (2d ed. 1987).

282. 428 U.S. 543 (1976).

283. *Id.* at 554.

reasonableness balancing test as explicated in *Brown v. Texas*[284] without considering the rationale underlying its origination. The absence of an equally effective alternative to code enforcement was significant in the *Camara* Court's finding that area inspection programs might be based on less than the traditional standard of probable cause.[285]

The significance of the *Sitz* Court's failure to address this consideration is amplified by evidence that there are, in fact, more effective alternatives to sobriety checkpoints for detecting drunken drivers.[286] As noted in *Delaware v. Prouse*,[287] "[the] foremost method of enforcing traffic and vehicle safety regulations . . . is

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284. 443 U.S. 47 (1979). The reasonableness balancing test found in *Brown* makes no explicit reference to consideration of the availability of a more effective alternative. *Id.* at 50-51. The second factor of the *Brown* test, however, suggests recognition of this rationale underlying origination of the test in *Camara* – "the *degree* to which the seizure advances the public interest." *Id.* at 51 (emphasis added). Inherent in consideration of the *degree* of effectiveness in advancing the public interest is certainly consideration of the availability of a *more effective* alternative and the degree to which it would advance the state interest.

285. Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967) ("There is unanimous agreement among those most familiar with this field that the *only effective way* to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures.") (emphasis added).

286. *See* Sitz v. Department of State Police, 429 N.W.2d 180, 184 (Mich. 1988) ("[Sheriffs] testified as to other means used in their counties to combat drunk driving and as to their respective opinions that other methods currently in use, e.g., patrol cars, were more effective means of combating drunk driving and utilizing law enforcement resources than sobriety checkpoints."); People v. Bartley, 466 N.E.2d 346, 348 (Ill. 1984) (finding less intrusive means available for detecting drunken drivers through observation by trained officers and for deterring drunken drivers in the enactment of stiffer penalties); State v. Cloukey, 486 A.2d 143, 147 (Me. 1985) ("There may be many effective ways of detecting a drunken driver without intruding on the rights of the citizen."); Little v. State, 479 A.2d 903, 917-18 (Md. 1984) (Davidson, J., dissenting) (recognizing the effectiveness of Maryland's traditional techniques for deterring and detecting drunken drivers and concluding that "not only empirical data but also other evidence proffered by the State demonstrates that a roadblock program [is] unnecessary because effective alternatives [are] available.").

See also Jacobs & Strossen, *supra* note 1, at 609 (listing traditional law enforcement techniques which are effective in enforcing drunk driving laws); *Exploring the Constitutional Limits, supra* note 5, at 607 (finding DWI roadblocks unconstitutional because there are more effective alternative methods).

See generally 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE 71-73 (2d ed. 1987).

But see State v. McLaughlin, 471 N.E.2d 1125, 1138 (Ind. Ct. App. 1984) ("[O]ne advantage of the roadblock over traditional methods of DWI law enforcement is the potential deterrent effect that roadblocks might have on those who would drink and drive.").

287. 440 U.S. 648 (1979).

acting upon observed violations."[288] Indeed, the absence of a more effective alternative has been recognized as justification for validating other constitutionally

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288. *Id.* at 659. *See* State v. McLaughlin, 471 N.E.2d 1125, 1137-38 n.7 (Ind. Ct. App. 1984) ("[T]he drunk driver tends to generate articulable suspicion by his poor driving performance."); State v. Deskins, 673 P.2d 1174, 1187 (Kan. 1983) (Prager, J., dissenting) ("Generally drunk drivers, through their behavior behind the wheel, manifest their presence to even lay observers. They can easily be discerned by law enforcement officers skilled in identifying the signals indicating a driver is operating the vehicle under the influences of alcohol or drugs."); State v. Parms, 523 So. 2d 1293, 1303 (La. 1988) ("[R]oving patrols making stops of erratic drivers are more effective [than roadblocks] against drunken driving."). In State *ex rel.* Ekstrom v. Justice Court, 663 P.2d 992 (Ariz. 1983) (en banc), the court commented on the significance of the state's admission that officers possessed the ability to detect drunken drivers through observation:

> In the past, the foremost method of enforcing the DWI laws has been by observing how the person drives. The state has stipulated that "[Department of Public Safety] officials, by observing and patrolling, regularly arrest drivers for DWI when there are no roadblocks. DPS officers are trained to detect drunk drivers on the road on the basis of observation. An experienced DPS officer becomes highly skilled at detecting drunk drivers by watching how a person drives. Without roadblocks, an experienced DPS officer can detect many drunk drivers."
>
> By the foregoing quotation, we see that the state has in effect stipulated itself out of court. If there is an adequate method of enforcing the drunk driving statute, there is no pressing need for the use of an intrusive roadblock device.

Ekstrom, 663 P.2d at 996.

Numerous factors which law enforcement officials rely upon in detecting drunken drivers through observations are found in the following list of characteristics of drunken drivers compiled by the California Highway Patrol:

1. Unreasonable speed (high).
2. Driving in spurts (slow, then fast, then slow).
3. Frequent lane changing with excessive speed.
4. Improper passing with insufficient clearance; also taking too long or swerving too much in overtaking and passing, e.g., overcontrol.
5. Overshooting or disregarding traffic control signals.
6. Approaching signals unreasonably fast or slow, and stopping or attempting to stop with uneven motion.
7. Driving at night without lights. Delay in turning lights on when starting from a parked position.
8. Failure to dim lights to oncoming traffic.
9. Driving in lower gears without apparent reason, or repeatedly clashing gears.
10. Jerky starting or stopping.
11. Driving unreasonably slow.
12. Driving too close to shoulders or curbs, or appearing to hug the edge of the road or continually straddling the center line.
13. Driving with windows down in cold weather.
14. Driving or riding with head partly or completely out of the window.

H. LAWRENCE ROSS, *Law, Science and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1, 11 (1973) (quoted in *Toll on the Fourth Amendment, supra* note 11, at 992 n.73).

See also Jeffrey Eugene Jones, Note, *The Constitutionality of Sobriety Checkpoints*, 43 WASH. & LEE L. REV. 1469, 1495-96 (1986) ("Because the drunk driving roadblock is not as effective in detecting and apprehending drunk drivers as is the routine roving patrol that stops drivers based on erratic driving behavior, the state must rely on the fact that the deterrence effect of the roadblock outweighs the intrusion of the seizure."); *A Sobering Look, supra* note 11, at 602 ("Unless a DUI roadblock serves as a deterrent to drunk drivers, the states can adequately enforce their drunk driving statutes by the more traditional method of observation by patrolling officers."); *Exploring the Constitutional Limits, supra* note 5, at 592 ("In considering the difficult question of whether a less intrusive, but comparably effective, alternative method exists, the empirical evidence generally suggests that the observational method is more effective in apprehending drunken drivers than are roadblocks, if effectiveness is measured in terms of DWI arrests per officer hour.").

See generally 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE 72 (2d ed. 1987).

There is, however, at least one countervailing argument advanced to cast doubt upon the assertion that the traditional method of observation is more effective in detecting drunken drivers:

> [E]ven if a patrolling officer is fortunate enough to be in the vicinity where a drunk driver is operating his vehicle, it does not necessarily follow that the driver will at that particular time drive his car in such a fashion as to create a reasonable suspicion justifying a stop. And the chances of such observation in the first place are rather slight, given the substantial number of intoxicated drivers on the roads.

4 LAFAVE, SEARCH AND SEIZURE 72-73 (2d ed. 1987) (footnotes omitted).

challenged enforcement measures.[289] Additionally, there is evidence suggesting that observational methods of detecting drunken drivers are "*more* effective" than sobriety checkpoints in promoting the efficient utilization of scarce police resources.[290]

Thus, given evidence that there are in fact more effective alternatives in detecting drunken drivers and the questionable effectiveness of sobriety checkpoints,[291] sobriety checkpoints cannot equate with the *Camara* Court's finding that "the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results."[292]

3. Severity of Intrusion and Crime Detection

The final consideration deemed "persuasive" by the *Camara* Court as justification for a reduction of the traditional standard of probable cause was the Court's

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289. Examples of other enforcement measures upheld where the court recognized the absence of a more effective alternative in achieving the desired results include license-registration roadblocks and hunting and fishing roadblocks. *See* People v. Andrews, 484 P.2d 1207, 1209 (Colo. 1971) (en banc) (upholding roadblocks for checking licenses); State v. Tourtillot, 618 P.2d 423, 430 (Or. 1980) (finding that game checkpoint stops are the most effective method of enforcing game laws).

See also Rogers, *supra* note 135, at 212 ("[A]irport and border checkpoints are justifiable given the complete lack of alternatives available to cope with the problems of hijacking and illegal aliens . . . . The sobriety/license checkpoints do not constitute the only alternative available to authorities seeking to cope with drunk drivers.").

290. *See* Sitz v. Department of State Police, 429 N.W.2d 180, 184 (Mich. App. 1988) (sheriffs testified that there "were more effective means of combating drunk driving and *utilizing law enforcement resources* than sobriety checkpoints.") (emphasis added); State v. Henderson, 756 P.2d 1057 (Idaho 1988):

> [The] Chief of Police . . . stated that his general experience was that the same number of officers on patrol would make more DUI arrests than the same number of officers engaged in a roadblock. [T]he roadblock commander . . . acknowledged that it is more efficient to have well-trained officers on patrol for DUI than at a roadblock. When asked if he could expect more arrests by putting the same number of officers on the street for the same amount of time, [he] replied, "absolutely."

Id. at 1060-61 (citations omitted).

See also R. George Wright, *Intoxication Roadblocks*, 19 IND. L. REV. 33, 43 (1986) ("While the cases do not permit a rigorous comparison of the cost-effectiveness of roadblocks and of routine patrolling, the productivity in terms of detection and apprehension per police officer-hour of roadblocks may well not exceed that of conscientious routine patrolling, other things being equal.").

Cf. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2490 n.1 (1990) (Stevens, J., dissenting) (noting that the standard detail for operation of a sobriety checkpoint is composed of at least eight officers and may have as many as twelve present); Jones v. State, 459 So. 2d 1068, 1079 (Fla. Dist. Ct. App. 1984) (recognizing the absence of evidence as to how many DUI arrests might be made by the same number of officers utilized at a sobriety checkpoint); State v. Henderson, 756 P.2d 1057 (Idaho 1988) (challenged checkpoint required 21 officers for its operation). The challenged checkpoint in State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984), evidences the extent to which law enforcement resources may be utilized in the operation of a carefully planned checkpoint:

> The checkpoints were manned by teams of ten officers each, with supervisory personnel also present at [each of the three locations]. Additionally, the agencies had on the sites mobile vans for booking and jailing offenders, blood testing equipment, breatholizer equipment, trained phlebotomists to administer blood tests, and mobile jail units to transport offenders.

Id. at 563.

291. *See supra* notes 276-77 and accompanying text; *Establishing Roadblocks*, *supra* note 1:

> The ultimate question that the [*Sitz*] Court answered is that the arrest of approximately one percent of the motorists passing through a roadblock is sufficient to provide the law-enforcement community with the ability to establish temporary, unannounced sobriety checkpoints and intrude on more [sic] approximately 99 percent of the motoring public. Certainly, the Court could not suggest that this approach is the most effective and efficient method of diminishing the problem of drunk driving.

Id. at 58.

292. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

finding that "the inspections [were] neither personal in nature nor aimed at the discovery of evidence of crime, [and] involve[d] a relatively limited invasion of the urban citizen's privacy."[293] For purposes of analysis, this factor is also separable into two distinct considerations: (1) the challenged enforcement activity is not aimed at the discovery of crime, and (2) the severity of the enforcement activity's intrusion on individual liberties.

With detection of drunken drivers being one of the avowed purposes of sobriety checkpoints, there can be little doubt that sobriety checkpoints are aimed at the discovery of crime.[294] Indeed, sobriety checkpoints are analogous to random area searches,[295] which Justice Powell has characterized as "no more than 'fishing expeditions' for evidence to support prosecutions."[296] Therefore, unless law enforcement officials are prepared to suggest that sobriety checkpoints are utilized solely for the checkpoints' unsubstantiated deterrent effect, an assertion that sobriety checkpoints are not aimed at the discovery of crime can hardly be accorded credence.

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293. *Id.*

294. *See, e.g.*, State *ex rel.* Ekstrom v. Justice Court, 663 P.2d 992 (Ariz. 1983) ("The primary purpose in establishing the roadblock was to enforce the state's drunk driving laws by discovering drunk drivers . . . ."); Colorado v. Rister, 803 P.2d 483, 496 (Colo. 1990) (en banc) (Quinn, J., dissenting) ("The officers were directed to look for evidence of alcohol impairment, and only if no such evidence was found was the motorist to be directed to proceed . . . ."); State v. Henderson, 756 P.2d 1057, 1061 (Idaho 1988) ("A roadblock is not an administrative search merely designed to raise an awareness of the DUI problem. It is carried out by police – not OSHA or Health and Welfare officials – and if convictions are sustained, it has penal consequences."); State v. Smith, 674 P.2d 562, 563 (Okla. Crim. App. 1984) ("[T]he primary purpose of the checkpoints was to seek out DUI offenders."); King v. Texas, 816 S.W.2d 447, 450-51 (Tex. Ct. App. 1991) (roadblock set up as subterfuge for catching drunk drivers); *The Prouse Dicta*, *supra* note 11 at 136 ("A sobriety checkpoint [is] . . . aimed at the detection of crime."); *id.* at 151 ("It is clear that if driving under the influence of alcohol is considered a crime by our society, sobriety checkpoints are specifically designed to detect that crime."). *See also id.* at 145 ("The mere 'questioning' of a suspected drunk driver is of a little value if the officer in the field is not permitted to gather the evidence necessary to obtain a conviction for driving under the influence of alcohol.").

The apparent unwillingness of law enforcement authorities to provide the public with advance notification of the implementation of a sobriety checkpoint, and the detrimental effect which this advance notification would have on the purported effectiveness of the checkpoint, *see supra* notes 203, 209-12 and accompanying text, and *infra* notes 306-12 and accompanying text, belies any assertion that the checkpoints are operated for their deterrent value.

> Certainly it would be feasible, even beneficial, for law enforcement agencies to undertake to publicize in advance their intention to utilize sobriety checkpoints. This is because "the efficacy of a deterrent roadblock is heightened by advance publicity in the media . . . . Such publicity would warn those using the highways that they might expect to find roadblocks designed to check for sobriety; the warning may well decrease the chance of apprehending 'ordinary' criminals, but should certainly have a considerable deterring effect by either dissuading people from taking 'one more for the road,' persuading them to drink at home, or inducing them to take taxicabs." Any one of these goals, if achieved, would have the salutary effect of interfering with the lethal combination of alcohol and gasoline.

4 LAFAVE, SEARCH AND SEIZURE 81-82 (2d ed. 1987) (footnote ommitted) (quoting State *ex rel.* Ekstrom v. Justice Court, 663 P.2d 992 (Ariz. 1983) (Feldman, J., concurring)) (footnote omitted).

For additional decisions recognizing the utility of advance publicity see 4 LAFLAVE, SEARCH AND SEIZURE 82 n.136 (2d ed. 1987).

295. The analogy of sobriety checkpoints to random area searches is found in the fact that sobriety checkpoints are temporary – i.e., not permanently located in a specified area – and also that the checkpoints subject all motorists passing through the checkpoints to a limited investigation.

296. Almeida-Sanchez v. United States, 413 U.S. 266, 278 (1973) (Powell, J., concurring).

The *Camara* Court's final consideration also requires a determination of the severity of the sobriety checkpoints' intrusion[297] on individual liberties. In finding that the intrusion on motorists effectuated by sobriety checkpoints is "slight,"[298] the *Sitz* Court relied upon *United States v. Martinez-Fuerte*[299] in determining that the objective intrusion on motorists is "minimal"[300] and that the subjective intrusion on motorists was not to such a degree as to "generate fear and surprise"[301] in law-abiding motorists. Though most decisions considering the objective intrusiveness of checkpoints evidence general agreement with the *Sitz* Court's opinion that

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297. In determining the severity of intrusion in contemporary Fourth Amendment analysis, courts have distinguished the nature of the intrusion between the "objective" nature of the intrusion and the "subjective" nature of the intrusion. "Objective" intrusiveness for purposes of checkpoint stop analysis is "measured by the duration of the seizure and the intensity of the investigation." Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2486 (1990). The "subjective" intrusiveness of checkpoint stops has been defined as "the generating of concern or even fright on the part of lawful travelers." United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

298. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2486 (1990).

299. 428 U.S. 543 (1976).

300. *Sitz*, 110 S. Ct. at 2486. The *Sitz* Court found that there was "virtually no difference" between the objective nature of the intrusion of sobriety checkpoints and the intrusion present at the checkpoints in *Martinez-Fuerte*. The only difference between the two checkpoints recognized by the *Sitz* Court was that there may be different types of questions asked by the officers at each. *Id.*

301. *Id.* The Michigan Court of Appeals adopted the trial court's finding that the subjective intrusiveness of the challenged sobriety checkpoint was "substantial," Sitz v. Department of State Police, 429 N.W.2d 180, 184 (Mich. Ct. App. 1988), because "the evidence showed [an] absence of any provision to alert the public to the option of turning around to avoid a checkpoint and the further absence of a provision ensuring that the checkpoints would be located where motorists could safely and legally make U-turns or turn-offs." *Department of State Police*, 429 N.W.2d at 185. The *Sitz* Court, however, opined that the court of appeals had misread its cases determining subjective intrusiveness: "The '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." Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2486 (1990).

Not only is there a lack of increase in subjective intrusiveness by a sobriety checkpoint's failure to make provision for legal U-turns to avoid the checkpoint, but decisions rendered subsequent to *Sitz* have also found that attempts to avoid checkpoints – such as by making a legal U-turn prior to passing the checkpoint's point of entry – provide officers manning the checkpoint reasonable suspicion upon which to pursue and stop the vehicle. *See, e.g.*, State v. Thill, 474 N.W.2d 86, 88 (S.D. 1991) (defendant's attempted avoidance of police roadblock by turning around in driveway prior to entering roadblock and then embarking on a "circuitous route" created an articulable and reasonable suspicion of criminal activity and justified a seizure of the defendant's vehicle). *See also* State v. Patterson, 582 A.2d 1204, 1206 (Me. 1990) (defendant's action in switching position with passenger prior to entering roadblock gave rise to a reasonable, articulable suspicion which justified a stop of the defendant's vehicle). *Cf.* Snyder v. State, 538 N.E.2d 961, 965 (Ind. Ct. App. 1989) (making turnaround gives rise to a "specific and articulable fact" justifying seizure); State v. Hester, 584 A.2d 256 (N.J. Super. Ct. App. Div. 1990) (upheld use of "pursuit vehicle" at sobriety checkpoint, ruling that a motorist need not have the opportunity to avoid a checkpoint for the checkpoint to be constitutional).

the *intensity of the investigation* at sobriety checkpoints is relatively minor,[302] there is substantial evidence that the *Sitz* Court's implicit finding of the reasonableness of the *duration of a seizure* at a sobriety checkpoint is unsubstantiated.[303] Therefore, it is evident that the objective intrusiveness of sobriety checkpoints cannot properly be deemed "minimal" in all cases. Thus, the objective intrusiveness alone of any particular sobriety checkpoint may well be sufficient to definitively conclude the analysis of the *Camara* Court's final consideration of the severity of intrusion of the challenged enforcement activity.

There is additionally the subjective nature of the intrusion effectuated by the sobriety checkpoint seizure which must be considered. Though the *Sitz* Court found an absence of "fear and surprise" generated in law-abiding motorists by sobriety checkpoints, the Court's sole rationale for this determination was based upon reliance on *Martinez-Fuerte* and the purported comparability of sobriety checkpoints to *Martinez-Fuerte's* permanent immigration checkpoints. The factors

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302. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975)) (" 'All that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document . . . .' "); State v. McLaughlin, 471 N.E.2d 1125, 1138 (Ind. Ct. App. 1984) ("The objective intrusion on fourth amendment privacy and liberty interests occasioned by this roadblock procedure was relatively minor . . . . Each [driver] was asked to produce his driver's license and vehicle registration, but no further questioning took place . . . .").

See also DWI Roadblocks, supra note 11, at 796 ("[B]ecause the encounter is relatively brief and to the point, it seems apparent that the objective aspects of the stop do not amount to an unconstitutional intrusion.").

Cf. United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975) (where the Court, in considering and finding the intrusion upon motorists occasioned by the investigation following a stop by a roving patrol to be modest, noted that "[t]here is no search of the vehicle or its occupants, and the visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside.").

But see Curbing the Drunk Driver, supra note 4, at 1485 ("The apprehension of drunk drivers . . . usually requires an extended DWI investigation involving an intrusive battery of tests. This intrusion goes far beyond the brief questioning of motorists at immigration checkpoints . . . .") (footnotes omitted); *Exploring the Constitutional Limits, supra* note 5, at 603 ("[A]t a typical DWI roadblock all stopped motorists would undergo intense visual inspection and questioning."); *Toll on the Fourth Amendment, supra* note 11, at 994-95 ("[T]he objective intrusion at DUI roadblocks is highly personal. At DUI roadblocks the police closely examine the driver's demeanor, coordination, eyes, speech, and breath. Although the stop may be brief, the examination is highly personal and intense.") (footnotes omitted).

But cf. Carroll v. United States, 267 U.S. 132, 153-54 (1925) ("It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.").

303. The *Sitz* Court recognized in the statement of facts to its opinion that "[t]he average delay for each vehicle was approximately 25 seconds." Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2484 (1990). The *Sitz* majority, however, failed to again consider this aspect of objective intrusiveness in its analysis. Thus, one must assume that the *Sitz* majority found this to be a reasonable length of detention. Nevertheless, it is not at all certain that the average sobriety checkpoint detention is comparable to this reasonable twenty-five second detention. *See, e.g.*, Colorado v. Rister, 803 P.2d 483, 485 (Col. 1990) (en banc) (average stop was three minutes in duration); State v. McLaughlin, 471 N.E.2d 1125, 1138 (Ind. Ct. App. 1984) ("the average length of time each driver was stopped was two to three minutes"); State *ex rel.* Ekstrom v. Justice Court, 663 P.2d 992, 993 (Ariz. 1983) (en banc) ("Vehicles were detained from 30-40 seconds to 5 minutes . . . .").

See generally Supreme Court OKs Sobriety Roadblocks, San Francisco Chron., June 15, 1990, at A1 ("initial screening takes less than thirty seconds"); *Five Arrested at City's First Checkpoint for Sobriety*, L.A. Times, Dec. 30, 1985, at 6, col. 6 ("Vehicles were backed up two blocks throughout the operation. The delay to motorists . . . varied from 3 to 3-1/2 minutes."); *Sobriety Checkpoint Snares More Controversy Than Suspects*, The Washington Post, Jan. 2, 1985, at D1 (reporting a delay of approximately five minutes); *Police Roadblocks in D.C. Nab 43 for Drunk Driving*, The Washington Post, June 26, 1983, at B1 ("Traffic backed up more than a mile . . . and drivers caught in the snarl complained that they were tied up for more than an hour in the muggy weather. Many cars overheated.").

found in *Martinez-Fuerte* as contributing to a diminished subjective intrusion on motorists—" '[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion [as he would in the case of roving patrol stops]' "[304]—were adopted by the *Sitz* majority without any accompanying analysis to support the finding that "[t]he intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*."[305] The *Sitz* majority's reliance upon *Martinez-Fuerte*, however, is unjustified.

In adopting *Martinez-Fuerte* as support for its finding that sobriety checkpoints do not generate fear and surprise in law-abiding motorists, the *Sitz* Court failed to take cognizance of the distinguishing fact that the checkpoints in *Martinez-Fuerte* were *permanently* located, a significant consideration in the *Martinez-Fuerte* Court's intrusiveness analysis.[306] The permanence of the checkpoint location was decisive in the *Martinez-Fuerte* Court's finding that there should be no "surprise" generated in law-abiding motorists by operation of the checkpoints. This permanence, however, is not present in the case of sobriety checkpoints where such a characteristic would substantially impair the effectiveness of the checkpoints in

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304. United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (quoting United States v. Ortiz, 422 U.S. 891, 894-95 (1975)).

305. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2487 (1990).

306. "Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere." *Martinez-Fuerte*, 428 U.S. at 559.

See generally 4 LAFAVE, SEARCH AND SEIZURE 75-76 (2d ed. 1987).

detecting drunken drivers.[307] Indeed, Justice Stevens recognized that "[s]urprise is crucial to its method."[308]

Though the element of "surprise," present by design in sobriety checkpoints and not present in the *Martinez-Fuerte* permanent checkpoints, is alone sufficient to justify a finding of a much higher level of subjective intrusiveness at sobriety checkpoints, this is not the only flaw in the *Sitz* Court's unreasoned adoption of *Martinez-Fuerte* in ascertaining the subjective intrusiveness of sobriety checkpoints. In the case of permanent immigration checkpoints, the checkpoints are established in permanent locations within a reasonable distance of the national border; these two characteristics of permanent immigration checkpoints evidence that local residents are both aware of the location of the checkpoint and the purpose of the checkpoint at all times. Such characteristics strongly suggest that the relatively infrequent traveler would also be aware of the purpose of the checkpoint. These characteristics of permanent immigration checkpoints evidently support the *Martinez-Fuerte* Court's finding that these checkpoints are less likely than roving patrol stops to frighten or annoy motorists. In contrast, the absence of these

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307. *See, e.g.*, People v. Bartley, 466 N.E.2d 346, 348 (Ill. App. Ct. 1984) ("In reality, DUI roadblocks are designed to be set up at night, without warning and at locations which are constantly changing."); Colorado v. Rister, 803 P.2d 483, 492 (Col. 1990) (en banc) (Quinn, J., dissenting) ("[A] temporary sobriety checkpoint . . . often depends for its effectiveness on the element of surprise."). The significance of the *Martinez-Fuerte* "permanence" and the reliance upon "surprise" by sobriety checkpoints is reflected in State v. Olgaard, 248 N.W.2d 392 (S.D. 1976):

> Neither the defendants in the instant case nor other motorists had prior knowledge of the roadblock in question and presumably could not have acquired such knowledge, for by its very nature the roadblock was set up to stop without prior warning, and perforce by surprise, all motorists who happened to pass that particular point on the night in question.

Id. at 394.

4 LAFAVE, SEARCH AND SEIZURE 76 (2d ed. 1987) ("[the checkpoints] would soon have little utility if they remained perpetually in the same place.").

Cf. State v. Smith, 674 P.2d 562, 563 (Okla. Crim. App. 1984) ("[Temporary sobriety checkpoints are] in no way the type of permanent checkpoint approved for a limited purpose in United States v. Martinez-Fuerte.") (citation omitted).

308. Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2490 (1990) (Stevens, J., dissenting). Not only does this element of "surprise" significantly increase the subjective intrusiveness of a sobriety checkpoint, but the allegedly vital utilization of "surprise" in an enforcement agency's *modus operandi* for effective enforcement may also be an insufficient justification for waiver of a warrant. In an enforcement case analogous to those involving sobriety checkpoints, the Court considered the Secretary of Labor's argument that "surprise" was crucial to the effective enforcement of certain provisions of the Occupational Safety and Health Act of 1970 (OSHA), and opined:

> The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The risk is that during the interval between an inspector's intial request to search . . . and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued *ex parte* and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should *ex parte* warrants issued in advance become standard practice.
>
> We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or *will make them less effective.*

Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978) (emphasis added).

characteristics in the operation of sobriety checkpoints fosters fear and annoyance.[309] Motorists approaching many sobriety checkpoints are not privy to the purpose of the stop nor do the motorists have advance notice of the location of the sobriety checkpoint.[310] For these reasons, sobriety checkpoints are not sufficiently analogous to *Martinez-Fuerte's* permanent immigration checkpoints to justify the *Sitz* Court's seemingly unquestionable reliance upon that decision in determining that sobriety checkpoints do not generate fear and surprise in law-abiding motorists. This is, of course, unless one chooses to adopt the rationale for validating roadblock stops forwarded by Justice Rehnquist, dissenting in *Delaware v. Prouse*:[311]

> Because motorists, apparently like sheep, are much less likely to be "frightened" or "annoyed" when stopped en masse, a highway patrolman needs neither probable cause nor articulable suspicion to stop *all* motorists on a particular thoroughfare, but he cannot without articulable suspicion stop less than all motorists. The Court thus elevates the adage "misery loves company" to a novel role in Fourth Amendment jurisprudence.[312]

Therefore, since sobriety checkpoints are aimed at the discovery of evidence of crime[313] and also exhibit characteristics evidencing potential substantial objective and subjective intrusion on the rights of motorists,[314] sobriety checkpoints cannot be found to satisfy the third "persuasive" consideration of the *Camara* Court.

Thus, none of the three factors which the *Camara* Court found "persuasive" as justification for a reduction of the traditional standard of probable cause to one of "reasonableness"[315] is present in the context of sobriety checkpoints. As a result,

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309. *Cf.* Stark v. Perpich, 590 F. Supp. 1057, 1061 (D. Minn. 1984) (finding that the roadblock seizures are "inconvenient, annoying, and even frightening to motorists"); State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984):

> The fear factor . . . is heightened by the presence of at least ten officers, chemical testing equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desirous of arresting criminals and that anyone passing through could easily be arrested.

Id. at 564.

310. *See* People v. Bartley, 466 N.E.2d 346, 348 (Ill. App. Ct. 1984) ("Motorists are often unaware of the reason for the stop prior to being asked to display their driver's license."); State v. McLaughlin, 871 N.E.2d 1125, 1139 (Ind. Ct. App. 1984) ("[N]o warning signs were posted to inform the approaching motorists of the fact or purpose of the roadblock, and it is not clear that detainees were ever informed of the precise purpose of the roadblock."). State *ex rel.* Ekstrom v. Justice Court, 663 P.2d 992, 993 (Ariz. 1983) (en banc) ("No warning signs or advance flashing lights announced the roadblock or its purpose, nor did [the Department of Public Safety] advise drivers in advance that roadblocks would be operated . . . ."). The publicity of the location of checkpoints is not only apparently constitutionally preferable, but has also been recognized by Congress as a significant tool in the implementation of a successful alcohol traffic safety program. Illustrative of Congress' recognition of the desirability of increased publicity of alcohol-related enforcement measures is the Highway Safety Act of 1982 in which states are required to increase efforts to inform the public of more aggressive enforcement of alcohol-related traffic offenses in order to qualify for certain basic and supplemental federal grants. Highway Safety Act of 1982, 96 Stat. 1738, 23 U.S.C. § 408 (1982). *See supra* note 4.

311. 440 U.S. 648 (1979).

312. *Id.* at 664 (Rehnquist, J., dissenting).

313. *See supra* notes 294-96 and accompanying text.

314. *See supra* notes 297-312 and accompanying text.

315. *See supra* notes 86-93 and accompanying text.

the *Sitz* Court's validation of sobriety checkpoints by employment of the reasonableness balancing test[316] is ill-founded. The *Sitz* Court's failure to consider the purposes and rationale underlying the origination and development of the reasonableness balancing test has resulted in a decision upholding sobriety checkpoints through application of an inappropriate standard for Fourth Amendment analysis. There are none of *Camara's* "persuasive" factors present with sobriety checkpoints to justify the *Sitz* Court's abandonment of the traditional standard of probable cause, under which requirement sobriety checkpoints would almost certainly be doomed.

B. Applicability of Warrant Requirement

"The warrant clause of the Fourth Amendment is not dead language."[317] Nevertheless, the *Sitz* Court upheld the constitutionality of sobriety checkpoints without even casual mention of the warrant requirement of the Fourth Amendment. Indeed, "[t]he Court's implication that the balancing test is the rule rather than the exception is troubling . . . ."[318] This is particularly true given the rationales underlying previous decisions considering whether a warrant should be required in various administrative search contexts. As will be shown, none of these rationales support abandonment of the warrant requirement for sobriety checkpoints.

In *Camara v. Municipal Court*,[319] the Supreme Court considered whether the public interest involved in code-enforcement housing inspections was sufficient justification to permit warrantless administrative searches.[320] In finding no reason why these inspection programs could not be effectively carried out pursuant to a reasonable search warrant requirement,[321] the *Camara* Court opined:

> In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.[322]

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316. *See supra* notes 167-99 and accompanying text.

317. United States v. United States Dist. Court, 407 U.S. 297, 315 (1972).

318. New Jersey v. T.L.O., 469 U.S. 325, 352 (1985) (Blackmun, J., concurring). *See* O'Connor v. Ortega, 480 U.S. 709 (1987):

> [O]nly when the practical realities of a particular situation suggest that a government official cannot obtain a warrant based upon probable cause without sacrificing the ultimate goals to which a search would contribute, does the Court turn to a "balancing" test to formulate a standard of reasonableness for this context.

Id. at 741.

But see New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, *we have not hesitated to adopt such a standard.*") (emphasis added).

319. 387 U.S. 523 (1967).

320. *Id.* at 533.

321. *Id.*

322. *Id.*

Following *Camara's* reasoning, sobriety checkpoints should be subject to the warrant requirement of the Fourth Amendment. Despite the gravity of the public interest involved with sobriety checkpoints, there is no evidence to suggest that requiring law enforcement officials to obtain a judicially-issued warrant prior to implementation of the sobriety checkpoint would "frustrate the governmental purpose behind the search."[323] This is true even though the sobriety checkpoints rely in large measure upon the element of "surprise" for their effectiveness.[324] Indeed, procurement of a warrant from a magistrate is not likely to be publicly broadcasted.

In considering the constitutionality of roving border patrols, the Supreme Court in *Almeida-Sanchez v. United States*[325] found no reason why a warrant system could not be constructed for operation of these roving patrols which would be "feasible and meaningful."[326] The Court found that the feasibility of obtaining a warrant in advance of the seizure was evidenced by the fact that the crime—the transportation of illegal aliens—will occur on certain, predictable roads and that the searches would be executed according to a predetermined plan.[327] These same factors are readily recognizable in consideration of sobriety checkpoints. The crime—drunken driving—will predominantly occur on certain, predictable roads[328] and the checkpoints will be operated in accordance with a predetermined

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323. *Id. See* 4 LAFAVE, SEARCH AND SEIZURE 78 (2d ed. 1987) ("Because [sobriety checkpoints] are planned well in advance, there is no reason why the prior approval of a magistrate could not be obtained.")

324. *See supra* notes 306-10 and accompanying text.

325. 413 U.S. 266 (1973).

326. *Id.* at 283.

327. *Id.*

328. Areas targeted for sobriety checkpoints include "strips" on which there are located a number of establishments which serve alcoholic beverages and roads on which there has been a high rate of arrest for drunken driving. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2487 (1990) ("checkpoints are selected pursuant to the guidelines").

See also id. at 2484 ("Under the guidelines, checkpoints would be set up at selected sites along state roads."); King v. State, 816 S.W.2d 447, 449 (Tex. Ct. App. 1991) (" 'target sites' . . . consist of areas that, based on data accrued in the two previous years, have a high probability of DWI violations, other violations, fatalities, and serious injuries"); *id.* (roadblock conducted at area concentrated with bars and restaurants).

Cf. State v. Patterson, 582 A.2d 1204, 1208-09 (Me. 1990) (Glassman, J., dissenting) (suggesting that officers have knowledge that "area [is] known for unusual number of safety violations" before conducting sobriety checkpoint).

plan.[329] Thus, there is no reason why a warrant system could not be devised for the operation of sobriety checkpoints which is both "feasible and meaningful."[330]

In *New Jersey v. T.L.O.*,[331] the Court relied upon *Camara* in finding that the burden of requiring school officials to obtain a warrant prior to subjecting a student under their authority to a search " 'is likely to frustrate the governmental purpose behind the search.' "[332] Utilization of this rationale for not requiring a warrant in the context of sobriety checkpoints, however, has already been shown to be inappropriate.[333]

Relying upon similar reasoning, the Court in *Griffin v. Wisconsin*[334] found that "[a] warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires."[335] Also particularly relevant in consideration of one of the avowed purposes of sobriety checkpoints – deterrence of drunken driving – is the Court's finding that "the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct and would reduce the deterrent effect that the possibility of expeditious searches would otherwise create."[336]

Once again, however, the requirement of obtaining a warrant prior to operation of a sobriety checkpoint would not interfere to any "appreciable degree"[337] with the effectiveness of the checkpoint. Additionally, the *Griffin* Court's concern that the judgment of the probation officer would be replaced by that of a magistrate would not be present with sobriety checkpoints. The location of sobriety checkpoints is predetermined by high-level law enforcement officials[338] and the checkpoints are

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329. *See Sitz*, 110 S. Ct. at 2484:

> Under the guidelines, checkpoints would be set up at selected sites along state roads. All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication. In cases where a checkpoint officer detected signs of intoxication, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests. Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made. All other drivers would be permitted to resume their journey immediately.

The limit on an officer's discretion is a vital consideration in Fourth Amendment analysis of challenged enforcement activities. *See* Camara v. Municipal Court, 387 U.S. 523 (1967). "[T]he Fourth Amendment requires that a seizure . . . must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, 443 U.S. 47, 51 (1979) (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 558-62 (1976)).

330. Almeida-Sanchez v. United States, 413 U.S. 266, 283 (1973).

331. 469 U.S. 325 (1985).

332. *Id.* at 340 (quoting Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967)).

333. *See supra* notes 320-24 and accompanying text.

334. 483 U.S. 868 (1987).

335. *Id.* at 876.

336. *Id.* (citations omitted). Similar reasoning was previously rejected by the Court in Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978), where the Court rejected the Secretary of Labor's contention that requiring a warrant prior to certain inspections of businesses would allow the business owner to disguise violations and, thus, reduce the effectiveness of and seriously burden the inspection program. *See supra* note 307 and accompanying text.

337. *Griffin*, 483 U.S. at 876.

338. *See supra* notes 328-29 and accompanying text.

operated in accordance with pre-established guidelines.[339] Thus, a magistrate need not engage in "second-guessing" the *modus operandi* of the checkpoint but, rather, merely make a determination as to the existence of probable cause for establishment of the checkpoint. Similarly, the *Griffin* Court's finding that requiring a warrant would reduce the deterrent effect is inapplicable to sobriety checkpoints. This reasoning was founded on the premise that obtaining a warrant would reduce the speed in which officials could respond to misconduct. This element of "speed of reaction" is not relevant in the case of sobriety checkpoints. In fact, the effective functioning of a sobriety checkpoint requires a carefully planned and coordinated effort by and among law enforcement officials[340] as evidenced by the customary usage of eight to twelve officers in a checkpoint's operation.[341]

Skinner v. Railway Labor Executives' Association[342] considered whether a warrant should be required before subjecting railroad employees involved in certain types of accidents to mandated drug testing.[343] The *Skinner* Court first opined that "[a]n essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents"[344] and that "[a] warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its

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339. *See, e.g.*, Commonwealth v. Trumble, 483 N.E.2d 1102 (Mass. 1985); Stark v. Perpich, 590 F. Supp. 1057 (D. Minn. 1984); State v. Golden, 317 S.E.2d 693 (Ga. App. 1984); Little v. State, 499 A.2d 903 (Md. 1984). *See supra* notes 328-29 and accompanying text.

See also State v. Sims, 808 P.2d 141, 149 (Utah Ct. App. 1991) (ruling that pre-established guidelines by high ranking officials is not sufficient; not only must there be pre-established guidelines, but the checkpoint must also first have specific legislation authorizing implementation).

The failure of law enforcement to conduct sobriety checkpoints in accord with pre-established guidelines renders the checkpoints unconstitutional. *See supra* notes 328-29 and accompanying text. *See* State v. Kitchen, 808 P.2d 1127 (Utah Ct. App. 1991):

> Applying Brown and Sitz to the case at bar, we hold that the roadblock herein was not conducted pursuant to an explicit, neutral plan, nor was it constitutionally permissible under the Brown balancing test.
>
> Unlike the plan in Sitz, the plan before us was prepared by the actual officer who conducted the roadblock, rather than by a neutral body. We question the neutrality of any plan which is authored by the same person whose actions the plan is purported to limit. Secondly, the purpose of the plan in Sitz was to provide guidelines for the conducting of roadblocks in general, whereas the plan before us was formed with this specific roadblock in mind. Thirdly, unlike the plan in Sitz, there is no evidence that the plan provided explicit guidelines, beyond the direction to stop only automobiles and light trucks. The guidelines in any plan must, at a minimum, be specific enough to prevent "arbitrary invasions" enacted "solely at the unfettered discretion of officers in the field."

Kitchen, 808 P.2d at 1130 (quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).

Some states additionally require that the guidelines be legislatively developed. *See, e.g.*, King v. State, 816 S.W.2d 447, 451 (Tex. Ct. App. 1991) (absence of a "legislatively developed administrative scheme" for conducting the checkpoint – as was present in *Sitz* – renders the checkpoint unconstitutional under the Fourth Amendment of the United States Constitution); State v. Sims, 808 P.2d 141, 149 (Utah Ct. App. 1991) (sobriety checkpoints are per se unconstitutional under the state constitution absent specific legislative authorization).

340. *See* State v. Deskins, 673 P.2d 1174 (Kan. 1983).

341. *See supra* note 290 and accompanying text.

342. _____U.S._____, 109 S. Ct. 1402 (1989).

343. *See supra* notes 158-60 and accompanying text.

344. *Skinner*, 109 S. Ct. at 1415.

objectives and scope."[345] The Court further noted that "[a] warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case."[346] The *Skinner* Court, however, ruled that requiring a warrant in this particular case, where "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees,"[347] would not serve to promote the aims of the warrant requirement of the Fourth Amendment.[348]

Requiring a warrant in the context of sobriety checkpoints, however, *will* serve to promote these dual purposes of the Fourth Amendment warrant requirement. Not only will a warrant requirement provide assurance to citizens that the sobriety checkpoints are not established in pursuance of random or arbitrary governmental action, but requiring a warrant will also ensure that there has been an objective determination as to whether there is sufficient probable cause to justify an intrusion at any particular location *ab initio*. Additionally, the *Skinner* Court's rationale in not requiring a warrant is clearly not applicable in consideration of sobriety checkpoints. The permissible limits of the intrusion accompanying the operation of sobriety checkpoints are neither "narrowly and specifically"[349] defined nor is the permissible scope of the attendant intrusion known to the motoring public.

Perhaps the most compelling support for requiring a warrant in the case of sobriety checkpoints is found in *National Treasury Employees Union v. Von Raab*,[350] a decision rendered by the Court on the same day that *Skinner* was decided. In *Von Raab*, the Court found that "every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the [Customs] Service must follow in administering the test."[351] Relying upon the same rationale as employed in *Skinner*, the *Von Raab* Court similarly found that " 'the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically . . . , and doubtless are well known to covered employees.' "[352] The Court proceeded to justify this finding: "The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a discretion-

345. *Id.* (citations omitted). *Accord* Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978) ("A warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.") (footnote omitted).

346. *Skinner*, 109 S. Ct. 1415 (citations omitted).

347. *Id.*

348. *Id.*

349. *Id.*

350. _____U.S._____, 109 S. Ct. 1384 (1989). *See supra* notes 161-66 and accompanying text.

351. *Id.* at 1391.

352. *Id.* (quoting Skinner v. Railway Labor Executives' Ass'n, _____U.S._____, 109 S. Ct. 1402, 1415 (1989)).

ary determination to search *based on a judgment that certain conditions are present,* there are simply 'no special facts for a neutral magistrate to evaluate.' "[353]

Again, as in *Skinner,* the same consideration of advance notice of the permissible scope of the intrusion found in *Von Raab* is not present in sobriety checkpoints. "[A] discretionary determination to [seize] based on a judgment that certain conditions are present"[354] *is,* however, found in the context of sobriety checkpoints. Though sobriety checkpoints are obviously distinguishable from random stops by roving patrols which have been held unconstitutional because of the field officer's unconstrained discretion in effectuating the stop,[355] the location of sobriety checkpoints is the result of a discretionary determination by high-level law enforcement officials "based on a judgment that certain conditions are present."[356] There is no reason why high-level law enforcement officials making a discretionary determination as to the location of a sobriety checkpoint—based on such factors being present as the high arrest rate for drunken driving in a particular area—should not be equated with the *Von Raab* Court's proposition affording significance to the fact that the Customs Service did *not* "make a discretionary determination to search based on a judgment that certain conditions are present."[357] Thus, though sobriety checkpoints alleviate the fear that the field officer might exercise unbridled discretion in the *seizure* of motorists,[358] the Von Raab holding suggests that discretionary determinations by high-level officials as to the *location* of sobriety checkpoints

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353. *Id.* (quoting South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring)) (emphasis added).

354. *Id.*

355. *See* Delaware v. Prouse, 440 U.S. 648 (1979).

356. *Von Raab,* 109 S. Ct. at 1391. *See supra* note 338 and accompanying text.

357. *Id.*

358. *See, e.g.,* Camara v. Municipal Court, 387 U.S. 523 (1967); Delaware v. Prouse, 440 U.S. 648 (1979). There remains undecided the issue of discretion *following* the seizure as a result of the *Sitz* Court's explicit refusal to consider the issue. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2485 (1990).

may not be justified absent a warrant as this provides " 'special facts for a neutral magistrate to evaluate.' "[359]

C. *"Effectiveness" Eliminated*

1. Dicta Doom

Not only did the *Sitz* Court's application of the reasonableness balancing test to sobriety checkpoints result in an erroneous determination of the satisfaction of Fourth Amendment standards, but the *Sitz* Court's application of the reasonableness balancing test also eliminated the "effectiveness" review from the reasonableness balancing test.[360] In considering the "effectiveness" factor found in the reasonableness balancing test as expressed in *Brown v. Texas*,[361] the *Sitz* Court opined that "[t]his passage from *Brown* was not meant to transfer from politically

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359. National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384, 1391 (1989) (quoting South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring)).

See Katz v. United States, 389 U.S. 347 (1967):

> It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause."

Katz, 389 U.S. at 356-57 (quoting Agnello v. United States, 269 U.S. 20, 33 (1925)).

See also 4 LAFAVE, SEARCH AND SEIZURE 77 (2d ed. 1987) ("[I]t would be open to a defendant challenging a sobriety checkpoint to bring into question the validity of the decision as to when and where it would be operated.").

But see Sherri Ann Carver, Comment, *The Battle of the Balancing Tests in the Fourth Amendment Drug Testing Cases:* Skinner v. Railway Labor Executives' Association – *The Proper Balance Is Struck*, 15 OKLA. CITY U.L. REV. 333, 358 (1990) ("Support for the Court's decisions can be found by analogizing *Skinner* and [*National Treasury Employees Union v.*] *Von Raab* to roadblock cases.").

360. States are apparently wasting little time in taking full advantage of this carte blanche aspect of the Court's decision. In Colorado v. Rister, 803 P.2d 483, 488-89 (Colo. 1990) (en banc), the Colorado Supreme Court, relying upon *Sitz* in upholding the constitutionality of a challenged sobriety checkpoint, held that, "[n]otwithstanding the lack of any driving-under-the-influence arrests at the . . . checkpoint, we conclude that the checkpoint reasonably advanced the state's interest in combatting drunken driving."

There are, however, jurisdictions continuing to recognize the vitality of the "effectiveness" prong in the *Brown* balancing analysis. *See, e.g.*, State v. Van Natta, 805 S.W.2d 40, 42 (Tex. Ct. App. 1991) (recognizing the necessity of "effectiveness" and requiring, at a minimum, a prima facie showing by the police of the sobriety checkpoint's effectiveness in order to uphold the constitutionality of the checkpoint); State v. Kitchen, 808 P.2d 1127 (Utah Ct. App. 1991):

> [T]he second prong of the Brown test, the degree to which the roadblock advances the public interest, has not been met. First, there was no finding as to whether this roadblock advanced the aforementioned public interest. Moreover, there is a paucity of evidence, empirical or otherwise, that this roadblock accomplished any of the purposes for which it was conducted. In Sitz, in addition to data as to the number of arrests made, records were kept as to the number of vehicles stopped, the number subject to further investigation, and the length of the delay involved. Here, only the number of violations were recorded. Additionally, in Sitz, expert testimony was received as to the effectiveness of roadblocks in advancing detection of drunk drivers; here, no such expert testimony was offered. In short, no evidence was offered or received to support a finding that this roadblock advanced the interests for which it was conducted and, therefore, this prong of the Brown test has not been met.

Kitchen, 808 P.2d at 1131 (footnote omitted).

361. 443 U.S. 47, 51 (1979) ("the degree to which the seizure advances the public interest").

accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."[362] In removing the "effectiveness" review from judicial consideration of a challenged law enforcement measure, the *Sitz* majority reasoned that "for purposes of Fourth Amendment analysis, the choice among . . . 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."[363] It is indeed ironic that the Court would utilize sobriety checkpoints to afford law enforcement officials this range of discretion where there are, in fact, alternative means available which are both more "efficient"[364] and more "effective."[365]

2. One Down, One to Go

Perhaps the most disturbing aspect of the *Sitz* Court's elimination of "effectiveness" from judicial review is that this reduces the reasonableness balancing test to but two considerations: (1) the gravity of the public interest, and (2) the severity of the intrusion on individual liberties. Such a minimized test opens Pandora's box to a myriad of state actions which may in fact be "ineffective" when there is perceived to be a weighty social goal. The only remaining limitation on such arbitrary police action is the severity of the intrusion which will accompany that action. In light of the Supreme Court's most recent decisions in which the Court has utilized the reasonableness balancing test,[366] however, this limitation approaches transparency. Ominously, the similarity to a police state[367] will increase as the Court continues to increase the severity of intrusion on individual liberties allowed.

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362. *Sitz*, _____U.S._____, 110 S. Ct. at 2487.

363. *Id.* See *Establishing Roadblocks supra* note 1:

> The Court has decided that it will leave decisions as to the appropriate weapon with which to fight drunk driving to the police administrators. The Court decided not to deprive the police of this potentially effective tool. The Court's decision was made by assigning more importance to the potential for arresting drunk drivers at these temporary roadblocks . . . than to the intrusion on large numbers of law-abiding motorists. This decision was made in total disregard of the data presented and cited by the Court and in Justice Stevens' dissent. The Court owes the public a more cogent explanation than the one it provided . . . .

Id. at 57.

See also Sitz, _____U.S._____, 110 S. Ct. 2481, 2490 (1990) (Brennan, J., dissenting) ("In the face of the 'momentary evil' of drunken driving, the Court today abdicates its role as the protector of [the] fundamental right [to be let alone].").

Cf. Susan Haberbarger, Comment, *Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After* Skinner v. Railway Labor Executives' Association?, 12 U. HAW. L. REV. 343, 381 (1990) ("The most notable aspect of the decision is the Supreme Court's *grant of broad discretion to the government* in its war on drugs . . . .") (emphasis added).

364. *See supra* note 290 and accompanying text.

365. *See supra* notes 285-88 and accompanying text.

366. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481 (1990); Skinner v. Railway Labor Executives' Ass'n, _____U.S._____, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384 (1989); Griffin v. Wisconsin, 483 U.S. 868 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985).

367. *See* State v. Patterson, 582 A.2d 1204, 1205 (Me. 1990) (society best served by regime that uses roadblocks). *Cf.* State v. Koppel, 499 A.2d 977, 983 (N.H. 1985); State v. Smith, 674 P.2d 562, 564 (Okla. Cr. App. 1984).

VI. CONCLUSION

A. Fiat justitia, ruat coelum[368]

"I suspect that this case is a prime example of the adage that 'bad facts make bad law.' "[369] Evident behind the *Sitz* decision is that the ends justify the means.[370] There are, however, scores of opinions evidencing the folly of promulgating unconstitutional laws and utilizing unconstitutional measures to counter a threatening menace.[371] Indeed, "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ."[372] Though directed at consideration of presidential powers in a state of emergency, the following statement by Justice Jackson accurately depicts the impetus of the *Sitz* Court's ruling: "The plea is for a resulting power to deal with a crisis or an

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368. "Let justice be done, though the heavens may fall."

369. Haig v. Agee, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting). *Accord* Carroll v. United States, 267 U.S. 132 (1925):

> The damnable character of the "bootlegger's" business should not close our eyes to the mischief which will surely follow any attempt to destroy [the bootlegger's business] by unwarranted methods. "To press forward to a great principle by breaking through every other great principle that stands in the way of its establishment; . . . in short, to procure an eminent good by means that are unlawful is as little consonant to private morality as to public justice."

Id. at 163 (McReynolds, J., dissenting) (quoting Sir William Scott, *The Le Louis*, 2 Dodson 210, 257).

370. *See also* State v. Smith, 674 P.2d 562, 564 (Okla. Crim. App. 1984) ("[S]tate agencies have ignored the presumption of innocence [in implementing sobriety checkpoints], assuming that criminal conduct must be occurring on the roads . . . , and have taken an 'ends justifies the means' approach.").

371. *See, e.g.*, National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384, 1401 (1989) (Scalia, J., dissenting) ("[T]he impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause . . . , cannot validate an otherwise unreasonable search."); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) ("The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."); *id.* at 274 ("The Court that decided Carroll v. United States . . . sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment.") (citation omitted); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935):

> Extraordinary conditions do not create or enlarge constitutional power. The constitution established a national government with powers deemed to be adequate, . . . but these powers of the national government are limited by constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary.

Id. at 528-29 (footnotes omitted).

Cf. Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) ("There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.").

372. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 944 (1983).

See also United States v. White, 401 U.S. 745 (1971) (Douglas, J., dissenting):

> [T]he concepts of privacy which the Founders enshrined in the Fourth Amendment vanish completely when we slavishly allow an all-powerful government, proclaiming law and order, efficiency, and other benign purposes, to penetrate all the walls and doors which men need to shield them from the pressures of a turbulent life around them and give them the health and strength to carry on.

White, 401 U.S. at 756.

emergency according to the necessities of the case, the unarticulated assumption being that necessity knows no law."[373]

B. Alarming Repercussions

The *Sitz* Court's decision, requiring neither a warrant nor even reasonable suspicion as grounds for seizures at sobriety checkpoints, clearly evidences the Court's continued willingness to subject private citizens to arbitrary state action where there is a perceived weighty social objective.[374] The *Sitz* opinion is indeed consistent with the two most recent Fourth Amendment cases decided by the Court, where the Court found that "[t]he government may take all necessary and reasonable regulatory steps to prevent or deter . . . hazardous conduct"[375] and that "[t]hese substantial interests . . . present a special need that may justify departure from the ordinary warrant and probable cause requirements."[376]

Though law enforcement advocates and politically active citizens' groups, as well as others, may scoff at forecasts of a trend toward arbitrary state police

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373. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring).

See also National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384, 1398 (1989) (Scalia, J., dissenting) ("While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been 'reasonable,' the answer depends largely upon *the social necessity that prompts the search.*") (emphasis added).

374. See Skinner v. Railway Labor Executives Ass'n, _____U.S._____, 109 S. Ct. 1402 (1989), where the Court recently upheld mandated drug and alcohol testing for railroad employees involved in certain types of accidents:

> The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances. Performing those tasks while impaired by alcohol is, of course, equally dangerous, though consumption of alcohol is legal in most other contexts. *The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct . . . .*

Id. at 1421 (emphasis added).

Also illustrative of this proposition is National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384 (1989), where the Court upheld mandatory drug testing as a prerequisite to certain positions within the Customs Service:

> The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. *These substantial interests . . . present a special need that may justify departure from the ordinary warrant and probable cause requirements.*

Id. at 1390-91 (emphasis added).

Cf. Comment, *Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After* Skinner v. Railway Labor Executives' Association?, 12 U. HAW. L. REV. 343, 380 (1990) ("This newly created exception to the warrant requirement will most likely encourage future drug-testing programs, *especially if their justifications lie within the ambit of securing public safety.*") (emphasis added).

375. *Skinner,* 109 S. Ct. at 1421. The *Skinner* requirement that the regulatory steps not only be "necessary" but also "reasonable" is assumedly satisfied by the *Sitz* Court's finding that sobriety checkpoints satisfy the requirements of the reasonableness balancing test.

376. *Von Raab,* 109 S. Ct. at 1390-91. The *Sitz* Court interestingly, however, rejected the motorists' contention that *Von Raab* provided the standard by which sobriety checkpoints should be judged, Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481, 2485 (1990), pointing out that *Von Raab* both cited and discussed the Court's previous decisions concerning police stops of motorists with approval and, thus, those cases were the relevant authorities in the context of sobriety checkpoints. Nevertheless, it is patently clear from the Court's continual willingness to rely upon the gravity of the public interest – at the practical exclusion of consideration of the effectiveness of an activity and the resultant intrusion – in upholding challenged state actions, that the *Sitz* Court might have just as easily relied upon *Von Raab* in reaching its desired ruling.

action, previous decisions of the Supreme Court certainly justify such concern.[377] The Court's most recent decisions permitting the state to invade individual liberties amplify this concern[378] and reflect the trend of the Court in reducing the Fourth Amendment to mere platitude.[379] Due recognition, however, must be accorded the proposition that these invasions on individual liberties are in pursuance of a perceived weighty social objective which represents a grave and legitimate interest of the state. Nevertheless, as Justice Douglas recognized in *Terry v. Ohio*,[380] "if the individual is no longer to be sovereign, . . . we enter a new regime."[381]

The Orwellian consequences of further reductions of the requirements of the Fourth Amendment are readily apparent. Random police searches of private residents for illegal drugs might be easily justified in such a system as well as countless

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377. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), Justice Brennan compiled a brief history of the Court's decisions evidencing this trend.

> Today's decision evidences the continuing evisceration of the Fourth Amendment protections against unreasonable searches and seizures . . . . Texas v. White permitted the warrantless search of an automobile in police custody despite the unreasonableness of the custody and opportunity to obtain a warrant. United States v. Watson held that regardless of whether opportunity exists to obtain a warrant, an arrest in a public place for a previously committed felony never requires a warrant . . . . United States v. Santana went further and approved the warrantless arrest for a felony of a person standing on the front porch of her residence. United States v. Miller narrowed the Fourth Amendment's protection of privacy by denying the existence of a protectible interest in the compilation of checks, deposit slips, and other records pertaining to an individual's bank account. Stone v. Powell precluded the assertion of Fourth Amendment claims in federal collateral relief proceedings. United States v. Janis held that evidence unconstitutionally seized by a state officer is admissible in a civil proceeding by or against the United States. South Dakota v. Opperman approved sweeping inventory searches of automobiles in police custody irrespective of the particular circumstances of the case. Finally, in Andresen v. Maryland, the Court, in practical effect, weakened the Fourth Amendment prohibition against general warrants.

Id. at 567-68 (Brennan, J., dissenting) (citations omitted).

See also State v. Smith, 674 P.2d 562, 564 (Okla. Crim. App. 1984) ("The Court finds [sobriety checkpoints], while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be referred to as a police state.").

378. *See* Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481 (1990); Skinner v. Railway Labor Executives' Ass'n, _____U.S._____, 109 S. Ct. 1402 (1989); National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384 (1989). *See also supra* note 258.

379. One may consider the fate of the Tenth Amendment in this regard:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or *that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted* . . . .

United States v. Darby, 312 U.S. 100, 124 (1941) (emphasis added).

Cf. National Treasury Employees Union v. Von Raab, _____U.S._____, 109 S. Ct. 1384, 1390 (1989) (Court recognized "*the longstanding principle* that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.") (emphasis added); Comment, *Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After* Skinner v. Railway Labor Executives' Association?, 12 U. HAW. L. REV. 343, 380 (1990) ("[*Railway Labor*] and [*National Treasury Employees Union v.*] *Von Raab* . . . continue the Court's 'erosion of the fourth amendment' by creating a 'drug-testing exception' to the warrant requirement.") (footnotes omitted).

380. 392 U.S. 1 (1968).

381. *Id.* at 39 (Douglas, J., dissenting).

other invasions of basic individual freedoms.[382] Would not such a system permit law enforcement officials to seize every citizen driving a General Motors car within an area where there had been a rash of recent auto thefts, of which a large majority of the vehicles stolen were General Motors cars? Would the state in fact need to show that there is a grave and legitimate state interest to be served by the seizure? *People v. Meitz*[383] suggests not. Indeed, given the trend of decisions, the potential repercussions of the *Sitz* decision are not nearly as speculative as they are alarming.[384] The *Sitz* decision, in fact, upholds an enforcement activity remarkably similar to those executed under the despised general writs of assistance issued during colonial times.[385]

C. Feasibility of Warrant Requirement

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[386]

In view of this long-recognized principle of Fourth Amendment jurisprudence, the *Sitz* Court's neglect of the Fourth Amendment warrant requirement is unjustified. Furthermore, a review of the Supreme Court's earlier decisions not requiring the

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382. *See* State v. Folsom, No. 90-CA-1 (Ohio Ct. App. July 2, 1990) (WESTLAW, Allstates library) (Milligan, J., concurring):

> I . . . [write] separately only to forewarn that the next generation of challenges to traffic stops resulting in D.U.I. arrests will face the impact of [Sitz]. When considering the federal constitutional prohibitions of the Fourth Amendment to the U.S. Constitution legitimate questions can be raised as to whether articulable suspicion, followed by probable cause, is any longer required in a singular traffic stop. If the police can stop and minimally detain all of the traffic, why can't they stop a single operator?

Id. at 2 (citing Michigan Dep't of State Police v. Sitz, _____U.S._____, 110 S. Ct. 2481 (1990)).

See generally A Sobering Look, supra note 11, at 604 ("It is not far-fetched to assume . . . that the the [sic] Court could use a decision upholding the constitutionality of DUI roadblocks to permit a myriad of intrusions on a person's right to travel freely either on foot or in car.").

383. 420 N.E.2d 1119 (Ill. App. 1981) (Upholding the seizure of the defendant two blocks from the site of a stakeout which had been established to investigate a rash of recent auto thefts from an apartment complex. The defendant was detained without probable cause or even reasonable suspicion because he was driving a General Motors vehicle and approximately 85 percent of the recent thefts were of late model General Motors vehicles).

384. *See Colorado Upholds Constitutuinality of Sobriety Stops at Fixed Checkpoint*, 59 U.S.L.W. 1103 (Jan. 8, 1991) (reporting that a sobriety checkpoint recently upheld as constitutional under both the federal and Colorado state constitutions was both more intrusive and less effective than the checkpoint approved in *Sitz*).

See also State v. Hester, 584 A.2d 256 (N.J. Super. Ct. App. Div. 1990) (upheld use of "pursuit vehicle" at sobriety checkpoint, ruling that a motorist need not have the opportunity to avoid a checkpoint for the checkpoint to be constitutional).

385. "What a scene does this open! Every man prompted by revenge, ill humour or wantonness to inspect the inside of his neighbour's house, may get a writ of assistance; . . . one arbitrary exertion will provoke another, until society will be involved in tumult and in blood." THE ADAMS PAPERS 143 (L. Butterfield ed. 1968) (reporting James Otis' argument against the writs of assistance on behalf of the colonists in the Supreme Court of Boston, 1761). *See also supra* notes 48-54 and accompanying text.

386. Terry v. Ohio, 392 U.S. 1, 21 (1968) (footnotes omitted).

procurement of a judicially-issued warrant provides no basis upon which to excuse this requirement in the context of sobriety checkpoints.[387]

Requiring law enforcement officials to secure a judicially-issued warrant prior to operation of a sobriety checkpoint would neither "frustrate the governmental purpose"[388] behind the checkpoint nor interfere to any "appreciable degree"[389] with the operation of the checkpoint. Additionally, any burden placed on law enforcement officials in requiring a warrant is certain to be minimal considering that this activity is routinely performed on a daily basis by these same officials for other enforcement purposes.[390] Thus, any additional burden imposed by a warrant requirement will be one of mere "inconvenience," an insufficient justification for circumventing the requirements of the Fourth Amendment.[391]

There is also insufficient justification for excusing the warrant requirement in the premise that predetermined guidelines for operation of the checkpoints serve

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387. *See supra* notes 317-59 and accompanying text. *But see* 4 LAFAVE, SEARCH AND SEIZURE 77-78 (2d ed. 1987).

388. *See* New Jersey v. T.L.O., 469 U.S. 325 (1985); United States v. United States Dist. Court, 407 U.S. 297 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967).

389. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987). *See supra* notes 334-41 and accompanying text.

390. *Cf.* O'Connor v. Ortega, 480 U.S. 709 (1987):

> Imposing unwieldy warrant procedures . . . upon supervisors, *who would otherwise have no reason to be familiar with such procedures,* is simply unreasonable. In contrast to other circumstances in which we have required warrants, supervisors in offices such as at the Hospital are hardly in the business of investigating the violation of criminal laws.

Id. at 722 (emphasis added).

391. *See* United States v. United States Dist. Court, 407 U.S. 297, 321 (1972). "Although some added burden will be imposed upon [the government by requiring prior judicial approval], this inconvenience is justified in a free society to protect constitutional values." *Id. See also* Marshall v. Barlow's, Inc., 436 U.S. 307, 316 (1978) (rejecting the contention that warrantless OSHA inspections should be permitted because of the serious burden which would be placed upon the courts requiring procurement of a warrant prior to inspection); *id.* at 321 ("We doubt that the consumption of enforcement energies in the obtaining of [the required] warrants will exceed manageable proportions."); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971) ("[The Fourth Amendment warrant requirement] is not an inconvenience to be somehow 'weighed' against the claims of police efficiency.").

There is, however, some support for not requiring a warrant prior to an administrative search when the inconvenience attendant with procuring a warrant in the particular context is "unduly burdensome":

> [R]equiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be *unduly burdensome.* Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.

O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (emphasis added).

as a limitation on official discretion. Such self-imposed guidelines[392] do not assure adequate protection of constitutional rights to the motoring public.[393]

Finally, not only should a judicially-issued warrant be required for the operation of sobriety checkpoints, but this warrant should also be based upon the traditional standard of probable cause as required by the strictures of the Fourth Amendment rather than upon a reduced standard predicated upon *ipse dixit.* That there are generally recognized exceptions to the traditional standard of probable cause is of no moment in the context of sobriety checkpoints, as evidenced by the inapplicability of the reasonableness balancing test to sobriety checkpoints.[394]

Therefore, even in recognition of the grave and legitimate state interest in curbing drunken driving, basic individual freedoms guaranteed by the Fourth Amendment such as the right to travel unimpeded,[395] the right to privacy,[396] and the right

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392. Guidelines established by law enforcement officials to regulate enforcement activities do not necessarily afford adequate constitutional safeguards to the private citizen. There is inherent in these self-imposed guidelines a certain "conflict of interest" which has been recognized to defeat similar arguments that enforcement activities should be permitted outside the purview of a warrant.

> The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. This historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy . . . .

United States v. United States Dist. Court, 407 U.S. 297, 317 (1972) (citing Katz v. United States, 389 U.S. 347, 359-60 (1967) (citation omitted) (footnotes omitted)).

393. There is inherent in self-imposed enforcement guidelines a "conflict of interest," *see supra* note 392, which can only be avoided through intervention of a neutral and detached magistrate judging the constitutional validity of the proposed enforcement activity. This concept of a separation of powers to regulate enforcement activities recognizes that neither executive discretion nor policy guidelines are sufficient to ensure the constitutional validity of an enforcement activity:

> The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches of Government.

United States Dist. Court, 407 U.S. at 317 (citing John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance,* 49 A.B.A. J. 943-44 (1963)).

Cf. Camara v. Municipal Court, 387 U.S. 523, 533 (1967) ("[B]road statutory safeguards are no substitute for individualized review . . . .").

394. *See supra* notes 260-316 and accompanying text. *Cf.* Colorado v. Rister, 803 P.2d 483 (Colo. 1990) (en banc):

> [T]he Sitz holding is remarkable for its failure to acknowledge the long-standing search and seizure principle, first enunciated in Terry v. Ohio, that the temporary seizure of a person for a brief investigation is constitutionally permissible as long as there are circumstances which, although not amounting to probable cause essential for a traditional arrest, are sufficient when judged against an objective standard to support a reasonable suspicion that "criminal activity may be afoot."

Id. (Quinn, J., dissenting) (citations omitted).

395. *See* U.S. CONST. amend. XIV, section 1. *See, e.g.,* Carroll v. United States, 267 U.S. 132, 154 (1925) ("[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is . . . probable cause for believing that their vehicles are carrying contraband . . . .").

396. *See, e.g.,* Cardwell v. Lewis, 417 U.S. 583, 589 (1974) ("[T]he primary object of the Fourth Amendment [is] . . . the protection of privacy . . . . 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.' ") (quoting Jones v. United States, 357 U.S. 493, 498 (1958)) (citations omitted).

to be left alone,[397] can only be adequately preserved through the requirement of a judicially-issued area warrant based on probable cause prior to the operation of a sobriety checkpoint.[398] There is no reason that a "feasible and meaningful"[399] war-

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397. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 386 (1985) (Stevens, J., dissenting) ("One of [the] most cherished ideals is the one contained in the Fourth Amendment: that the government may not intrude on the personal privacy of its citizens without a warrant or compelling circumstance.").

398. An alternative ground upon which sobriety checkpoints could be held constitutional is where the sobriety checkpoint program utilized by state law enforcement is operated pursuant to specific legislative authorization which includes specified criteria for the operation of the checkpoints. *See supra* note 339 and accompanying text. Where there is such specific legislative authorization, the checkpoints might be analogized – for constitutional purposes – to administrative inspections of pervasively regulated industries. *See* New York v. Burger, 482 U.S. 691 (1987) (discussing the reasonableness of a warrantless inspection of a pervasively regulated business):

> [A] warrantless inspection . . . in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made . . . .
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers . . . .

Burger, 482 U.S. at 711 (quoting Donovan v. Dewey, 452 U.S. 594, 600 (1981)) (citations omitted).

The *Burger* Court expounded on these factors later in its opinion, holding that the particular regulatory scheme under consideration – inspections of automobile junkyards – "satisfies the three criteria necessary to make reasonable warrantless inspections pursuant to [the regulatory scheme under review]." *Burger*, 482 U.S. at 708.

The rationales employed by the *Burger* Court in finding satisfaction of each of the three criteria may easily be applied to hold constitutional a sobriety checkpoint program operated pursuant to carefully drafted, specific legislative authorization. Consider:

> The [state] regulatory scheme satisfies the three criteria necessary to make reasonable warrantless inspections pursuant to [the state's sobriety checkpoint statute]. First, the state has a substantial interest in [detecting and removing drunken drivers from the highways because of the problems and tragedies attendant with drunken driving. *See supra* note 1 and accompanying text.].
>
> Second, regulation of [motorists through the use of highway sobriety checkpoints] reasonably serves the state's substantial interest in eradicating [drunken driving].
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> . . .
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> Third, [the state's sobriety checkpoint statute] provides a "constitutionally adequate substitute for a warrant." The statute informs the operator of a vehicle . . . that [sobriety checkpoints will be implemented] on a regular basis . . . . Thus, the vehicle [operator] knows that the [checkpoints] to which he is subject do not constitute discretionary acts by a government official but are conducted pursuant to statute . . . . [The statute] also sets forth the scope of the [seizure] and, accordingly, places the [motorist] on notice as to how to comply with the statute. In addition, it notifies the [motorist] as to who is authorized to conduct [the checkpoint].
>
> Finally, the "time, place, and scope" of the [checkpoint] is limited . . . to place appropriate restraints upon the discretion of the [officers conducting the checkpoint] . . . . The officers are allowed to conduct [a checkpoint] only [during the hours specified in the statutory guidelines. The checkpoints may stop only every *x-numbered* vehicle]. And the permissible scope of these [seizures] is narrowly defined: [the checkpoint officers may only examine the motorist's demeanor and ask the motorist a short series of questions specifically provided by statute].

Burger, 482 U.S. at 708-11 (citations omitted).

399. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 283 (1973). *See supra* notes 325-30 and accompanying text.

rant system could not be designed such as to render this requirement "practical"[400] for law enforcement officials while providing adequate constitutional safeguards to the motoring public. Indeed, the only arguable obstacle to law enforcement officials is providing proof of probable cause for operation of the sobriety checkpoint.[401] Without this requisite of proof, however, sobriety checkpoints must be unconstitutional.

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400. *See* United States v. United States Dist. Court, 407 U.S. 297 (1972):

> [T]he very heart of the Fourth Amendment directive [is] that, *where practical*, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify [the] invasion . . . . Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate."

Id. at 316 (citing Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971); Katz v. United States, 389 U.S. 347, 356 (1967)) (emphasis added).

401. Factors which a magistrate may deem persuasive in a determination of probable cause for the implementation of a sobriety checkpoint at a specified location include (1) the geographical proximity and relation of the checkpoint to a "strip" on which there is located a number of establishments which serve alcoholic beverages, *see supra* notes 328-29 and accompanying text, and (2) the existence of a high rate of arrest for drunken driving on a particularly described length of a certain roadway, *see supra* notes 354-59 and accompanying text.

The Court has long-recognized that facts peculiar to a specific geographical location may be sufficient in themselves to establish probable cause. In Carroll v. United States, 267 U.S. 132, 160-61 (1925), the Court found that the arresting officers had probable cause to stop suspected bootleggers seen traveling on a highway known to be one highly-traveled by bootleggers and frequently patrolled in search of bootleggers. The Court noted:

> "It has been very justly observed at the bar that the court is bound to take notice of public facts *and geographical positions*, and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government."

Id. at 159-60 (quoting The Apollon, 9 Wheat. 362, 374 (1824)) (emphasis added).

Little alteration need be made to Justice Story's quoted passage from The Apollon to evidence the applicability of "geographical location" in the context of the establishment of probable cause at sobriety checkpoints. Consider:

> "It has been very justly observed at the bar that the court is bound to take notice of [records of arrest rates for driving under the influence and drunken-driving accidents] and [geographical locations in which there is a high rate of occurrence of these incidents], and that this [particular X mile stretch of road] has been infested, [particularly on week-end nights], by [drunken drivers], is matter of general notoriety, and may be gathered from the public documents of the government."

Id.

See Colorado v. Rister, 803 P.2d 483, 489 (Colo. 1990) (en banc) ("[T]he location of the checkpoint was established on a reasonable basis - information available to the State Patrol indicated that roads in the area of recreational sites near . . . Walden had been used by drunken drivers."); *see* State v. Coccomo, 427 A.2d 131, 134 (N.J. Super. 1980) (checkpoint established "where many bars are located" found "sufficiently productive to qualify as a reasonable law enforcement practice."). *See also* Almeida-Sanchez v. United States, 413 U.S. 266, 283 n.3 (1973) (Powell, J., concurring) ("Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of warrant.").

See supra notes 327, 353-58 and accompanying text.

Cf. Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978) (quoting Camara v. Municipal Court, 387 U.S. 523, 538 (1967)) ("For purposes of an administrative search . . . , probable cause justifying the issuance of a warrant may be based . . . on specific evidence of an existing violation [or] on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' ") (footnote omitted). The author suggests that "a particular stretch of road" might be substituted in the quoted passage for "a particular establishment" with insignificant impact on the impetus of the Court's finding. The prevalent considerations in the Court's decision, irrespective of the context in which applied, is that probable cause for an administrative search may be established by (1) direct evidence of a violation or, (2) showing that the search will be specifically limited to a particular location and carried-out in accord with reasonable standards established for executing the search.

But see State v. Henderson, 756 P.2d 1057, 1058 (Idaho 1988) (requisite individualized suspicion not found where "site was selected because it was an area having a history of alcohol-related traffic violations as well as being a street with heavy traffic.").

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.[402]

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402. Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).