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Illinois Supreme Court Upholds Drunk Driving Roadblocks - People v. Bartley

Steven T. Naumann

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THE ILLINOIS SUPREME COURT UPHOLDS DRUNK DRIVING ROADBLOCKS

People v. Bartley

109 Ill. 2d 273, 486 N.E.2d 880 (1985),
cert. denied, 106 S. Ct. 1384 (1986)

INTRODUCTION

Drunk drivers kill and injure thousands of people every year.¹ In an effort to reduce the slaughter, the states have stepped up enforcement of drunk driving laws, increased the minimum drinking age,² and increased the penalties for those convicted.³ One controversial action taken by the

1. See *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983); *Mackey v. Montrym*, 443 U.S. 1, 17 n.9 (1979); *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 8, 663 P.2d 992, 999 (1983); *People v. Bartley*, 109 Ill. 2d 273, 285-86, 486 N.E.2d 880, 885-86 (1985) (quoting National Transportation Safety Board Study), *cert. denied*, 106 S. Ct. 1384 (1986); *Commonwealth v. Trumble*, 396 Mass. 81, 86-87, 483 N.E.2d 1102, 1105-06 (1985); H.R. REP. NO. 867, 97th Cong., 2d Sess. 7, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 3367, 3367; Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1457 n.1 (1983).

While the term drunk driving is used throughout this comment, states refer to drunk driving as either driving under the influence (DUI) or driving while intoxicated (DWI). See *Ekstrom*, 136 Ariz. at 2, 663 P.2d at 993 (DWI); *Bartley*, 109 Ill. 2d at 276, 486 N.E.2d at 881 (DUI).

2. See MASS. GEN. LAWS ANN. ch. 138, § 34 (West Supp. 1985) (compare provisions effective prior to June 1, 1985 with provisions effective June 1, 1985); N.Y. ALCO. BEV. CONT. LAW §§ 65 to 65-b (McKinney Supp. 1986) (compare provisions effective prior to Dec. 1, 1985 with provisions effective Dec. 1, 1985). See also R.I. GEN. LAWS § 3-8-6 (Supp. 1986); TENN. CODE ANN. § 57-4-203(b) (Supp. 1986); N.Y. Times, Feb. 9, 1986, at 59, col. 2 (Vermont raises minimum drinking age from 18 to 21 effective July 1, 1986).

The federal government encourages raising the minimum drinking age to 21 by denying states some highway funds if they don't raise their minimum drinking age by September 30, 1986. See 23 U.S.C. § 158 (Supp. III 1985).

3. See, e.g., CAL. VEH. CODE § 23195 (West 1985) (impoundment of car of convicted drunk driver); CAL. VEH. CODE § 23182 (West Supp. 1986) (enhanced sentence for convicted drunk driver who causes bodily injury); MASS. GEN. LAWS ANN. ch. 90, § 24(1)(a)(1) (West Supp. 1986) (raised minimum fine).

Illinois has passed a number of provisions, effective January 1, 1986, which increase the penalties for drunk driving. Supervision is no longer authorized for anyone convicted of DUI for a second time within a five year period. Pub. Act 84-916, § 1, 1985 Ill. Laws 5831, 5831-33 (codified at Ill. Uniform Code of Corrections § 5-6-1(d), ILL. REV. STAT. ch. 38, ¶ 1005-6-1(d) (1985)). The penalty for drunk driving is increased from a misdemeanor to a felony if a person convicted of drunk driving is involved in an accident causing "great bodily harm." Pub. Act 84-899, § 1, 1985 Ill. Laws 5735, 5736 (codified at Ill. Vehicle Code § 11-501(f), ILL. REV. STAT. ch. 95 ½, ¶ 11-501(f) (1985)).

The new laws authorize police to administer tests after all accidents involving personal injury or death. Pub. Act 84-272, § 7, 1985 Ill. Laws 2409, 2440-41 (codified at Ill. Vehicle Code § 11-501.3, ILL. REV. STAT. ch. 95½, ¶ 11-501.3 (1985)). Furthermore, conviction for drunk driving now makes a prima facie case for reckless homicide. *Id.* at § 2, 1985 Ill. Laws at 2413 (codified at Ill. Criminal Code § 9-3(b), ILL. REV. STAT. ch. 38, ¶ 9-3(b) (1985)). Finally, the new laws provide for a summary suspension of a driver's license for failing to take a sobriety test. *Id.* at § 7, 1985 Ill.

states has been to set up roadblocks stopping motorists, and, without any individualized suspicion, checking the drivers for signs of intoxication.

The Supreme Court has allowed fixed roadblocks for immigration checks⁴ and arguably approved of roadblocks for checking for drivers' licenses and other vehicle violations.⁵ However, the Court has not ruled on the specific issue of whether temporary roadblocks to check for intoxicated drivers violates the constitutional protection against unreasonable searches and seizures.⁶ State courts are divided on the constitutionality of such roadblocks⁷ with most allowing roadblocks under specific cir-

Laws at 2433, 2437-40 (codified at Ill. Vehicle Code §§ 6-208.1, 11-501.1(c)-(h), ILL. REV. STAT. ch. 95½, ¶¶ 6-208.1, 11-501.1(c)-(h) (1985)).

See also *State v. McLaughlin*, 471 N.E.2d 1125, 1136 (Ind. Ct. App. 1984).

4. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

5. *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

6. *People v. Bartley*, 109 Ill. 2d 273, 283, 486 N.E.2d 880, 884 (1985), *cert. denied*, 106 S. Ct. 1384 (1986); *Nelson v. Lane County*, 79 Or. App. 753, 762, 720 P.2d 1291, 1297, *appeal granted*, 301 Or. 765, 726 P.2d 377 (1986).

Four months after the Illinois Supreme Court decided *Bartley*, the United States Supreme Court passed up two opportunities to review the constitutionality of drunk driving roadblocks. See *Lowe v. Virginia*, 106 S. Ct. 1464 (1986); *Bartley v. Illinois*, 106 S. Ct. 1384 (1986).

7. For courts upholding roadblocks see *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984); *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984); *People v. Bartley*, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S. Ct. 1384 (1986); *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986); *State v. Riley*, 377 N.W.2d 242 (Iowa Ct. App. 1985); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983); *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. Ct. App. 1983), *cert. denied*, 465 U.S. 1105 (1984); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984); *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984); *State v. Alexander*, 22 Ohio Misc. 2d 34, 489 N.E.2d 1093 (1985); *State v. Martin*, 145 Vt. 562, 496 A.2d 442 (1985); *Lowe v. Commonwealth*, 230 Va. 346, 337 S.E.2d 273 (1985), *cert. denied*, 106 S. Ct. 1464 (1986); *Fury v. City of Seattle*, 46 Wash. App. 110, 730 P.2d 62 (1986); *cf. Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984).

For courts striking down roadblocks as unconstitutional see *State v. Jones*, 483 So. 2d 433 (Fla. 1986) (but approving future roadblocks if procedures meet stated criteria); *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985); *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986) (*per curiam*) (no planning by supervisory personnel); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985) (on state constitutional grounds); *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984); *Nelson v. Lane County*, 79 Or. App. 753, 720 P.2d 1291 (on state constitutional grounds), *appeal granted*, 301 Or. 765, 726 P.2d 377 (1986); *Commonwealth v. Tarbert*, 348 Pa. Super. 306, 502 A.2d 221 (1985), (on state constitutional grounds), *appeal granted*, 513 A.2d 1381 (Pa. 1986); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976); *Webb v. State*, 695 S.W.2d 676 (Tex. Ct. App. 1985).

Some courts remain divided as to the constitutionality of roadblocks. *Compare Ingersoll v. Palmer*, 175 Cal. App. 3d 1028, 221 Cal. Rptr. 659 (1985) (roadblock constitutional), *vacated and review granted*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986) *with In re Richard T.*, 185 Cal. App. 3d 855, 229 Cal. Rptr. 884 (1986) (roadblock unconstitutional) *and State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (Law Div. 1980) (roadblock constitutional) *with State v. Kirk*, 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985) (roadblock unconstitutional on state constitutional grounds but approving roadblocks under new police procedures).

Some courts that had previously found roadblocks unconstitutional have later found the seizures constitutional when specific changes were made in the procedures. *Compare State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983) (roadblock unconstitutional due to discretion on the part of field officers) *with State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984) *and Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983) (stops not made in

cumstances. In *People v. Bartley*,⁸ the Illinois Supreme Court upheld a temporary roadblock that contained many of the features apparently required for constitutionality but lacked others.

This comment will first analyze the development by the Supreme Court of reasoning that allows, under certain circumstances, the stopping of automobiles without individualized suspicion. The focus will then shift to the history of *Bartley* and how the Illinois Supreme Court arrived at the conclusion that the *Bartley* roadblock did not violate the constitution. The analysis will suggest possible shortcomings in the *Bartley* court's reasoning and discuss possible requirements to make future roadblocks pass constitutional muster.

LEGAL HISTORY

The fourth amendment protects individuals against unreasonable searches and seizures.⁹ The reason for this prohibition is to protect individuals' privacy and security from arbitrary intrusions of governmental officials.¹⁰ The Supreme Court has determined the reasonableness, and thus the constitutionality of seizures, by balancing the public purpose served by the seizure; whether the specific actions accomplish that public

safe manner and field officers exercised discretion) *with* Commonwealth v. Trumble, 396 Mass. 81, 483 N.E.2d 1102 (1985).

Oregon courts have found roadblocks constitutional under the fourth amendment but later held that these checkpoints violated the Oregon Constitution. *Compare* State v. Shankle, 58 Or. App. 134, 647 P.2d 959 (1982) *with* Nelson v. Lane County, 79 Or. App. 753, 720 P.2d 1291, *appeal granted*, 301 Or. 765, 726 P.2d 377 (1986).

Other courts have allowed roadblocks for license and safety checks. *See* United States v. Diaz-Albertini, 772 F.2d 654 (10th Cir. 1985); United States v. Prichard, 645 F.2d 854 (10th Cir. 1981), *cert. denied*, 454 U.S. 832 (1982); State v. Cloukey, 486 A.2d 143 (Me. 1985); State v. Goines, 16 Ohio App. 3d 168, 474 N.E.2d 1219 (1984). *But see* State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980); State v. Goehring, 374 N.W.2d 882 (N.D. 1985); State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985).

Texas considers driver's license roadblocks, which are authorized by statute, constitutional but drunk driving roadblocks unconstitutional. *Carter v. State*, 700 S.W.2d 289 (Tex. Ct. App. 1985). *Compare* Brown v. State, 617 S.W.2d 196 (Tex. Crim. App. 1981), *rev'd on other grounds*, 460 U.S. 730 (1983) *with* Webb v. State, 695 S.W.2d 676 (Tex. Ct. App. 1985).

8. 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S. Ct. 1384 (1986).

9. The fourth amendment states:

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 persons or things to be seized.

U.S. CONST. amend. IV.

The due process clause of the fourteenth amendment makes the fourth amendment enforceable against the states. *Ker v. California*, 374 U.S. 23, 30-31 (1963); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

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

purpose; and the intrusiveness on the individual.¹¹ The results of balancing these factors generally require "specific, objective facts" to justify the seizure of a person.¹² However, when the balancing test justifies a seizure without some objective facts, the fourth amendment requires a "plan embodying explicit, neutral limitations" to limit the discretion of the police.¹³ These factors are important as applied to drunk driving roadblocks because the Supreme Court has stated that stopping a car at a roadblock is a seizure for the purposes of the fourth amendment.¹⁴

Over the last ten to fifteen years, the Supreme Court has outlined the fourth amendment limitations on automobile stops. In *Almeida-Sanchez v. United States*,¹⁵ the Court considered the case of a defendant whose car was stopped and searched by a roving patrol of the United States Border Patrol without a warrant, probable cause, or even reasonable suspicion.¹⁶ Although the government relied on a statute that authorized automobile searches within a "reasonable distance" of the border, the Court stated that such searches, without probable cause, violated the fourth amendment.¹⁷

11. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). See also *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983).

12. *Brown*, 443 U.S. at 51. This objective standard allows seizures for probable cause or when an officer has "reasonable suspicion" for the seizure. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

13. *Brown*, 443 U.S. at 51.

14. *Prouse*, 440 U.S. at 653; *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

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

16. *Id.* at 267-68. The defendant's car was stopped twenty-five miles north of the Mexican border. *Id.*

The *Almeida-Sanchez* Court acknowledged that searches and seizures of automobiles were permitted without a warrant. *Id.* at 269. See also *United States v. Ross*, 456 U.S. 798 (1982); *Cardwell v. Lewis*, 417 U.S. 583 (1974) (plurality opinion); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Carroll v. United States*, 267 U.S. 132 (1925). However, the Court stated that any search of an automobile still required probable cause on the part of the authorities. *Almeida-Sanchez*, 413 U.S. at 269-70. See also *Ross*, 456 U.S. at 809 & n.11; *Chambers*, 399 U.S. at 51.

Recently, however, the Court has carved out limited exceptions to the probable cause requirement for car searches. See *New York v. Class*, 106 S. Ct. 960 (1986) (reaching into car to expose Vehicle Identification Number after car stopped for some probable cause is reasonable); *Michigan v. Long*, 463 U.S. 1032 (1983) (search of passenger compartment for weapons may be based on reasonable suspicion); *New York v. Belton*, 453 U.S. 454 (1981) (search of passenger compartment allowed as search incident to arrest).

The Supreme Court allowed an exception to the probable cause requirement by allowing a limited search for weapons if a policeman had a reasonable suspicion that a person was "armed and dangerous." *Terry v. Ohio*, 392 U.S. 1, 24 (1968). The reasonable suspicion standard requires police to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the search or seizure. *Id.* at 21. The Court eventually extended this lower reasonable suspicion standard to seizures of automobiles by the Border Patrol. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); discussed *infra* notes 18-19 and accompanying text. Furthermore, reasonable suspicion can support a limited car search for weapons. See *Long*, 463 U.S. at 1049-51.

17. *Almeida-Sanchez*, 413 U.S. at 273-75.

Two years later, in *United States v. Brignoni-Ponce*,¹⁸ the Court considered whether a roving patrol could stop an automobile and briefly question the occupants without reasonable suspicion to determine if they were illegal aliens. The Court balanced the important governmental interest in interdicting illegal aliens against interference with the individuals' liberty. Because the intrusion was limited, the Court decided that probable cause was not necessary for police to stop cars. However, the Court still required that the Border Patrol officers have reasonable suspicion that a car contained illegal aliens before stopping an automobile.¹⁹

On the same day that the Court held roving patrol stops without reasonable suspicion unconstitutional, the Court decided, in *United States v. Ortiz*,²⁰ whether searches without probable cause were permissible at fixed immigration checkpoints which were not located at the border. The government sought to distinguish *Ortiz* from *Almeida-Sanchez* by relying on the limitations on the Border Patrol's discretion on whom to stop. Additionally, the government pointed out that motorists were less likely to be frightened at a fixed roadblock than if stopped by a roving patrol and this would reduce the intrusion on the individuals.²¹ The Court noted that there was a significant distinction between stopping a car at a fixed checkpoint and a similar stop by a roving patrol but held that these differences were not of such a magnitude to allow searching vehicles without probable cause.²²

This line of cases, which prohibited searches by either roving patrols or at fixed checkpoints without probable cause and further prohibited stops by roving patrols without reasonable suspicion, led to *United States v. Martinez-Fuerte*.²³ Faced with the question of the constitutionality of stopping vehicles at fixed checkpoints without reasonable suspicion, the Court balanced the public interest in stopping the flow of illegal aliens and smugglers against the intrusion on the individual occupants of the

18. 422 U.S. 873 (1975). The sole basis for stopping the automobiles was that the occupants appeared to be Mexican. *Id.* at 876-77. No search was involved in this case. The fact that the vehicle's occupants appeared to be Mexican was not sufficient to justify the roving patrol stop. *Id.* at 885-87.

19. *Id.* at 881-84. The Court emphasized that even under the lower reasonable suspicion standard, the Border Patrol could only briefly question the occupants of the automobile. The Court still required probable cause for a search or a more extensive seizure. *Id.* at 881-82. *But see Long*, 463 U.S. at 1049-51.

20. 422 U.S. 891 (1975).

21. *Id.* at 894-95.

22. *Id.* at 896-98. The Court noted, however, that they were not deciding the question of whether fixed checkpoint stops without probable cause were constitutional. *Id.* at 897 n.3. In a concurring opinion, Justice Rehnquist emphasized that the holding in *Ortiz* was limited to searches and not to stops at fixed immigration checkpoints. *Id.* at 898-99 (Rehnquist, J., concurring).

23. 428 U.S. 543 (1976).

vehicles.²⁴

The Court divided the intrusion on the individual into two categories—objective and subjective.²⁵ The objective intrusiveness was found to be minimal because of the briefness of the stop, the limited amount of questioning, and the solely visual inspection. The Court specifically noted that neither the individuals nor the car was searched.²⁶

The subjective intrusion was similarly limited by the checks imposed by a fixed checkpoint. First, because the checkpoints were fixed, motorists knew or should have known of their locations. This would eliminate any surprise at being stopped. Second, occupants of all cars were able to see that the operation of the checkpoint was not at the discretion of the officers in the field. The location was chosen by supervisory personnel who allocated the officers to accomplish the assigned task. Furthermore, since only cars entering the checkpoint could be stopped, motorists need not fear harassment or arbitrariness in the selection of which vehicles to stop.²⁷ The Court, therefore, held that less than reasonable suspicion was required to stop and question motorists at “reasonably located checkpoints.”²⁸

In *Delaware v. Prouse*,²⁹ the Court again considered a stop by a roving patrol but this time for an automobile license and safety check. The Court noted that random stops by Border Patrol agents without reasonable suspicion were unconstitutional and that both the objective and subjective intrusiveness of random license stops were no less than those

24. *Id.* at 557-61. In addition to interdicting illegal aliens and smugglers, the Court stated that making their avoidance of detection more difficult was also in the public interest. *Id.* at 557.

25. *Id.* at 558. Objective intrusion is of a physical nature and focuses on the “nature, duration and scope” of the seizure. Subjective intrusion, which focuses on the psychological effects on the individual, is concerned with how a person perceives or reacts to the seizure. *Id.* at 558. *See also* Jacobs & Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 629 (1985).

26. *Martinez-Fuerte*, 428 U.S. at 558.

27. *Id.* at 558-59. The Court rejected the requirement of a warrant for fixed checkpoints because of the ease of court review of the location and operation of the checkpoint. *Id.* at 556-66.

28. *Id.* at 562. Although the question of stopping automobiles for other than immigration purposes was not before the *Martinez-Fuerte* Court, the majority noted that states had long stopped motorists to check for drivers licenses and compliance with safety requirements. *Id.* at 560 n.14. *See also* *Ortiz*, 422 U.S. at 897 n.3; *Brignoni-Ponce*, 422 U.S. 883 n.8.

The Court has allowed searches and seizures without probable cause or reasonable suspicion in several other contexts. *See* *Donovan v. Dewey*, 452 U.S. 594 (1981) (inspection of underground mines); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (inspection of business premises); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (code-enforcement inspection of personal residence); *see also* *New York v. Class*, 106 S. Ct. 960 (1986) (limited search to expose Vehicle Identification Number); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (customs officers inspecting documents aboard a ship which could easily leave United States waters); *cf.* *INS v. Delgado*, 466 U.S. 210 (1984) (immigration “survey” not a seizure).

29. 440 U.S. 648 (1979).

caused by roving border patrols.³⁰ Although the Court agreed that the states had an important interest in promoting highway safety by insuring that only licensed drivers and safe vehicles were on the roads, these interests were outweighed by the individuals' fourth amendment interests.³¹ The Court concluded that even though the intrusions on the motorist were limited, the stops were constitutionally proscribed because there were no standards controlling the action of police or limiting their discretion.³²

The importance of *Prouse* as applied to drunk driving roadblocks, however, is the dicta that followed the holding.³³ The Court stated that alternatives that limited the discretion of police officers in choosing motorists such as stopping all cars at a roadblock, might be allowed.³⁴ Furthermore, two concurring justices suggested that stopping cars according to a preset formula (every tenth car was given as an example) should also be permissible.³⁵

Even with this dicta, *Prouse* left the question of stopping motorists for safety checks unsettled. Random stops without reasonable suspicion were constitutionally proscribed while stops at fixed checkpoints were

30. *Id.* at 657. The Court noted that the inconvenience to motorists, as well as the anxiety caused by being pulled over in a seemingly random fashion, were similar whether inflicted by police making a random license check or by a roving immigration patrol. *Id.*

31. *Id.* at 658-59. The Court noted that the state's interest in arresting drunk drivers or those driving under the influence of drugs was a part of the interest in promoting highway safety. *Id.* at 659 n.18.

A major factor in the Court's decision not to allow random traffic stops were the alternatives available to the state such as direct observation by police officers. *Id.* at 659-60. *But see* *People v. Bartley*, 125 Ill. App. 3d 575, 578, 466 N.E.2d 346, 348 (1984), *rev'd*, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S. Ct. 1384 (1986); *State v. Deskins*, 234 Kan. 529, 545, 673 P.2d 1174, 1187 (1983) (Prager, J., dissenting).

The Court further assumed, in the absence of statistics, that unlicensed drivers were less safe than licensed drivers, and therefore, the probability that a traffic violator will be unlicensed was greater than the probability of a randomly selected motorist being unlicensed. *Prouse*, 440 U.S. at 659-60. The notion of showing the effectiveness of the random stops in *Prouse* carries over to the question of the effectiveness of drunk driving roadblocks. *See infra* text accompanying notes 46-48.

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

33. *See* *Jacobs & Strossen, supra* note 25, at 616-17 & n.95. The authors state that in *Texas v. Brown*, 460 U.S. 730 (1983) and *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Court has considered the dictum as holding. *See also* *Webb v. State*, 695 S.W.2d 676, 684 n.2 (Tex. Ct. App. 1985) (Sparling, J., dissenting).

34. *Prouse*, 440 U.S. at 663. *See Villamonte-Marquez*, 462 U.S. at 588-89.

35. *Prouse*, 440 U.S. at 664 (Blackmun, J., concurring). In his dissent, Justice Rehnquist noted that the requirement to stop all motorists rather than stopping random motorists "elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." *Id.* at 664 (Rehnquist, J., dissenting). Justice Rehnquist's main objection was with the holding of *Prouse* and not the dicta. He would have allowed random stops. *Id.* at 667. *See also* *State v. Marchand*, 104 Wash. 2d 434, 438, 706 P.2d 225, 227 (1985) ("The logic of this belief [that stopping all automobiles is less intrusive than stopping particular cars] escapes us.").

acceptable even in the absence of individualized suspicion.³⁶ However, most motorist checkpoints fall somewhere in between and are similar to the temporary checkpoints referred to in *Martinez-Fuerte*.³⁷

In *Texas v. Brown*,³⁸ the Court gave a brief indication of the constitutionality of such temporary checkpoints. The case involved a stop at a "routine driver's license checkpoint" in Fort Worth.³⁹ Seven justices either explicitly or implicitly agreed with the Texas appellate court that there was no reason to question the constitutionality of the initial stop at the roadblock.⁴⁰ With this limited guidance from the Supreme Court, the states proceeded to determine the constitutionality of drunk driving roadblocks.

While some state courts held drunk driving roadblocks unconstitutional per se,⁴¹ most courts applied the balancing tests articulated by the Supreme Court in *Martinez-Fuerte*, *Prouse*, and *Brown*. A major concern in the state cases was the discretion of the officers in the field in setting up

36. Compare *Delaware v. Prouse*, 440 U.S. 648 (1979) with *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

37. *Martinez-Fuerte*, 428 U.S. at 552. See *State v. Smith*, 674 P.2d 562, 563 (Okla. Crim. App. 1984).

38. 460 U.S. 730 (1983) (plurality opinion). This case is not related to *Brown v. Texas*, 443 U.S. 47 (1979), discussed *supra* notes 11-13.

39. *Brown*, 460 U.S. at 733 (opinion of Rehnquist, J.). The checkpoint was set up first at one location in the city and an hour later at a second location where the defendant was later stopped. The officers funneled all vehicles toward the checkpoint and stopped each automobile. The roadblocks were set up solely to check for driver's license, registration, and vehicle inspection violators. Petitioner's Brief at 2-3, *Texas v. Brown*, 460 U.S. 730 (1983). While the defendant did not contest the validity of the stop during his state appeal, he questioned whether all cars were stopped at the roadblock where he was arrested. Respondent's Brief at 8 n.2, *Texas v. Brown*, 460 U.S. 730 (1983). Following the stop, the policemen shined a flashlight in the car and saw a balloon which was later found to contain heroin. *Brown*, 460 U.S. at 733, 735 (opinion of Rehnquist, J.).

40. The discussion of both courts was minimal. The Texas Court of Criminal Appeals described the roadblock as "a routine and nonrandom license check." *Brown v. State*, 617 S.W.2d 196, 199 (Tex. Crim. App. 1981), *rev'd on other grounds*, 460 U.S. 730 (1983). The court went on to state: "We do not here question . . . the validity of the officer's initial stop of appellant's vehicle as a part of a license check." 617 S.W.2d at 200. Justice Rehnquist, writing for a plurality of the Court, added, "and we agree." *Brown*, 460 U.S. at 739 (opinion of Rehnquist, J.). The major question for both courts, however, was whether the seizure of the balloon later found to contain heroin was constitutional under the "plain view" doctrine. *Id.* at 732-33.

For a seizure to be constitutional under the "plain-view" doctrine, the "initial intrusion" must be lawful. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-68 (1971) (opinion of Stewart, J.). In *Brown*, three concurring justices found the seizure of the balloon constitutional. *Brown*, 460 U.S. at 750 (Stevens, J., concurring). Consequently, they implicitly agreed that the initial stop also had to be constitutional.

The two remaining concurring justices did not reach the issue of whether the stop was constitutional. They stated that the defendant did not question the propriety of the initial stop. *Brown*, 460 U.S. at 746 (Powell, J., concurring).

41. See *State v. Smith*, 674 P.2d 562, 565 (Okla. Crim. App. 1984); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976) (decided prior to *Prouse*). Two post-*Bartley* decisions found roadblocks per se violations of state constitutions. See *Nelson v. Lane County*, 79 Or. App. 753, 720 P.2d 1291, 1296, *appeal granted*, 301 Or. 765, 726 P.2d 377 (1986); *Commonwealth v. Tarbert*, 348 Pa. Super. 306, 502 A.2d 221, 226 (1985), *appeal granted*, 513 A.2d 1381 (Pa. 1986).

the roadblock and determining procedures for operation of the roadblock.⁴² Stopping every car (or cars according to a pre-set formula) was not enough. The courts required that the roadblocks be similar to the immigration checkpoint in *Martinez-Fuerte*. They required that both the roadblock and the procedures be planned by administrative personnel.⁴³ Other concerns expressed by the courts that distinguished drunk driving roadblocks from fixed immigration checkpoints were the lack of notice to motorists,⁴⁴ and possibly frightening motorists by not insuring their safety during the stop.⁴⁵

However, the most controversial question was the effectiveness of the roadblocks in apprehending drunk drivers.⁴⁶ Some courts insisted that the states show that checkpoints were more effective than the traditional solution of police observing motorists and thus detecting drunk drivers.⁴⁷ Some courts considering the effectiveness of the blockades, however, have considered the deterrent of the roadblocks in the balancing equation rather than the apprehension rate.⁴⁸

From these concerns, the courts developed tests to determine the constitutionality of drunk driving roadblocks.⁴⁹ What became apparent from these cases was that the reasonableness of any given seizure depended on the specific facts of each case. With this as guidance, the Illinois courts considered the constitutionality of such roadblocks.

A month before the *Prouse* decision, the Illinois Appellate Court, in *People v. Estrada*,⁵⁰ considered the constitutionality of a "systematic check" of automobile safety equipment. The *Estrada* safety check was

42. Compare *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 9, 663 P.2d 992, 996, 1000 (1983) with *State v. Deskins*, 234 Kan. 529, 542, 673 P.2d 1174, 1185 (1983).

43. *Deskins*, 234 Kan. at 542, 673 P.2d at 1185; *State v. Cocomo*, 177 N.J. Super. 575, 583, 427 A.2d 131, 135 (Law Div. 1980); cf. *Ekstrom*, 136 Ariz. at 5, 663 P.2d at 996; *Commonwealth v. McGeoghegan*, 389 Mass. 137, 143, 449 N.E.2d 349, 353 (1983).

The *Deskins* court specifically stated that "unbridled discretion of the officer in the field" would invalidate the roadblock regardless of other factors. *Deskins*, 234 Kan. at 541, 673 P.2d at 1185.

44. *Ekstrom*, 136 Ariz. at 5, 663 P.2d at 996; *McGeoghegan*, 389 Mass. at 143-44, 449 N.E.2d at 353; cf. *Deskins*, 234 Kan. at 541, 673 P.2d at 1185.

45. *McGeoghegan*, 389 Mass. at 143, 449 N.E.2d at 353.

46. This requirement is also imposed by a factor in the balancing test stated in *Brown v. Texas* which considers "the degree to which the seizure advances the public interest." See *supra* note 11 and accompanying text.

47. *Ekstrom*, 136 Ariz. at 5, 663 P.2d at 996; *Deskins*, 234 Kan. at 544-45, 673 P.2d at 1187 (Prager, J., dissenting).

This requirement apparently followed from the Supreme Court's finding in *Prouse* that there were other, more effective methods of accomplishing the state's purpose. See *supra* text accompanying note 31. See also W. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 10.8, at 207-08 (Supp. 1986).

48. *Ekstrom*, 136 Ariz. at 10, 663 P.2d at 1001 (Feldman, J., concurring); *Deskins*, 234 Kan. at 537, 673 P.2d at 1182. See W. LAFAVE, *supra* note 47, at § 10.8, at 209.

49. See, e.g., *Deskins*, 234 Kan. at 541, 673 P.2d at 1185.

50. 68 Ill. App. 3d 272, 386 N.E.2d 128, cert. denied, 444 U.S. 968 (1979).

set up by two Illinois State policemen who after finishing the check of a car, stopped the next automobile approaching the checkpoint.⁵¹ The court noted the important state interest in highway safety and stated that many safety violations could only be detected by stopping vehicles.⁵² The court concluded that the safety check was constitutional because the limited police discretion of a "systematic check" distinguished such stops from unconstitutional "spot checks."⁵³

In *People v. Long*,⁵⁴ another district of the appellate court extended this reasoning to the arrest for drunk driving of a defendant who stopped 100 yards prior to a driver's license checkpoint. The court similarly upheld the constitutionality of this checkpoint because the important state interest in highway safety and the limited police discretion outbalanced any fourth amendment concerns.⁵⁵ Fifteen days later, the same appellate court decided *Bartley*.⁵⁶

PEOPLE V. BARTLEY FACTS OF THE CASE

In early December, 1982, two supervisory officers of the Illinois State Police decided to set up a roadblock in McDonough County for the purported purpose of checking drivers' licenses. The location of the roadblock was established by these supervisors.⁵⁷ The plan was for the field officers manning the checkpoint to stop every westbound automobile, however, this procedure could be and was dispensed with when traf-

51. *Id.* at 274, 386 N.E.2d at 129-30. The defendant was arrested for possession of marijuana and the trial court granted his motion to suppress the evidence concluding that stopping the defendant's car violated the fourth amendment. *Id.* at 273-74, 386 N.E.2d at 129.

52. *Id.* at 278-79, 386 N.E.2d at 132-33. The court specifically stated that inoperable horns and unsafe tires can only be checked by stopping a car. Furthermore, police generally can not observe turn signals and malfunctioning lights during the day. *Id.* at 278, 386 N.E.2d at 132.

53. *Id.* at 278-79, 386 N.E.2d at 132-33. *Estrada* was followed by *People v. Lust*, 119 Ill. App. 3d 509, 456 N.E.2d 980 (1983) where another district of the Illinois Appellate Court upheld a safety check of trucks, also conducted by the Illinois State Police. The field officers had the discretion of where to locate the checkpoints and to pass trucks if traffic backed up. *Id.* at 511, 456 N.E.2d at 981. In reversing the trial court's suppression order, the appellate court focused on the important state interest in highway safety as well as the limited discretion given the field officers on which trucks to stop. *Id.* at 511-12, 456 N.E.2d at 982-83. The court specifically stated that the limited discretion given to the officers on where to locate the checkpoint, how long to operate the checkpoint, and when traffic became heavy enough to justify passing trucks did not change the balancing equation to make the checkpoint unconstitutional. *Id.* at 513, 456 N.E.2d at 983.

54. 124 Ill. App. 3d 1030, 465 N.E.2d 123 (1984).

55. *Id.* at 1034-35, 465 N.E.2d at 126-27.

56. Two of the three judges were common to both panels. Compare *People v. Bartley*, 125 Ill. App. 3d 575, 576, 579, 466 N.E.2d 347, 347, 349 (1984), *rev'd*, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S. Ct. 1384 (1986) with *Long*, 124 Ill. App. 3d at 1031, 1035, 465 N.E.2d at 124, 127.

57. *People v. Bartley*, 109 Ill. 2d 273, 277, 486 N.E.2d 880, 881 (1985), *cert. denied*, 106 S. Ct. 1384 (1986).

fic backed up. The roadblock was set up on a five lane highway in a lighted area and police cruisers were stationed with their lights flashing to "funnel" the cars into the roadblock.⁵⁸ The officers in the field were told to work in teams of two with one officer asking the driver for his driver's license and shining a flashlight into the automobile while the other officer checked the car's exterior, interior, and license plate. Furthermore, the field officers were instructed to operate the checkpoint in accordance with a manual prepared by the State Police.⁵⁹

Approximately one hour before commencement of the operation, one of the supervising officers briefed the field officers. The briefing was not attended by every field policeman including the officer who arrested the defendant.⁶⁰ The field officers were told to enforce other violations of traffic laws including those applying to drunk driving but there was no testimony concerning supervisory instructions on identifying suspected drunk drivers.⁶¹

The roadblock was in operation for approximately two hours and near the end of that time period, the defendant was stopped and given "field sobriety tests" which he failed. He then refused to take a breathalyzer test and was arrested.⁶² The defendant moved to suppress the evidence and his arrest as violative of his fourth amendment rights. The trial court agreed.⁶³

REASONING OF THE APPELLATE COURT

The appellate court applied the balancing test enunciated in *Brown v. Texas*⁶⁴ to determine the constitutionality of the roadblock. Although

58. *Id.* at 277-78, 486 N.E.2d at 882. The roadblock was a coordinated operation involving the State Police, county sheriff, city police and Secretary of State's police.

59. *Id.* at 278, 486 N.E.2d at 882. For a photograph showing the Illinois State Police checking an automobile at a drunk driving roadblock in April, 1986 see Chi. Tribune, April 14, 1986, § 2, at 1, cols. 2-5.

60. *Bartley*, 109 Ill. 2d at 277-79, 486 N.E.2d at 882. The other officer in the team, however, had attended the briefing. *Id.* at 277, 486 N.E.2d at 882.

Although several policemen, including the arresting officer, understood that the purpose of the roadblock was to conduct driver's license checks, one of the supervising policemen stated that another reason for the checkpoint was to stop drunk drivers. *Id.* at 278-79, 486 N.E.2d at 882. This State Police supervisor described the roadblock on a television videotape as "part of a crackdown on holiday drunk drivers." *Id.* at 279, 486 N.E.2d at 882. In spite of this television interview, however, no advanced publicity of the roadblock was given to the public. *Id.* at 292, 486 N.E.2d at 888.

61. *Id.* at 278-79, 486 N.E.2d at 882.

62. *Id.* at 279, 486 N.E.2d at 883. The trial judge determined that the police had neither reasonable suspicion nor probable cause to stop the defendant. *Id.* at 280, 486 N.E.2d at 883.

63. *People v. Bartley*, 125 Ill. App. 3d 575, 576, 466 N.E.2d 346, 347 (1984), *rev'd*, 109 Ill. 2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S. Ct. 1384 (1986). The trial court also determined that the true purpose of the roadblock was to apprehend drunk drivers and that the license checkpoint justification "was a subterfuge." *Bartley*, 109 Ill. 2d at 279-80, 486 N.E.2d at 883.

64. 443 U.S. 47, 50-51 (1979). See *supra* text accompanying note 11.

the court found a legitimate public interest in reducing alcohol related deaths and injuries, the court also found that the roadblock was not the only effective method of detecting or deterring drunk drivers.⁶⁵ The court, therefore, interpreted the fourth amendment to require the state to show that roadblocks were more effective than less intrusive conventional methods. The appellate court also criticized the subjective intrusion of the roadblock including the lack of criteria for selecting the time and location of the roadblock.⁶⁶ The State then appealed to the Illinois Supreme Court.⁶⁷

ILLINOIS SUPREME COURT'S DECISION

Justice Simon, writing for a unanimous court, balanced the public

65. *Bartley*, 125 Ill. App. 3d at 578, 466 N.E.2d at 348. The court stated that observation "by a trained officer" was the primary method of locating drunk drivers. *Id.* Furthermore, the court distinguished *Martinez-Fuerte* and *Prouse* by stating that illegal aliens and those driving with invalid licenses or unsafe vehicles could not be easily detected by observation. *Id.* But see *Prouse*, 440 U.S. at 659-60. The court also suggested that harsher punishment for drunk driving was another less intrusive method of removing intoxicated drivers from the road. *Bartley*, 125 Ill. App. 3d at 578, 466 N.E.2d at 348.

Curiously, the *Bartley* court made no attempt to distinguish *Long*, thus creating uncertainties. See *State v. Garcia*, 481 N.E.2d 148, 153 (Ind. Ct. App. 1985), *aff'd*, 500 N.E.2d 158 (Ind. 1986). The only difference between the cases appears to be that the *Long* checkpoint was set up to check for drivers' licenses and not as a subterfuge for drunk driving checks. *Long*, 124 Ill. App. 3d at 1034, 465 N.E.2d at 126. This distinction appears to be critical to the *Bartley* court. See *Bartley*, 125 Ill. App. 3d at 578, 466 N.E.2d at 348.

An appellate panel from another district disagreed with the conclusions drawn by the *Bartley* court. *People v. Conway*, 135 Ill. App. 3d 887, 892-93, 482 N.E.2d 437, 440 (1985). The *Conway* court rejected the argument that increased penalties for drunk driving would adequately promote the state's objective of stopping drunk drivers. By analogy, the court noted that while the same argument could be made against roadblocks for safety or driver's license infractions, courts had not seriously considered this alternative in the balancing equation. *Id.* at 892, 482 N.E.2d at 440. Furthermore, the *Conway* court rejected the less intrusive alternative of apprehending drunk drivers solely on direct police observation by stating that not all drunk driving takes place within sight of the police. *Id.* at 892-93, 482 N.E.2d at 440.

The roadblock considered by the *Conway* Court was similar in nature to the *Bartley* roadblock. The *Conway* roadblock was set up by the Secretary of State's police on a four lane highway. One direction of traffic was met with warning signs and traffic cones and then funneled into a single lane. Police cruisers on the scene operated with their lights flashing. If the traffic at the roadblock backed up and created a possible safety problem, the field supervisor could pass vehicles at his discretion. No cars were passed the night of the *Conway* roadblock. *Id.* at 888-89, 482 N.E.2d at 437-38.

Each car was stopped and the driver was asked to show her driver's license. The officers then checked the license as well as the license plate registration. If the officers in the field suspected a driver of drunk driving, the officer requested the motorist to perform "field sobriety tests." *Id.*

The *Conway* court did not discuss if the location and procedures were selected by supervisory personnel. However, a police captain testified concerning typical procedures used for setting up and operating such roadblocks. *Id.* at 888, 482 N.E.2d at 437-38.

66. Factors that the court referred to were the temporary and shifting nature of the roadblock, the fact that the stops were made at night with officers shining flashlights into the motorists' eyes and looking into the car, and that the occupants were not told the reason for the stop until they were asked for their driver's licenses. *Bartley*, 125 Ill. App. 3d at 579, 466 N.E.2d at 348.

67. *Bartley*, 109 Ill. 2d at 276-77, 486 N.E.2d at 881.

interest in reducing drunk driving against motorists' fourth amendment interests.⁶⁸ Noting the seriousness of the drunk driving problem, the court found a "compelling" state interest which justified "some intrusion . . . in order to reduce alcohol related accidents and deter [drunk] driving."⁶⁹

The court found that the roadblock accomplished the public purpose, by emphasizing the deterrent effect of roadblocks and deferring to the state on the choice of means. Although no statistics on the effectiveness of roadblocks were stated, the court evaluated the deterrent effect of the roadblocks on the "basis of common sense."⁷⁰

The third part of the balancing process involves weighing the intrusiveness of the seizure. The court found that the time period of the seizure was minimal, 15 to 20 seconds. The nature of the questioning, simply asking motorists for their licenses, was not a great intrusion.⁷¹ Similarly, the court found that shining flashlights into the car was a reasonable action and did not result in an unacceptable level of objective

68. *Id.* at 285, 486 N.E.2d at 885. The court first stated that the Supreme Court, in *Texas v. Brown*, 460 U.S. 730 (1983), had not objected to the roadblock or the actions of officers in checking a car's interior. See *supra* notes 38-40 and accompanying text. After reviewing other prior Supreme Court cases concerning fixed checkpoints and roving patrols as well as prior state court cases, the court determined standards for measuring both objective and subjective intrusions caused by the roadblock stop. *Bartley*, 109 Ill. 2d at 280-83, 486 N.E.2d at 883-84. In its analysis, the court emphasized the factors which the Supreme Court found acceptable in *Martinez-Fuerte*. See *supra* notes 23-28 and accompanying text.

69. *Bartley*, 109 Ill. 2d at 285, 486 N.E.2d at 885. The court rejected requiring statistics to show the extent of the drunk driving problem in Illinois or the City of Macomb where the roadblock was setup. The rejection related to whether the state had an important interest in detecting and deterring drunk driving. *Id.* at 286, 486 N.E.2d at 886. The lack of statistics does not appear in the court's analysis of whether the roadblock was set up in a location designed to accomplish the state's objective. Some states consider such statistics important to determine if the location of the roadblock will accomplish the state's goal. See *infra* notes 95-102 and accompanying text.

The court also rejected the argument that the less intrusive method of detecting drunk drivers by observation was a more effective method of accomplishing this important state purpose. *Bartley*, 109 Ill. 2d at 286, 486 N.E.2d at 886. The court gave three reasons for this finding. First, using reasoning similar to the *Conway* court, the supreme court stated that not all drunk driving occurs within sight of the police and thus a drunk driver can be involved in an accident before she would be detected by normal police observations. *Id.* Furthermore, the court added that normal observations may not detect a driver who is impaired to the point of not being able to respond to emergency conditions. *Id.* at 287, 486 N.E.2d at 886. See also *infra* note 90. Finally, the court noted that because the problem of drunk driving was so severe, complimentary actions of roadblocks and deterring violators by observation were warranted. *Bartley*, 109 Ill. 2d at 287, 486 N.E.2d at 886.

70. *Bartley*, 109 Ill. 2d at 287, 486 N.E.2d at 886. See also *Ingersoll v. Palmer*, 175 Cal. App. 3d 1028, 1040-41, 221 Cal. Rptr. 659, 666 (1985), *vacated and review granted*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986); *People v. Scott*, 63 N.Y.2d 518, 528-29, 473 N.E.2d 1, 6, 483 N.Y.S.2d 649, 654 (1984).

71. *Bartley*, 109 Ill. 2d at 287-88, 486 N.E.2d at 886. The court concluded that the objective intrusion did not exceed that experienced at fixed immigration checkpoints. *Id.* at 288, 486 N.E.2d at 886. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976). See also *Little v. State*, 300 Md. 485, 508, 479 A.2d 903, 914 (1984).

intrusiveness.⁷²

Finally, the court turned toward the subjective intrusion of the particular roadblock. The court emphasized that the elimination of discretion on the part of the police officers in the field, as well as operating the roadblock under safe conditions, minimized motorists' apprehension of being endangered or selectively stopped.⁷³

The court first stated that the fear of arbitrary police action was reduced because both the decision to set up the roadblock and the site selection were made by supervisory officers of the Illinois State Police.⁷⁴ Secondly, cars were stopped in a "preestablished, systematic fashion" which further reduced the subjective concerns and distinguished the *Bartley* roadblock from a "roving patrol."⁷⁵ The third factor which limited police discretion was the existence of planned procedures for roadblock operations. The court stated that the State Police supervisory personnel pre-roadblock briefing on how the field officers were to conduct the roadblock satisfied this criterion.⁷⁶

72. *Bartley*, 109 Ill. 2d at 288, 486 N.E.2d at 886-87. The court determined that looking into cars with flashlights was a reasonable method to insure the safety of the police in the event the vehicle's occupants had weapons. Furthermore, there was a reasonable relationship between the effort to halt drunk driving and setting up the roadblocks at night—more drunk drivers are on the road at night. *Id.* See also *Scott*, 63 N.Y.2d at 523, 473 N.E.2d at 2, 483 N.Y.S.2d at 650.

The court had earlier stated that the driver's license check in *Texas v. Brown* involved shining a flashlight into the car. *Bartley*, 109 Ill. 2d at 283, 486 N.E.2d at 884. Other courts have considered the shining of flashlights into the car as part of the subjective intrusion analysis. See *State v. Superior Court*, 143 Ariz. 45, 49, 691 P.2d 1073, 1077 (1984); *Little*, 300 Md. at 506, 479 A.2d at 914.

One distinguishing feature of the *Little* roadblock that made the shining of the flashlight less subjectively intrusive than in *Bartley* was that in *Little* the flashlight was shined only at the driver and not at the rest of the interior of the car. *Little*, 300 Md. at 492, 479 A.2d at 906.

73. *Bartley*, 109 Ill. 2d at 288, 486 N.E.2d at 887.

74. *Id.* at 289, 486 N.E.2d at 887. See *State v. Superior Court*, 143 Ariz. at 47, 691 P.2d at 1075; *Little*, 300 Md. at 490, 479 A.2d at 905; *Commonwealth v. Trumble*, 396 Mass. 81, 84, 483 N.E.2d 1102, 1104 (1985); *Scott*, 63 N.Y.2d at 523, 473 N.E.2d at 2-3, 483 N.Y.S.2d at 650-51; *State v. Martin*, 145 Vt. 562, 573, 496 A.2d 442, 449 (1985).

75. *Bartley*, 109 Ill. 2d at 289, 486 N.E.2d at 887. See also *Palmer*, 175 Cal. App. 3d at 132, 221 Cal. Rptr. at 660 (every fifth northbound car); *State v. Garcia*, 500 N.E.2d 158, 160 (Ind. 1986) (groups of five cars); *State v. Riley*, 377 N.W.2d 242, 243 (Iowa Ct. App. 1985) (all eastbound cars stopped); *Deskins*, 234 Kan. at 542, 673 P.2d at 1185 (all cars stopped); *Little*, 300 Md. at 506, 479 A.2d at 913 (all cars stopped); *Trumble*, 396 Mass. at 85, 483 N.E.2d at 1104 (all cars stopped but no trucks or tractor-trailers); *Scott*, 63 N.Y.2d at 523, 473 N.E.2d at 2, 483 N.Y.S.2d at 650 (all cars stopped); *Martin*, 145 Vt. at 572, 496 A.2d at 449 (all traffic stopped); cf. *State v. Marchand*, 104 Wash. 2d 434, 435, 706 P.2d 225, 225 (1985) (after check completed next car stopped).

76. *Bartley*, 109 Ill. 2d at 290, 486 N.E.2d at 887. However, the court noted that no formal, detailed instructions were given to the officers manning the roadblock on procedures for detecting drunk drivers. *Id.* The court noted that other jurisdictions did provide such detailed instructions. See *infra* note 118.

The court did not consider this lack of guidelines significant because the officers in the field were experienced in singling out drunk drivers based on their observations. Furthermore, the court stated that the lack of guidelines would not increase the motorists' fears because of the "systematic operation" of the roadblock. *Bartley*, 109 Ill. 2d at 290, 486 N.E.2d at 888.

The arresting officer had been a policeman for over one year and "had seen intoxicated persons

The court next analyzed whether the roadblock was conducted in a safe manner and in such a way as to show motorists that it was an official police operation. The *Bartley* roadblock met these requirements.⁷⁷ Finally, the court turned to the question of whether advanced notice of roadblocks was necessary to further reduce the fears of motorists. While noting that advanced publicity increased the deterrent effect of roadblocks, the court concluded that the roadblock contained sufficient safeguards to prevent this lack of advanced publicity from causing the roadblock to be unconstitutional.⁷⁸

ANALYSIS

The Illinois Supreme Court stated that stopping motorists at roadblocks without probable cause was not per se unconstitutional⁷⁹ and noted that the United States Supreme Court had allowed both searches and seizures in the past without probable cause or individualized suspicion.⁸⁰ Furthermore, the dicta in *Prouse* indicating that stopping all cars to check for driver's licenses might be constitutional, and the facts of *Texas v. Brown*,⁸¹ where the Court did not challenge "a routine and non-random license check," give added weight to the argument that the Supreme Court is unlikely to hold drunk driving roadblocks unconstitutional per se.⁸² Therefore, as almost every court facing the same question has done,⁸³ the Illinois Supreme Court applied a balancing test to weigh

on numerous occasions." *Id.* at 279, 486 N.E.2d at 882. Because of the officer's experience, the court was similarly not disturbed that the arresting officer had not attended the pre-roadblock briefing. The court noted, however, that his teammate at the roadblock attended the briefing and that the other officer then suggested that the sobriety tests be administered to the defendant. *Id.* at 290, 486 N.E.2d at 888.

77. *Id.* at 291, 486 N.E.2d at 888. Presumably one reason for the requirement of showing an official police operation is to eliminate fears that the stop is being made by persons impersonating police officers who might harm the car's occupants. *Cf. Palmer*, 175 Cal. App. 3d at 1044, 221 Cal. Rptr. at 669 ("reassure motorists that the stop is duly authorized").

The court also found that the subjective fears of the automobile occupants were not increased by the "subterfuge" of calling the roadblock a license check, rather than identifying it as its true purpose, a drunk driving roadblock. The court emphasized that any added inconvenience caused by the police checking for signs of intoxication was minimal. *Bartley*, 109 Ill. 2d at 292, 486 N.E.2d at 888-89.

78. 109 Ill. 2d at 291-92, 486 N.E.2d at 888-89. Other roadblocks have been preceded by widescale publicity. *See infra* note 105.

79. *Bartley*, 109 Ill. 2d at 280, 486 N.E.2d at 883.

80. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

81. 460 U.S. 730 (1983) (plurality opinion).

82. *See W. LAFAVE, supra* note 47 § 10.8, at 205.

83. *Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984); *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984); *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983); *Ingersoll v. Palmer*, 175 Cal. App. 3d 1028, 221 Cal. Rptr. 659 (1985), *vacated and review granted*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986); *State v. Jones*, 483 So. 2d 433 (Fla. 1986);

the state's interest against the individual's privacy interest.⁸⁴ The *Bartley* court considered many factors before concluding that the roadblock was constitutional. However, the court underemphasized some concerns that seriously impact on the constitutionality of this specific roadblock.

The *Bartley* court's conclusion, concerning the importance of the state's interest, is well supported and not controversial. Even courts that have held drunk driving roadblocks unconstitutional have acknowledged the great state interest involved.⁸⁵ Furthermore, the Supreme Court has stated that a state's interest in ridding its roadways of drunk drivers is included in the state's interest in highway safety. This important state interest is thus entitled to great weight in the balancing equation.⁸⁶

The Bartley Roadblock Did Not Accomplish its Stated Purpose

The second factor in the balancing test, showing that the action accomplishes the public purpose, has not been met with the same unanimity by other courts. Some courts and commentators have argued that roadblocks are not an effective means of apprehending intoxicated drivers. They point to the relatively low number of drunk drivers apprehended compared to the large number of cars stopped.⁸⁷ However, while

State v. Golden, 171 Ga. App. 27, 318 S.E.2d 693 (1984); State v. Garcia, 500 N.E.2d 158 (Ind. 1986); State v. McLaughlin, 471 N.E.2d 1125 (Ind. Ct. App. 1984); State v. Riley, 377 N.W.2d 242 (Iowa Ct. App. 1985); State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983); Little v. State, 300 Md. 485, 479 A.2d 903 (1984); Commonwealth v. Trumble, 396 Mass. 81, 483 N.E.2d 1102 (1985); Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983); State v. Muzik, 379 N.W.2d 599 (Minn. Ct. App. 1985); State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985); State v. Kirk, 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985); State v. Cocomo, 177 N.J. Super. 575, 427 A.2d 131 (Law Div. 1980); People v. Scott, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984); State v. Olgaard, 248 N.W.2d 392 (S.D. 1976); Webb v. State, 695 S.W.2d 676 (Tex. Ct. App. 1985); State v. Martin, 145 Vt. 562, 496 A.2d 442 (1985); Lowe v. Commonwealth, 230 Va. 346, 377 S.E.2d 273 (1985), *cert. denied*, 106 S. Ct. 1464 (1986); Fury v. City of Seattle, 46 Wash. App. 110, 730 P.2d 62 (1986).

Cf. United States v. Prichard, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981); State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980); State v. Cloukey, 486 A.2d 143 (Me. 1985); State v. Goines, 16 Ohio App. 3d 168, 474 N.E.2d 1219 (1984); State v. Goehring, 374 N.W.2d 882 (N.D. 1985); State v. Marchand, 104 Wash. 2d 434, 706 P.2d 225 (1985).

84. See *supra* text accompanying note 68.

85. See State v. McLaughlin, 471 N.E.2d 1125, 1136 (Ind. Ct. App. 1984) (overruled in State v. Garcia, 500 N.E.2d 158, 162-63 (Ind. 1986)); State v. Koppel, 127 N.H. 286, 292, 499 A.2d 977, 982 (1985); State v. Smith, 674 P.2d 562, 564 (Okla. Crim. App. 1984); Webb v. State, 695 S.W.2d 676, 681 (Tex. Ct. App. 1985). See also *supra* note 1.

86. Delaware v. Prouse, 440 U.S. 648, 659 n.18 (1979).

87. See *Ekstrom*, 136 Ariz. at 2, 663 P.2d at 993 (14 drunk drivers arrested out of 5,763 vehicles stopped); Jones v. State, 459 So. 2d 1068, 1079 (Fla. Dist. Ct. App. 1984) (5 or 6 drunk driving arrests out of 100 to 200 cars stopped), *aff'd*, 483 So. 2d 433 (Fla. 1986); *McLaughlin*, 471 N.E.2d at 1137 (3 drunk driving arrests out of 115 cars stopped); *Deskins*, 234 Kan. at 544-46, 673 P.2d at 1186-87 (Prager, J., dissenting) (15 drunk drivers arrested out of 2000 to 3000 vehicles stopped); *Koppel*, 127 N.H. at 288, 499 A.2d at 979 (18 drunk driving arrests out of 1680 vehicles stopped); *Jacobs & Strossen*, *supra* note 25, at 638 n.195, 645, 652 n.244; Comment, 28 Sr. Louis U.L.J. 813, 813 n.1 (1984). See also *Trumble*, 396 Mass. at 85, 483 N.E.2d at 1105 (8 drunk drivers out of 503

these statistics show low apprehension rates, they are similar to those the Supreme Court considered effective for the Border Patrol at fixed immigration checkpoints.⁸⁸

The *Bartley* court countered that effectiveness should also take into account drunk drivers who were apprehended but would not have been detected by less intrusive means.⁸⁹ This argument is made stronger because statistics purporting to show the ineffectiveness of roadblocks ignore evidence that drunk driving roadblocks remove drivers from roadways prior to their being detected using conventional methods.⁹⁰ However, without good evidence supporting the effectiveness of roadblocks in apprehending drunk drivers, the Supreme Court may not accept such roadblocks as constitutional because less intrusive methods exist for detecting intoxicated drivers.⁹¹

To sustain the roadblock, the *Bartley* court argued that drunk driving roadblocks accomplish the state's purpose by deterring drunks from driving. While the court's "common sense" approach may be open to attack since there are few if any statistics showing that roadblocks do in fact deter drunk drivers,⁹² many courts in other jurisdictions have recognized the deterrent effect of drunk driving roadblocks.⁹³ Furthermore, in

cars stopped); *Scott*, 63 N.Y.2d at 528 n.3, 473 N.E.2d at 5 n.3, 483 N.Y.S.2d at 653 n.3. *But see Garcia*, 500 N.E.2d at 162 (7 drunk driving arrests out of approximately 100 cars stopped).

Seven drunk drivers were arrested at the *Bartley* roadblock but the court did not indicate how many vehicles were stopped. *Bartley*, 109 Ill. 2d at 279, 486 N.E.2d at 882. The *Conway* roadblocks resulted in the arrest of six drunk drivers out of 582 vehicles stopped. *People v. Conway*, 135 Ill. App. 3d 887, 889, 482 N.E.2d 437, 438 (1985).

A recent set of Chicago area roadblocks yielded 11 drunk drivers out of 1079 vehicles stopped. *Chi. Tribune*, *supra* note 59, at cols. 3-4.

88. In *Martinez-Fuerte*, the Court cited statistics to demonstrate the effectiveness of the checkpoint. Border Patrol officers arrested 725 illegal aliens in 171 vehicles out of 146,000 vehicles passing through the checkpoint. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). *See also W. LAFAVE*, *supra* note 47 § 10.8, at 208.

Furthermore, although the *Prouse* Court held that "[t]he marginal contribution to roadway safety" did not justify the seizure "of every vehicle on the roads," the later dicta in *Prouse* apparently allows such seizures if police discretion is limited. *Delaware v. Prouse*, 440 U.S. 648, 661-63 (1979). With such discretion eliminated, *Prouse* does not dictate that drunk driving roadblocks must be the most effective method of apprehending intoxicated drivers.

89. *See supra* note 69.

90. *See Koppel*, 127 N.H. at 297, 499 A.2d at 985 (Souter, J., dissenting) (state interest served by detecting drunk drivers before they would be detected by conventional methods); *Lowe*, 230 Va. at 352, 337 S.E.2d at 277 (drunk drivers arrested at the roadblock had lower blood alcohol levels than those drunk drivers arrested following conventional identification).

91. *Ekstrom*, 136 Ariz. at 5, 663 P.2d at 996; *Jones*, 459 So. 2d at 1077; *Deskins*, 234 Kan. at 544, 673 P.2d at 1187 (Prager, J., dissenting).

92. *See Jacobs & Strossen*, *supra* note 25, at 638-45.

93. *State v. Superior Court*, 143 Ariz. at 48-49, 691 P.2d at 1076-77; *Palmer*, 175 Cal. App. 3d at 1040, 221 Cal. Rptr. at 666; *Koppel*, 127 N.H. at 293, 499 A.2d at 982; *Scott*, 63 N.Y.2d at 526-29, 473 N.E.2d at 4-6, 483 N.Y.S.2d at 652-54; *Lowe*, 230 Va. at 352-53, 337 S.E.2d at 277. *See also Little*, 300 Md. at 505-06, 479 A.2d at 913; *Nelson v. Lane County*, 79 Or. App. 753, 772, 720 P.2d

another context, the Supreme Court recognized the deterrent value of checkpoints.⁹⁴

However, because the *Bartley* court relied on its "common sense" to assume that the roadblock would in fact deter drunk drivers, the justices did not consider two other vital factors which impact on the usefulness of the roadblocks in keeping drunks off the road. The first factor which the court did not weigh was whether the location of the roadblock was chosen according to statistics which indicated that drunk driving had previously been a problem in that area.⁹⁵ Locating roadblocks in areas where drunk driving has been a problem increases the probability of both detecting and deterring drunk drivers.⁹⁶

Considering that one part of the *Brown* balancing test requires that the state show that their actions accomplish the important public purpose, this lack of evidence, that the roadblock was located based on data indicating drunk driving problems in the past, weighs against many of the state's arguments. Lack of a rational explanation for why the roadblock was placed in a specific location decreases any argument of actual effectiveness of the roadblock.⁹⁷ Furthermore, the lack of standards to guide supervisory personnel on where to locate the roadblocks distinguishes the *Bartley* roadblock from the fixed checkpoints in *Martinez-Fuerte* which the Supreme Court determined were reasonably located to accomplish the public purpose.⁹⁸

Six months prior to *Bartley*, a New Jersey appellate court considered this same issue in *State v. Kirk*.⁹⁹ After reviewing prior state decisions, the *Kirk* court concluded that a major factor required to sustain drunk driving roadblocks was whether the roadblocks were established

1291, 1303, *appeal granted*, 301 Or. 765, 726 P.2d 377 (1986) (Richardson, P.J., specially concurring); W. LAFAYE, *supra* note 47 § 10.8, at 208-09; *cf.* Note, *supra* note 1, at 1471-72.

The *Little* court detailed evidence of the deterrent effect of the roadblocks such as increased taxi business from drunks, intoxicated individuals asking others to drive, and increased chartered transportation operations. *Little*, 300 Md. at 505-06, 479 A.2d at 913.

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

95. The court discussed the lack of statistics in the context of whether drunk driving was a problem in Illinois and Macomb. *See supra* note 69.

96. *State v. Cocomo*, 177 N.J. Super. 575, 582, 427 A.2d 131, 134-35 (Law Div. 1980).

97. *Jacobs & Strossen*, *supra* note 25, at 671; Note, *supra* note 1, at 1472; *cf.* *Stark v. Perpich*, 590 F. Supp. 1057, 1060 (D. Minn. 1984) (statistics insure against racial, ethnic, or economic discrimination in the location of the roadblock).

98. *Martinez-Fuerte*, 428 U.S. at 559 n.13, 562 n.15. Although the Court stated that the locations of the immigration checkpoints should be left to the Border Patrol's discretion, the Court also stated that this discretion was to be guided by regulations and statutes. *Id.* at 559 n.13. The Court also noted that the location, at or near major roads leaving the Mexican border, was reasonable. *Id.* at 562 n.15. In contrast, the state presented no evidence to the *Bartley* court of what criteria were used to decide on the roadblock location.

99. 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985).

based on data that the location and time was likely to deter and detect drunk drivers.¹⁰⁰ The *Kirk* court noted that courts had upheld roadblocks where the locations were supported by “empirical data.” Conversely, courts would declare roadblocks unconstitutional where the location was not based on “‘standards . . . with regard to time [and] place.’”¹⁰¹ With the notable exception of *Bartley*, this trend has continued in decisions subsequent to *Kirk*.¹⁰² The lack of evidence that the location and time of the roadblock was selected based on data showing past alcohol related traffic problems, therefore, should result in the roadblock being unconstitutional.¹⁰³

The Illinois Supreme Court discussed the second vital factor, the lack of advanced publicity, but included this factor in the concerns of the subjective intrusiveness of the seizure. The court should also have considered how the lack of advanced publicity effected the deterrence and thus the ability of the roadblock to accomplish its purpose.¹⁰⁴ Other

100. *Id.* at 40-41, 493 A.2d at 1277.

101. *Id.* at 44, 493 A.2d at 1280. For cases discussed by the *Kirk* court where the state provided information about the location and time of the roadblock see *State v. Superior Court*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-77 (1984) (statistics showing sites having a high percentage of drunk driving accidents); *State v. Cocomo*, 177 N.J. Super. 575, 582, 427 A.2d 131, 134 (Law Div. 1980) (roadblock location based on “empirical data” where most fatal accidents involved drunk drivers); *People v. Scott*, 63 N.Y.2d 518, 523, 473 N.E.2d 1, 2, 483 N.Y.S.2d 649, 650 (1984) (checkpoints set up at “high accident locations” and at times of “greatest risk”). See also *Little v. State*, 300 Md. 485, 490, 479 A.2d 903, 905 (1984) (locations determined from data on “alcohol related accident rates”); cf. *State v. Cloukey*, 486 A.2d 143, 144 (Me. 1985) (safety check roadblock located on basis of past high accident rate).

For cases discussed by the *Kirk* court where the state provided no such information see *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 9, 663 P.2d 992, 1000 (1983) (Feldman, J., concurring) (location not based on “standards . . . with regard to time and place”); *State v. McLaughlin*, 471 N.E.2d 1125, 1138 (Ind. Ct. App. 1984) (state could not show a reasonable relationship between the roadblock location and its effectiveness).

102. For cases where courts found roadblocks constitutional see *Ingersoll v. Palmer*, 175 Cal. App. 3d 1028, 1031-32, 221 Cal. Rptr. 659, 660 (1985) (location chosen based on “street layout, traffic patterns, and frequency of drunk driving arrests”), *vacated and review granted*, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986); *State v. Garcia*, 500 N.E.2d 158, 160 (Ind. 1986) (location chosen due to large number of alcohol related accidents); *Commonwealth v. Trumble*, 396 Mass. 81, 84, 483 N.E.2d 1102, 1104 (1985) (large number of fatal accidents and drunk driving arrests at roadblock location); *Lowe v. Commonwealth*, 230 Va. 346, 351, 337 S.E.2d 273, 276 (1985) (checkpoints located based on analysis of sites of “drunk-driving arrests and alcohol-related accidents”), *cert. denied*, 106 S. Ct. 1464 (1986).

But see State v. Riley, 377 N.W.2d 242, 243 (Iowa Ct. App. 1985) (roadblock location and time selected by supervisory officer but no justification discussed in case for decision).

For post-*Kirk* cases where the courts found roadblocks unconstitutional see *State v. Muzik*, 379 N.W.2d 599, 604 (Minn. Ct. App. 1985) (“insufficient evidence that roadblock site was rationally selected”); *State v. Koppel*, 127 N.H. 286, 288, 499 A.2d 977, 979 (1985) (locations chosen based on accident data and drunk driving arrests); *Webb v. State*, 695 S.W.2d 676, 681 (Tex. Ct. App. 1985) (no statistics in the record showing degree of drunk driving problem at roadblock location).

103. The conclusion from these cases is that a rational explanation for the location and time of the roadblock is a necessary but not sufficient condition for constitutionality.

104. In fact, the court noted that advanced publicity increases the deterrent effects of roadblocks. *Bartley*, 109 Ill. 2d at 291-92, 486 N.E.2d at 888. See also Note, *supra* note 1, at 1472 n.104.

courts have analyzed the importance of advanced publicity in deterring drunk drivers¹⁰⁵ and in *Ingersoll v. Palmer*,¹⁰⁶ a California appellate court has gone so far as to state "advance publicity is absolutely essential to the establishment of a constitutionally permissible roadblock."¹⁰⁷

In another case decided shortly after *Bartley, State v. Muzik*,¹⁰⁸ the Minnesota Court of Appeals theorized that where a roadblock was not accompanied by advanced publicity, courts required the state to show that the roadblock was more effective at detecting drunk drivers than less intrusive conventional means.¹⁰⁹ However, the court stated that when a roadblock was preceded by advanced publicity, the deterrent value was greater, and therefore, the state no longer would be required to show that roadblocks are more effective than conventional methods.¹¹⁰ Under this theory, because the Illinois Supreme Court emphasized the deterrent value of the roadblocks, the court should have required advanced publicity for the procedure to be constitutional. The *Bartley* roadblock, therefore, had sufficient deficiencies in showing that the state's interest was accomplished so that the court should have found the procedures unconstitutional without considering the third prong of the balancing test.

Detailed Instructions on Procedures After the Cars Were Stopped Should Be Required

The last part of the balancing test considers the intrusion on the motorists who were stopped at the roadblock. The court found the intrusion to be minimal. Clearly, any objective intrusion—caused by the short stop, the questions, and the shining of flashlights into the car—was no greater than that experienced by motorists in *Texas v. Brown*.¹¹¹

105. See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 10, 663 P.2d 992, 1001 (Feldman, J., concurring); *Deskens*, 234 Kan. at 538, 673 P.2d at 1182. See also *State v. Superior Court*, 143 Ariz. at 49, 691 P.2d at 1077; *Koppel*, 127 N.H. at 293, 499 A.2d at 983; *Kirk*, 202 N.J. Super. at 58, 493 A.2d at 1288.

For additional cases where roadblocks were preceded by widescale publicity see *Palmer*, 175 Cal. App. 3d at 1032, 221 Cal. Rptr. at 660, *Trumble*, 396 Mass. at 85, 483 N.E.2d at 1105; *Lowe v. Commonwealth*, 230 Va. 346, 352, 337 S.E.2d 273, 277 (1985), cert. denied, 106 S. Ct. 1464 (1986). The *Trumble* court, although asked by a lower court to decide whether advanced publicity was required, refused to address the issue. *Trumble*, 396 Mass. at 91, 483 N.E.2d at 1108.

106. 175 Cal. App. 3d 1028, 221 Cal. Rptr. 659 (1985), vacated and review granted, 41 Cal. 3d 714, 715 P.2d 680, 224 Cal. Rptr. 719 (1986).

107. *Id.* at 1046, 221 Cal. Rptr. at 669-70.

108. 379 N.W.2d 599 (Minn. Ct. App. 1985).

109. *Id.* at 603 n.2.

110. *Id.*

111. 460 U.S. 730 (1983) (plurality opinion). See text accompanying note 39. The *Brown* plurality specifically stated that the use of a flashlight to look in the car "trenched upon no right secured . . . by the Fourth Amendment." *Brown*, 460 U.S. at 740 (opinion of Rehnquist, J.). Three concurring justices agreed. See *id.* at 750 (Stevens, J., concurring). The *Palmer* court similarly found no

Although the intrusion in drunk driving roadblocks is slightly greater than at immigration checkpoints where not all motorists are questioned, after *Brown*, and the dicta in *Prouse* suggesting such stops could be constitutional, the Supreme Court would not likely object to the roadblocks on the basis of objective intrusion.

The question of subjective intrusiveness, however, is different. There is no question that the *Bartley* roadblock overcame the minimum *Prouse* hurdle of eliminating discretion by officers in the field concerning which cars to stop.¹¹² The roadblock was planned by supervisory personnel and overcame a presumption of arbitrariness on the part of the police.¹¹³ However, these factors only apply in *Bartley* to the decisions of setting up the roadblock and stopping the cars.

Arbitrariness can still occur after the initial contact between the police and the motorist. The issue was not addressed by the *Prouse* Court because the issue in *Prouse* was only whether the initial stop was valid. However, the Court considered the impact of police decisions to further examine automobile occupants in *Martinez-Fuerte*. The *Martinez-Fuerte* majority indicated that although the Border Patrol required discretion on which motorists to select for further questioning, the officers were trained in various factors to identify illegal aliens.¹¹⁴ The Court emphasized that these factors were "relevant" to the purpose of the checkpoint.¹¹⁵ In contrast, the officers manning the *Bartley* roadblock did not receive detailed instruction in the relevant factors to look for to identify drunk drivers. Lack of guidance opens the door to police arbitrariness in deciding against whom to administer sobriety tests.

The Illinois court, however, did not consider the lack of guidance to field officers on how to identify drunk drivers critical.¹¹⁶ This lack of direction is contrary to the requirements of the fourth amendment which mandates neutral principles to constrain police discretion.¹¹⁷ If the concern is to minimize the intrusiveness on motorists by constraining the discretion of the police, detailed guidelines for identifying drunk drivers should be available to the officers in the field. Indeed, other state courts have included this factor as part of their analysis in approving road-

constitutional problem with shining a flashlight into the car to look for open bottles of alcohol. *Palmer*, 175 Cal. App. 3d at 1032, 221 Cal. Rptr. at 660.

112. See *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

113. See *Martinez-Fuerte*, 428 U.S. at 559.

114. *Id.* at 563 n.16, 564 & n.17.

115. *Id.* at 564 n.17. Furthermore, the more detailed questioning only involved requests for proof of citizenship and questions about the occupants' citizenship, and was thus a minor intrusion. *Id.* at 563-64.

116. See *supra* note 76.

117. See *supra* text accompanying note 13.

blocks.¹¹⁸ The New York Court of Appeals, in *People v. Scott*,¹¹⁹ went further and qualified its holding to cases where the police discretion in identifying drunk drivers was restricted by written procedures.¹²⁰ The excessive discretion granted to the field officers in *Bartley* should have led the Illinois Supreme Court to strike down this roadblock as unconstitutional.

A final factor that was lacking in the *Bartley* roadblock and thus increased the subjective intrusiveness on motorists was the lack of advanced warning or publicity. Although as the *Bartley* court stated, advanced publicity may not be constitutionally required to reduce the subjective intrusiveness,¹²¹ the *Bartley* roadblock lacked even a minimal amount of advanced warning to motorists on the purpose of the roadblock.¹²² While the court rejected the claim that subjective apprehension is increased by not knowing the reason for the stop, other courts have considered some sort of advanced warning significant.¹²³

118. *State v. Jones*, 483 So. 2d 433, 438 (Fla. 1986); *Little*, 300 Md. at 491, 479 A.2d at 906; *Trumble*, 396 Mass. at 90-91, 93, 483 N.E.2d at 1108-10; *Scott*, 63 N.Y.2d at 526, 473 N.E.2d at 4, 483 N.Y.S.2d at 652; *Nelson v. Lane County*, 79 Or. App. 753, 764, 720 P.2d 1291, 1298, *appeal granted*, 301 Or. 765, 726 P.2d 377 (1986); *Lowe*, 230 Va. at 351, 337 S.E.2d at 277. *See also State v. Superior Court*, 143 Ariz. at 47, 691 P.2d at 1075; *Jacobs & Strossen*, *supra* note 25, at 673 n.318; *W. LAFAVE*, *supra* note 47 § 10.8, at 212.

As an example, the memorandum from the Genesee County Sheriff issued prior to the *Scott* roadblock specified:

the nature of the inquiries to be made [after stopping all vehicles and gave] specific direction that unless the operator's appearance and demeanor gave cause to believe him or her intoxicated sobriety test[s] were not to be given. [The memorandum] listed the factors to be considered and stated that neither the odor of alcohol alone nor any one of the listed factors would suffice as a basis for sobriety tests.

Scott, 63 N.Y.2d at 523, 473 N.E.2d at 2, 483 N.Y.S.2d at 650-51.

Some of the indicia of intoxication that the arresting officer observed prior to asking the defendant if he had been drinking were fumbling with a wallet while producing the requested documents, bloodshot and watery eyes, and a "strong odor of alcohol." *Id.* at 523, 473 N.E.2d at 2, 483 N.Y.S.2d at 650.

The instructions issued to the officers in the *Little* roadblock listed several factors to be used to identify drunk drivers including: "an odor of alcoholic beverage about the driver, slurred speech, the general appearance, and/or other behavior normally associated with D.W.I. violators." *Little*, 300 Md. at 491, 479 A.2d at 906. *See also Palmer*, 175 Cal. App. 3d at 1045, 221 Cal. Rptr. at 669.

119. 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984).

120. The *Scott* court qualified its holding to cases where "operating personnel are prohibited from administering sobriety tests unless they observe listed criteria, indicative of intoxication, which give substantial cause to believe that the operator is intoxicated." *Id.* at 522, 473 N.E.2d at 2, 483 N.Y.S.2d at 650.

121. *Bartley*, 109 Ill. 2d at 292, 486 N.E.2d at 888. *See also State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985). The *Muzik* court stated that while advanced publicity might not be required to reduce the subjective intrusion on motorists, the existence of advanced publicity could effect the state's burden of showing that the roadblock accomplished the public interest. *Id.* at 604 n.4.

122. In fact, the motorists were not told that they entered a drunk driving checkpoint because the roadblock was supposedly set up as a license checkpoint. *Bartley*, 109 Ill. 2d at 292, 486 N.E.2d at 888-89. *See also Ekstrom*, 136 Ariz. at 9, 663 P.2d at 1000 (Feldman, J., concurring).

123. *State v. Superior Court*, 143 Ariz. at 49, 691 P.2d at 1077 (sobriety check sign at least 100 feet before stop); *Palmer*, 175 Cal. App. 3d at 1032, 1045-46, 221 Cal. Rptr. at 660, 669-70 (several

The *Bartley* court should have required at least warning signs in advance of the roadblocks announcing a sobriety checkpoint. This would have reduced the apprehension of the vast majority of motorists who were not intoxicated and thus would have had no reason to fear a drunk driving checkpoint.¹²⁴ Furthermore, the more advanced warning or publicity the state gives, the more the temporary roadblock resembles the constitutionally permissible fixed checkpoint and the less it looks like the unconstitutionally proscribed "roving patrol."¹²⁵

CONCLUSION

The Illinois Supreme Court found that a roadblock set up to check for drunk drivers was constitutional. The court balanced the state's interest in detecting and deterring drunk drivers against individuals' interests to be free from unreasonable searches and seizures and determined that the roadblock seizure was reasonable. However, the court did not require evidence showing that the location of the roadblock would be effective in detecting or deterring drunk drivers, nor did the court require advanced publicity of roadblocks to insure their deterrent value. Finally, the court did not require detailed guidelines so that the officers manning the roadblock could determine which drivers to investigate further. This excessive discretion is contrary to Supreme Court and constitutional requirements. In addition, the court did not require advanced warning of the roadblock in the form of signs to limit its subjective intrusiveness on the motorists.

In view of these three major deficiencies, the court should have declared this particular roadblock unconstitutional. However, with the additional safeguards, roadblocks to detect and deter drunk driving should

warning signs including one identifying roadblock as a sobriety checkpoint); *Little*, 300 Md. at 506, 479 A.2d at 913 (sobriety check sign 200 to 300 feet before checkpoint); *Trumble*, 396 Mass. at 90, 483 N.E.2d at 1108 (roadblock sign 500 feet before stop); *Scott*, 63 N.Y.2d at 526, 473 N.E.2d at 4, 483 N.Y.S.2d at 652 (warning signs 300 feet prior to checkpoint).

124. *State v. Superior Court*, 143 Ariz. at 49, 691 P.2d at 1077; *Ekstrom*, 136 Ariz. at 10, 663 P.2d at 1001 (Feldman, J., concurring); *Jones v. State*, 459 So. 2d 1068, 1076 (Fla. Dist. Ct. App. 1984), *aff'd*, 483 So. 2d 433 (Fla. 1986).

125. *See Jones*, 459 So. 2d at 1076 (advanced publicity "provide[s] a meaningful substitute for the type of permanency . . . of the roadblock in *Martinez-Fuerte*"). However, in affirming the appellate court, the Florida Supreme Court disagreed that advanced publicity was required. *State v. Jones*, 483 So. 2d 433, 439 (Fla. 1986).

The advanced publicity should not require the state to announce the exact location of the checkpoints. This would have the undesirable effect of reducing the deterrent value of the roadblock by allowing drunk drivers to plan alternate routes. *See State v. Superior Court*, 143 Ariz. at 49, 691 P.2d at 1077; *Palmer*, 175 Cal. App. 3d at 1046, 221 Cal. Rptr. at 670; *Commonwealth v. McGeoghegan*, 389 Mass. 137, 143, 449 N.E.2d 349, 353 (1983); *Scott*, 63 N.Y.2d at 528, 473 N.E.2d at 2, 483 N.Y.S.2d at 650; *State v. Martin*, 145 Vt. 562, 575, 496 A.2d 442, 450 (1985); *W. LAFAYE*, *supra* note 47 § 10.8, at 213-14; *cf. Jacobs & Strossen*, *supra* note 25, at 672 n.314.

not violate citizens' rights to be free from unreasonable searches and seizures.

STEVEN T. NAUMANN