

1984

Mass Investigations without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks

James B. Jacobs
james.jacobs@nyls.edu

Nadine Strossen
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

18 U.C. Davis L. Rev. 595 (1984-1985)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.



ARTICLES

Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks

James B. Jacobs and Nadine Strossen***

In response to recently heightened public concern about highway deaths and injuries attributable to drunk driving, many states and localities are establishing sobriety checkpoints at which police briefly stop and investigate all drivers. These checkpoints result in the detention and criminal investigation of hundreds of thousands of ordinary citizens based only upon the statistical likelihood that a certain percentage of them are

*Professor of Law and Director, Center for Research in Crime and Justice, New York University School of Law. B.A. 1969, Johns Hopkins University; J.D. 1973, Ph.D. 1975, University of Chicago.

**Assistant Professor and Supervising Attorney, Civil Rights Clinic, New York University School of Law. B.A. 1972, Harvard-Radcliffe College; J.D. 1975, Harvard Law School.

The authors are grateful for comments on an early version of this manuscript by Professors Tony Amsterdam, Joe Grano, Graham Hughes, Chet Mirsky, and Henry Monaghan; for the research assistance of Jodi Saposnick and Lois Bloom; and for the secretarial assistance of Laura C. Krupinsky and Harvis & Zeichner. Professor Strossen is grateful for having had the opportunity to discuss some of the issues addressed in this Article with her colleagues on the American Civil Liberties Union's National Board of Directors and Due Process Committee.

intoxicated, and not upon any individualized suspicion of crime. Sobriety checkpoints could be found unconstitutional under traditional interpretations of the fourth amendment's probable cause requirement, as well as under the more recent fourth amendment balancing test. These roadblocks could also be rejected by policymakers because they have not been demonstrated to be effective in detecting or deterring drunk drivers, and because they are inconsistent with fundamental values underlying the fourth amendment. In the event that some jurisdictions choose to operate sobriety checkpoints, specific procedural safeguards should be implemented to minimize their interference with fourth amendment interests.

INTRODUCTION

Intensified public concern over the ravages of drunk driving has recently generated an arsenal of new laws and reduction strategies.¹ One increasingly popular but troublesome measure is the sobriety checkpoint or, less euphemistically, the drunk driving roadblock.² The many

¹ In 1982, 21 states passed strict anti-drunk driving laws. OFFICE OF STATE PROGRAM ASSISTANCE, STATE LEGISLATION INTRODUCED AND/OR ENACTED DURING THE 1982 LEGISLATIVE SESSION — ALCOHOL AND DRUNK DRIVING 1-1a Table 1 (1982) (378 bills involving alcohol safety introduced in 1982; 38 bills enacted) (copy on file with *U.C. Davis Law Review*); see also NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, ALCOHOL & HIGHWAY SAFETY LAWS: A NATIONAL OVERVIEW (1981).

² The National Transportation Safety Board has described the basic features of the typical drunk driving roadblock:

1) Police agencies select the times of operation and locations of checkpoints, based on empirical evidence of high DWI [driving while intoxicated] 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

influential proponents of roadblocks include the Presidential Commission on Drunk Driving,³ various citizens' anti-drunk driving groups,⁴ and police and prosecutors in jurisdictions around the country.⁵ Adding to the momentum is a new federal law that qualifies states for supplemental highway safety grants if their police forces establish sobriety checkpoints.⁶

At drunk driving roadblocks, police officers require every passing driver (or every *n*th driver) to stop for a brief visual inspection and questioning. If an officer suspects intoxication, he may direct the driver to the side of the road for further investigation. If there is probable cause to believe a driver is intoxicated, the driver may be arrested and subject to criminal prosecution and punishment. Such mass stops of unsuspected ordinary citizens for purposes of criminal investigation are unprecedented. Yet, they have been allowed to take root with little serious scrutiny.

The sense of urgency surrounding drunk driving has discouraged careful legal or policy analysis of sobriety checkpoints. Neither the Supreme Court nor any other federal court has ruled upon the legality of drunk driving roadblock investigations.⁷ The state courts that have re-

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 (1984) [hereafter NTSB STUDY], *quoted in* 67 Op. Cal. Att'y Gen. 471, 472-73 (1984).

³ PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 14 (1983) [hereafter PRESIDENTIAL COMMISSION REPORT] (copy on file with *U.C. Davis Law Review*).

⁴ The New York Governor's Alcohol and Highway Safety Task Force, comprised of police officials, prosecutors, and members of citizens' groups such as Mothers Against Drunk Driving (MADD) and Remove Intoxicated Drivers (RID) concluded that "the systematic, constitutionally conducted traffic checkpoint is the single most effective action in raising the community's perception of the risk of being detected and apprehended for drunk driving." GOVERNOR'S ALCOHOL AND HIGHWAY SAFETY TASK FORCE, DWI — DRIVING WHILE INTOXICATED 103 (1981).

⁵ Drunk driving roadblocks have been used in at least 21 states. 67 Op. Cal. Att'y Gen. 471, 472 (1984) (citing NTSB STUDY, *supra* note 2).

⁶ Highway Safety Act of 1966 as amended, 28 U.S.C. § 408 (1982). The regulation specific to roadblocks is found at 23 C.F.R. § 1309.6(11) (1984).

⁷ Two federal court cases involved investigations similar to those conducted at sobriety checkpoints, but did not rule upon the constitutionality of sobriety checkpoint investigations. *Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984), described *infra* note 8; *Garrett v. Goodwin*, 569 F. Supp. 106, 113 (E.D. Ark. 1982) (consent decree resolving issues presented by challenge to "saturation enforcement" roadblocks, "aimed at

viewed these investigations have arrived at varying conclusions, on the whole without thoroughly analyzing the fundamental issue of whether any sobriety checkpoint investigation is inherently unconstitutional because it is not based upon individualized suspicion. Rather, the courts have focused on the adequacy of the particular procedural safeguards attending the checkpoint operations at issue.⁸ They also have focused predominantly on the initial stop, ignoring the numerous discretionary decisions and more intrusive investigations that ensue.⁹ Neither the

mak[ing] many arrests for offenses ranging from DWI, Wanted Persons, Stolen Trucks and Cars, Drugs and Narcotics, and so forth").

⁸ These state court decisions largely assume, without substantial discussion, that drunk driving roadblocks would be constitutional if they were implemented with certain procedural safeguards. Accordingly, most courts have focused upon the adequacy of checkpoint procedures. For cases holding such procedures to be adequate, see *Idaho v. Baker*, No. 24-6693-82 (Idaho Magis. Ct. May 11, 1983); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984); *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984); *accord* 67 Op. Cal. Att'y Gen. 471 (1984). For cases holding such procedures to be inadequate, see *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983); *Jones v. State*, 459 So. 2d 1068 (Fla. Dist. Ct. App. 1984); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

Only two decisions discuss in any depth the crucial issue of whether any investigation conducted at a drunk driving roadblock is inherently unconstitutional for want of probable cause or reasonable suspicion. Both decisions hold drunk driving roadblocks per se unconstitutional, regardless of their specific operational details. *State v. Bartley*, 125 Ill. App. 3d 575, 466 N.E.2d 346 (1984); *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984); *cf.* *Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984) (automobile stops to conduct drunk driving survey and not for law enforcement purposes upheld when participation voluntary and other procedural safeguards observed; under this reasoning, drunk driving roadblock conducted for law enforcement purposes probably would be per se unconstitutional). With very little discussion, one court appeared to reach the converse conclusion. *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. Ct. App. 1983) (drunk driving roadblock operated for law enforcement purposes held constitutional; driver's conviction affirmed).

The Indiana Court of Appeals employed still another mode of analysis and invalidated a drunk driving roadblock investigation because the government had not proved that there were no less intrusive methods for combating drunk driving. *State v. McLaughlin*, 471 N.E.2d 1125 (Ind. Ct. App. 1984). The court stated that in the future, "a proper showing by the state that the roadblock method is more effective than traditional methods of drunk driving law enforcement might tip the balance in favor of the reasonableness of the roadblock procedure." *Id.* at 1142. However, the court noted that deterrence might effectively be achieved by advance publicity of a concentrated anti-drunk driving campaign using traditional law enforcement tactics, and therefore concluded that "the deterrent qualities of a publicized DWI roadblock would not, standing alone, render that procedure reasonable." *Id.*

⁹ For a discussion of discretionary decisions and intrusive investigations police of-

courts nor the policymakers approving drunk driving roadblocks have provided sufficient guidance to field officers regarding procedures to follow after the initial vehicle stop.¹⁰ The procedures actually followed have included the use of handheld devices to test every driver's breath for alcohol¹¹ and, in at least one case, the use of trained dogs to sniff every vehicle for narcotics.¹² Further, both the courts and the policymakers authorizing sobriety checkpoints have uncritically endorsed their effectiveness, without sufficiently considering alternative drunk driving countermeasures that do not infringe on constitutional rights. There have been few rigorous efforts to evaluate the impact of sobriety checkpoints in reducing fatalities or injuries; data suggesting little, if any, positive impact are often overlooked by policymakers and courts.¹³

Questioning the legality, efficacy, and desirability of drunk driving countermeasures, including drunk driving roadblocks, is not popular; anti-drunk driving sentiment runs too high.¹⁴ The rush to embrace roadblocks reflects an understandable popular desire to stem the tragic

ficers can make at sobriety checkpoints, see *infra* text accompanying notes 65 & 232-42.

¹⁰ For example, the Westchester County, New York *Manual of Procedure* requires the officer to "look for articulable facts, such as an odor of alcoholic beverage, slurred speech, the general appearance and/or other behavior normally associated with the D.W.I. violator," but does not place any limits on the officer's conduct except that it be "consistent with good judgment." WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY, MANUAL OF PROCEDURE NO. 942, DRIVING WHILE INTOXICATED (DWI) — SOBRIETY CHECKPOINTS 2 (May 18, 1983) (copy on file with *U.C. Davis Law Review*). These guidelines typically leave unanswered many questions about a sobriety checkpoint investigation. For example, while officers are generally instructed to be alert for any contraband lying in a car in plain view, it remains unclear whether the officer should use a flashlight to inspect the vehicle for open liquor bottles or other signs of drinking. Similarly unclear is whether a police officer may — or, indeed, should — use a handheld breath testing device to test the breath of every driver coming through the roadblock for alcohol. Using such a small device may well be more accurate and seemly than using the officer's nostrils. See *infra* note 256.

¹¹ See Letter to the Editor from Robert Voas, Wash. Post, July 9, 1983, at A20, col. 3 (reporting the use of such a device by Washington, D.C. Metropolitan Police at a drunk driving roadblock on June 14, 1983, apparently the first use of such a device in the United States).

¹² See *infra* note 243.

¹³ See, e.g., *infra* note 200.

¹⁴ Some checkpoint proponents claim that drunk driving roadblocks are "overwhelmingly favored by the public as an enforcement tool." A. WILLIAMS & A. LUND, INSURANCE INSTITUTE FOR HIGHWAY SAFETY, DETERRENT EFFECTS OF ROADBLOCKS ON DRINKING & DRIVING (1984) (copy on file with *U.C. Davis Law Review*). But see Grossman, *The Maryland Roadblocks — Ineffective, Intrusive and Unpopular*, Baltimore Sun, Dec. 23, 1982, at A9, col. 2.

deaths and injuries caused by drunk drivers. Nevertheless, skepticism about a radically new, intrusive police strategy always is warranted. It would be extremely unwise to accept drunk driving roadblocks without the most careful examination.¹⁵

Most of the limited scholarly debate about drunk driving roadblocks has been waged in constitutional terms and, like the cases, has concentrated on the procedural details of the initial stop.¹⁶ This Article contends that, regardless of the procedures, these mass suspicionless investigations may violate the fourth amendment. However, even if federal and state courts uphold sobriety checkpoint investigations under the

¹⁵ As the Supreme Court stated, when striking down random searches of automobiles, which the government asserted to be necessary to deal with the grave illegal immigration problem:

It is not enough to argue, as does the Government, that the problem . . . is a serious one. 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. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

"These [Fourth Amendment rights] . . . belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

Almeida-Sanchez v. United States, 413 U.S. 266, 273-74 (1973) (quoting *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting)); see also *infra* note 193 and text accompanying note 344.

¹⁶ Like most of the cases concerning sobriety checkpoints, the limited scholarly discussion of these checkpoints does not critically examine the fundamental constitutional and policy questions they present: whether the absence of individualized suspicion violates the fourth amendment and whether they are uniquely effective in curtailing drunk driving. Instead, like the judicial decisions, the scholarly discussions focus largely on recommended procedural safeguards. See Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457 (1983) (recommends operating roadblocks pursuant to area search warrants and with certain physical features) [hereafter Note, *Roadblock Seizures*]; Note, *Filling in the Blanks after Prouse: A New Standard for the Drinking-Driving Roadblock*, 20 LAND & WATER L. REV. 241 (1985) (recommends specific measures to ensure that motorists are stopped according to neutral and predetermined criteria); Comment, *Sobriety Checkpoint Roadblocks: Constitutional in Light of Delaware v. Prouse?*, 28 ST. LOUIS U.L.J. 813 (1984) (urges each state to develop rules for the operation of checkpoints). But see Comment, *The Fourth Amendment Roadblock Against Detecting Drunk Drivers: Commonwealth v. McGeoghegan*, 28 SUFFOLK U.L. REV. 475 (1984) (concludes that roadblocks are unconstitutional and not the only practical measure for deterring and apprehending drunk drivers).

fourth amendment¹⁷ and analogous state constitutional provisions,¹⁸ policymakers still could reject such investigations because of policy concerns, including a sensitivity to the constitutional problems they raise.¹⁹ That a police practice might withstand constitutional challenge does not assure its prudence or effectiveness. In light of their dubious efficacy²⁰ and the existence of alternative methods for dealing with the drunk driving problem,²¹ sobriety checkpoints constitute a questionable allocation of law enforcement resources. More fundamentally, they contravene crucial values underlying the fourth amendment (as well as its state counterparts),²² which delimit the police role in a free society.²³

Parts I and II of this Article examine the constitutionality of drunk driving roadblock investigations. First, they may violate the fourth amendment's probable cause requirement, because they are distinguishable from the few discrete categories of searches and seizures that have been permitted absent either probable cause or a lesser degree of individualized suspicion.²⁴ Second, they may fail the fourth amendment's "reasonableness" test, because they provide only speculative law enforcement gains at the cost of substantial governmental interference with individual liberty and privacy.²⁵ Part III discusses essential fourth amendment values antithetical to drunk driving roadblocks that may provide policymakers an independent basis for rejecting them.²⁶ In the

¹⁷ See *infra* text accompanying notes 28-264.

¹⁸ See *infra* notes 265-66 and accompanying text.

¹⁹ See *infra* notes 267-70 and accompanying text.

²⁰ See *infra* text accompanying notes 194-211.

²¹ See *infra* text accompanying notes 212-27.

²² Throughout this Article, references to the fourth amendment should be understood to encompass the corresponding provisions of state constitutions.

²³ Professor Anthony Amsterdam has urged a greater utilization of "subconstitutional controls on police practices," because the absence of such controls "has left the people and the police of this nation with the . . . impression that the Constitution is our one instrument for keeping the police within the rule of law." Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 380 (1974).

²⁴ See *infra* text accompanying notes 28-131.

²⁵ See *infra* text accompanying notes 132-264.

²⁶ See *infra* text accompanying notes 265-90. Although this Article focuses on the fourth amendment concerns implicated by drunk driving roadblock investigations, the use of evidence obtained through such investigations in criminal proceedings also raises troubling fifth amendment concerns. In his seminal dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928), Justice Brandeis declared in the following oft-quoted passage:

[The Fourth and Fifth Amendments] conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifi-

event that drunk driving roadblocks are implemented in a particular jurisdiction, notwithstanding the pertinent constitutional and policy considerations, part IV urges procedural safeguards to minimize interference with fundamental fourth amendment values.²⁷

I. DRUNK DRIVING ROADBLOCKS AND THE FOURTH AMENDMENT'S PROBABLE CAUSE REQUIREMENT

The fourth amendment provides:

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.²⁸

It is beyond cavil that a roadblock stop and investigation, no matter how limited in duration or purpose, constitutes a search and seizure subject to the fourth amendment.²⁹ Therefore, a sobriety checkpoint stop and investigation must satisfy all the fourth amendment requirements for a lawful search and seizure, unless one of the few recognized exceptions is applicable.

A. *The Fourth Amendment's Probable Cause Requirement*

Drunk driving roadblock investigations are not based upon probable cause to believe that a driver has committed, or is committing, any crime. Thus, these investigations should not pass fourth amendment muster unless they satisfy the Supreme Court's standards for excusing the probable cause requirement in certain limited circumstances. In some recent cases, the Court has required only that a challenged search

able intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Accord *Boyd v. United States*, 116 U.S. 616, 627-30 (1886) (in preventing compulsory extortion of person's own testimony or papers for use as evidence of crime, "the Fourth and Fifth Amendments run almost into each other"). Justice Brandeis's views were ultimately endorsed when the Court overruled *Olmstead* in *Katz v. United States*, 389 U.S. 347, 353 (1967).

²⁷ See *infra* text accompanying notes 291-342.

²⁸ U.S. CONST. amend. IV. The fourth amendment is enforceable against the states through the fourteenth amendment's due process clause. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

²⁹ See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979).

or seizure be "reasonable,"³⁰ but most of the Court's fourth amendment decisions have emphasized that "'reasonableness' turns, at least in part, on the more specific commands" of the amendment's warrant clause.³¹ The conventional view that the reasonableness of a search or seizure depends upon a validly issued warrant and probable cause³² has been aptly summarized by Justice Powell:

[I]t is by now axiomatic that the Fourth Amendment's proscription of "unreasonable searches and seizures" is to be read in conjunction with its command that "no Warrants shall issue, but upon probable cause." Under our cases, both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, though in certain limited circumstances neither is required.³³

As Justice Powell indicates, the two requirements specified in the warrant clause, a search warrant and probable cause,³⁴ are separate and independent. The few "jealously and carefully drawn"³⁵ exceptions to each requirement that the Supreme Court has recognized are also separate and independent; excusal of a warrant does not negate the probable cause requirement.³⁶

Warrantless searches and seizures at drunk driving roadblocks may well be permissible under the motor vehicle exception to the warrant

³⁰ See *infra* note 132 and accompanying text.

³¹ *United States v. United States Dist. Court*, 407 U.S. 297, 315 (1972).

³² Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 281-82 (1984) (over past 30 years, during which Supreme Court has issued vast majority of its fourth amendment decisions, this has been "conventional view").

³³ *Almeida-Sanchez v. United States*, 413 U.S. 266, 277 (1973) (Powell, J., concurring).

³⁴ According to the classic definition, probable cause exists "'[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed'" by the individual who is the subject of the search or seizure. *Carroll v. United States*, 267 U.S. 132, 161 (1925) (quoting *Stacey v. Emery*, 97 U.S. 642, 645 (1878)). *But see* Wasserstrom, *supra* note 32, at 320: "In [his] opinions [in *Illinois v. Gates*, 103 S. Ct. 2317 (1983), and *Texas v. Brown*, 103 S. Ct. 1535 (1983)], Justice Rehnquist eviscerated the probable cause requirement by defining probable cause as 'reason to suspect,' and so, conceivably, as many as six Justices now subscribe to that definition."

³⁵ *Jones v. United States*, 357 U.S. 493, 499 (1958).

³⁶ The Supreme Court's most recent fourth amendment decisions continue to reaffirm this fundamental precept. See, e.g., *New Jersey v. TLO*, 105 S. Ct. 733, 743 (1985) ("Ordinarily, a search — even one that may permissibly be carried out without a warrant — must be based upon 'probable cause' to believe that a violation of the law has occurred."). Conversely, although an exception to the probable cause requirement might permit a particular search to be based upon a less rigorous evidentiary standard, this would not excuse law enforcement agents from obtaining a warrant verifying that such standard had been satisfied. See, e.g., cases cited *infra* note 58.

requirement, which permits a government agent to conduct a warrantless car search if "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."³⁷ However, *Carroll v. United States*,³⁸ which initially established this exception, repeatedly stressed that automobile searches must be based upon probable cause. The *Carroll* Court stated, for example:

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 [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 known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.³⁹

Lacking probable cause, drunk driving roadblock investigations violate the fourth amendment unless, either directly or by analogy, they fall within one of the narrow search and seizure categories for which the probable cause requirement is excused.

B. Comparison of Drunk Driving Roadblock Investigations to Searches and Seizures Not Requiring Probable Cause

1. Brief Investigative Stops Based on "Reasonable Suspicion"

As recently as two decades ago, the Supreme Court had not expressly recognized any exceptions to the fourth amendment's central probable cause requirement for stopping and investigating an individual, how-

³⁷ *Carroll v. United States*, 267 U.S. 132, 153 (1925) (search for and seizure of liquor by prohibition agent).

³⁸ *Id.*

³⁹ *Id.* at 153-54. The Supreme Court has repeatedly reaffirmed this basic principle. For example, in *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-70 (1973) (footnote omitted) (citation omitted), the Court declared:

[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search. As Mr. Justice White wrote for the Court in *Chambers v. Maroney* [involving an automobile search]: "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."

See also *infra* note 75 (distinguishing cars from facilities of pervasively regulated businesses subject to searches without probable cause) and text accompanying notes 249-57 (discussing privacy expectations in automobiles).

ever briefly.⁴⁰ “[A]ny restraint on the person amounting to a seizure for the purposes of the Fourth Amendment,” such as the restraint entailed in a sobriety checkpoint stop, “was invalid unless justified by probable cause.”⁴¹ In 1968, in a landmark decision, *Terry v. Ohio*,⁴² the Court created one very limited exception to this general rule: if a police officer has a “reasonable suspicion,” grounded in “specific and articulable facts” and “rational inferences” from those facts, that an individual is armed and dangerous, then the officer “is entitled for the protection of himself and others in the area to conduct a carefully limited search of the [suspect’s] outer clothing . . . in an attempt to discover weapons which might be used to assault him.”⁴³ Since 1968, the Supreme Court has permitted brief “investigative” or “*Terry*-type” stops, based upon the lower reasonable suspicion standard, in a few additional circumstances.⁴⁴

⁴⁰ See *Henry v. United States*, 361 U.S. 98, 100-02 (1959) (footnotes omitted):

The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both 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. . . .

That philosophy [rebellng against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption 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

It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen.

See also *infra* note 257.

⁴¹ *Florida v. Royer*, 460 U.S. 491, 498 (1983).

⁴² 392 U.S. 1 (1968).

⁴³ *Id.* at 21, 23-24, 30.

⁴⁴ See, e.g., *United States v. Hensley*, 105 S. Ct. 675 (1985) (when police had reasonable suspicion that individual was wanted in connection with completed felony, “momentary” detention to investigate that suspicion was permissible); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (reasonable suspicion that vehicle is transporting undocumented aliens justifies brief stop of vehicle and questioning of passengers to investigate suspicion); *Adams v. Williams*, 407 U.S. 143 (1972) (brief stop and frisk for weapons was permissible when reliable informant reported that individual

Terry and its progeny require an officer to have a reasonable, factually based belief that any person he stops and investigates, however briefly, has committed, or is about to commit, a crime. In *Terry*, the Court expressly refused to condone any search or seizure based merely on an officer's "inchoate and unparticularized suspicion."⁴⁵ The Court emphasized that the "demand for specificity in the information upon which police action is predicated" — regardless of whether such information is judged against the probable cause standard or the reasonable suspicion standard — "is the central teaching of this Court's Fourth Amendment jurisprudence."⁴⁶ "Anything less" than this rule of specificity "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."⁴⁷

Sobriety checkpoints violate the fundamental rule of specificity. Motorists are detained and investigated without particularized suspicion. In effect, they are presumptively subject to detention until the police are satisfied that they are not driving under the influence of alcohol. Therefore, *Terry* and its progeny do not authorize the mass suspicionless detentions and investigations that occur at sobriety checkpoints.

2. Searches and Seizures Not Based on Individualized Suspicion

The sanctity of the specificity rule is underscored by how few and narrow are its exceptions. In a handful of cases, the Supreme Court has condoned five limited types of suspicionless searches and seizures: (1) administrative inspections of buildings and business facilities;⁴⁸ (2) brief car stops at permanent Border Patrol checkpoints to detect undocumented aliens;⁴⁹ (3) brief car stops at roadblocks to enforce drivers' li-

in question was carrying narcotics and gun). In *United States v. Sharpe*, 105 S. Ct. 1568 (1985), the Court recently upheld an unusually prolonged investigative detention, which lasted 20 minutes. Although recognizing that the brevity of a *Terry*-type stop is an important factor in assessing its reasonableness, the Court did not view this factor as determinative; instead, it examined whether the police had "diligently pursued a means of investigation that was likely to confirm or dispel their [suspicion that the defendant was engaged in marijuana trafficking] quickly, during which time it was necessary to detain the defendant." *Id.* at 1575.

⁴⁵ 392 U.S. at 27.

⁴⁶ *Id.* at 21 n.18. The Supreme Court has recently reaffirmed this teaching of *Terry*. See, e.g., *United States v. Cortez*, 449 U.S. 411, 418 (1981).

⁴⁷ 392 U.S. at 22.

⁴⁸ See *infra* text accompanying notes 56-75.

⁴⁹ See *infra* text accompanying notes 76-89.

cense, automobile registration, and similar administrative regulations;⁵⁰ (4) customs inspections of documents aboard oceangoing vessels;⁵¹ and (5) workplace "surveys" by Immigration and Naturalization Service (INS) agents to identify undocumented aliens.⁵² Several lower courts have upheld two other types of suspicionless searches and seizures: routine screenings of people entering airport boarding areas and certain public buildings⁵³ and roadblocks to enforce hunting and fishing regulations.⁵⁴ Drunk driving roadblock investigations lack the key characteristics that have led courts to excuse the usual individualized suspicion requirement for these other searches and seizures.⁵⁵

a. Administrative Inspections

i. Health and Safety Code Inspections

In the leading cases of *Camara v. Municipal Court*⁵⁶ and *See v. City of Seattle*,⁵⁷ the Supreme Court held that administrative agents could conduct routine building inspections to enforce health and safety codes, even if investigators did not suspect that any particular building contained code violations.⁵⁸ The Court stated that several reasons justified

⁵⁰ See *infra* text accompanying notes 90-99.

⁵¹ See *infra* text accompanying notes 100-08.

⁵² See *infra* text accompanying notes 109-17.

⁵³ See *infra* text accompanying notes 118-23.

⁵⁴ See *infra* text accompanying notes 124-31.

⁵⁵ Some lower courts have upheld a few other types of suspicionless searches and seizures. *E.g.*, *Doe v. Renfrow*, 475 F. Supp. 1012, 1022 (N.D. Ind. 1979) (Canine drug search of students without individualized suspicion, for purposes other than criminal prosecution, upheld because students' "expectation of privacy necessarily diminishes in light of . . . constant supervision while in school."), *aff'd in part & remanded in part*, 631 F.2d 91 (7th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 1022 (1982). *But see* *New Jersey v. TLO*, 105 S. Ct. 733, 744 n.8 (1985) (reserves decision on whether individualized suspicion required for school authorities' searches of students); *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 480-82 (5th Cir. 1982) (canine drug search of students requires individualized suspicion), *cert. denied*, 103 S. Ct. 3536 (1983); *cf.* *Bellnier v. Lund*, 438 F. Supp. 47, 53-54 (N.D.N.Y. 1977) (individualized suspicion required to strip search students for stolen money). However, unlike the suspicionless searches and seizures discussed *infra* text accompanying notes 118-31, no other suspicionless searches have been upheld on a widespread basis (as have airport boarding area investigations, *see infra* text accompanying note 118), or received the endorsement of any Supreme Court Justice (as have hunting and fishing roadblocks, *see infra* text accompanying note 126).

⁵⁶ 387 U.S. 523 (1967).

⁵⁷ 387 U.S. 541 (1967).

⁵⁸ In both cases, the Court held that the inspections must be authorized by warrants, which should be issued upon a showing that "reasonable legislative or administrative

this exception to the probable cause requirement: (1) building code inspections have a long history of judicial and public acceptance; (2) there was "unanimous agreement among experts" that these inspections constituted "the only effective way" to enforce the health and safety codes at issue since many dangerous conditions proscribed by the codes, such as faulty wiring, were not observable from the outside, and might not be apparent even to a building's occupants;⁵⁹ (3) the inspections were not personal; and (4) the inspections were not "aimed at discovery of evidence of crime."⁶⁰ Most of the foregoing factors have also characterized the few other suspicionless health and safety code inspections that the Court has authorized subsequent to *Camara* and *See*.⁶¹

In contrast, none of these factors is present in the drunk driving roadblock context. They do not enjoy a history of public or judicial

standards for conducting an area inspection are satisfied with respect to a particular" building. *Camara*, 387 U.S. at 534, 538; *see also See*, 387 U.S. at 545-46; *accord* *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrant required for federal inspection of workplace to enforce health and safety standards). Drunk driving roadblocks that have been implemented to date have not been authorized by warrants. *See infra* text accompanying notes 322-24 (discussing advisability of warrant requirement for sobriety checkpoints).

⁵⁹ *Camara*, 387 U.S. at 537. Of course, the same argument could be made with respect to many other crimes, such as illegal possession of firearms or drugs. Therefore, this factor alone should not justify suspicionless searches and seizures. Indeed, the Supreme Court has never upheld any suspicionless search or seizure under either the traditional fourth amendment analysis or the more recent balancing analysis, *see infra* text accompanying notes 132-62, solely on the ground that the law could not otherwise be effectively enforced. *See* Justice Brandeis's ringing dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) ("To declare that in the administration of the criminal law the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.").

⁶⁰ *Camara*, 387 U.S. at 537. While certain low level criminal offenses may be involved in administrative code violations, *see id.* at 527 n.2, the main goal of administrative inspections is not criminal prosecution. The Supreme Court has expressly recognized that if the purpose of a search is to locate contraband or evidence of crime, then the fourth amendment provides the same protection to commercial property as it does to a private home. *Donovan v. Dewey*, 452 U.S. 594, 598 n.6 (1981); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-59 (1977).

⁶¹ *Donovan v. Dewey*, 452 U.S. 594 (1981) (pursuant to Federal Mine Safety and Health Act of 1977, federal mine inspectors may inspect all mines at established intervals to ensure compliance with health and safety standards); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (pursuant to Occupational Safety and Health Act of 1970, Secretary of Labor's agents may inspect work area of any employment facility subject to Act for safety hazards and regulatory violations). The only factor underlying the *Camara* and *See* holdings that did not characterize these subsequently approved health and safety inspections was a long-standing public and judicial acceptance.

acceptance. To the contrary, they constitute a recent law enforcement innovation that has met with mixed reactions from the public, policy-makers, and courts.⁶²

Drunk drivers can be and are detected without roadblocks. Laws prohibiting drunk driving can be and are effectively enforced through traditional law enforcement techniques governed by the probable cause requirement. Drunk drivers, particularly the dangerous ones, often manifest their presence not only to experienced law enforcement officers,⁶³ but also to lay observers. Many drunk drivers, especially those who pose the greatest danger, are stopped and arrested by police officers enforcing traffic laws. Probable cause to stop a vehicle for a traffic violation is not rare. Drivers exceed speed limits, follow other vehicles too closely, ignore lights and signs, cross center lines, and otherwise operate dangerously. An officer's further observations after making a traffic stop may give him probable cause to believe that the driver is intoxicated. The effectiveness of this traditional highway patrol approach is evidenced by the 1.92 million drunk driving arrests in 1983, more than for any other crime for which national data are compiled.⁶⁴

Further, unlike administrative inspections, searches and seizures at drunk driving roadblocks are personal, involving the detention, inspection, and questioning of individuals, not just the inspection of premises. The criteria police officers typically consider include: whether the driver has bloodshot eyes or dilated pupils; whether his breath smells of alcohol; whether his speech is slurred or incoherent; how coordinated and controlled the driver's movements are — for example, whether he is able to retrieve a driver's license from a wallet or a vehicle registration from a glove compartment without fumbling; how well he performs divided attention tasks;⁶⁵ and whether the car contains any

⁶² See *supra* notes 8 & 14 and *infra* notes 269-70. This factor should not be determinative. See *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (noting that if search warrants could be excused for administrative inspections of pervasively regulated businesses only when regulation had long history, new or emerging industries, including those posing major safety and health problems, would be immunized from warrantless inspection).

⁶³ See PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 26 (experienced officer's observations usually sufficient to establish probable cause).

⁶⁴ FBI, U.S. DEPARTMENT OF JUSTICE, UNIFORM CRIME REPORTS; CRIME IN THE UNITED STATES 170 (1983) (Table 23) [hereafter FBI CRIME REPORTS]. Although many jurisdictions maintained drunk driving roadblocks for certain periods in 1983, the available statistics indicate that these roadblocks made only a minuscule contribution to the total number of arrests. See *infra* note 195.

⁶⁵ The National Highway Traffic Safety Administration recommends that officers staffing a roadblock use divided attention tasks such as engaging a driver in conversa-

opened bottles or cans of alcoholic beverages. In some cases, the officer may administer field sobriety tests — which commonly include reciting the alphabet, touching the finger to the nose, standing on one foot, and walking a straight line — or breath tests, which measure the driver's blood alcohol level.

Finally, the purpose of drunk driving roadblocks is to ferret out crimes — not reported crimes, but crimes that are statistically predictable. Drunk driving is a criminal offense of long standing.⁶⁶ It is investigated by state and local police, not by administrative agency personnel. Almost all persons arrested for drunk driving are convicted of a violation or a misdemeanor.⁶⁷ A few are convicted of felonies. The trend is toward increasingly harsh criminal sanctions.⁶⁸ Thus, with respect to all four criteria upon which the *Camara* Court relied, drunk driving roadblocks differ from health and safety code inspections.

tion while he looks for his license and questioning him, for example, about his destination. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, *THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT* 8-11 (1983) (copy on file with *U.C. Davis Law Review*) [hereafter NHTSA, SAFETY CHECKPOINTS].

⁶⁶ Criminal laws proscribing drunk driving have been relatively harsh for many decades. *See, e.g.,* North v. Russell, 427 U.S. 328 (1976) (affirming conviction of first-time DWI offender who was sentenced to 30 days in jail, \$150 fine, and revocation of his driver's license after nonjury trial before nonlawyer judge in police court); *see also* King & Tipperman, *The Offense of Driving While Intoxicated: The Development of Statutory and Case Law in New York*, 3 HOFSTRA L. REV. 541 (1975). The extent to which police, prosecutors, and judges discount these laws is another matter, and one that afflicts enforcement of all criminal laws.

Pursuant to a trend beginning in the late 1950's, all states have adopted implied consent laws that require a driver to submit to a blood or breath test for alcohol if a police officer has probable cause to believe that the driver is intoxicated. *See* Lerblance, *Implied Consent to Intoxication Tests: A Flawed Concept*, 53 ST. JOHNS L. REV. 39 (1978). In the early 1970's the federal government funded a major initiative to increase the arrest and conviction rates for drunk driving. Zador, *Statistical Evaluation of the Effectiveness of Alcohol Safety Action Projects*, in 8 ACCIDENT ANALYSIS AND PREVENTION 51 (1976).

⁶⁷ FBI CRIME REPORTS, *supra* note 64, at 162; *see infra* note 220.

⁶⁸ In New York State, for example, a second drunk driving conviction within ten years is a felony punishable by a four-year prison term. N.Y. VEH. & TRAF. LAW § 1192 (McKinney Supp. 1984); N.Y. PENAL LAW § 70.00(2)(e) (McKinney 1975). As of 1982, approximately 29 people were incarcerated for this offense. D. MACDONALD, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, *PERSONS COMMITTED FOR DRIVING WHILE INTOXICATED OR CRIMINALLY NEGLIGENT HOMICIDE INVOLVING DRIVING WHILE INTOXICATED IN 1982 AND FIVE YEAR TREND: 1978-1982*, at 2 (1983) (copy on file with *U.C. Davis Law Review*).

ii. Inspections of Pervasively Regulated Enterprises

Three Supreme Court decisions have upheld statutorily authorized suspicionless administrative inspections of the facilities of certain enterprises subject to pervasive regulation: mining operations, and liquor and firearms businesses.⁶⁹ The administrative inspections in this special category share the material characteristics of the health and safety code inspections upheld in *Camara* and *See*.⁷⁰ They are further justified, the Court has explained, by a "federal regulatory presence [which] is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes."⁷¹ Under this analysis, people who choose to operate such pervasively regulated enterprises have impliedly consented to suspicionless searches of their business facilities.⁷²

Like so many endeavors in contemporary life, driving is subject to governmental regulation. However the regulation of driving is hardly as pervasive as the regulation of the mining, firearms, and liquor businesses. While there is no absolute right to operate a vehicle on public roads, there is a greater right to drive than to operate a mine, or to manufacture or sell liquor or firearms.⁷³ Therefore, the government

⁶⁹ *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *see also* *United States v. Harper*, 617 F.2d 35, 38-39 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980), quoted *infra* note 108 (commercial shipping is highly regulated enterprise for fourth amendment purposes); *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979), discussed *infra* note 130 (same conclusion regarding hunting and fishing).

⁷⁰ *See supra* text accompanying notes 56-60. In contrast with its rulings that other types of administrative inspections must be conducted pursuant to a warrant, *see supra* note 58, the Supreme Court has stated that warrantless administrative inspections of these pervasively regulated enterprises are constitutionally permissible under certain circumstances. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981); *United States v. Biswell*, 406 U.S. 311, 313-16 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970).

⁷¹ *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

⁷² *See, e.g.*, *United States v. Biswell*, 406 U.S. 311, 316 (1972):

When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records [and equipment] will be subject to effective inspection.

Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority.

See also the passage from *Delaware v. Prouse*, 440 U.S. 648, 662 (1979), quoted *infra* note 75.

⁷³ A driver's license represents sufficient liberty and property interests to prohibit its revocation or suspension without procedural due process. *Illinois v. Batchelder*, 103 S.

may impose more conditions on the latter than on the former.⁷⁴ Indeed, the Supreme Court has expressly refused to extend the rationale underlying the pervasively regulated enterprises line of administrative inspection cases to automobile searches and seizures.⁷⁵

Ct. 3513, 3516-17 (1983) (due process satisfied by right to hearing before driver may be deprived of license for failure to submit to breath analysis test under state's implied consent statute; due process does not require arresting officers to recite in affidavit specific evidence that gave rise to reasonable belief that arrestee was driving under influence of alcohol); *Mackey v. Montrym*, 443 U.S. 1, 10 (1978) (prehearing license suspension for refusal to submit to breath analysis test upon DWI arrest does not violate due process); *Dixon v. Love*, 431 U.S. 105, 112 (1977) (prehearing license revocation procedure in cases of multiple traffic violation convictions does not violate due process); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (before state may suspend license of uninsured motorist involved in accident who did not post security to cover damages claimed, procedural due process requires determination of whether there is reasonable possibility motorist will be liable for accident). See generally J. REESE, *POWER POLICY PEOPLE: A STUDY OF DRIVER LICENSING ADMINISTRATION* (1971).

⁷⁴ Cf. *United States v. Lopez*, 328 F. Supp. 1077, 1093 (E.D.N.Y. 1971) (involving airport passenger screenings). Without discussion, the *Lopez* court treated airplane travel as being protected by the constitutional right to travel that the Supreme Court had recognized in *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *United States v. Guest*, 383 U.S. 745 (1966), and ruled that the government cannot "condition the exercise of the constitutional right to travel on the voluntary relinquishment of . . . Fourth Amendment rights." 328 F. Supp. at 1093.

⁷⁵ For example, in *Delaware v. Prouse*, 440 U.S. 648, 662 (1979), the Court stated that "[t]here are certain 'relatively unique circumstances' . . . in which consent to regulatory restrictions is presumptively concurrent with participation in the regulated enterprise" (quoting *Marshall*, 436 U.S. at 313, and citing *Biswell*, 406 U.S. 311; *Colonnade*, 397 U.S. 72). However, it distinguished the situation of "[a]n individual operating . . . an automobile," explaining that such individual "does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation." *Id.* (footnote omitted). Similarly, in *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973), the Court refused to extend the teachings of *Colonnade* and *Biswell* to car searches near the Mexican border to enforce immigration laws, explaining that a "central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business." As Justice Powell noted in his concurring opinion in *Almeida-Sanchez*: "One who merely travels [by car] in regions near the borders . . . can hardly be thought to have submitted to inspections in exchange for a special perquisite." *Id.* at 281; see also *supra* note 39 and accompanying text (discussing probable cause requirement for automobile searches and seizures) and *infra* text accompanying notes 249-57 (discussing privacy expectations in automobiles).

b. *Car Stops at Permanent Border Patrol Checkpoints*

In *United States v. Martinez-Fuerte*,⁷⁶ the Supreme Court authorized Border Patrol agents to stop briefly all cars passing through permanent checkpoints located on major highways leading away from the Mexican border to detect undocumented aliens. The Court found that the investigations conducted at Border Patrol checkpoints displayed most of the special characteristics of suspicionless administrative inspections relied on in *Camara*.⁷⁷ It concluded that these investigations were essential for enforcing immigration laws;⁷⁸ although somewhat personal, they focus largely on the existence of documents regarding citizenship and immigration status, and their aim is not to discover evidence of crime, but to prevent undocumented aliens from remaining in the country. Almost all detected undocumented aliens agree to leave the United States voluntarily. Very few are subjected to administrative deportation proceedings, much less criminal prosecution.⁷⁹

⁷⁶ 428 U.S. 543 (1976).

⁷⁷ See *supra* text accompanying notes 56-60.

⁷⁸ In support of this conclusion, the Court stated:

[M]aintenance of a traffic-checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border

A requirement that stops on major routes inland always be based on 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.

428 U.S. at 556-57. As discussed *supra* note 59, the alleged necessity of a suspicionless search and seizure should not be sufficient to uphold it under the fourth amendment.

⁷⁹ With the exception of major drug traffickers, undocumented aliens are almost always given the opportunity to leave the United States voluntarily; only those who refuse are deported. In 1982, fewer than two percent of all undocumented aliens who were ordered by the INS to leave the country were formally deported. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 77 (1984); see also *INS v. Lopez-Mendoza*, 104 S. Ct. 3479, 3487 (1984). Deportation proceedings are not criminal. Although more than one million undocumented aliens are apprehended each year, only about 2700 criminal prosecutions are commenced annually under all immigration laws. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT 293 (1982); see also *Almeida-Sanchez v. United States*, 413 U.S. 266, 278-79 (1973) (Powell, J., concurring) (citations omitted):

The Government further argues that such searches [for illegal aliens] resemble those conducted in *Camara* in that they are undertaken primarily for administrative rather than prosecutorial purposes, that their function is simply to locate those who are illegally here and to deport them. This argument is supported by the assertion that only 3% of aliens apprehended in this country are prosecuted.

Drunk driving roadblock investigations do not meet several criteria that were critical to the Court's approval of the brief Border Patrol checkpoint stops in *Martinez-Fuerte*. Most significantly, it has long been accepted that, because of the extraordinary governmental interest in controlling our international borders, boundary area searches and seizures aimed at preventing illegal immigration and smuggling are subject to less stringent limitations than other types of searches and seizures.⁸⁰ Although the checkpoint stops upheld in *Martinez-Fuerte* did not occur at the border itself,⁸¹ they were clearly aimed at preventing illegal immigration,⁸² and were located at carefully chosen sites to

⁸⁰ See *Carroll*, 267 U.S. at 154:

Travellers may be so stopped [without probable cause] in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage.

Accord Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring) (Border area searches of cars for undocumented aliens "draw a large measure of justification from the Government's extraordinary responsibilities and powers with respect to the border."). The Supreme Court has "'always stressed the uniqueness of the border-search rule, and . . . repeatedly pointed out that its rationale cannot be applied to any other situation.'" *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2585 n.6 (1983) (Brennan, J., dissenting) (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)); *United States v. Ramsey*, 431 U.S. 606, 616-20 (1977) (reviewing statutes and cases dating back to 1789). The *Ramsey* Court concluded that "searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." 431 U.S. at 616; see also, e.g., *Almeida-Sanchez*, 413 U.S. at 272-74.

⁸¹ 428 U.S. at 545 (checkpoint 66 miles from Mexican border). The Supreme Court has recognized that, in certain circumstances, "border searches" to control immigration and importation can take place at the "functional equivalents" of the international border. Such functional equivalents include, for example, an airport at which a plane from another country first lands in this country. *Almeida-Sanchez*, 413 U.S. at 273; see also *United States v. Bilir*, 592 F.2d 735, 740 (4th Cir. 1979):

The many difficulties that attend the attempt to . . . apprehend increasingly mobile and sophisticated smugglers at the very borders . . . have . . . given birth to [the extended border search] doctrine. . . . [That doctrine] holds that some searches by customs officials, although conducted at points physically away from an actual border and removed in time from the precise time of importation, may nevertheless be treated as border searches [subject to relaxed fourth amendment standards].

⁸² *People v. Gale*, 46 Cal. 2d 253, 294 P.2d 13 (1956), supports the inference that the pertinent feature of a search for purposes of assessing whether it should be governed by the relatively lenient standards applicable to "border searches" is not where it

maximize the apprehension of illegal aliens not easily detected right at the border.⁸³ Therefore, the rationale of the border area search cases could be plausibly extended to these checkpoint investigations.

Additionally, in contrast to the permanent immigration enforcement checkpoints at issue in *Martinez-Fuerte*, sobriety checkpoints are temporary, commonly changing locales in a single night.⁸⁴ The *Martinez-Fuerte* Court expressly cautioned that the reach of its holding was "confined to permanent checkpoints"⁸⁵ for two reasons. First, investigations at permanent locations should engender less concern or fright because motorists would know, or could obtain knowledge of, their locations.⁸⁶ Second, such investigations both appear to and actually do involve less discretionary law enforcement activity. The location is chosen not by officers in the field, but by officials responsible for making overall decisions regarding the most effective allocation of limited enforcement resources.⁸⁷ Their shifting, temporary location makes drunk driving roadblocks more analogous to the roving immigration enforcement patrols that the Supreme Court invalidated in *United States v. Brignoni-Ponce*⁸⁸ than to the permanent checkpoint stops it approved in *Martinez-Fuerte*.⁸⁹

occurs, but what its purpose is. In that case, the California Supreme Court invalidated an investigation conducted at a checkpoint near the Mexican border, stressing that its purpose was not to enforce immigration or customs regulations, but rather "to curb the juvenile problem" and check for "anything that looked suspicious." *Id.* at 256, 294 P.2d at 15. This analysis would support an argument that a search occurring away from the border but for the purpose of enforcing immigration laws or customs regulations should be governed by border search standards.

⁸³ The Border Patrol selected each permanent checkpoint location in accordance with several criteria designed to promote the apprehension of illegal aliens. For example, each checkpoint was required to be close to the confluence of two or more significant roads leading away from the border, and beyond the 25-mile zone in which "border passes" are valid. *Martinez-Fuerte*, 428 U.S. at 553.

⁸⁴ Some law enforcement personnel contend that the location of sobriety checkpoints must be temporary, and subject to change, if they are to have a significant law enforcement impact. *See, e.g.*, Note, *Roadblock Seizures*, *supra* note 16, at 1461 n.18, 1484 (citing letters from law enforcement officials stating that roadblocks in permanent locations would not serve as effective deterrents but urging that judicial warrants, based upon empirical evidence, be obtained before setting up any temporary roadblock). *But see infra* text accompanying notes 325-34 (suggesting advantages of maintaining sobriety checkpoints at fixed, permanent locations).

⁸⁵ 428 U.S. at 566 n.19.

⁸⁶ *Id.* at 559.

⁸⁷ *Id.*

⁸⁸ 422 U.S. 873 (1975).

⁸⁹ 428 U.S. at 566.

c. Roadblocks to Inspect Drivers' Licenses and Vehicle Registrations

The Supreme Court has never directly upheld roadblock stops to inspect drivers' licenses and vehicle registrations. Although several Supreme Court cases suggest that the Court would probably approve such stops,⁹⁰ this does not necessarily mean the Court would support drunk driving roadblocks.⁹¹

In *Delaware v. Prouse*,⁹² the Court held that the Delaware State Police practice of randomly stopping automobiles, without any individualized suspicion, to enforce drivers' license and vehicle registration regulations violated the fourth amendment. Far from supporting the legality of drunk driving roadblocks, this holding reinforces the rule of specificity,⁹³ requiring individualized suspicion even for limited police interferences with individual liberty. Proponents of drunk driving roadblocks do not rely on the *Prouse* holding, but instead seek support from the following dictum:

This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock type stops is one possible alternative.⁹⁴

In two 1983 decisions the Court effectively treated the foregoing dictum

⁹⁰ Similarly, courts have upheld other types of routine vehicle stops to enforce administrative regulations through nonpersonal inspections of the vehicle or its contents. *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 663 n.26 (1979) (“[O]ur holding today [does not] cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others.”); *People v. Dickinson*, 104 Cal. App. 3d 505, 163 Cal. Rptr. 515 (1980) (upholding inspection by Plant Quarantine officer at permanent plant quarantine station near state border to prevent importation of “pests” into state); *Stephenson v. Department of Agriculture & Consumer Serv.*, 342 So. 2d 60, 62 (Fla. 1976) (upholding statute requiring trucks to stop at road guard station maintained by state agency, explaining that these inspections are “more nearly akin to drivers’ license checks than detentions for criminal investigations”), *appeal dismissed*, 434 U.S. 803 (1977). These inspections share all of the salient features of the administrative inspections stressed in the *Camara* opinion. *See supra* text accompanying notes 56-60.

⁹¹ *See infra* text accompanying notes 96-99 & 175-264.

⁹² 440 U.S. 648 (1979).

⁹³ *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968); *see supra* text accompanying notes 46-47.

⁹⁴ 440 U.S. at 663. In the same vein, Justice Blackmun suggested in his concurring opinion that another possible alternative would be to question every tenth car at a roadblock stop. *Id.* at 664.

as if it had been a holding,⁹⁵ thereby signaling its approval of stops at license-registration roadblocks.

Still, the Court's approval of license-registration roadblocks does not necessarily augur its approval of drunk driving roadblocks. In contrast with drunk driving roadblocks, license-registration roadblocks meet all the criteria of suspicionless administrative inspections that led the *Camara* Court to approve such inspections.⁹⁶ As the Supreme Court has noted, suspicionless stops to enforce laws regarding drivers' licenses and similar matters have historically and widely been used by state and local law enforcement agencies, and are therefore "accepted by motorists as incident to highway use."⁹⁷ As with administrative inspections, there is no viable enforcement alternative. For example, stopping a motorist is the only method of determining whether he is driving without a license. Likewise, absent roadblock-type stops, determining whether drivers are complying with laws requiring them to carry insurance and registration documents in the vehicle would be impossible.⁹⁸ The investigations conducted at license-registration roadblocks also are neither personal nor aimed at discovering evidence of a crime. Rather, they seek documents and aim at enforcing administrative regulations. The Supreme Court has clearly indicated, specifically in the context of automobile searches, that the probable cause requirement is excused only

⁹⁵ In *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion), the Supreme Court ratified the lower court's approval of a car stop at a "routine driver's license checkpoint" merely by stating "we agree" and citing the *Prouse* dictum. *Id.* at 739; *see also id.* at 735-36; *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2579 (1983). The Court's opinions in both cases were authored by Justice Rehnquist, who dissented in *Prouse* because he viewed as constitutional even random license-registration stops, lacking in individualized suspicion. *Prouse*, 440 U.S. at 667 (Rehnquist, J., dissenting).

⁹⁶ *See supra* text accompanying notes 56-60.

⁹⁷ *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 n.14 (1976).

⁹⁸ The courts that have expressly approved license-registration roadblocks have stressed the absence of alternative means for detecting noncompliance. *See, e.g.*, *United States v. Croft*, 429 F.2d 884 (10th Cir. 1970); *People v. Andrews*, 173 Colo. 510, 484 P.2d 1207 (1971). *But see* text accompanying notes 102-05. In his comprehensive treatise on search and seizure law, Professor LaFave noted that the cases approving license-registration roadblocks and Border Patrol checkpoint stops are:

[G]rounded on . . . a determination that, as in *Camara*, the particular government interests involved could not be adequately protected if an individualized reasonable suspicion test were applicable. This being so, it cannot be assumed that those cases inevitably carry over to roadblocks conducted for more ordinary or traditional investigative purposes.

W. LAFAVE, SEARCH AND SEIZURE § 9.5, at 85 (Supp. 1985); *see also supra* note 59 (absence of viable enforcement alternatives should not, standing alone, justify suspicionless search or seizure).

when the search is conducted for administrative rather than law enforcement purposes.⁹⁹

d. Customs Inspections of Documents Aboard Oceangoing Vessels

In *United States v. Villamonte-Marquez*,¹⁰⁰ the Supreme Court permitted a search without particularized suspicion in a situation that is readily distinguishable from drunk driving roadblock investigations. Pursuant to statutory authority dating back to the First Congress,¹⁰¹ United States Customs officers, without any suspicion of wrongdoing, boarded a vessel in waters readily accessible to the open sea to inspect its documentation.

In holding this inspection permissible, the Supreme Court recognized: “[I]f the Customs officers in this case had stopped an automobile on a public highway near the border . . . the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion.”¹⁰² However, the Court grounded its opinion on “the important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares.”¹⁰³ The Court reasoned that, because such vessels can readily leave United States waters, Customs officials have no alternative means to enforce documentation requirements that serve important government interests.¹⁰⁴ In contrast, the Court noted: “A police officer patrolling a high-

⁹⁹ For example, in *South Dakota v. Opperman*, 428 U.S. 364 (1976), in which the Court upheld an administrative inventory search of an automobile that had been impounded for multiple parking violations, it repeatedly stressed the “noncriminal context” of the search at issue, explaining: “The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures.” *Id.* at 370 n.5. Moreover, the *Opperman* opinion emphasized that the search had in fact been conducted for bona fide administrative purposes and was not a pretext for a criminal investigation. *Id.* at 376.

¹⁰⁰ 103 S. Ct. 2573 (1983).

¹⁰¹ *Id.* at 2577.

¹⁰² *Id.* at 2579 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)).

¹⁰³ *Id.* at 2579-80.

¹⁰⁴ Although the *Villamonte-Marquez* opinion did not expressly invoke the border search exception to general fourth amendment requirements, it did stress that the documentation laws at issue “play a vital role in . . . assisting . . . government officials in the prevention of entry into this country of controlled substances, illegal aliens” and other prohibited items. *Id.* at 2581. Therefore, the Court viewed this category of suspicionless searches and seizures, as well as those it approved in *Martinez-Fuerte*, see *supra* text accompanying notes 80-83, and *Delgado*, see *infra* text accompanying note 117, as promoting the extremely important governmental interests in prohibiting illegal immigration and smuggling. That sobriety checkpoint investigations do not serve this

way can often tell merely by observing a vehicle's license plate and other outward markings whether the vehicle is currently in compliance with the requirements of state law."¹⁰⁵ Likewise, police officers frequently can discern, merely through observation, that drivers are under the influence of alcohol, or at least that there is probable cause to believe they are.¹⁰⁶

Thus, the *Villamonte-Marquez* rationale itself weighs against the constitutionality of drunk driving roadblocks. Furthermore, the document inspection involved in *Villamonte-Marquez* also conformed to the salient features of the suspicionless administrative inspections approved in *Camara*,¹⁰⁷ including a long history of acceptance and a nonpersonal nature.¹⁰⁸

e. *INS Immigration Control Workplace "Surveys"*

To enforce immigration laws, INS agents enter workplaces, pursuant to warrants or employers' consent, to seek undocumented aliens. Al-

interest materially distinguishes them from these other types of suspicionless investigations.

¹⁰⁵ *Villamonte-Marquez*, 103 S. Ct. at 2580. *But see supra* note 98 and accompanying text.

¹⁰⁶ *See supra* text accompanying note 64.

¹⁰⁷ *See supra* text accompanying notes 56-60.

¹⁰⁸ *Villamonte-Marquez*, 103 S. Ct. at 2577. Several lower federal court decisions have upheld Customs officers' suspicionless "stopping and boarding" of United States ships actually in the open seas, under a statutory provision similar to the one at issue in *Villamonte-Marquez*. *See, e.g.*, *United States v. Harper*, 617 F.2d 35 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978). The *Harper* court analogized "stopping and boarding" to inspections of highly regulated enterprises:

Certain industries such as liquor and firearms have such a history of government oversight that no reasonable expectation of privacy exists within the industry.

Commercial shipping can be categorized [as] another such enterprise. Since the beginning of the republic, federal officials have had the authority to board and inspect American flag ships. Persons who sail under the American flag accept the responsibilities and the burdens when they elect to register their ships with the United States Coast Guard. Such regulatory inspections have their basis in the international law of the seas that requires each nation carefully to maintain the navigability and safety of its own commercial fleet as a condition of non-interference from other nations.

617 F.2d at 38-39. For the reasons set forth *supra* text accompanying notes 69-75, sobriety checkpoint investigations, unlike Customs officers' inspections of United States vessels, cannot be treated as inspections of closely regulated enterprises.

though the INS agents may believe it statistically likely that a significant number of undocumented aliens work at the particular site, they rarely have even a particularized suspicion, much less probable cause to believe, that any specific employee is an undocumented alien. Nevertheless, the INS agents systematically question all employees briefly about their citizenship status, asking some to produce immigration papers. If this brief investigation does not establish probable cause that a particular employee is an undocumented alien, that employee is free to continue working; if probable cause is established, INS agents may arrest the worker and initiate proceedings to expel him from the United States.¹⁰⁹

In *INS v. Delgado*,¹¹⁰ the Supreme Court rejected a fourth amendment challenge to an INS immigration control workplace "survey," holding that it did not constitute a search or seizure subject to fourth amendment constraints. The Court enunciated the general principle that an employee's response to INS agents' questions and document requests would not constitute a search or seizure "[u]nless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded."¹¹¹ The Court then concluded that, under this standard, neither the work force as a whole, nor any of the individual employees who challenged the constitutionality of the "survey," had been subject to a search or seizure.¹¹² In his separate concurring opinion, Justice Powell opined that the Court need not decide the "close" question of whether any fourth amendment search or seizure had occurred, "because it is clear that any 'seizure' that may have taken place was permissible under the reasoning" of *Martinez-Fuerte*.¹¹³

If confronted with an INS employee investigation that did meet their criteria for a search or seizure, the Justices in the *Delgado* majority¹¹⁴

¹⁰⁹ Three INS workplace "surveys" are described in *INS v. Delgado*, 104 S. Ct. 1758, 1760 (1984). See generally Catz, *Fourth Amendment Limitations on Non-Border Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution*, 39 OHIO ST. L.J. 66 (1978).

¹¹⁰ 104 S. Ct. 1758 (1984).

¹¹¹ *Id.* at 1763.

¹¹² *Id.* at 1763-65.

¹¹³ *Id.* at 1765 (Powell, J., concurring in judgment) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

¹¹⁴ Justice Rehnquist, joined by Chief Justice Burger and Justices White, Blackmun, Stevens, and O'Connor, authored the majority opinion. Justice Brennan, joined by Justice Marshall, filed an opinion concurring in part and dissenting in part. *Id.* at 1767. Justice Brennan's opinion viewed the INS agents' questioning of the individual employees as a fourth amendment search and seizure and concluded that it could not be

might share Justice Powell's view that such investigation would be justified by the *Martinez-Fuerte* rationale. Nevertheless, approval of suspicionless INS workplace "surveys" would not extend to sobriety checkpoints. Like the investigations involved in *Martinez-Fuerte*,¹¹⁵ and unlike sobriety checkpoint investigations, INS workplace "surveys" manifest many salient characteristics of permissible administrative inspections: necessity for enforcing an important regulatory scheme, relative impersonality, and primary focus upon a goal other than criminal prosecution.¹¹⁶ Another factor that links INS workplace "surveys" with the Border Patrol checkpoints involved in *Martinez-Fuerte*, but not sobriety checkpoint investigations, is the extraordinary governmental interest in controlling the borders and preventing illegal immigration.¹¹⁷

f. Metal Detector Screenings of Airplane Passengers and People Entering Certain Public Buildings

Routine screening procedures at airports and certain other public buildings (such as courthouses) take place despite the lack of individualized suspicion. Everyone who enters must first pass through metal detectors or magnetometers. Although the Supreme Court has never ruled on the constitutionality of such screening procedures, lower federal courts have consistently upheld them.¹¹⁸

These screening procedures share several material characteristics of the other routine searches that the Supreme Court has approved.¹¹⁹ It is extremely difficult to establish individualized suspicion that particular passengers are carrying weapons or bombs.¹²⁰ While airport and public

justified by the rationale underlying *Martinez-Fuerte* or other Supreme Court decisions. *Id.* at 1768-75 (Brennan, J., concurring in part and dissenting in part).

¹¹⁵ 428 U.S. 543 (1976).

¹¹⁶ 104 S. Ct. at 1766-67; *see also supra* text accompanying notes 56-68.

¹¹⁷ This uniquely important governmental purpose also underlies the suspicionless Customs documentation inspections aboard oceangoing vessels approved in *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1981); *see supra* note 104.

¹¹⁸ *See generally* W. LAFAYE, *supra* note 98, § 2.2, at 263.

¹¹⁹ *See supra* text accompanying notes 56-60; *see, e.g.*, *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978) (upheld courthouse metal detector search because it was neither intended to gather evidence for criminal prosecutions, nor as subterfuge for such purposes; it was "clearly necessary" to protect courthouse from "real danger of violence"; and no "less intrusive alternative means" for conducting search existed).

¹²⁰ Indeed, the skyjacker "profile," the chief law enforcement strategy for detecting skyjackers before the advent of routinized magnetometer screenings, also departed from the traditional probable cause standard and raised serious civil liberties concerns. Although maintained in secrecy, the profiles were believed to target individuals for searches based on certain impermissible criteria, including ethnic background, youth,

building screenings are somewhat personal, because individuals must pass through the metal detector, they are not as personally intrusive as roadblock stops.¹²¹ Additionally, airport and other public building screenings primarily aim to prevent people from carrying weapons or contraband onto particular premises, not to detect and prosecute those who do.¹²² Anyone carrying weapons or contraband can dispose of such items before passing through a magnetometer, or forego entering the premises altogether.¹²³

clothing, and hairstyles. See Gora, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled?*, 18 VILL. L. REV. 1036, 1037 (1973). In *United States v. Lopez*, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971), Judge Weinstein expressed grave concerns about the implications of both the profile system and routine magnetometer screenings, noting that the profile included an "ethnic element for which there is no experimental basis." But see *supra* note 59 (absence of viable enforcement alternative should not, standing alone, justify a suspicionless search or seizure).

¹²¹ In the parlance of the Supreme Court's fourth amendment reasonableness analysis, magnetometer screenings are "objectively unintrusive," see *infra* text accompanying note 146, because they are extremely brief, consisting of only a mechanical survey of the passenger's garments, with no physical contact between the passenger and a security guard. Moreover, these screenings are "subjectively unintrusive," see *infra* text accompanying notes 146-56 & 258, because they are conducted by a machine, based upon strictly objective physical properties, and hence accord little or no discretion to the personnel administering them.

¹²² For this reason, under a fourth amendment balancing analysis, airport screening procedures are far more "productive," see *infra* text accompanying notes 167-79, than are drunk driving roadblocks. Because no passenger can board any airplane without successfully passing through a metal detector, this type of screening is highly effective in preventing people from carrying metal weapons onto aircraft. A prospective passenger must either dispose of his weapon or forego boarding. In contrast, a drunk driver can continue to drive notwithstanding the existence of roadblocks; although a roadblock may impel the drunk driver to choose another route, it will not necessarily remove him from the road.

¹²³ This arguably voluntary or consensual feature has been stressed in decisions upholding airport and other public building screenings. See, e.g., *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973) (airport screening procedures constitutional only if they recognize right to avoid search by electing not to board aircraft). That one could be forced to forego airplane travel or entrance to a public building as the price for exercising the choice of avoiding a search or seizure suggests that such a choice might not be free. See *United States v. Albarado*, 495 F.2d 799, 806-07 (2d Cir. 1974) ("To make one choose between flying to one's destination and exercising one's constitutional right [to remain free from unreasonable searches and seizures] appears to us . . . in many situations a form of coercion, however subtle.") (citation omitted). Unlike airport or other public building screenings, a drunk driving roadblock could be set up so that motorists could use alternative routes with relatively minimal inconvenience if they wished to avoid the roadblock. Therefore, the voluntary or consensual search model is potentially more applicable to the drunk driving roadblock than to these other mass investigatory techniques. See *infra* text accompanying notes 330-34.

g. *Hunting and Fishing Roadblocks*

The Supreme Court has not considered the legality of temporary hunting and fishing roadblocks to enforce limitations on the number of captured game or fish, or prohibitions on killing certain protected species. Professor Wayne LaFave, a leading fourth amendment expert, has expressed grave doubts about their constitutionality.¹²⁴ However, two state supreme courts have upheld hunting and fishing roadblocks against fourth amendment challenges (although in one of the cases over vigorous and persuasive dissent),¹²⁵ and two current United States Supreme Court Justices have indicated their approval of suspicionless searches by game wardens.¹²⁶ In any event, the asserted rationale for upholding hunting and fishing roadblocks does not extend to drunk driving roadblocks. Indeed, one of the state courts that upheld hunting and fishing roadblocks struck down sobriety checkpoints.¹²⁷

In contrast to drunk driving roadblocks, hunting and fishing roadblocks share some of the essential features of the administrative inspections upheld in *Camara*. They are not personal since they seek only documents or objects — namely, hunting or fishing licenses, and dead animals or fish. The courts that have upheld hunting and fishing roadblocks also have concluded that it would be extremely difficult to enforce hunting and fishing regulations effectively in accordance with the

¹²⁴ Professor LaFave has urged that such roadblocks be conducted pursuant to an area search warrant, so that “a magistrate could circumscribe in advance a warden’s authority . . . imposing limits as to time and area and, perhaps, factors which at least would support a likelihood that any person stopped has been engaged in hunting and fishing.” W. LaFAVE, *supra* note 98, § 10.8, at 177-78 (Supp. 1985). Moreover, he has noted that even a hunting and fishing roadblock authorized by a search warrant and limited to a very brief questioning and visual inspection still might not pass muster under the fourth amendment: “The basic and very difficult question is whether the roadblock concept can logically be extended to game law enforcement without making it equally available for all other criminal law enforcement programs as well.” *Id.* at 179.

¹²⁵ *State v. Tourtillott*, 289 Or. 835, 618 P.2d 423 (1980) (three justices joining dissenting opinion), *cert. denied*, 451 U.S. 972 (1981); *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979).

¹²⁶ In *Delaware v. Prouse*, 440 U.S. 648, 664 (1979), Justice Blackmun’s concurring opinion (in which Justice Powell joined) included the following dictum: “I would not regard the present case as a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties.”

¹²⁷ In *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979), the South Dakota Supreme Court upheld the constitutionality of suspicionless roadblock investigations to enforce hunting laws. *Id.* at 725. In contrast, in *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976), the same court invalidated suspicionless investigations at a drunk driving roadblock.

probable cause requirement.¹²⁸ Assuming this conclusion to be correct, it does not justify drunk driving roadblocks, because probable cause to believe someone is driving under the influence of alcohol is not very difficult to establish.¹²⁹

Another distinction is that hunting and fishing roadblocks interfere much less substantially with the freedom and privacy interests that the fourth amendment protects than do drunk driving roadblocks. They are implemented in isolated settings during limited times of the year, and affect a very small percentage of drivers. Furthermore, the drivers they do affect are almost exclusively hunters and fishermen.¹³⁰ In this respect, hunting and fishing roadblocks are more akin to traditional, specific purpose law enforcement roadblocks than to drunk driving roadblocks.¹³¹

After reviewing the authorities discussed in this part of the Article, a policymaker or court could conclude that drunk driving roadblock investigations are unconstitutional under the fourth amendment (or its state counterparts) because they are not based upon probable cause and do not fall within any exception to the probable cause requirement, either directly or by analogy. The following part questions whether drunk driving roadblock investigations can satisfy the fourth amendment reasonableness requirement.

¹²⁸ See *Tourtillott*, 289 Or. at 858-89, 618 P.2d at 430 (noting that "the broad expanse of territory . . . much of which is virtually uninhabited" undermines the effectiveness of traditional law enforcement techniques), *cert. denied*, 451 U.S. 972 (1981); *Halverson*, 277 N.W.2d at 724 (explaining that enforcing law through searches based upon probable cause would not be effective "since the number of hunters is large and game officers few"). *But see supra* note 59 (absence of viable enforcement alternatives should not, standing alone, justify suspicionless search or seizure).

¹²⁹ See *supra* text accompanying note 64.

¹³⁰ In *Tourtillott*, the Oregon Supreme Court expressly declined to "consider whether a game checkpoint located in a metropolitan area might be overly intrusive." 289 Or. at 858 n.13, 618 P.2d at 430 n.13. The *Halverson* court upheld hunting and fishing roadblock investigations on the additional theory that agreeing to submit to these investigations is an implicit precondition for receiving a hunting or fishing license. 277 N.W.2d at 724-25. This is the same implied consent rationale underlying the pervasively regulated enterprise cases. See *supra* text accompanying notes 69-72. Regardless of whether these cases could logically be extended to hunting and fishing roadblocks, they should not be extended to drunk driving roadblocks. See *supra* text accompanying notes 73-75.

¹³¹ See *infra* notes 271-72 and accompanying text.

II. DRUNK DRIVING ROADBLOCKS AND THE FOURTH AMENDMENT BALANCING ANALYSIS

A. *The Fourth Amendment Balancing Analysis*

A current trend in the Supreme Court's fourth amendment jurisprudence has been to evaluate certain types of searches and seizures (including some involving automobiles)¹³² only in terms of the reasonableness requirement in the fourth amendment's first clause.¹³³ The Supreme Court recently summarized its fourth amendment reasonableness or balancing test:

Our focus in this area of Fourth Amendment law has been on the question

¹³² The Supreme Court has not enunciated specific criteria concerning when it will evaluate any particular search and seizure under this reasonableness or balancing approach rather than the traditional approach. There appears to be a trend toward an increasing reliance on the balancing test. See generally Wasserstrom, *supra* note 32. But, for a recent example of a Supreme Court decision employing conventional fourth amendment analysis, see *Winston v. Lee*, 105 S. Ct. 1611, 1617 (1985) (in holding that state's surgical removal of bullet from beneath defendant's skin, to seek evidence of his alleged crime, would violate fourth amendment, Court stated that warrant and probable cause are "threshold requirements," and that "[b]eyond these standards . . . a number of other factors [should be considered] in determining the 'reasonableness' of challenged search and seizure).

Justice Powell recently noted that the Court has employed the fourth amendment balancing test in cases "involving the apprehension of aliens illegally in the United States." *INS v. Delgado*, 104 S. Ct. 1758, 1765-66 (1984) (Powell, J., concurring in judgment). In *Brown v. Texas*, 443 U.S. 47, 50 (1979), the Court indicated that the balancing test would be applied to "seizures that are less intrusive than a traditional arrest." However, the demarcation between a *Terry*-type investigative stop and a traditional arrest is becoming increasingly blurred. Compare, e.g., *United States v. Sharpe*, 105 S. Ct. 1568 (1985), discussed *supra* note 44 (characterized 20-minute detention at issue as investigative or *Terry*-type stop) with *Sharpe v. United States*, 660 F.2d 967, 970 (4th Cir. 1981) (same case) (characterized same detention as "custodial arrest" and "de facto arrest").

Although the Court has not said explicitly that all automobile searches and seizures should be judged under the balancing test, it has in fact consistently employed that test in cases involving the brief detention and investigation of automobiles and their passengers. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Therefore, it seems likely that the Court would evaluate drunk driving roadblock investigations under the balancing test, as have almost all of the courts that have considered these investigations, see *supra* note 8.

¹³³ It should be stressed that no additional types of suspicionless searches and seizures, beyond those described *supra* text accompanying notes 48-131, have been permitted under the balancing approach. However, because the respective criteria involved in this approach and traditional fourth amendment analysis differ somewhat, it is important to examine drunk driving roadblocks specifically under the balancing criteria.

of the "reasonableness" of the type of governmental intrusion involved. "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."¹³⁴

Under traditional fourth amendment analysis, any search or seizure is presumptively unreasonable, and hence unconstitutional, unless it is based upon a warrant and probable cause. Neither requirement can be dispensed with unless there is an applicable exception.¹³⁵ In contrast, when the balancing approach is employed, reasonableness is evaluated on an ad hoc basis according to a utilitarian calculus. The ultimate issue is whether the costs of a particular search or seizure, in terms of reducing individual liberty or privacy, are outweighed by its benefits in terms of promoting some societal interest.¹³⁶ Whether probable cause

¹³⁴ *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2579 (1983) (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), and citing several decisions involving Border Patrol car searches). Under the balancing analysis, the Court evaluates whether a search or seizure was reasonable in its inception. The fourth amendment also requires searches or seizures to be reasonable in their execution. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 20 (1968). Therefore, even if a drunk driving roadblock investigation is viewed as reasonable in its inception, procedural safeguards must still be imposed to ensure that it is reasonable in its execution. *See infra* text accompanying notes 298-342.

¹³⁵ *See supra* text accompanying notes 31-36.

¹³⁶ In applying the balancing test, the Court in several respects unfairly weights the scales in favor of reasonableness. On the individual side of the balance, the Court weighs only the individual interests of the particular person involved in the case at bar. It does not consider the collective interests of all people whose freedom and privacy are invaded by the type of search or seizure at issue. On the other side of the balance, the only societal interests that the Court considers are those relating to law enforcement. There is a compelling societal interest in maintaining our collective security from invasions by the police, as well as by criminals. *See Johnson v. United States*, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."), *quoted in Camara v. Municipal Court*, 387 U.S. 523, 529 (1967); *see also* Justice Brandeis's famous dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1927). Yet the current fourth amendment balancing test ascribes no weight to this vital societal interest. *See* Justice Brennan's opinion in *New Jersey v. TLO*, 105 S. Ct. 733, 755 n.5 (1985) (dissenting in part). Conversely, the Court ascribes too much weight to society's alleged law enforcement interests in particular searches and seizures by, in effect, assuming that they will be uniquely successful in achieving their law enforcement goals, and ignoring their countervailing law enforcement costs. *See id.* at 755, 757 (Brennan, J., dissenting in part).

A prominent state supreme court justice articulated some of these criticisms of fourth amendment balancing tests in an opinion finding suspicionless hunting and fishing roadblock stops unconstitutional:

The . . . most common fallacy in "balancing" is to place on one side the entire, cumulated interest represented by the state's policy and compare it

(or even reasonable suspicion) should be required is integrated into the overall analysis of individual cost versus societal benefit.¹³⁷ The Court has not stated expressly which party bears the burden of proof in a fourth amendment reasonableness inquiry. However, language in some recent opinions indicates that the burden is on the government.¹³⁸ Because any search or seizure by definition intrudes on individual liberty and privacy, it can be viewed as presumptively unreasonable. However, the government may overcome this presumption by demonstrating that the search or seizure is relatively unintrusive, or that the countervailing societal interest is very strong.¹³⁹

The strength of the government's interest depends upon the seriousness of the offense that the search or seizure aims to detect or deter,¹⁴⁰

with one individual's interest in freedom from the specific intrusion on the other side. . . . The semantic balance looks different when it matches the freedom of thousands of citizens from being stopped and questioned by police officers against the chance that one or a few will admit to a . . . violation.

State v. Tourtillott, 289 Or. 835, 879-82, 618 P.2d 423, 441-42 (1980) (Linde, J., dissenting), cert. denied, 451 U.S. 972 (1981). In light of the large number of cars stopped and the small number of arrests made at drunk driving roadblocks, they might well fail the type of balancing test described by Justice Linde. See *infra* notes 183, 195, & 271 and text accompanying notes 194-211 & 214.

¹³⁷ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-62 (1976).

¹³⁸ For example, in *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court repeatedly indicated that the state had the burden of demonstrating the efficacy — and perhaps even the necessity — of the spot license and registration checks at issue. See *infra* text accompanying notes 167-74. But see *Prouse*, 440 U.S. at 667 (Rehnquist, J., dissenting) (“[T]he Court’s approach reverses the presumption of constitutionality accorded acts of the States. The burden is not upon the State to demonstrate that its procedures are consistent with the Fourth Amendment, but upon respondent to demonstrate that they are not.”).

¹³⁹ Several courts that have ruled upon drunk driving roadblocks have expressly recognized that the state bears the burden of justifying them by establishing that roadblocks are in fact effective in reducing drunk driving and that no less intrusive alternative law enforcement technique can serve this purpose. See, e.g., *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983); *People v. Bartley*, 125 Ill. App. 3d 375, 466 N.E.2d 346, 348-49 (1984); *State v. McLaughlin*, 471 N.E.2d 1125 (Ind Ct. App. 1984); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983).

¹⁴⁰ See, e.g., *Brown v. Texas*, 443 U.S. 47, 50-51 (1979) (“Consideration of the constitutionality of such seizures [that are less intrusive than a traditional arrest] involves a weighing of the gravity of the public concern served by the seizure. . . .”). In traditional fourth amendment analysis, the seriousness of the offense at issue has no bearing on the scope of fourth amendment protection. See generally *W. LAFAVE, supra* note 98, § 1.2(e), at 37-38. But see *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting) (“[I]f we are to make judicial exceptions to the Fourth

its effectiveness in accomplishing such detection or deterrence,¹⁴¹ and the comparative effectiveness of alternative measures available for such detection or deterrence.¹⁴² A factor often considered is whether the law enforcement goal in question could effectively be promoted through techniques that intrude less upon individual privacy and freedom.¹⁴³ In upholding as reasonable certain types of searches and seizures that are not based upon probable cause, the Court repeatedly has pointed to the absence of viable alternative law enforcement techniques to promote the pertinent law enforcement goal.¹⁴⁴ Conversely, in striking down as unreasonable other types of searches and seizures that are not based on probable cause, the Court consistently has relied on the availability of alternative law enforcement strategies that do less damage to fourth amendment interests, including strategies based on probable cause.¹⁴⁵

Amendment for these reasons [the special problems presented by automobiles] . . . they should depend somewhat upon the gravity of the offense.”)

¹⁴¹ See *infra* text accompanying notes 167-71 & 174.

¹⁴² See *infra* text accompanying notes 143-45 & 172-73.

¹⁴³ The Court has not only employed the “least intrusive alternative” approach in determining whether searches and seizures not based on probable cause are reasonable in their inception. It also has employed this approach in determining whether such searches and seizures are reasonable in their execution. See *infra* text accompanying notes 295-96.

The least intrusive alternative approach is not a consistent theme in fourth amendment jurisprudence. To the contrary, the Court has expressly rejected this approach in reviewing some searches and seizures. See, e.g., *Michigan v. Long*, 103 S. Ct. 3469 (1983) (officers not required to adopt “alternative means” to ensure safety when *Terry*-type investigation requires quick decisions); *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983) (least intrusive alternative principle held not applicable to inventory searches); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (In upholding warrantless search of car trunk, Court noted that the abstract, hypothetical availability of “‘less intrusive’ means does not, by itself, render the search unreasonable.”).

The cases that employ the least intrusive alternative analysis in evaluating searches and seizures not based on probable cause or reasonable suspicion do not explain why such analysis is appropriate in those contexts, but not in other fourth amendment cases. A detailed, overarching explanation is beyond the scope of this Article. However, a cogent rationale for including the least restrictive alternative requirement in the fourth amendment balancing test can be suggested: the balancing analysis demands that any governmental intrusion on individual rights be specifically justified by its necessity to promote a certain societal interest. Accordingly, if the societal interest ostensibly justifying any intrusion could effectively be promoted through a measure that threatens liberty and privacy less than the one being challenged, the latter should ipso facto fail the balancing test. See *infra* note 293.

¹⁴⁴ See, e.g., *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2580 (1983); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-57 (1976).

¹⁴⁵ For example, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court struck down random car stops by Border Patrol agents, away from international bor-

In evaluating the intrusiveness of a particular search or seizure, the Court distinguishes two factors: objective and subjective intrusiveness. The degree of objective or physical intrusiveness of a particular search or seizure depends upon its nature, duration, and scope. The degree of subjective or psychological intrusiveness turns upon a hypothetical individual's perception of and reaction to it.¹⁴⁶ The Court asks whether the search or seizure is likely to stimulate feelings of "concern," "fright," "surprise,"¹⁴⁷ "embarrassment,"¹⁴⁸ "anxiety,"¹⁴⁹ or "awe"¹⁵⁰ in its target.¹⁵¹

The Supreme Court's discussion of subjective intrusiveness does not rely on empirical evidence — either specific evidence regarding the reactions of particular individuals, or generalized evidence such as public opinion surveys or expert opinions.¹⁵² Instead, the Court makes as-

ders, to make brief inquiries regarding citizenship and residency. The Court stated: "We are not convinced that the legitimate needs of law enforcement *require* this degree of interference with lawful traffic." *Id.* at 883 (emphasis added). The Court also stated: "Our decision . . . takes into account . . . the availability of alternatives to random stops unsupported by reasonable suspicion." *Id.* at 883 n.8.

¹⁴⁶ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976).

¹⁴⁷ *Id.* at 558-59.

¹⁴⁸ *United States v. Ortiz*, 422 U.S. 891, 895 (1975).

¹⁴⁹ *Delaware v. Prouse*, 440 U.S. 648, 657 (1979).

¹⁵⁰ *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2580 (1983).

¹⁵¹ The more recent suspicionless search and seizure cases discussed in part I of this Article were expressly decided pursuant to the reasonableness standard. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Some of the older opinions discussed in part I, which first recognized exceptions to the probable cause requirement, were not explicitly phrased in the current balancing rubric. However, the criteria that they considered can readily be rephrased in these terms. For example, in permitting suspicionless housing inspections, *Camara v. Municipal Court*, 387 U.S. 523 (1967), stressed two factors that can be viewed as lessening the subjective intrusiveness of these inspections: they had a long history of public and judicial acceptance, and an administrative rather than a criminal purpose. *Id.* at 537. Individuals should be relatively unsurprised and unfrightened by searches to which they are accustomed, and which will almost certainly not lead to criminal prosecution or sanctions. *Camara* expressly noted that an administrative inspection may be "a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." *Id.* at 530. Another factor stressed by *Camara*, the impersonal nature of housing inspections, can be described as lessening their objective intrusiveness. See *id.* The final factor upon which *Camara* relied constitutes the governmental side of the balance under the reasonableness approach — the absence of viable alternatives for promoting important governmental interests. *Id.*

¹⁵² Perhaps most motorists would not mind being stopped at drunk driving roadblocks. See *supra* note 14. However, public opinion should hardly be a determinative measure of constitutionality; if it were, we probably would have very few rights. The volatility and inconsistency of public opinion is another reason to avoid relying on it in

sumptions about an appropriate reaction to a particular type of search or seizure. Thus, the Court's fourth amendment balancing decisions rely on purported descriptive observations that are essentially prescriptive value judgments.¹⁵³

In evaluating subjective intrusiveness, the Court has primarily focused on whether individuals are, or would perceive themselves to be, arbitrarily or discriminatorily singled out by the police. The Court presumes that individuals who perceive themselves as victims of arbitrariness or discrimination will define the search or seizure as especially intrusive. Conversely, the Court presumes that individuals who perceive that they are being subjected to the same treatment as every other similarly situated individual will define the police encounter as relatively unintrusive.¹⁵⁴ Another important determinant of the degree of subjec-

constitutional adjudication. As Justice Brennan recently cautioned:

Moved by whatever momentary evil has aroused their fears, officials — perhaps even supported by a majority of citizens — may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of “the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.” . . . That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term “probable cause.”

New Jersey v. TLO, 105 S. Ct. 733, 754 (1985) (Brennan, J., dissenting in part) (footnote and citations omitted) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

¹⁵³ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (“[T]he stops [at border crossing checkpoints] should not be frightening or offensive because of their public and relatively routine nature.”).

¹⁵⁴ For example, in *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975), the Court stated:

[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving patrol stop. . . . 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 . . . by the intrusion.

This statement is a shining example of a prescriptive statement masquerading as a descriptive observation. It is not only unsupported by any data on motorists' probable reactions to roadblock stops versus roving patrol stops; as Justice Rehnquist observed in his dissenting opinion in *Prouse*, quoted *infra* note 285, it is also contrary to common sense. It seems highly likely that some travelers would be especially frightened by a roadblock replete with blinking lights, numerous police officers and vehicles, pulled-over cars, and spectators. It is hardly obvious that everyone will find these law enforcement extravaganzas comforting. In other countries, such displays of police power are the hallmark of authoritarian regimes. One state court that found all drunk driving roadblocks per se unconstitutional stressed that the subjective intrusiveness, or “fear

tive intrusiveness is whether individuals are taken by surprise, in which case the search or seizure ranks high on the subjective intrusiveness scale.¹⁵⁵ The Court also has concluded that a search or seizure in public is less subjectively intrusive than one in private.¹⁵⁶

As indicated in the preceding discussion, the Court's fourth amendment balancing approach is subject to serious criticism on several grounds.¹⁵⁷ Most importantly, by attenuating the independent significance of the fourth amendment's central probable cause requirement, the balancing approach markedly diminishes fundamental, historically rooted, fourth amendment protections.¹⁵⁸ Furthermore, the subjective

factor," was *heightened* by the presence of numerous police officers and other indicia of authority. *State v. Smith*, 674 P.2d 562, 564 (Okla. Crim. App. 1984).

¹⁵⁵ *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976). This assumption could be disputed. If, notwithstanding the forewarning, the motorist cannot avoid the roadblock, the effect of the advance warning may very likely be to prolong and intensify his anxiety, rather than to reduce it. *See Delaware v. Prouse*, 440 U.S. 648, 657 (1979) ("anxiety" is an aspect of subjective intrusiveness). The Supreme Court seems to be equating anxiety with surprise. But surely a court could take judicial notice that anxiety can be caused by the dread of an anticipated, completely unsurprising event.

¹⁵⁶ *Martinez-Fuerte*, 428 U.S. at 560. This conclusion is also questionable. It is certainly plausible that at least some individuals would suffer greater embarrassment as a result of a search or seizure conducted in public view than one conducted in private. *See United States v. Ortiz*, 422 U.S. 891, 895 (1975) ("embarrassment" is an aspect of subjective intrusiveness). The Colorado Supreme Court recently observed that roadside sobriety tests could be considered more subjectively intrusive than chemical testing for blood alcohol content precisely because the latter usually takes place "in the relatively obscure setting of a station house or hospital," whereas the former often takes place "on or near a public street with the suspect exposed to the full view of . . . anyone else who happens to be in the area." *People v. Carlson*, 677 P.2d 310, 317 (Colo. 1984).

¹⁵⁷ For a classic critique of "interest balancing" in constitutional adjudication, see Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424 (1962).

¹⁵⁸ *See supra* text accompanying notes 31-33; *see also* Justice Blackmun's concurring opinion in *New Jersey v. TLO*, 105 S. Ct. 733, 749 (1985) (quoting *United States v. Place*, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring)) (citations omitted) (third and fourth brackets in original):

"[T]he [Fourth] Amendment does not leave the reasonableness of most [searches] to the judgment of courts or government officers; the Framers of the Amendment balanced the interests involved and decided that a [search] is reasonable only if supported by a judicial warrant based on probable cause." . . . Only 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.

See also Dunaway v. New York, 442 U.S. 200, 214 (1979) ("For all but . . . narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by

intrusiveness concept, which is central to the balancing approach, is illogical and lacks empirical support.¹⁵⁹ By committing itself to this concept, the Court overemphasizes the fourth amendment's purpose of limiting arbitrary or discriminatory searches and seizures, while slighting the amendment's equally important purpose of preventing unjustified or unfounded searches and seizures.¹⁶⁰ The balancing approach also does not fairly weigh the individual and societal interests actually implicated by particular searches and seizures,¹⁶¹ and is subject to other criticisms beyond the scope of this Article.¹⁶² The key point for present purposes is that, even assuming the appropriateness of the balancing test, drunk driving roadblocks are of dubious constitutionality.

B. *Balancing Analysis of Drunk Driving Roadblocks*

Although the Supreme Court's balancing approach generally subjects searches and seizures to less rigorous scrutiny than they would receive under traditional fourth amendment analysis, it by no means results in automatic approval. *Delaware v. Prouse*,¹⁶³ a leading example of the balancing analysis, illustrates this point. The *Prouse* Court invalidated as unreasonable random suspicionless car stops to check for drivers' licenses and vehicle registrations. The *Prouse* rationale provides strong

probable cause."); see also *infra* text accompanying notes 279-88.

¹⁵⁹ See *supra* notes 152-56 and accompanying text.

¹⁶⁰ The Court's notion of subjective intrusiveness is disturbing not only because of its unsubstantiated assumptions about what types of police interference will be intolerable to the reasonable individual. See *supra* notes 153-56 and accompanying text. More fundamentally, the Court's emphasis on this concept is troublesome because it reflects a limited view of the fourth amendment's guarantees. The Court's subjective intrusiveness concept turns upon judgments concerning equal protection and due process values that are peripheral to the fourth amendment's central concern for limiting the role of the police in the everyday lives of ordinary citizens. See *infra* text accompanying notes 279-88. Rather than asking whether a challenged police practice infringes on citizens' privacy and freedom, the Court asks whether the practice is implemented uniformly and with advance notice. But, that a police practice might comport with equality and procedural fairness concerns does not assure its consistency with fourth amendment concerns. The purpose of the fourth amendment is to protect individuals from Big Brother's surveillance — regardless of whether the surveillance is uniform and overt, and regardless of whether it has been preceded by advance notice.

¹⁶¹ See *supra* note 136.

¹⁶² Another major defect in the balancing test, which Justice Brennan recently described as "Rohrschach-like," is that it calls for subjective, ad hoc determinations. *New Jersey v. TLO*, 105 S. Ct. 733, 752 (1985) (Brennan, J., dissenting in part). It affords policymakers and law enforcement agents scant guidance and encourages repetitive litigation focusing upon the factual differences among generally similar situations.

¹⁶³ 440 U.S. 648 (1979).

support for the conclusion that drunk driving roadblock stops are also unreasonable. The random or "spot" checks at issue in *Prouse* were designed to promote the very same "vital" societal interest in highway safety as are drunk driving roadblocks.¹⁶⁴ Indeed, the *Prouse* decision expressly recognized that one societal interest addressed by the challenged spot checks was "the apprehension of . . . drivers under the influence of alcohol or narcotics."¹⁶⁵ Notwithstanding the importance of this governmental purpose, the Court invalidated the spot checks because the state had not satisfied its burden of proving that they were sufficiently productive "[i]n terms of actually discovering" unlicensed or intoxicated drivers "or deterring them from driving."¹⁶⁶ It is doubtful that proponents of drunk driving roadblocks could satisfy this burden of proof either.

1. The Productivity of Drunk Driving Roadblocks

Prouse makes clear that roadblock proponents would not prevail in court merely by touting the gravity of the drunk driving problem and averring, without specific proof, that roadblocks provide a solution. To pass the fourth amendment balancing test, a challenged law enforcement technique must be proved "a sufficiently productive mechanism to justify the [resulting] intrusion on fourth amendment interests."¹⁶⁷ The *Prouse* Court observed that no evidence demonstrated that the stops at issue "substantially promoted" the state's interest in increasing highway safety,¹⁶⁸ or proved such stops to be "necessary."¹⁶⁹ The *Prouse* opinion repeatedly stressed the absence of empirical data to substantiate the alleged effectiveness of these stops,¹⁷⁰ and noted that they merely made "incremental" or "marginal" contributions to highway safety.¹⁷¹ The Court concluded that, "given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that . . . spot check[s are justified] . . . under the Fourth Amendment."¹⁷² Without citing any evidence, the Court declared that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . .

¹⁶⁴ *Id.* at 658.

¹⁶⁵ *Id.* at 659 n.18.

¹⁶⁶ *Id.* at 660.

¹⁶⁷ *Id.* at 659.

¹⁶⁸ *Id.* at 661.

¹⁶⁹ *Id.* at 660.

¹⁷⁰ *Id.* at 659-61.

¹⁷¹ *Id.* at 659, 661.

¹⁷² *Id.* at 659.

is acting upon observed violations."¹⁷³ Finally, *Prouse* discounted the spot checks' alleged deterrent effect, noting that no such effect was substantiated by empirical evidence.¹⁷⁴

The burden of proof established by *Prouse* would be very difficult for drunk driving roadblock proponents to satisfy. No convincing data demonstrate that sobriety checkpoints "substantially promote,"¹⁷⁵ much less are "necessary" for,¹⁷⁶ highway safety. Moreover, there are "alternative mechanisms" for promoting this goal, including "[t]he foremost method of acting upon observed violations."¹⁷⁷ There is only "mere assertion," rather than convincing empirical evidence, to demonstrate that drunk drivers "would not be deterred by the possibility of being involved in a traffic violation or having some other experience" that would subject them to a police officer's scrutiny, but that they "would be deterred by the possibility" of being stopped at a roadblock.¹⁷⁸ For these reasons, the *Prouse* conclusion that the spot check "does not appear sufficiently productive to qualify as a reasonable law enforcement practice under the Fourth Amendment"¹⁷⁹ applies with equal force to sobriety checkpoints.

The unreasonableness of drunk driving roadblocks becomes even clearer when the actual gravity of the drunk driving problem, the efficacy of roadblocks, and the availability of less intrusive alternatives are examined more closely. All of these considerations weigh against sobriety checkpoints on both constitutional and policy grounds.

a. *The Gravity of the Drunk Driving Problem*

Many legislators, police officials, prosecutors, and judges apparently have an image of drunk driving as a unique and ever-increasing problem that requires extraordinary countermeasures.¹⁸⁰ Too few policy-

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 660.

¹⁷⁵ *Id.* at 661.

¹⁷⁶ *Id.* at 660.

¹⁷⁷ *Id.* at 659.

¹⁷⁸ *Id.* at 660.

¹⁷⁹ *Id.*

¹⁸⁰ For example, several Supreme Court opinions convey the view that drunk driving is an enormous problem. *See, e.g.,* *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983): "The situation underlying this case — that of the drunk driver — occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court . . . has repeatedly lamented the tragedy." The *Neville* opinion also cited statements from other Supreme Court opinions that reflect this perspective. *See id.*

makers or courts examine the available information concerning either the amount of drunk driving or the number of traffic deaths and injuries, much less the number of deaths and injuries caused by drunk drivers. While the personal and social costs of drunk driving should not be minimized, they must be demystified and placed in proper perspective. In evaluating drunk driving roadblocks, it is especially noteworthy that only a small percentage of drivers are drunk at any given time and place,¹⁸¹ and only a small subset of these drunk drivers are involved in accidents causing death or injuries.¹⁸² These figures underscore that, in

¹⁸¹ It is difficult to estimate the amount of drunk driving that occurs, even in a particular jurisdiction at a particular time of year, month, week, or day. To obtain the most accurate results, one would need to stop all motorists at random times and places and have them submit to blood or chemical tests for alcohol. It would be important not to distort the results either by choosing roadways with particular kinds of drivers (for example, college students, blue collar workers, or churchgoers), or by choosing unusual times. Some studies have followed this model. The most famous is Professor Borkenstein's Grand Rapids study in which drivers were randomly tested at sites where accidents had occurred in the previous three years. Drivers were asked to provide breath samples to the researchers voluntarily. Borkenstein's results show that only .75% of all drivers who were tested had a blood alcohol content (BAC) at or above .10%, which is the national standard for drunk driving. Another 2.47% had a BAC between .05% and .09%. Ten percent of all drivers tested positively for the presence of any alcohol at all. Borkenstein, Crowther, Shumate, Ziel & Zylman, *The Role of the Drinking Driver in Traffic Accidents (The Grand Rapids Study)* (2d. ed.), in 2 *BLUTALKOHOL: ALCOHOL, DRUGS AND BEHAVIOR* 1, 66 (Supp. 1974) [hereafter Borkenstein].

A higher proportion of drivers are intoxicated during the late night or early morning weekend hours than at other times. A nationwide study conducted in 1973 by the University of Michigan's Highway Research Institute found that 3.2% of the drivers tested between 10 and 12 p.m. had a BAC at or above .10%, and 6.3% had a BAC between .05% and .09%. The period between 2 and 3 a.m. showed 11.1% of the drivers with a BAC above .10% and 13.5% with a BAC from .05% to .09%. Wolfe, *Characteristics of Late-Night, Weekend Drivers: Results of the U.S. National Roadside Breath-Testing Survey and Several Local Surveys*, in 1 *ALCOHOL, DRUGS, AND TRAFFIC SAFETY, PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE ON ALCOHOL, DRUGS, AND TRAFFIC SAFETY* 41, 41-49 (S. Israelstam & S. Lambert eds. 1974).

Prior to implementing the federally sponsored Alcohol Safety Action Projects (ASAP) in the early 1970's, 19 communities conducted nighttime random roadside breath test surveys. Five and two-tenths percent (5.2%) of the drivers surveyed had a BAC level over .10%. Voas, *Results and Implications of the ASAPS*, in 3 *ALCOHOL, DRUGS AND TRAFFIC SAFETY* 1129, 1129-44 (L. Goldberg ed. 1981).

¹⁸² See J. GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS: DRINKING, DRIVING AND THE SYMBOLIC ORDER* (1981) (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); Zylman, *A Critical Evaluation of the Literature on "Alcohol Involvement" in Highway Deaths*, 6

an effort to detect and deter a small fraction of drivers, sobriety checkpoints infringe the rights of vast numbers of innocent sober drivers.¹⁸³

Although the total number of lives lost or impaired in traffic accidents is very high, fatal or serious accidents are statistically rare events in light of the number of drivers and the amount of driving. The National Safety Council reports a death rate of approximately 2.9 deaths per one hundred million vehicle miles.¹⁸⁴ Fatalities have steadily declined over the past decade.¹⁸⁵ Indeed, the ratio of traffic deaths to population, miles driven, and licensed drivers has not increased over the last five decades.¹⁸⁶ The Department of Transportation's figures for 1983 show 43,208 traffic deaths, the lowest level in twenty years.¹⁸⁷ The traffic death rate in 1983 — 2.9 deaths per one hundred million vehicle miles — was the lowest ever recorded.¹⁸⁸ These statistics should dispel any notion that there is an unprecedented epidemic of traffic injuries or deaths.

Although drunk driving is a significant factor in traffic death and injury tolls, the widely cited statistic that drunk drivers cause fifty percent of all traffic fatalities¹⁸⁹ is probably exaggerated.¹⁹⁰ In any case,

ACCIDENT ANNAL. & PREV. 163 (1974) (showing how the estimates of fatalities caused by drunk driving have been systematically exaggerated); *see also infra* text accompanying note 191.

¹⁸³ These considerations should be weighed against the constitutionality of drunk driving roadblocks in the Supreme Court's balancing analysis. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976): "In *Brignoni-Ponce*, we recognized that Fourth Amendment analysis in this context [vehicle stops and investigations of motorists] also must take into account the overall degree of interference with legitimate traffic." (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975)); *see also supra* note 136.

¹⁸⁴ NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 40 (1983) [hereafter ACCIDENT FACTS] (copy on file with *U.C. Davis Law Review*).

¹⁸⁵ Before drunk driving roadblocks were introduced in the 1980's, the number of deaths per 100 million motor vehicle miles had long been declining. From 1971-81, the number of deaths dropped 28%. The rate of decline from 1980-81 was 5%; from 1981-82, it was 9%. *Id.* at 59.

¹⁸⁶ *Id.*

¹⁸⁷ NATIONAL TRANSPORTATION SAFETY BOARD, ANNUAL REPORT TO CONGRESS 1983, at 21 (1984).

¹⁸⁸ ACCIDENT FACTS, *supra* note 184, at 40. These figures increased slightly in 1984. NATIONAL TRANSPORTATION SAFETY BOARD, ANNUAL REPORT TO CONGRESS 1983, at 21 (1984).

¹⁸⁹ *See, e.g.*, PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 2; *Pro and Con: Checkpoints to Catch Drunk Drivers?*, 65 U.S. NEWS & WORLD REP., July 4, 1983, at 65 (quoting New York City Police Commissioner Robert McGuire).

¹⁹⁰ This figure is based upon data collected by the National Highway Traffic Safety Administration's Fatal Accident Reporting System (FARS). Although FARS seeks

drunk drivers are unlikely to cause more than a small number of deaths or injuries over the course of a year in any particular area. For example, a study supervised by Professor Herman Goldstein of the University of Wisconsin Law School and Professor Charles Susmilch, a sociologist, revealed that from 1975 to 1980, sixty-six persons were killed in traffic accidents in Madison, Wisconsin, a city with a 250,000 population, including a large number of college students. That is an average of slightly over thirteen fatalities per year. Goldstein and Susmilch estimated that no more than fifty-three percent of these fatalities could be attributed to drunk drivers, yielding an average of 7.0 drunk driving deaths per year. A more conservative estimate would attribute approximately thirty-six percent of the fatalities to at-fault drunk drivers, or 4.8 deaths per year.¹⁹¹ Attempting to eliminate or reduce these 4.8-7.0 fatal accidents (and the larger number of serious accidents) each year by stopping tens, or even hundreds, of thousands of motorists is akin to the proverbial search for a needle in a haystack.

The majority of fatal accidents involving drunk drivers are single vehicle crashes.¹⁹² Because most of those who die in alcohol-related accidents are drunk drivers, most alcohol-related traffic deaths more closely resemble suicide than homicide. The existence of many sober victims makes drunk driving a crime problem as well as a major public health problem. However, drunk driving does not obviously outrank many other types of injurious conduct that criminal laws seek to deter and

BAC test scores for drivers involved in all traffic fatalities, it has only been able to obtain these scores for 36.6% of such drivers. Of this 36.6%, 42.5% had a BAC test result greater than .10% (the nationwide standard for drunk driving). There is every reason to believe that the 36.6% do not constitute a random sample of drivers involved in fatal accidents, since the police would be more likely to administer BAC tests to those drivers they suspected of intoxication. Therefore, the true percentage of traffic fatalities caused by drunk drivers might well be much lower than 42.5%. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, FATAL ACCIDENT REPORTING SYSTEM: 1980 (1981); see also Zylman, *supra* note 182.

¹⁹¹ 2 H. GOLDSTEIN & C. SUSMILCH, *THE DRINKING-DRIVER IN MADISON, A STUDY OF THE PROBLEM AND THE COMMUNITY'S RESPONSE* 13 (1982).

¹⁹² For example, Goldstein and Susmilch found that between 1975 and 1980, only 6% of the people killed by drunk drivers were pedestrians or passengers in other cars, while 62% of the people killed were the drunk drivers themselves, and 31% were passengers in drunk drivers' cars. Sober drivers killed more nondrinking drivers and pedestrians than did drunk drivers. *Id.* at 17. These figures are consistent with data demonstrating that driver deaths constitute a high percentage of all traffic fatalities. See 11 HIGHWAY & VEHICLE SAFETY REPORT 4 (Feb. 18, 1985) (preliminary study of traffic fatalities for 1984 showed that 58% were drivers) (copy on file with *U.C. Davis Law Review*).

punish — mass murders, armed robbery, kidnapping, arson, child abuse, and narcotics trafficking, to name a few. Thus, there is no more reason to set aside our traditional social, political, and legal values to fight drunk driving than to fight these other crimes.¹⁹³

b. The Efficacy of Drunk Driving Roadblocks

Proponents of drunk driving roadblocks exaggerate their efficacy in reducing traffic carnage. Even their proponents recognize that the potential effectiveness of drunk driving roadblocks does not lie in detecting drunk drivers and removing them from the roads.¹⁹⁴ Sobriety checkpoints produce very few drunk driving arrests.¹⁹⁵ Rather, advocates seek

¹⁹³ Decisionmakers would do well to recall Lord Camden's observation with respect to the English common law tradition that "the mere need to solve crimes . . . did not allow the law to place its own enforcement above all other values." J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19-42 (1966). The powerful language of Supreme Court cases such as the following oft-quoted passage in *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (footnotes omitted), also bears serious consideration:

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [the fourth amendment] and the values it represents may appear unrealistic or "extravagant" to some. But the values 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 intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.

See also *supra* note 15 and *infra* text accompanying note 344.

¹⁹⁴ For example, the police chief of Narragansett, Rhode Island, who first experimented with drunk driving roadblocks in that state, has acknowledged that roadblocks are not a particularly efficient way of apprehending drunk drivers. Fitzgerald, *Road Blocks Would Deter Drunk Driving, 2 Officials from R.I. Tell U.S. Panel*, Providence J., Dec. 1, 1982, cited in AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE, *THE CONSTITUTIONAL AND POLICY PROBLEMS WITH DRUNK DRIVING ROADBLOCKS* 3 (April 1983) (copy on file with *U.C. Davis Law Review*); accord NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, *THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT* 2 (1983) (copy on file with *U.C. Davis Law Review*) (emphasis in original): "[Drunk driving roadblocks] . . . have *not* been proven cost effective when used solely for producing DWI arrests, nor when they are used as the *sole* DWI enforcement technique."

¹⁹⁵ Although thousands of cars are stopped, only a few drunk driving arrests are made. In State *ex rel.* *Ekstrom v. Justice Court*, 136 Ariz. 1, 2, 663 P.2d 992, 993 (1983) (Prager, J., dissenting), the Arizona Supreme Court pointed out that 5763 vehicles were stopped at the drunk driving roadblocks under consideration, yet only 14 drivers were arrested for driving under the influence. Similarly, the dissenting opinion

to justify them chiefly on the basis of an alleged deterrent effect¹⁹⁶ that is speculative and probably unmeasurable.¹⁹⁷ First, they claim that arrestees at roadblocks will not only be removed from the road during their processing, but will also be deterred from committing future violations. Second, roadblocks are said to exercise a general deterrent effect on the entire population of drivers who encounter them. Regardless of whether drivers were drinking before passing through the roadblock, they may leave it believing that the possibility of apprehension for drunk driving is much higher than previously imagined. If that is true, they may be less likely to drive while intoxicated in the future. Third, it is claimed that drunk driving roadblocks may have a general deterrent effect on citizens who have not been stopped themselves, but who have learned of the roadblocks through the media or by word of

in *State v. Deskins*, 234 Kan. 529, 544-46, 673 P.2d 1174, 1187 (1983), pointed out that of the 2000-3000 motorists stopped at the drunk driving roadblock in question, only 15 were arrested for driving under the influence of alcohol. A DWI strike force that operated sobriety checkpoints in Bergen County, New Jersey from May 31, 1983, to October 30, 1983, reported that 17,824 motor vehicles were stopped, and that 276 DWI arrests were made. During its 22 weekends of operation, the strike force made one DWI arrest for every 5.2 hours of enforcement. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, 3 TRAFFIC SAFETY EVALUATION RESEARCH REVIEW 5 (Nov.-Dec. 1984) (copy on file with *U.C. Davis Law Review*) [hereafter TRAFFIC SAFETY EVALUATION]. During the July 4, 1983, weekend the Massachusetts State Police maintained drunk driving roadblocks at which 11,863 cars were stopped and 66 DWI arrests made. *Id.* at 5. The Delaware State Police have reported that at the sobriety checkpoints which they conducted between December 1982 and September 1983, 14,412 vehicles were stopped and 264 alcohol-related arrests made. *Id.* at 8; *see also infra* text accompanying note 214.

¹⁹⁶ *See, e.g.*, GOVERNOR'S ALCOHOL AND HIGHWAY SAFETY TASK FORCE, *supra* note 4, at 9; NTSB STUDY, *supra* note 2.

¹⁹⁷ Highly respected literature in the field of criminology indicates that most criminals simply do not believe they will be caught, therefore rendering doubtful the purported deterrent effect of severe criminal laws. *See, e.g.*, F. ZIMRING & G. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* (1973). There is no reason to believe that drunk drivers would be more likely than other criminals to believe they will be caught. To the contrary, since they are drunk, there is every reason to think these individuals might be particularly resistant to deterrence threats. The limited attempts to determine whether sobriety checkpoints in fact have any deterrent effect have not found one. For example, a recent study of the extent to which two drunk driving roadblock programs changed public perceptions or behavior concerning drunk driving found no deterrent effect. The study concluded: "Despite the high visibility and awareness of roadblocks, and evidence that they increase estimates of the likelihood that drunk drivers will be picked up, the limited evidence from the self-reported behavioral measures does not indicate that roadblocks have changed the drinking and driving behavior of [survey] respondents" TRAFFIC SAFETY EVALUATION, *supra* note 195, at 17; *see infra* note 201.

mouth.¹⁹⁸

Despite claims by police departments, government officials, anti-drunk driving programs, and citizens' groups,¹⁹⁹ it has not been convincingly demonstrated that drunk driving roadblocks have reduced drunk driving in any jurisdiction,²⁰⁰ and the authors are unaware of

¹⁹⁸ See Note, *Roadblock Seizures*, *supra* note 16, at 1458 n.3; see also *supra* note 4.

¹⁹⁹ For example, during the year following Delaware's enactment of a strengthened anti-drunk driving law, alcohol-related fatalities in that state dropped 23%. According to Delaware Lieutenant Governor Michael Castle, "probably the single greatest deterrent effect has been the sobriety checkpoints run by the State Police." NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *TRAFFIC SAFETY NEWSLETTER*, Oct.-Dec. 1983, at 3 (copy on file with *U.C. Davis Law Review*). The Lieutenant Governor's conclusion is apparently impressionistic, and not based upon any empirical analysis. The results he cited could be attributable to many factors, including changes in police behavior. See *infra* notes 205-11 and accompanying text.

²⁰⁰ To the authors' knowledge, the only serious effort to evaluate the effectiveness of drunk driving roadblocks was undertaken by the Maryland State Police. They implemented roadblocks for a trial three-month period in Harford County. They then compared the numbers of all accidents, alcohol-related accidents, and fatal accidents during that period with corresponding statistics in the same county from the same period during the previous year, and with the experience of a control county during these same two time periods. The results are as follows:

	Harford County		Frederick County	
	Dec. - Feb. 1981-1982	Dec. - Feb. 1982-1983	Dec. - Feb. 1981-1982	Dec. - Feb. 1982-1983
Total Accidents	755	665	581	580
Percent Increase/ Decrease		-12%		0%
Alcohol- Related Accidents	133	120	108	96
Percent Increase/ Decrease		-10%		-11%
Fatal Accidents	3	8	10	3

Maryland State Police, Field Operations Bureau, Traffic Program Planning Unit, Sobriety Checkpoint Program Evaluation Report 10 (Apr. 20, 1983) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*). As compared with the previous year, total accidents in the test county declined more than in the control county. Nevertheless, taken as a whole, these figures show the roadblocks to have been ineffective.

At the outset, it should be noted that it is an error to attempt to determine whether a particular public policy intervention has produced a change by looking at only two points in time (before and after the change). To carry out "interrupted time series

any serious research underway to test roadblocks' avowed efficacy; admittedly, such research would be very difficult to execute.²⁰¹

Studies of other enforcement measures that have increased drunk driving arrest rates have concluded that such measures do not reduce either drunk driving or alcohol-related fatalities.²⁰² There seems to be

analysis" properly requires many data points both before and after the policy intervention, to determine whether there is a real break in a long-term trend, just a momentary oscillation, or a regression to the mean. See H.L. ROSS, *DETECTING THE DRINKING DRIVER* 17 (1982).

Putting that fundamental problem aside, however, can we conclude that the 12% drop in total accidents in Harford County (as compared with the 0% drop in total accidents in the control county) is attributable to a deterrent effect generated by sobriety checkpoints? The answer is clearly "no." An informed conclusion would require a great deal more information about the accidents involved, including what kinds of accidents they were, what time of the day or night they occurred, and whether they were single- or multi-vehicle. The table reveals that for accidents coded as "alcohol-related" (a designation leaving a great deal of room for discretion), the reduction in the test county (-10%) is no greater than the reduction in the control county (-11%). One could not conclude from those figures that the sobriety checkpoints had any effect on accident reduction. Furthermore, the statistics on fatal accidents are adverse to the roadblock cause: the test county experienced a 267% increase in fatal accidents (from 3 to 8), whereas the control county experienced a decrease of more than 300% (from 10 to 3).

Despite these statistics (which we emphasize cannot be taken seriously because of the lack of the large number of data points necessary for interrupted time series analysis), the report concludes that: "In summary, the pilot program has demonstrated that sobriety checkpoints have the potential to reduce motor vehicle accidents in the area where they are utilized." Sobriety Checkpoint Program Evaluation Report, *supra*, at 15. Accordingly, the Report recommended "[s]tatewide implementation of sobriety checkpoints on a highly selective basis." *Id.* The Maryland State Police's drunk driving roadblock program was upheld by the Maryland Court of Appeals in *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984).

²⁰¹ It would be extremely difficult to test the marginal deterrent effect of drunk driving roadblocks. One might try to measure the blood alcohol levels of all drivers (or a random sample of drivers) on a particular road on several occasions before and after the implementation of a roadblock program, but that would be expensive and entail legal problems. See *Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984). Assuming this testing could be done, any decrease in drunk drivers would constitute the marginal deterrent effect of the police initiative, unless other developments (such as stricter laws) during the same period were responsible for the change. This research would be problematic not only due to the difficulty of controlling for other change agents, but also because there are only a very small number of serious crashes on any one road in a year.

²⁰² Professor H. Laurence Ross, the foremost evaluator of drunk driving countermeasures, has concluded that efforts to reduce drunk driving through increasing the probability of arrest and severity of punishment have not been successful. H.L. ROSS, *supra* note 200, at 102-04. His research shows that even when crackdowns produce a short-term decrease in drunk driving, normal patterns reappear after a relatively brief

no correlation between the number or rate of drunk driving arrests in a jurisdiction and the increase or decrease in fatal accidents, especially if one considers only single vehicle nighttime fatalities, those most likely to involve alcohol.²⁰³

Supporters of drunk driving roadblocks cite reported decreases in fatalities in jurisdictions that have used such roadblocks. Most of these reports are highly unreliable, based upon unpublished and unsubstantiated claims by agencies entrusted with the job of combating drunk driving and anxious to demonstrate success.²⁰⁴ Even if they were accurate, these statistics do not demonstrate the efficacy of the roadblocks for several reasons. First, drunk driving roadblocks are usually implemented simultaneously with other new anti-drunk driving initiatives. Consequently, any decline in the incidence of drunk driving could be due to any one of these other measures.²⁰⁵

period. *Id.* at 105; accord Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 453 (1969); Ennis, *General Deterrence and Police Enforcement: Effective Countermeasures Against Drinking and Driving?*, 9 J. SAFETY RESEARCH 15, 22-23 (1977); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1681 (1981).

Similarly, although the federal government's Alcohol Safety Action Projects (ASAP), implemented in 32 counties between 1972 and 1976, resulted in substantially increased drunk driving arrests in some communities, they produced no discernible reduction in alcohol-related fatalities. Nichols, Weinstein, Ellingstad & Struckman-Jo, *The Specific Deterrent Effect of ASAP Education and Rehabilitation Programs*, 10 J. SAFETY RESEARCH 177, 185 (1978) (little deterrent effect); see also Zylman, *Mass Arrests for Impaired Driving May Not Prevent Fatal Crashes*, in PROCEEDINGS OF THE SIXTH INTERNATIONAL CONFERENCE ON ALCOHOL, DRUGS, AND TRAFFIC SAFETY, ADDICTION RESEARCH FOUNDATION 225 (1970). In 1974, the Insurance Institute of Highway Safety compared year to year variations in highway crash fatality patterns in 28 ASAP locations with those in comparable non-ASAP locations, both before and during ASAP's operational period. Institute researchers found no reductions in fatalities unique to the ASAP areas. They observed that, "in the absence of any evidence of an overall reduction in fatalities, it is only possible to conclude scientifically that ASAPs, as large scale social programs, have been ineffective." INSURANCE INSTITUTE FOR HIGHWAY SAFETY, 16 STATUS REPORT, Apr. 16, 1981, at 7 (copy on file with U.C. Davis Law Review).

²⁰³ See Waller, King, Nielson & Turkel, *Alcohol and Other Factors in California Highway Fatalities*, 14 J. FORENSIC SCIENCE 429, 432 (1969).

²⁰⁴ See *supra* note 199.

²⁰⁵ Other drunk driving countermeasures that have been implemented contemporaneously with sobriety checkpoints include raising the drinking age, imposing mandatory minimum jail sentences, restricting plea bargaining, and establishing a certain blood alcohol content as conclusive proof of guilt. Even the National Transportation Safety Board, which advocates drunk driving roadblocks, recognizes that "studies to isolate the impact of [drunk driving roadblocks] alone are difficult to accomplish because other

Second, any reduction may be the natural continuation of a long-term downward trend or the regression to the mean after a brief increase that temporarily interrupts a long-term downward trend. The rate of fatal driving accidents per mile driven has been declining since the advent of the automobile.²⁰⁶ Furthermore, the total number of traffic fatalities has declined by almost twenty percent since its peak in the early 1970's.²⁰⁷ No one knows to what extent the decline in traffic fatalities is due to better driving, safer cars, advances in emergency medical care, lower speed limits, improvements in roads, signs or lights, or other factors.

Third, even assuming that drunk driving roadblocks initially decreased drunk driving, this effect would probably diminish as drinking drivers became accustomed to roadblocks, learned where they were likely to be located, and realized that the possibility of being arrested remained low. Thus, over time, drunk driving roadblocks would not significantly increase the likelihood — or, more importantly, the perception of the likelihood — that a drunk driver would be caught. To the extent that drinking drivers react to roadblocks by driving on less safe backroads, where roadblocks cannot be effectively implemented, any deterrent effect would be offset by a displacement effect that could, ironically, increase drunk driving accidents.²⁰⁸ Indeed, available statistics indicate that even when the implementation of drunk driving roadblocks and other anti-drunk driving measures is followed by an initial decline in drinking and driving, this trend is soon reversed.²⁰⁹

[drunk driving] countermeasures, associated publicity, and myriad environmental factors combine to affect crash levels." NTSB STUDY, *supra* note 2, at 7.

²⁰⁶ ACCIDENT FACTS, *supra* note 184, at 59.

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Fitzgerald, *supra* note 194 (police chief who first instituted drunk driving roadblocks in Rhode Island commented that they probably caused drivers to shift their drinking activities to other communities where risk of being stopped was not perceived to be great).

²⁰⁹ The typical pattern is for the initial effect of an anti-drunk driving strategy, if any, to dissipate steadily over time. In several states that took strict action against drunk drivers in 1981 or 1982, early reductions in deaths and accidents involving such drivers have slowed or even reversed. For example, in Maine, after a law to attain higher rates of arrest, conviction, and punishment took effect in September 1981, the number of fatalities fell from 261 in 1980 to 211 in 1981, and to 166 in 1982. However, in 1983, the number of fatalities rose to 222. In Maryland, after several drunk driving countermeasures took effect in 1981, traffic deaths decreased from 792 in 1981 to 660 in 1982. However, the figure for 1983 remained at 660. *Drunk Driving Toll is Down, but Fears Remain*, N.Y. Times, Feb. 6, 1984, at A17, col. 1. Without careful study, it is not possible to say whether a drop in fatalities in a particular year is a real decrease, or simply a regression to the mean. See *supra* note 200. In other words, the

Finally, even if drunk driving roadblocks did decrease drunk driving, fatal and serious accidents would not necessarily decline, at least not at the same rate as drunk driving.²¹⁰ The most intractable drunk drivers are, by definition, the ones least concerned about apprehension and punishment. Many may be binge drinkers, thrill seekers, depressives, or suicidal or anti-social personalities.²¹¹ Notwithstanding any positive impact that roadblocks might have in deterring some people's future drinking-driving behavior, they might well have no influence on this type of driver. Unfortunately, we know very little about different types of drunk drivers and the natural history of fatal crashes, making pre-

high fatality year may well have been aberrational, and what looks like a decrease achieved through sound policy intervention may only be a return to normal levels.

Professor Ross found that in European countries that undertook serious efforts to combat drunk driving in the late 1960's and early 1970's, initial reductions were followed by relatively quick returns to previous levels. H.L. Ross, *supra* note 200, at 24-48. This phenomenon is illustrated by the British experience under the 1967 Road Safety Act, which empowered the police to require a breath test of any driver and deemed a driver's refusal to take the test a failure. Just as with drunk driving roadblocks, this British law aimed exclusively at increasing the certainty of apprehending drunk drivers (rather than increasing the certainty or severity of punishment). Immediately after the 1967 Road Safety Act went into effect, weekend traffic fatalities and serious injuries dropped to one-third of their previous levels. However, this effect gradually wore off, and within three years, fatalities had returned to their previous levels. *Id.* at 31.

²¹⁰ There is no hard evidence that roadblocks affect highway fatalities. The one roadblock whose impact has been analyzed with some, albeit insufficient, care had no positive impact on highway fatalities. See Table 1, *supra* note 200. An analysis of accident trends issued by New York's STOP-DWI program noted a 15.1% decline in fatal automobile accidents in 1982 (before sobriety checkpoints were implemented in New York) as compared to the previous three-year period, while all accidents declined by only 1.8%. The decline was attributed to a higher rate of unemployment (which was considered at least possibly related to the number of miles driven), an increase in seat belt usage, and improved emergency medical response, as well as harsher DWI laws. OFFICE OF ALCOHOL AND HIGHWAY SAFETY, NEW YORK DEPARTMENT OF MOTOR VEHICLES, OFFICE OF ALCOHOL AND HIGHWAY SAFETY, ACCIDENT TRENDS SINCE INITIATION OF THE SPECIAL TRAFFIC OPTIONS PROGRAM FOR DRIVING WHILE INTOXICATED 4, 8, 10, 19 (1983) (copy on file with *U.C. Davis Law Review*).

²¹¹ The prominent Scandinavian criminologist Johannes Andaneas recently came to this conclusion:

Motorists 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.

Andaneas, *Drinking—and Driving—Laws in Scandinavia*, in SCANDINAVIAN STUDIES IN LAW 13, 21 (1984). On suicide and drunk driving, see N. TABACHNICK, ACCIDENT OR SUICIDE; DESTRUCTION BY AUTOMOBILE (1973).

dictions concerning the efficacy of roadblocks all the more speculative.

c. The Availability of Less Intrusive Anti-Drunk Driving Measures

Claims concerning the need for drunk driving roadblocks are flawed for another reason. Other law enforcement and non-law enforcement strategies not only constitute potentially effective countermeasures, but also can be implemented without impinging on fourth amendment interests. In the absence of any data demonstrating the superiority of roadblocks, both policymakers and judges should prefer less intrusive countermeasures.²¹²

As even proponents of drunk driving roadblocks have acknowledged,²¹³ roadblocks do not produce many arrests for drunk driving, and are not, in that respect, demonstrably superior to other law enforcement techniques. For example, of 1,107,945 people stopped at drunk driving roadblocks conducted in New York City in the past two years, only 4823 — slightly more than four tenths of one percent — were arrested for drunk driving.²¹⁴ Police officers patrolling on roads selected because of the high incidence of drinking and driving, or officers stationed near bars and taverns at carefully chosen times, would probably make at least as many drunk driving arrests per officer hour as officers stationed at drunk driving roadblocks. The traditional patrol approach, where police officers arrest drivers whose observed erratic driving behavior creates probable cause, produces close to two million arrests per year.²¹⁵ To increase the deterrent effect of arrests made by officers on roving patrol, the police can implement periodic crackdowns with great fanfare. Deployment of police officers on patrol can also create the appearance of heightened police presence, since drivers can never be sure whether and where they will encounter a patrol car. Assigning officers to patrol duty has the added advantage that they can simultaneously enforce other laws.

²¹² See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975) (invalidating Border Patrol practice of randomly stopping vehicles, without individualized suspicion, to seek illegal aliens): “[T]he nature of illegal alien traffic . . . tend[s] to generate articulable grounds for identifying violators. Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference.” *Id.* at 883; see also *supra* text accompanying notes 143-45 & 172.

²¹³ See *supra* note 194.

²¹⁴ Telephone interview with Lanie Kirschner, New York Department of Transportation (Apr. 15, 1985); see also *supra* note 195.

²¹⁵ FBI CRIME REPORTS, *supra* note 64, at 170 (Table 23).

In light of the unimpressive arrest record of sobriety checkpoints, their proponents' major claim is that they produce more general deterrence per hour of police effort than roving patrols.²¹⁶ Yet this assertion is also unsubstantiated by reliable empirical research. How many potential drunk drivers will be deterred by ten police officers working eight hours at a sobriety checkpoint? How does that number compare with the number who would be deterred by ten officers deployed on aggressive, strategically located and timed roving patrols, or stationed in front of busy taverns on main roads, seeking drivers whom they have probable cause to believe are intoxicated? No one knows.²¹⁷

Even assuming that heightened public perception of the arrest risk for drunk driving had a general deterrent effect,²¹⁸ other strategies that are consistent with fourth amendment values could achieve this re-

²¹⁶ See Note, *Roadblock Seizures*, *supra* note 16, at 1458 n.3.

²¹⁷ Not surprisingly, the courts that have insisted upon empirical evidence to support the efficacy of drunk driving roadblocks, vis-a-vis alternative countermeasures based upon probable cause, have invalidated roadblocks. See, e.g., *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983); *State v. Bartley*, 125 Ill. App. 3d 575, 578, 466 N.E.2d 346, 348-49 (1984); *State v. McLaughlin*, 471 N.E.2d 1125, 1138 n.7 (Ind. Ct. App. 1984) ("[W]e are . . . without information whether the concentration of seven police officers for one hour at this roadblock on an out-of-town road is a more effective means of identifying and apprehending drunk drivers than having those officers patrol roads nearer the places where drivers are likely to be drinking."); see also *State v. Deskins*, 234 Kan. 529, 545, 673 P.2d 1174, 1187 (1983) (Prager, J., dissenting):

[T]he roadblock was in effect for . . . four hours . . . [and] between 2,000 and 3,000 motor vehicles were stopped at [it]. A total of 74 violations were discovered . . . only 15 of which were for driving while intoxicated. During this period . . . 35 police officers were on duty, which . . . involved a total of 140 man hours [I]t was not unreasonable . . . to assume that the same or greater productivity in arresting drunk drivers could have been achieved by distributing the 35 officers . . . throughout the city for the sole purpose of observing erratic driving and stopping and checking drunk drivers.

Even a court that upheld a sobriety checkpoint suggested that roving patrols might be more efficient. *Idaho v. Baker*, No. 24-6699-82, slip op. at 8 (Idaho Magis. Ct. May 11, 1983).

²¹⁸ Just as the authors believe that drunk driving roadblocks should not be accepted without scrutiny, they also believe that alternative drunk driving countermeasures should be carefully examined from both a legal and a policy perspective. See, e.g., *supra* note 197 (questioning deterrent effect of criminal laws upon drunk drivers). In suggesting a range of possible alternatives, no endorsement of any or all is intended. Rather, the authors stress that drunk driving roadblocks cannot fairly be viewed as the only available method for effectively addressing the drunk driving problem.

sult.²¹⁹ General deterrence could be promoted by increasing administrative penalties, such as license suspension or revocation, and the severity of criminal punishments. For example, some states have pursued increased conviction rates (which are already very high)²²⁰ and severity of punishments through measures establishing a certain blood alcohol level as conclusive proof of guilt, making plea bargaining more difficult, and imposing mandatory minimum jail sentences.²²¹ General deterrence could also be fostered by the imposition of nontraditional punishments; one possibility is the forfeiture or impoundment of the drunk driver's vehicle.²²² Another type of drunk driving countermeasure is a higher minimum age for drinking or driving.²²³

²¹⁹ Government agencies could post signs and make radio and television broadcasts warning that aggressive roving patrols are looking for evidence of drunk driving, and that the drivers they arrest will be vigorously prosecuted. Police cars could "sit on" roadside taverns, and decoy cars could be placed along roadsides. Special police cadets, perhaps even volunteers, could be enlisted in the effort to observe and arrest drunk drivers. Another alternative would be to station police officers at certain "natural roadblocks," such as tollbooths, where drivers stop or slow down, thus facilitating observations as to their appearance and behavior. Tollbooth attendants also could be trained to detect drunk drivers.

²²⁰ See Little, *An Empirical Description of Administration of Justice in Drunk Driving Cases*, 7 LAW & SOC'Y REV. 476 (1973) (58.5% of apprehended DWI offenders convicted as charged and 89.2% convicted on either original charge or reduced charge; DWI cases have close to 90% overall conviction rate, which is higher than that for any other offense, including public drunkenness); see also *supra* note 67. The Madison, Wisconsin study by Goldstein and Susmilch found that "of all arrests made for DWI in March 1980 . . . 88% of the persons charged with DWI were convicted of that charge . . . none of the arrests in our sample led to an acquittal." 2 H. GOLDSTEIN & C. SUSMILCH, *supra* note 191, at 71.

²²¹ For example, a law that became effective in California in January 1982 made plea bargaining much more difficult. CAL. VEH. CODE § 23200(a) (West Supp. 1985). This law established a .10% blood alcohol content as conclusive proof of guilt, *id.* § 23155(a)(3), and toughened punishments for drunk driving, see, e.g., *id.* § 23200(a).

²²² California is one jurisdiction that has implemented impoundment as a countermeasure. See CAL. VEH. CODE § 23195 (West Supp. 1985). Regulations under the Highway Safety Act of 1966 as amended, 28 U.S.C. § 408 (1982), also require impoundment of a driver's car if his license is suspended or revoked for an alcohol-related offense. 23 C.F.R. § 1309.6(b)(18) (1984).

²²³ A new federal law denies some federal highway funds to states that do not enact a minimum drinking age of 21 by September 30, 1986. 23 U.S.C. § 158 (1982). In 1984, four states — Massachusetts, Nebraska, Rhode Island, and Tennessee — raised the minimum drinking age to 21. Measures raising the drinking age to 21 will be under review by 24 of the 26 states that now allow alcohol purchases by younger residents. 2 HIGHWAY & VEHICLE SAFETY REPORT 4 (Jan. 21, 1985) (copy on file with U.C. Davis Law Review).

States with increased minimum drinking ages seem to show lower accident rates for

Because drunk driving is a complex social problem, deeply rooted in our culture, some experts believe that it cannot be dealt with effectively through roadblocks or any other law enforcement approach.²²⁴ Experience in other countries with more extended histories of attempting to reduce drunk driving suggests that this problem needs to be addressed outside the criminal justice system.²²⁵ Some analysts urge that resources should be channeled into public education programs to reinforce the image of drunk driving as dangerous and irresponsible.²²⁶ Public educa-

younger drivers. For an empirical study on the relationship of drinking age and alcohol-related traffic casualties, see A. WAGENAAR, ALCOHOL, YOUNG DRIVERS, AND TRAFFIC ACCIDENTS 53 (1983) (results revealed significant reductions in alcohol-related crashes involving young drivers after increases in legal drinking age); see also Williams, Zador, Harris & Karpf, *The Effect of Raising the Legal Minimum Drinking Age on Involvement in Fatal Crashes*, 12 J. LEGAL STUD. 169, 178 (1983) (emphasis in original):

When states lowered their legal drinking ages in the early 1970s, the result, for both law-affected and younger drivers, was an increased involvement in fatal crashes, especially those crashes in which alcohol is most often involved. The results of the present study indicate that when states raise the drinking age, there is a corresponding decrease in fatal crashes among law-affected drivers.

²²⁴ Professor Robert Force has proposed that drunk driving be altogether decriminalized. R. Force, *The Inadequacy of Drinking-Driving Laws: A Lawyer's View*, in PROCEEDINGS, SEVENTH INTERNATIONAL CONFERENCE ON ALCOHOL, DRUGS AND TRAFFIC SAFETY 438, 441-42 (1979). As part of its sustained, multi-faceted campaign to reduce the drunk driving problem, the National Association of Independent Insurers advocates that first-time drunk driving offenses, not involving bodily injury, be handled on an administrative basis. See *NAII to Launch Attack on Drunk Driving Problem*, 31 UNDERWRITER'S REPORT, Aug. 5, 1982, at 1 (copy on file with U.C. Davis Law Review). Goldstein and Susmilch suggest the following alternative strategies: monitoring those drivers whose behavior poses a continuing danger; increasing control over the provision of alcohol to those who subsequently drive; and educating the community about the drunk driving problem. H. GOLDSTEIN & C. SUSMILCH, *supra* note 191, at 168, 179, 185.

²²⁵ For example, Professor Ross's exhaustive studies of law enforcement strategies aimed at reducing drunk driving in Europe and the United States have convinced him that significant long-term reductions cannot be achieved through the criminal justice system. Instead, he suggests raising the drinking age and developing crash-proof cars. H.L. ROSS, *supra* note 200, at 114.

²²⁶ The Presidential Commission on Drunk Driving recommended that the media, clergy, and medical communities help develop new social norms to inhibit drunk driving. PRESIDENTIAL COMMISSION REPORT, *supra* note 3, at 7-8. This is easier said than done. See generally Horchheimer, *Reducing Alcohol Abuse: A Critical Review of Enforcement Strategies*, in NATIONAL RESEARCH COUNCIL, ALCOHOL & PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 286-335 (1981); H. Blane & L. Hewitt, *Mass Media, Public Education and Alcohol: A State of the Art Review*, Final Report Prepared for National Institute on Alcohol Abuse and Alcoholism, Drug Abuse and

tion campaigns can also attempt to change the behavior of those in a position to prevent drunk driving — the driver's family and friends, tavern owners, and social hosts.

Possibly the most effective strategy for reducing highway carnage — whether caused by drunk driving, other forms of incompetent and irresponsible driving, defective vehicles, or poorly marked or designed roadways — is to require that all passenger cars be equipped with passive restraint systems, preferably airbags. This safety innovation would save thousands of lives annually²²⁷ without having to depend upon changing the intractable social attitudes or life patterns of millions of drivers, some of whom are immature, irresponsible, and self destructive.

2. The Intrusiveness of Drunk Driving Roadblock Investigations

As the preceding section demonstrates, drunk driving roadblock investigations could be found unconstitutionally unreasonable under the *Prouse* analysis because their advocates cannot carry the burden of substantiating their avowed effectiveness. This section shows that drunk driving roadblock investigations could also be found to fail the *Prouse* reasonableness test because they are more intrusive than roadblock investigations aimed at enforcing license-registration requirements (as well as the four other types of suspicionless searches that the Supreme Court has authorized) in both objective and subjective terms.²²⁸

Mental Health Admin., Department of Health, Education and Welfare (Feb. 1977) (unpublished manuscript) (copy on file with *U.C. Davis Law Review*).

²²⁷ Air bag operation is described in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 103 S. Ct. 2856, 2862 (1983):

The airbag is an inflatable device concealed in the dashboard and steering column. It automatically inflates when a sensor indicates that deceleration forces from an accident have exceeded a preset minimum, then rapidly deflates to dissipate those forces. The life saving potential of these devices was immediately recognized, and in 1977, after substantial on-the-road experience . . . it was estimated by NHTSA that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually.

A 1980 NHTSA Report reduced the predicted number of lives that airbags save annually to 9000. *Id.* at 2864.

²²⁸ This conclusion is underscored by a recent Arizona Supreme Court decision that invalidated a drunk driving roadblock using a balancing analysis. The Court concluded that the state had used the "subterfuge" of asserting that the purpose of the roadblock was to check drivers' licenses and vehicle registrations, and that drunk driving enforcement should be "an incidental beneficiary." *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983). Clearly, in the view of both the state and the court, drunk driving roadblocks are constitutionally more vulnerable than are license-

a. *Objective Intrusiveness*

Drunk driving roadblock investigations are more objectively intrusive than the suspicionless searches and seizures that the Supreme Court has approved. The initial investigation at a drunk driving roadblock is personal, involving a police officer's inspecting, smelling, questioning, and perhaps coordination testing of the driver. Those drivers detained after the initial investigation are subjected to progressively more intrusive investigations. In contrast, the investigation at a license-registration roadblock is inherently limited and nonpersonal; whether a driver possesses certain specific documents can be promptly and objectively determined without inspecting the driver's body or conduct.²²⁹ The purpose of a drunk driving roadblock investigation — to assess whether a driver is intoxicated — requires a subjective evaluation of the driver's personal attributes and behavior that cannot be so promptly or accurately accomplished.²³⁰

The opportunity to utilize drunk driving roadblocks for law enforcement purposes other than to counter the drunk driving problem will magnify their objective intrusiveness.²³¹ Recent Supreme Court decisions markedly expand the search and seizure options available whenever a police officer has lawfully stopped a car. Pursuant to a valid vehicle stop, the officer may seize any weapons, drugs, or other "fruits

registration roadblocks.

²²⁹ Similarly, the purpose of a Border Patrol stop — to ascertain whether any aliens lack proper documentation — should generally be capable of relatively prompt and objective determination through a "response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (quoting Brief for United States at 25).

²³⁰ See *supra* text accompanying note 65.

²³¹ Like all discretionary police power, the power to conduct roadblock investigations can be exercised in an invidiously discriminatory fashion. As Professor Amsterdam has noted, "[t]he dangers of abuse of a particular power are, certainly, a pertinent consideration in determining whether the power should be allowed in the first instance." Amsterdam, *supra* note 23, at 435. Significantly, he stressed that

A . . . compelling case can be made, obviously, for the rule that motor-vehicle stoppings without probable cause are altogether impermissible because the danger of abuse of the license-check pretext far outweighs the need of the police to apprehend unlicensed drivers not observed to be violating other traffic laws or driving unsafely.

Id. at 436; accord *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (in explaining why *Brignoni-Ponce* decision had invalidated discretionary suspicionless car stops and investigations by Border Patrol, Court noted that "[t]here also was a grave danger that such unreviewable discretion would be abused by some officers in the field").

or instrumentalities" of crime that are in "plain view" inside the car.²³² The officer may also ask the driver to produce a driver's license and vehicle registration, and may shine a flashlight into the car to observe the driver and the car's interior.²³³ If, as is usually the case, the driver opens the glove compartment to look for the vehicle's registration, the officer may adjust his body position specifically to obtain a better view of the glove compartment's contents.²³⁴ If the officer sees any fruits or instrumentalities of crime in the glove compartment, he may seize them under the plain view doctrine.²³⁵ The Supreme Court has recently indicated that if, during a lawful automobile stop, a police officer smells alcohol or drugs, he may seize them and arrest the driver pursuant to the "plain odor" doctrine.²³⁶

Additionally, the Court has held that, following any lawful vehicle stop, the police officer may direct the driver to get out of the car, even without reason to suspect the driver of a crime.²³⁷ If the officer notices a bulge under the driver's clothing, the driver may be frisked for weapons.²³⁸ If the officer reasonably suspects that the driver is dangerous, he may conduct a warrantless search of the vehicle's interior, including the glove compartment (and perhaps also the trunk), before allowing the driver to reenter and proceed.²³⁹

²³² *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plurality opinion).

²³³ *See, e.g., Texas v. Brown*, 460 U.S. 730, 739-40 (1983) (plurality opinion).

²³⁴ *Id.* at 740; *see also* *People v. Vasquez*, 36 CRIM. L. REP. (BNA) 2290 (N.Y. App. Div. Dec. 20, 1984) (police officer who stopped automobile because of its dangling license plate was entitled to lean into car to speak to passenger, look around, and seize pistol he saw lying in plain view on floorboard, even though officer did not suspect that driver or his passenger posed any danger to him).

²³⁵ *Brown*, 460 U.S. at 740.

²³⁶ Although the issue was not presented to the Court in *United States v. Johns*, 105 S. Ct. 881, 886 (1985), the Court observed in dictum that "[w]hether [defendants] ever had a privacy interest in the packages reeking of marijuana is debatable."

²³⁷ *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). A recent Colorado Supreme Court decision extended *Mimms* by upholding an officer's order to a driver, who had been stopped for a traffic violation, to get out of the car and walk to its rear. *People v. Carlson*, 677 P.2d 310, 315-16 (Colo. 1984). *Carlson* further held that the plain view doctrine authorized the officer's observation of the defendant's gait and furnished reasonable suspicion that the defendant was driving under the influence of alcohol. However, it ruled that field sobriety tests could not be administered absent probable cause or voluntary consent.

²³⁸ *Mimms*, 434 U.S. at 106, 111-12.

²³⁹ *Michigan v. Long*, 103 S. Ct. 3469, 3480 (1983). The Supreme Court remanded to the Michigan Supreme Court to determine whether the trunk search was permissible under *South Dakota v. Opperman*, 428 U.S. 364 (1976), or other authority. The Michigan Supreme Court had not previously reached this issue. *Long*, 103 S. Ct. at

If a police officer has probable cause to believe that a vehicle contains contraband, he may conduct a warrantless search of the entire vehicle and all its contents, including the contents of any closed container in the passenger compartment or trunk.²⁴⁰ The police officer may take the vehicle to the station and conduct a warrantless search of the entire vehicle and its contents,²⁴¹ and he may place closed containers that were inside the car into storage facilities, returning days later to conduct warrantless searches of them.²⁴²

If routine suspicionless stops are permitted at drunk driving roadblocks, thousands of ordinary unsuspected citizens would be subject to the expansive investigations authorized by the decisions summarized above. These search and seizure doctrines provide police officers with powerful temptations to exploit drunk driving roadblock stops to carry out general law enforcement "check-ups."²⁴³ Indeed, at virtually every drunk driving roadblock for which arrest data are available, there have been substantially more arrests or summonses for offenses other than drunk driving.²⁴⁴ If the police are given permission to stop vehicles at sobriety checkpoints, and to make limited observations and inquiries, more far-ranging investigations will inevitably follow. Therefore, the purportedly minimal intrusion occasioned by the initial stop and investigation cannot realistically be regarded as the only invasion of individual rights to be weighed in the balancing test; in many, if not all, in-

3474 n.3.

²⁴⁰ *United States v. Ross*, 456 U.S. 798 (1982); *New York v. Belton*, 453 U.S. 454 (1981).

²⁴¹ *Ross*, 456 U.S. at 807 n.9.

²⁴² *United States v. Johns*, 105 S. Ct. 881, 887 (1985).

²⁴³ The Arkansas State Police recently operated a "saturation enforcement roadblock," aimed at "mak[ing] many arrests for offenses ranging from DWI, Wanted Persons, Stolen Trucks and Cars, Drugs and Narcotics, and so forth," at which narcotics officers moved up and down the lines of waiting vehicles with dogs trained to sniff narcotics. *Garrett v. Goodwin*, 569 F. Supp. 106, 113 (E.D. Ark. 1982).

²⁴⁴ For example, a DWI strike force operating sobriety checkpoints in Bergen County, New Jersey from May 31, 1983, to October 30, 1983, reported that 17,824 motor vehicles were stopped, 276 DWI arrests were made, 275 moving violations were ticketed, 508 other violators were ticketed, and 72 other criminal arrests were made. *TRAFFIC SAFETY EVALUATION*, *supra* note 195, at 5. *See also* *State v. Deskins*, 234 Kan. 529, 545, 673 P.2d 1174, 1187 (Prager, J., dissenting) (of 2000-3000 motorists stopped during four-hour roadblock in Topeka, Kansas, 15 arrested for drunk driving, and 59 charged with other offenses). *But see* *TRAFFIC SAFETY EVALUATION*, *supra* note 195, at 5 (during weekend of July 4, 1983, Massachusetts State Police maintained drunk driving roadblocks at which 11,863 cars were stopped and total of 81 arrests made, of which 66 were for "operating under the influence").

stances, the objective intrusiveness is significantly greater.²⁴⁵

b. Subjective Intrusiveness

The subjective intrusiveness of a search or seizure depends in substantial part on the extent to which people value privacy in the setting in which it occurs.²⁴⁶ For example, because people almost always seek to maintain the privacy of their homes, it is assumed that any house search is very subjectively intrusive.²⁴⁷ At the other end of the spectrum, because managers of commercial enterprises open to the public generally do not seek to maintain privacy, it is assumed that the subjective intrusiveness of such searches is relatively slight.²⁴⁸

Although a car is not an entirely private domain, it constitutes an

²⁴⁵ A policymaker evaluating sobriety checkpoints should clearly consider the full scope of investigations likely to occur at such checkpoints. However, what a reviewing court should consider in evaluating the objective intrusiveness of any particular investigation under the fourth amendment balancing test is a more complicated issue, one which the Supreme Court has not directly addressed. A reviewing court should assign a weight to the societal interests that it determines drunk driving roadblocks to promote, and then determine the amount of intrusiveness that would be permissible. The court could find that the pertinent countervailing societal interests permit no intrusion whatsoever on individual privacy, freedom, and security. Alternatively, it could conclude that they permit only the initial stop and a very limited investigation; in that case, any further investigation would demand independent justification, such as reasonable suspicion, probable cause, or the motorist's consent. If a court upholds any portion of a drunk driving roadblock investigation without individualized suspicion under a balancing approach, it must find that the intrusiveness entailed in that portion of the investigation is outweighed by its promotion of countervailing societal interests. In other words, unless the court holds that a portion of the drunk driving roadblock investigation is justified on independent grounds, such as development of facts supporting reasonable suspicion or probable cause, it can only sustain the investigation if it finds that the intrusiveness of the entire investigation was outweighed by the countervailing societal interests.

²⁴⁶ In its seminal decision in *Katz v. United States*, 389 U.S. 347, 351 (1967), the Supreme Court repudiated the notion that certain areas are protected by the fourth amendment while others are not, because "the Fourth Amendment protects people, not places." The Court explained that the fourth amendment generally protects whatever the individual "seeks to preserve as private, even in an area accessible to the public." *Id.*

²⁴⁷ See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (referring to "the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection").

²⁴⁸ See, e.g., *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981) ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy . . . in such property differs significantly from the sanctity accorded an individual's home. . . .").

intermediate case between the private home and the commercial enterprise.²⁴⁹ City planners and transportation experts find that commuters and other travelers will endure numerous inconveniences and delays to enjoy the privacy and autonomy afforded by their automobiles as compared to the forced intimacy of buses and trains.²⁵⁰ In our modern society, driving has the same social and psychological significance that walking had for previous generations.²⁵¹ People sometimes drive to escape the demands of job and home, to carry on intimate conversations, or simply to think. Being in a private car, especially late at night, when sobriety checkpoints are almost always operated,²⁵² is far different from being out in public. A vehicle occupant may not wish to be seen in a particular locale, in particular clothing, or with a particular companion. In short, an individual has a substantial interest in freely and privately operating a vehicle on the roadways that is worthy of serious consideration and respect.

The Supreme Court has expressly recognized that, because of an automobile traveler's substantial expectations of privacy and security, wide-scale governmental interference with such travel would contravene the fourth amendment.²⁵³ The Supreme Court also has expressly recog-

²⁴⁹ See *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971) ("The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away. . . ."); see also *supra* note 39 and accompanying text (discussing probable cause requirement for automobile searches and seizures) & note 75 (distinguishing cars from facilities of pervasively regulated businesses subject to searches without probable cause).

²⁵⁰ See J. MEYER & J. GOMEZ-IBANEZ, *AUTOS, TRANSIT, AND CITIES: A TWENTIETH CENTURY FUND REPORT* 277-78 (1981).

²⁵¹ For a paean to walking and related activities, as "historically part of the amenities of life . . . [that] have been in part responsible for giving our people the feeling of independence and self-confidence . . . [and] have encouraged lives of high spirits," see *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 & nn.6-7 (1972) (unanimously reversing convictions under vagrancy ordinance that levied criminal penalties on, among others, "common night walkers" and "persons wandering or strolling around from place to place without any lawful purpose or object," and holding ordinance void for vagueness).

²⁵² A court could take judicial notice that being stopped and investigated by a police officer at night is generally more frightening, and hence more subjectively intrusive, than being stopped and investigated during the daytime. For this reason also, drunk driving roadblock investigations are very subjectively intrusive. Cf. *United States v. Piner*, 608 F.2d 358, 361 (9th Cir. 1979) (holds that random suspicionless stop and boarding of vessel by Coast Guard after dark violates fourth amendment because governmental purpose of enforcing safety and registration regulations can be accomplished through "less intrusive means" of inspections during daylight hours).

²⁵³ See *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) (emphasis added):

Many people spend more hours each day traveling in cars than walking

nized that a police stop of a moving vehicle is likely to be "materially more intrusive" than the average police stop of a pedestrian, because of the opportunity offered by an automobile stop to inspect areas of the passenger compartment not otherwise observable.²⁵⁴

Drunk driving roadblocks interrupt the travel of vast numbers of innocent motorists²⁵⁵ and subject them to police scrutiny. Many automobile travelers may reasonably resent this interference with their privacy, security, and freedom. For example, some may reasonably find that being "sniffed" for alcoholic breath is very unpleasant.²⁵⁶ For these reasons, the substantial subjective intrusiveness of sobriety checkpoints should not be overlooked.²⁵⁷

on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. *Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed.*

Recent improvements in mobile telephone technology have caused a rapid increase in car telephones, which should continue to become more common. This development enhances the automobile's status as a setting for private personal and business activity, thereby augmenting car travelers' privacy expectations. *See generally* Pottle & Frick, *Mobile Telephone: The Personal Connection*, PERSONAL COM. MAG., July-Aug. 1984, at 61, 61-64; Anderson, *Cellular Phone Use to Boom*, U.S.A. Today, Oct. 4, 1984, at 3B. (The authors are grateful to Professor Eli M. Noam, Director of the Columbia University Research Program in Telecommunications Policy, for bringing this point to their attention.)

²⁵⁴ *United States v. Mendenhall*, 446 U.S. 544, 556-57 (1980) (plurality opinion) (dictum); *accord* *People v. John BB.*, 56 N.Y.2d 482, 487, 438 N.E.2d 864, 867, 453 N.Y.S.2d 158, 161 (1982) ("[T]he obvious impact of stopping the progress of an automobile is more intrusive than the minimal intrusion involved in stopping a pedestrian.").

²⁵⁵ *See supra* note 195 and *infra* note 271.

²⁵⁶ The subjective intrusiveness of being "sniffed" has been recognized in the context of canine drug searches. *See Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 478-79 (5th Cir. 1982) (holding that dogs' sniffing of students without individualized suspicion was an unconstitutional search) (citations omitted), *cert. denied*, 103 S. Ct. 3536 (1983):

The commentators agree that "the intensive smelling of people, even if done by dogs, [is] indecent and demeaning." . . . Most persons in our society deliberately attempt not to expose the odors emanating from their bodies to public smell. In contrast, where the Supreme Court has upheld limited investigations of body characteristics not justified by individualized suspicion, it has done so on the grounds that the particular characteristic was routinely exhibited to the public Intentional close proximity sniffing of the person is offensive whether the sniffer be canine or human.

²⁵⁷ In fourth amendment rubric, an automobile stop involves a "seizure" of the per-

The Supreme Court has stressed that another crucial determinant of the subjective intrusiveness of a search or seizure, in addition to the privacy expectations involved, is the degree of discretion wielded by those conducting it.²⁵⁸ A drunk driving roadblock involves a broad range of discretionary decisions regarding investigatory techniques. Sobriety checkpoint investigations are not susceptible to such routine, uniform administration as Border Patrol checkpoints or license-registration roadblocks. To make a meaningful assessment of a driver's sobriety, the police officer at a drunk driving roadblock will have to tailor the nature, scope, and duration of the investigation to the particular driver. The determinations concerning what types of observations to make, what — if anything — the driver should be asked to say or do, and what constitutes sufficient cause to trigger further investigation are inherently discretionary.²⁵⁹ While the initial roadblock stop may be uniform and automatic, every subsequent investigatory decision requires discretion. Since the Supreme Court considers an investigation to be subjectively intrusive if its targets feel singled out for special treatment, the Court should define drunk driving roadblock investigations as subjectively intrusive for this added reason.²⁶⁰

son. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). Until recently, the Supreme Court regarded such a seizure, no matter where it occurred, as one of the most serious invasions of the freedom, privacy, and personal security protected by the fourth amendment. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)):

This inestimable [fourth amendment] right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closed in his study to dispose of his secret affairs. For, as this Court has always recognized, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

See also supra note 40. More recent Supreme Court decisions, which characterize roadblock stops as involving a minimal intrusion on fourth amendment interests, reflect the Court's narrowing view of the concerns underlying the fourth amendment. *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

²⁵⁸ *See, e.g., United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

²⁵⁹ *See supra* text accompanying note 65.

²⁶⁰ *See supra* text accompanying note 154. In *United States v. Ortiz*, 422 U.S. 891 (1975), the Court invalidated automobile searches conducted by Border Patrol agents at border checkpoints to detect illegal aliens. Although all cars were stopped, only some, selected at random, were searched. Because motorists were subjected to investigations of varying length and scope, the Court viewed these investigations as subjectively intrusive, akin to the random Border Patrol stops invalidated in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The Court explained:

Sobriety checkpoints are also more subjectively intrusive than previously approved suspicionless searches and seizures because they aim to deter and apprehend criminals. As the Court has recognized,²⁶¹ an individual who undergoes a search or seizure will reasonably experience greater concern or fright²⁶² when its purpose is to enforce the criminal law than when its purpose is to enforce an administrative scheme.²⁶³

The greater regularity attending the stop does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment. Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches other cars as well. Where only a few are singled out for a search . . . motorists may find the searches especially offensive.

Ortiz, 422 U.S. at 895. The foregoing reasoning appears to have been at least somewhat undermined by *United States v. Martinez-Fuerte*, 428 U.S. 543, 563 (1976), in which the Court authorized Border Patrol agents randomly to refer some motorists who had been stopped at a border checkpoint to a "secondary inspection area" for more extensive questioning (although not for the vehicle searches at issue in *Ortiz*).

²⁶¹ The Court has noted that an individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978). However, it has consistently cited the noncriminal aim of certain searches and seizures as a factor justifying an exception to the probable cause requirement. *See, e.g., supra* text accompanying note 60.

²⁶² *See supra* text accompanying notes 147-51.

²⁶³ Several courts that have ruled upon roadblock investigations have stressed the crucial importance of the criminal-administrative distinction. A determination that such roadblocks were not being used as a subterfuge to conduct criminal law enforcement searches (including searches relating to drunk driving) was essential to a conclusion of legality. *See, e.g., Garrett v. Goodwin*, 569 F. Supp. 106, 118 (E.D. Ark. 1982) (consent decree authorized license-registration roadblocks only if specific steps are taken to assure that criminal law enforcement needs have no role in conduct of roadblocks; for example, only officers whose primary duties are traffic enforcement may be present); *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983) (invalidated roadblocks ostensibly for enforcing license and registration requirements, because court found that their real purpose was drunk driving enforcement); *State v. Smith*, 674 P.2d 562, 563-65 (Okla. Crim. App. 1984) (invalidated roadblock allegedly maintained to check drivers' licenses because primary purpose was to identify drunk drivers; *Martinez-Fuerte* distinguished because Border Patrol stops are not intended to seek out criminals; subjective intrusiveness at drunk driving roadblock was great because approaching motorists "would reasonably perceive the officers as being desirous of arresting criminals and that anyone passing through could easily be arrested"); *see also supra* note 99; *cf. Doe v. Renfrow*, 475 F. Supp. 1012, 1024 (N.D. Ind. 1979) (upholding canine drug search of school students, without individualized suspicion, because purpose of search is to maintain discipline within school; stating that "[i]f the search had been conducted for the purpose of discovering evidence to be used in a criminal prosecution, the school may well have had to satisfy a standard of probable cause"),

When analyzed pursuant to the Supreme Court's reasonableness or balancing approach, drunk driving roadblocks could be found unconstitutional, as well as unwise. Empirical evidence does not establish their effectiveness in detecting or deterring drunk driving, much less their comparatively greater effectiveness than alternative law enforcement techniques that are consonant with fourth amendment values. Drunk driving roadblocks also intrude substantially on individual liberty and privacy, both objectively and subjectively. For these reasons, the analysis that led to the Supreme Court's apparent approval of license-registration roadblocks²⁶⁴ points to a contrary conclusion respecting drunk driving roadblocks.

III. DRUNK DRIVING ROADBLOCKS AND THE VALUES UNDERLYING THE FOURTH AMENDMENT

Regardless of how the Supreme Court and other federal courts might rule on the fourth amendment issues presented by drunk driving roadblocks, state court judges and policymakers could still reject them. As recognized by a rapidly growing body of case law and scholarly literature, when interpreting state constitutional provisions, state courts may legitimately depart from authoritative interpretations of analogous federal constitutional provisions.²⁶⁵ Therefore, a state court could hold that drunk driving roadblocks violate the fourth amendment's state constitutional counterpart, regardless of whether the Supreme Court holds

aff'd in pertinent part, 631 F.2d 91 (7th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 1022 (1982); *infra* text accompanying notes 339-42 (suggesting that purpose of sobriety checkpoints be limited to enforcement of administrative regulations).

²⁶⁴ See *supra* text accompanying notes 92-95.

²⁶⁵ In *Oregon v. Hass*, 420 U.S. 714 (1975), the Court stated that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary under federal constitutional standards." *Id.* at 719 (emphasis in original) (dictum). See generally Falk, *The State Constitution: A More Than "Adequate" Non-federal Ground*, 61 CALIF. L. REV. 273 (1973); Hill & Marks, *Foreword: Toward a Federalist System of Rights*, 1984 ANN. SURV. AM. L. 1; Project Report, *Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 284-96 (1973).

For an example of a state court decision interpreting the state constitution as imposing stricter limits upon law enforcement authorities than the federal constitution specifically in the context of anti-drunk driving measures, compare *South Dakota v. Neville*, 459 U.S. 553, 564-65 (1983) (admission at trial of defendant's refusal to submit to blood alcohol test, when arresting officer had not fully warned defendant of consequences of refusal, does not violate federal due process clause) with *State v. Neville*, 346 N.W.2d 425, 430-31 (S.D. 1984) (same case on remand) (admission of defendant's refusal violates due process clause of South Dakota Constitution).

them to violate the fourth amendment itself. Several state court judges have already rejected sobriety checkpoints on state constitutional grounds.²⁶⁶

Police administrators and legislators could also reject drunk driving roadblocks because of the serious constitutional problems they raise.²⁶⁷ It is entirely appropriate for policymakers to decide against a proposed law enforcement innovation based upon their independent views, aside from any judicial rulings, that the measure would intrude upon a constitutional danger zone.²⁶⁸ Some police administrators²⁶⁹ and legisla-

²⁶⁶ See, e.g., *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 10, 663 P.2d 992, 1001 (1983) (Feldman, J., concurring); *People v. Bartley*, 125 Ill. App. 3d 375, 466 N.E.2d 346 (1984).

²⁶⁷ Policymakers could also reject sobriety checkpoints because they are insufficiently productive. See *supra* text accompanying notes 167-79 & 194-227.

²⁶⁸ See generally Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587, 590, 595 (1975) ("legislators are obligated to determine . . . the constitutionality of proposed legislation" and should not necessarily be bound by Supreme Court's constitutional holdings; "the conscientious legislator will treat a law's adverse effects on constitutionally protected interests as a cost in the intuitive cost-benefit analysis that underlies the legislative process"; deferential standards of judicial review may imply that legislative standards should be more rigorous); cf. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 243-44, 252 (1976) ("We do not assume that a law has been constitutionally made merely because a court will not set it aside A governor or a President ought to veto, on constitutional grounds, a bill that he knows to have been adopted in violation of a constitutionally required procedure, even though the courts would not question its enactment."; public and other branches of government should not treat any law as legitimate merely because it survives judicial evaluation through weighing of competing social and personal interests). (The authors are grateful to New York University School of Law Professor Lawrence G. Sager for commending these authorities to their attention.)

²⁶⁹ Carroll D. Buracker, the Police Chief of Fairfax County, Virginia, has rejected drunk driving roadblocks for four reasons, involving policy and constitutional considerations:

Roadblocks seem to us to affect the innocent citizen more than the drunken driver.

. . . .

[Under the *Delaware v. Prouse*, 440 U.S. 648 (1979), requirement that seizures be reasonable, it has not been] demonstrated, to our satisfaction, that they are especially efficacious as a drunken driver enforcement measure.

. . . .

So-called "high impact" enforcement strategies, such as roadblocks, task forces, and other special measures, have been demonstrated to have only a fleeting effect on enforcement problems that tend to be persistent and recurring in nature, as is the case with drunk driving offenses

. . . .

tors²⁷⁰ have opposed drunk driving roadblocks for these reasons.

The salient feature of all drunk driving roadblocks, which raises serious constitutional and policy concerns, is that motorists are detained and investigated without any basis to believe they have violated any laws. This central feature of the drunk driving roadblock sets it apart from our normal law enforcement techniques and the fourth amendment values they reflect. Sobriety checkpoints do not target for investigation individuals reasonably suspected of having committed a crime. Rather, on the chance of turning up criminal law violators, police officers investigate all motorists who pass through the checkpoint.

American police have long deployed roadblocks on limited occasions for specific purposes. But the systematic use of roadblocks to conduct routine mass vehicle stops aimed at combating drunk driving constitutes a marked departure from previous practice. The conventional roadblock is set up to intercept kidnappers, bank robbers, or other felony suspects fleeing the scene of a crime. In contrast with drunk driving roadblocks, which have an extremely widespread impact,²⁷¹ conventional roadblocks occur infrequently within any jurisdiction and affect only a tiny percentage of the driving public.²⁷² More importantly, these conventional

Moreover, [roadblocks] represent a substantial diversion of resources away from other important areas.

Buracker, *The "Roadblock" Strategy as a Drunken Driver Enforcement Measure*, 51 POLICE CHIEF, Apr. 1984, at 59, 59-62.

²⁷⁰ A bill introduced during the 1983 session of Maryland's House of Delegates would have prohibited the operation of drunk driving roadblocks throughout that state. See Md. H.D. 265 (1983 Regular Session) (a bill entitled, "An Act concerning 'Sobriety Checkpoint' Prohibition"); see also *Maryland Seeks to End Checks for Sobriety*, Wash. Post, Mar. 8, 1983, at B1, col. 5 (state legislator describes drunk driving roadblocks as police tactic he might expect to see "in Russia, or Hitler-occupied Germany"). The bill was not favorably reported out of committee. Daily Rec. (Baltimore), Mar. 29, 1983, at 1, col. 7.

²⁷¹ For example, roadblocks implemented in Westchester County, New York from January through November 1983 stopped anywhere from 1000 to 4000 vehicles per night. WESTCHESTER COUNTY DEPARTMENT OF PUBLIC SAFETY, SOBRIETY CHECKPOINTS (1981) (copy on file with *U.C. Davis Law Review*). In New York City, nightly roadblocks involving approximately 100 officers, set up at bridges and tunnels connecting Manhattan to the other boroughs, stopped 624,000 motorists between May 27, 1983, and October 16, 1983. Telephone interview with Catherine Keegan, Assistant to Joel Stahl, Commissioner of the New York Department of Transportation (Nov. 12, 1983); see also *supra* note 195 and text accompanying note 214.

²⁷² Because police operating traditional roadblocks often have some description of the cars or the passengers they are seeking, they generally neither stop all cars nor question all motorists passing through the roadblock. See, e.g., *State v. Silvernail*, 25 Wash. App. 185, 605 P.2d 1279 (1980) (based upon information provided by burglary victim,

roadblocks are completely consistent with traditional police efforts to apprehend specific criminal suspects (and, in the case of kidnapping, to rescue specific crime victims),²⁷³ within a certain geographic area, soon after a particular crime has been committed and reported. It would be very different if the police decided to cordon off all roads surrounding all banks to check motorists for evidence of bank robberies not specifically known to have been committed, but statistically likely to occur.²⁷⁴

police stopped all cars departing from certain ferry to look for persons matching description of burglars).

²⁷³ In contrast with drunk driving roadblocks, traditional roadblocks aim at intercepting the perpetrators of ongoing or recently completed crimes that jeopardize human life. Therefore, the societal interests at stake are particularly urgent. This distinction is articulated in Justice Jackson's oft-quoted dissent in *Brinegar v. United States*, 338 U.S. 160, 183 (1949):

If we assume, for example, that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

²⁷⁴ The rationale underlying conventional roadblocks could justify a drunk driving roadblock only if it were set up to apprehend a particular drunk driver who had already committed a felony (killing or injuring another driver), and who the police reasonably believed to be fleeing the scene of the crime along the road where the roadblock was located. See *United States v. Harper*, 617 F.2d 35, 40-41 (4th Cir.) (upholding stops of all vehicles on route reasonably expected to be used for escape of persons suspected of having imported 25 tons of marijuana) (citations omitted), *cert. denied*, 449 U.S. 887 (1980):

The purpose of these stops was to arrest suspects for a known crime, not to discover evidence of undetected crimes by the happenstance of visual searches. A serious crime had been committed involving numerous participants, some of whom were known to be fleeing the scene along a route reasonably expected to be used for their escape

The Fourth Amendment does not create barriers to reasonable law enforcement activities in the area of a detected crime By virtue of the exigency of fleeing, perhaps dangerous, suspects, we think the stops of all persons found on a likely access route to the scene of the crime was reasonable

The limitations upon a conventional roadblock, which set it apart from a drunk driving roadblock, are delineated in the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2(2) (Proposed Official Draft 1975). The Code provides that an officer may stop and search cars if "he has reasonable cause to believe that a felony has been committed and stopping all or most . . . motor vehicles moving in a particular direction . . . is

Is it likely that such a tactic would be upheld on the rationale that it might deter motorists and the general citizenry from committing bank robberies? Not in the view of Professor Wayne LaFave, who has stated:

It is not permissible for the police to celebrate Burglary Prevention Week by setting up random roadblocks to search cars for burglary tools, to blockade a high-crime area of the city and search all cars leaving the area, or to establish roadblocks to curb the juvenile problem. Such tactics as these pose the most serious threat to the interest of privacy.²⁷⁵

Despite Professor LaFave's thoughtful conclusion that roadblocks cannot be justified by their avowed general deterrent effect, state courts have upheld drunk driving roadblocks on just this rationale.²⁷⁶

Drunk driving roadblocks share the fundamental characteristic common to the hypothetical bank robbery roadblock posited above and the other roadblocks described by Professor LaFave: they are aimed not at detecting identified or suspected offenders, but instead at turning up previously unidentified and unsuspected offenders, and at deterring future unlawful conduct. Acceptance of drunk driving roadblocks would signal approval of policing that relies upon the statistical chance of uncovering a certain percentage of violators in large groups of persons. Once accepted in the drunk driving context, this dragnet technique could be extended to other pressing law enforcement problems, such as possession of narcotics or firearms, mugging, shoplifting, or bank robberies. There is a strong parallel between a drunk driving roadblock investigation based upon the statistical likelihood that a certain number of passing drivers will be under the influence of alcohol and, for example, a requirement that all pedestrians on a certain street submit to a frisk or magnetometer search based upon the statistical likelihood that some of them will be carrying a gun or knife illegally.²⁷⁷

reasonably necessary to permit a search for the perpetrator or victim . . . in view of the seriousness and special circumstances of such felony." *Id.*

²⁷⁵ W. LAFAVE, *supra* note 98, § 9.5(b), at 145 (1972).

²⁷⁶ *See, e.g.*, Little v. State, 300 Md. 485, 505, 479 A.2d 903, 913 (1984) ("prospect of being stopped at a roadblock . . . convinced some intoxicated individuals to find alternate means of transportation"); 67 Op. Cal. Att'y Gen. 471, 481 (1984) (advance warning increases deterrent effect); *see also* State *ex rel.* Ekstrom v. Justice Court, 136 Ariz. 1, 10, 663 P.2d 992, 1001 (1983) (Feldman, J., concurring).

²⁷⁷ Drunk driving roadblocks lack any clear distinguishing feature that would prevent their use as a precedent for implementing other dragnet law enforcement tactics. *See, e.g.*, the following statement by the Executive Director of the American Civil Liberties Union of Maryland:

What principle inherent in [drunk driving] roadblock stops limits their use? That people are in cars? The courts and common sense have long

As the Supreme Court has recognized, the long-range precedential impact of any challenged governmental action should be a factor in evaluating its lawfulness.²⁷⁸ Therefore, in evaluating drunk driving roadblock investigations, policymakers and courts should consider the adverse impact upon fourth amendment values of the entire genre of suspicionless, dragnet searches and seizures.

Fourth amendment history and Supreme Court precedents make clear the Founders' intention to bar police interference with our citizens' privacy and freedom on the mere chance of uncovering wrongdoing. The primary characteristic of the general warrants and writs of assistance that were so odious to the Constitutional Framers, and which the fourth amendment was expressly designed to curb, was precisely "their indiscriminate quality, their license to search Everyman without particularized cause."²⁷⁹ In his seminal article on the fourth amendment, Professor Anthony Amsterdam articulated the twin evils of indis-

held that the right to privacy is not obliterated by a steering wheel. That the police intrusion is minimal? If you refuse to stop or roll down your window or be properly sheep-like, you'll discover how "minimal" the police consider the matter — arrest or worse will ensue. That drunken driving is especially abominable and we need immediate, effective steps against it? Of course, drunken driving is awful, and, of course, roadblocks may "work." But there are dozens of offenses as vile as drunk driving. It would "work" to allow the police to search everyone entering a schoolhouse for drugs, alcohol or weapons; to demand, in a crackdown against shoplifting, that everyone carrying bags of merchandise during the Christmas season show the police proof of purchase; or periodically to search homes in selected neighborhoods for heroin, pistols, stolen goods or escaped prisoners. We disposed of these alternatives a couple of hundred years ago, when we decided not to be an authoritarian society.

Roemer, *Debate & Discussion, Sobriety Checkpoints*, Baltimore Sun, Jan. 8, 1983 (copy on file with *U.C. Davis Law Review*).

²⁷⁸ See, e.g., *Boyd v. United States*, 116 U.S. 616, 635 (1886) ("Illegitimate and unconstitutional practices get their first footing . . . by . . . slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."); see also *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("[T]he First Amendment . . . was designed to avoid these [totalitarian] ends by avoiding these beginnings.").

²⁷⁹ *Wilkes v. Wood*, 19 Howell St. Tr. 1153, 1167 (1763); see also 2 *LEGAL PAPERS OF JOHN ADAMS* 139-44 (L. Wroth & H. Zobel eds. 1965). Dragnet searches and seizures under general warrants were repudiated in England more than two centuries ago and met with still less favor in the colonies. James Otis denounced them as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book." *Stanford v. Texas*, 379 U.S. 476, 481 (1965) (quoting James Otis).

criminate searches and seizures:

Indiscriminate searches or seizures might be thought to be bad for either or both of two reasons. The first is that they expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against *unjustified* searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. The second is that indiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This latter concern runs against *arbitrary* searches and seizures: it condemns the petty tyranny of unregulated rummagers.²⁸⁰

The Supreme Court recently has been so intent upon eradicating the second evil inherent in indiscriminate searches that it has shown insufficient concern about the first.²⁸¹ In its zeal to forestall arbitrary searches and seizures, the Court has too readily allowed certain unjustified searches and seizures.²⁸² For example, in *Delaware v. Prouse*,²⁸³ the Supreme Court disapproved "sporadic and random stops of individual vehicles making their way through city traffic."²⁸⁴ However, it approved "those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and *all are subjected to a show of the police power of the community*."²⁸⁵ Thus, investigations without specific justification are apparently acceptable as long as they do not appear arbitrary or discriminatory.²⁸⁶ *Prouse* and other recent Supreme

²⁸⁰ Amsterdam, *supra* note 23, at 411.

²⁸¹ See *supra* note 160 and accompanying text.

²⁸² Indeed, in certain contexts, the Court has expressly encouraged *unjustified* searches and seizures in an effort to limit *arbitrary* searches and seizures. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-59 (1976) (both endorsing roadblocks at which *all* vehicles stopped, while disapproving random stops of *some* vehicles).

²⁸³ 440 U.S. 648 (1979) (involving car stops to check for drivers' licenses and vehicle registrations). This case is discussed extensively *supra* text accompanying notes 92-97 & 163-74.

²⁸⁴ *Prouse*, 440 U.S. at 657.

²⁸⁵ *Id.* (emphasis added). Dissenting in *Prouse*, Justice Rehnquist aptly highlighted the flawed reasoning that led his brethren to endorse roadblock stops:

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.

Id. at 644 (emphasis in original).

²⁸⁶ Another example of this truncated view of the fourth amendment is the Court's

Court decisions ignore the fourth amendment's first and foremost concern for protecting autonomy, privacy, and freedom from unjustified governmental interference, no matter how uniformly and routinely carried out.²⁸⁷ In Professor Amsterdam's words:

[T]he authors of the Bill of Rights had known oppressive government I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. . . .

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.²⁸⁸

Viewed in these terms, the argument against the wholesale detention

indication in *Brown v. Texas*, 443 U.S. 47, 51 (1979), that a search or seizure does not necessarily require individualized suspicion, so long as it is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." This suggestion was premised on the Court's expressed view that the purpose of the individualized suspicion requirement is to prevent "arbitrary invasions [of privacy] solely [in] the unfettered discretion of officers in the field," *id.* (emphasis added), and that this purpose can also be served by the "neutral plan" requirement, *id.* The fallacy in this view is that it overlooks the additional, at least equally important, purpose of the individualized suspicion requirement — to prevent unjustified invasions of individual freedom, security, or privacy. This purpose is not served by the "neutral plan" requirement.

The Court's emphasis on preventing arbitrary, as opposed to unjustified, searches and seizures, has also had the effect of diluting the fourth amendment's protections in another sense. The Court has focused on the amendment's requirement that searches and seizures be reasonable in their execution, while discounting the amendment's concomitant requirement that searches and seizures be reasonable in their inception. *See infra* notes 293 & 309 and text accompanying notes 291-93.

²⁸⁷ In its venerable decision in *Boyd v. United States*, 116 U.S. 616, 627-30 (1886) (holding that statute authorizing government to compel production of documents for use in forfeiture proceedings violated fourth and fifth amendments), the Supreme Court referred to the principles enunciated in Lord Camden's seminal decision in *Entick v. Carrington*, 19 Howell St. Tr. 1029 (1765), and declared that these principles:

[A]ffect the very essence of constitutional liberty and security
 [T]hey apply to all invasions on the part of the government and its employés of the . . . privacies of life [T]he essence of the offence . . . is the invasion of [one's] indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence. . . .

See also the passage from *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting), quoted *supra* note 26.

²⁸⁸ Amsterdam, *supra* note 23, at 400, 403.

and investigation of citizens at drunk driving roadblocks is compelling indeed. Far from being consistent with the aims of a free and open society, these roadblocks evoke strong images of authoritarianism. A free and open society does not authorize its police to interdict, inspect, and interrogate its citizens en masse merely because it is statistically predictable that a certain small percentage is breaking the law at any given time.²⁸⁹ As the Oklahoma Court of Criminal Appeals declared, in rejecting drunk driving roadblocks:

The Court finds drunk [driving roadblocks] . . . draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an "end justifies the means" approach . . . [A] basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop Were the authorities allowed to maintain such activities . . . the next logical step would be to allow similar stops for searching out other types of criminal law offenders.²⁹⁰

Regardless of whether the fourth amendment values reflected in the

²⁸⁹ See Justice Hans Linde's dissent in *State v. Tourtillott*, 289 Or. 835, 856, 618 P.2d 423, 444 (1980), *cert. denied*, 451 U.S. 972 (1981) (approving suspicionless roadblock stops to enforce hunting regulations):

The guarantees of the fourth amendment and Oregon's [corresponding constitutional provision] have a broad role as institutional and procedural safeguards in shaping the conduct of government officers before the fact The security and freedom from unwarranted official impositions that the search and seizure clauses guarantee is that of "the people," of men and women going about their everyday business, not only or primarily the interests of criminal suspects.

See also *State v. Deskins*, 234 Kan. 529, 546-47, 673 P.2d 1174, 1188 (1983) (Prager, J., dissenting) (If each political subdivision in the state were free to institute a drunk driving roadblock, Kansans potentially would have to go through "'Checkpoint Charley' at the boundary of every city and every county.").

²⁹⁰ *State v. Smith*, 674 P.2d 562, 564 (Okla. Crim. App. 1984); *accord State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 6, 663 P.2d 992, 997 (1983) (Feldman, J., concurring):

The issue [presented by drunk driving roadblocks] . . . is whether the fourth amendment permits officers to stop and question persons whose conduct is innocent, unremarkable and free from suspicion.

The question has frightening implications. The thought that an American can be compelled to "show his papers" before exercising his right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals It might be argued that if the law did permit such stops, we would have less crime. Nevertheless, our system is based on the idea that the risk of criminal activity is less of a danger than the risk of unfettered interference with personal liberty.

preceding statement lead courts to hold sobriety checkpoints unconstitutional, they could lead policymakers to opt for alternative anti-drunk driving strategies.

IV. DRUNK DRIVING ROADBLOCKS AND PROCEDURAL SAFEGUARDS

Searches and seizures must be reasonable not only in their inception, but also in their execution.²⁹¹ The imposition of procedural safeguards to promote the goal that searches and seizures be reasonably executed is certainly important.²⁹² However, it bears emphasis that even the maximal degree of reasonableness in the execution of a search or seizure cannot cure a lack of reasonableness in its inception. The irreducible central feature of roadblock investigations, which undermines their reasonableness at the inception stage, is their lack of individualized justification. Nevertheless, in the event that any sobriety checkpoint investigations are authorized, notwithstanding the constitutional and policy problems they raise, this part of the Article recommends procedural safeguards for their execution.

The Supreme Court has enforced the reasonableness-in-execution requirement particularly stringently with respect to searches and seizures not based on probable cause.²⁹³ For example, the Court recently held that a *Terry*-type²⁹⁴ stop violated the fourth amendment because its scope and duration exceeded permissible limits. The Court stated that a *Terry*-type stop must "last no longer than is necessary to effectuate its purpose. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."²⁹⁵ The Court further de-

²⁹¹ See, e.g., *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

²⁹² As Justice Frankfurter observed: "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943).

²⁹³ In some sense, the Court seems to recognize an inverse relationship between the degree of reasonableness required in the inception of a search or seizure, and the degree of reasonableness required in its execution. The less reasonable a search or seizure is in its inception — i.e., the more it departs from the probable cause standard — the more carefully the Court will scrutinize its scope, duration, and other operational details to ensure that it was carried out reasonably. This inverse relationship may help explain why the Court appears to require a least intrusive alternative approach in examining certain searches and seizures not based upon probable cause, even though it has not imposed such a requirement upon searches and seizures in general. See *supra* note 143.

²⁹⁴ See *supra* text accompanying notes 42-44 (defining *Terry*-type stop).

²⁹⁵ *Florida v. Royer*, 460 U.S. 491, 500 (1983). In *United States v. Sharpe*, 105 S.

clared that “[i]t is the State’s burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration.”²⁹⁶ Because the searches and seizures that occur at drunk driving roadblocks are not justified even by the relaxed reasonable suspicion standard, the foregoing requirements should be enforced even more rigorously than in the *Terry*-stop context.

Supreme Court decisions have also stressed that the execution of searches or seizures without probable cause or reasonable suspicion must not be left to the discretion of individual officers in the field. Accordingly, these decisions have turned on the sufficiency of restrictions curbing field officer discretion.²⁹⁷

In accordance with the foregoing principles, under no circumstances should a drunk driving roadblock be permitted unless it involves sufficient procedural safeguards limiting field officers’ discretion in executing roadblock investigations. The governmental unit administering any drunk driving roadblock should have the burden of proving: (1) that the initial investigations last no longer than necessary to make a preliminary determination whether a driver is intoxicated, and employ the least intrusive procedures reasonably available for quick determination; (2) that if intoxication is reasonably suspected after an initial investigation, any further investigation is also as brief and unintrusive as reasonably possible; and (3) that all phases of the investigations are carried out in accordance with neutral procedures strictly limiting field officer discretion.

The government should be required to show that the sobriety checkpoints are operated pursuant to measures curbing field officer discretion, as well as the duration and scope of checkpoint investigations. Such measures might include: general statutory authorization expressing a legislative determination that drunk driving roadblocks are appropriate under specified circumstances;²⁹⁸ detailed administrative regulations prescribing all aspects of the design and operation of each

Ct. 1568 (1985), discussed *supra* note 44, the Court recently reaffirmed this least intrusive alternative approach for assessing whether searches and seizures not based on probable cause are reasonable. For a general discussion of the role of the least intrusive alternative analysis in fourth amendment jurisprudence, see *supra* note 143. Although the Court has not employed this approach in evaluating all searches and seizures, the approach should logically be an element in all fourth amendment balancing tests, *see id.*

²⁹⁶ *Royer*, 460 U.S. at 500.

²⁹⁷ *See, e.g., Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

²⁹⁸ *See infra* text accompanying notes 303-07.

roadblock;²⁹⁹ area search warrants governing the location and duration of any particular roadblock;³⁰⁰ operation at a fixed permanent location, or sufficient advance notice;³⁰¹ and exclusionary rules barring the use of evidence obtained at drunk driving roadblocks in criminal prosecutions.³⁰²

A. Statutory Authorization

As the Supreme Court has indicated, statutory authorization is an essential, although not sufficient, condition for the validity of any search or seizure not based upon probable cause.³⁰³ The Court has not assumed the legality of such searches or seizures even if it concludes they are permitted by the fourth amendment. For example, in *Colonnade Catering Corp. v. United States*,³⁰⁴ the Court held a suspicionless administrative inspection invalid specifically because it had not been authorized by statute, but indicated that, if it had been so authorized, the fourth amendment would have permitted the inspection.³⁰⁵

In the context of sobriety checkpoints, statutes should both authorize such checkpoints under specified circumstances and prescribe the minimal procedural safeguards circumscribing any checkpoint operation.³⁰⁶ Several recent state court decisions invalidating drunk driving roadblocks have expressly relied on the absence of statutory authorization.³⁰⁷

²⁹⁹ See *infra* text accompanying notes 308-21.

³⁰⁰ See *infra* text accompanying notes 322-24.

³⁰¹ See *infra* text accompanying notes 325-34.

³⁰² See *infra* text accompanying notes 335-42. Many of the courts that have ruled upon the legality of drunk driving roadblocks have held these types of measures to be essential for a roadblock to withstand constitutional challenge. See cases cited *supra* note 8.

³⁰³ See, e.g., *United States v. Villamonte-Marquez*, 103 S. Ct. 2573, 2577-78 (1983) (Customs document inspection on oceangoing vessel was executed pursuant to statute whose lineal ancestors date back to First Congress); *United States v. Martinez-Fuerte*, 428 U.S. 543, 566 n.19 (1976) (Court stressed "longstanding congressional authorization" for Border Patrol stops at permanent checkpoints); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (Legality of "a regulatory inspection system of business premises that is carefully limited in time, place, and scope . . . depends . . . on the authority of a valid statute."); see also *supra* text accompanying note 69.

³⁰⁴ 397 U.S. 72 (1970).

³⁰⁵ *Id.* at 76-77; see also *United States v. Biswell*, 406 U.S. 311, 314 (1972) ("[I]t is clear under *Colonnade* that the Fourth Amendment would not bar a seizure of illicit liquor.").

³⁰⁶ See, e.g., 67 Op. Cal. Att'y Gen. 471 (1984).

³⁰⁷ The Pennsylvania Court of Common Pleas recently invalidated a drunk driving roadblock on the ground that under Pennsylvania's vehicle and traffic laws, the police had statutory authority to stop drivers only based upon probable cause. The court com-

Of course, it is an axiom of our legal-political system that no legislative authorization can cure constitutional deficiencies.

B. Detailed Administrative Rules

To ensure that any drunk driving roadblocks that legislatures might authorize are set up and operated in a manner as consonant as possible with fourth amendment values, all aspects of such roadblocks should be prescribed at the highest agency level, and detailed written rules should be distributed to all field officers.³⁰⁸ The Supreme Court has recognized that if an officer's discretion is not limited by the reasonable suspicion or probable cause requirement, it must instead be checked by "a plan embodying explicit, neutral limitations."³⁰⁹ Administrative rules gov-

mented that the state legislature "has not yet chosen to permit an arbitrary blocking of the Commonwealth's highways to seek out an intoxicated motorist." *Commonwealth v. Jackson*, No. 1672-83, slip. op. (Pa. Ct. Common Pleas Feb. 9, 1984). In *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984), the court held all investigations at drunk driving roadblocks unconstitutional because they were not based upon any individualized suspicion. The court observed that there was "no statutory authority which would support . . . the State's contention that it has the power to establish" drunk driving roadblocks. *Id.* at 565; *see also* *State v. Deskins*, 234 Kan. 529, 543, 673 P.2d 1174, 1185 (1983) (although majority upheld a particular drunk driving roadblock, it suggested that "minimum uniform standards for the operation" of a roadblock should be adopted by the legislature or attorney general); *id.* at 545-47, 673 P.2d at 1188 (Prager, J., dissenting) (absence of legislative standards and limitations would free all 730 jurisdictional units in state to establish roadblocks); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983) (observed that statutorily prescribed drunk driving roadblocks would be preferable, but expressly refrained from deciding whether statutory authorization was constitutionally required).

³⁰⁸ As one state court judge noted, in delineating the procedural requirements that he believed to be constitutionally necessary for suspicionless roadblock stops: "The mere fact of statutory authorization is not enough. The question is whether the law or deliberate agency policies promulgated under it give reasonable discretion and limits to the investigatory power or leave that power at large in the hands of individual officers." *State v. Tourtillott*, 289 Or. 845, 883-84, 618 P.2d 423, 443 (1980) (Linde, J., dissenting), *cert. denied*, 451 U.S. 972 (1981).

³⁰⁹ *Brown v. Texas*, 443 U.S. 47, 51 (1979) (citations omitted) (holding unconstitutional state statute that allowed police to detain someone and require identification, even without any reasonable suspicion to believe individual had engaged in criminal conduct):

A central concern [in fourth amendment jurisprudence] has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure . . . or that the seizure must be carried out

erning sobriety checkpoints should reduce the appearance, as well as the actuality, of arbitrary or unnecessarily intrusive roadblock investigations; in the Supreme Court's terminology, they should minimize both subjective and objective intrusiveness.³¹⁰

Administrative rules should prescribe both the location of drunk driving roadblocks and their manner of operation. The selection of locations should be based on such factors as the number and frequency of serious accidents and the proximity of bars. The choice of a particular site should result in the detection and deterrence of substantial numbers of drunk drivers. The site selection should not reflect or result in invidious discrimination against any drivers.³¹¹ Safety should not be jeopardized nor traffic flow unduly hindered.³¹² Administrative rules should

pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

As pointed out, *supra* note 286, the *Brown* decision focuses largely on the fourth amendment's concern for eliminating arbitrariness in the carrying out of searches and seizures, while deemphasizing the fourth amendment's concern for requiring individualized justification in the undertaking of searches and seizures. Its pertinence in the present context therefore underscores the point that none of the recommended administrative rules governing the execution of roadblock investigations can solve the problems posed by the lack of individualized cause for commencing such investigations.

³¹⁰ Professor Amsterdam has proposed a general requirement that, in order to be upheld under the fourth amendment, all searches and seizures must be "conducted pursuant to and in conformity with either legislation or police departmental rules and regulations," which "must be reasonably particular in setting forth the nature of the searches and seizures and the circumstances under which they should be made." Amsterdam, *supra* note 23, at 416. The major function of such a general rulemaking requirement would be to provide "a pervasive safeguard against arbitrary searches and seizures." *Id.* In particular, Professor Amsterdam emphasized that such a requirement would check the danger of arbitrariness inherent in searches and seizures which, like drunk driving roadblock investigations, are not based upon probable cause:

[R]ulemaking supplies a needed check against arbitrariness in the conduct of various searches and seizures that presently occupy a troubling fourth amendment limbo. These include border searches, stoppings of automobiles for driver's license checks . . . inspections of the premises of gun dealers and liquor dealers, and other routine law enforcement practices which, for a variety of reasons, have been exempted from the requirements of a warrant or probable cause.

Id. at 418 (footnote omitted).

³¹¹ See *Stark v. Perpich*, 590 F. Supp. 1057, 1060 (D. Minn. 1984) (court ordered that locations of all sites for roadblocks at which drivers were stopped to participate in survey regarding drinking-driving behavior be chosen without regard to any racial, ethnic, or economic characteristics of surrounding population or neighborhood, or of population using roadway).

³¹² See, e.g., *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983) (in invalidating drunk driving roadblock, court stressed that roadblock area was

specify lighting, signs, and other physical arrangements that would maximize safety and convenience and minimize surprise and anxiety.³¹³ The guidelines should also provide for advance warning through media publicity of sobriety checkpoints' locations and times.³¹⁴

In addition, the administrative rules should delineate investigative procedures. Neutral procedures for selecting cars to be stopped should be specified in detail, providing for the stopping of every car or every *n*th car, and expressly prohibiting the consideration of arbitrary or invidious factors (for example, the race or appearance of the driver or the type of automobile).³¹⁵ Officers should have clear instructions concerning what they should say and do once a car has been stopped and the types of observations that they should make.³¹⁶ The length of the stop should be limited to approximately a minute or less,³¹⁷ and the rules should expressly prohibit the officers from prolonging it unless they have at least a reasonable suspicion, based upon articulable objective

unsafe for motorists, and that motorists were backed up on highway for at least two-thirds of a mile).

³¹³ See, e.g., 67 Op. Cal. Att'y Gen. 471, 481-83 (1984). Appropriate physical requirements would include, for example: adequate lighting, such as overhead lights or roadside flares; barriers set up in advance of the roadblock causing drivers to slow down sufficiently to reduce traffic hazards; large roadside signs in advance of the roadblock, announcing its location and purpose; and an area into which drivers can pull aside should the officers have a sufficient factual basis to conduct any investigation beyond the limited inquiry permitted during the initial stop.

³¹⁴ Some courts that have passed upon drunk driving roadblocks have viewed the degree of advance warning provided to the driving public through the media as a very significant factor. Compare *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983) (in invalidating roadblocks, court stressed absence of advance warning) and *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349, 353 (1983) (in invalidating roadblock, court suggested that advance publication of date of roadblock, while not constitutionally necessary, would mitigate surprise) with *Little v. State*, 300 Md. 485, 490, 479 A.2d 903, 905 (1984) (in upholding roadblocks, court noted extensive statewide publicity, including live television coverage, disclosing exact location in advance). Advance warning of a roadblock may undermine its deterrent effect. See *supra* notes 208-09 and accompanying text.

³¹⁵ See *supra* note 311.

³¹⁶ See *Stark v. Perpich*, 590 F. Supp. 1057, 1061 (D. Minn. 1984) (court ordered that as soon as any motorist is stopped pursuant to drinking-driving survey, prescribed statement, expressly designed to reduce "subjective coercion," must be read to him).

³¹⁷ That this is a reasonable maximum duration for the initial stop at a drunk driving roadblock is corroborated by the few cases referring to the actual duration of such stops. *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 2, 663 P.2d at 992, 993 (1983) (30-40 seconds to five minutes); *Little v. State*, 300 Md. 485, 491-92, 479 A.2d 903, 906 (1984) (15-30 seconds).

facts, indicating intoxication.³¹⁸ The rules should also expressly prohibit officers from conducting any search of a car, or subjecting any driver to field sobriety or breath tests, absent evidence satisfying the probable cause standard.³¹⁹ To facilitate agency and judicial enforcement of the reasonable suspicion and probable cause standards, police officers should maintain records of the specific articulable facts that assertedly satisfy such standards in any particular case.³²⁰ The rules should further require *Miranda* warnings to be given no later than when an officer has probable cause sufficient to administer field sobriety or breath tests.³²¹

³¹⁸ The line between a "reasonable suspicion," based on "specific and articulable facts," and a mere "inarticulate hunch," *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968), may often be very difficult to draw. For that reason, certain jurists and scholars vigorously opposed the authorization of any searches or seizures based on evidence short of the probable cause standard. *See, e.g., id.* at 38-39 (Douglas, J., dissenting). Therefore, it is particularly important that drunk driving roadblocks not be implemented without specific guidelines concerning the types of inquiries and observations that may be made during the initial brief stop, and the resulting conclusions that would give rise to a "reasonable suspicion" sufficient to prolong the investigation. For an example of facts that were held to give rise to a reasonable suspicion (but not probable cause) of driver intoxication, see *People v. Carlson*, 677 P.2d 310 (Colo. 1984) (driver had redness about his eyes, drove erratically back and forth between center and side of roadbed, and car had odor of alcohol).

³¹⁹ The Colorado Supreme Court recently held that roadside sobriety testing could not be based on a mere "reasonable suspicion" that a person was driving under the influence of alcohol, but rather, required either probable cause or voluntary consent. The court noted that the sole purpose of roadside sobriety testing is to acquire evidence of criminal conduct, and that governmental intrusions into individual privacy for such purposes require probable cause. The court also noted that because roadside testing involves "physical maneuvers not normally performed in public or knowingly exposed to public viewing," it constitutes a "substantial" invasion of privacy. *Carlson*, 677 P.2d at 316-17; *see also supra* note 156.

³²⁰ *See Ramirez v. Webb*, 36 CRIM. L. REP. 2291 (W.D. Mich. Dec. 10, 1984) (granting preliminary injunction prohibiting agents of the Immigration and Naturalization Service (INS) from making suspicionless car stops to seek illegal aliens, and directing INS agents to maintain records of bases for reasonable suspicion allegedly justifying such stops).

³²¹ In *Berkemer v. McCarty*, 104 S. Ct. 3138 (1984), the Court rejected any per se rule either that *Miranda* applies to all traffic stops, or that a suspect stopped for a traffic offense need not be advised of his rights until formally placed under arrest. Instead, the Court stated that if and when *Miranda* warnings should be given to such a suspect would depend upon factors including the length of the detention, whether the suspect is subjected to investigation in public view, and whether the detention reasonably could be viewed as the functional equivalent of an arrest. Under these standards, *Miranda* warnings are clearly required when a driver has been detained long enough, and investigated thoroughly enough, to allow the officer to determine that there is prob-

C. Area Search Warrant

To help assure that the selection of drunk driving roadblock sites is based upon the factors enumerated in the governing rules, the police department should be required to obtain from a neutral, independent magistrate an area search warrant authorizing a sobriety checkpoint at a particular location for a specified, reasonably limited time period. As discussed above, even when the Supreme Court has permitted limited types of searches or seizures to be conducted without probable cause, it has generally insisted on adherence to the warrant requirement, unless that requirement is independently excused by an applicable exception.³²² The potentially useful role that warrants can play in limiting field officer discretion was summarized by the Supreme Court in a recent Occupational Safety and Health Act inspection case:

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. Also, a warrant would then and there advise the [individual whose property was being searched] of the scope and objects of the search, beyond which limits the inspector is not expected to proceed.³²³

To obtain a warrant authorizing a sobriety checkpoint, the agency should be required to demonstrate that a serious drunk driving problem exists in the vicinity of the requested checkpoint; that the proposed timing of the checkpoint's operation is consistent with the goals of detection and deterrence; and that the proposed site is consistent with considerations of nondiscrimination, safety, and convenience.³²⁴ The magistrate should not renew the warrant after expiration of a reasonable time pe-

able cause, and when the officer subjects the driver to field sobriety or chemical tests in public view.

³²² See *supra* text accompanying notes 34-36 & note 58. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 562 n.15, 564-66 (1976), the Court rejected the contention that a warrant should be required prior to the establishment of any Border Patrol immigration enforcement checkpoint. The Court distinguished Border Patrol checkpoint stops from administrative inspections for which it had required warrants, because the permanent location of the Border Patrol checkpoints played the same discretion limiting role that the warrant was designed to serve in the administrative inspection cases. *Id.* at 564-66. For the reasons discussed *supra* text accompanying notes 65 & 258-60, drunk driving roadblock stops are inherently subject to field officer discretion. Therefore, to help curb this discretion, area warrants should be required. As discussed *infra* text accompanying notes 325-34, sobriety checkpoints should also be operated at permanent locations or pursuant to sufficient advance notice to enable motorists to avoid them.

³²³ *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

³²⁴ See Note, *Roadblock Seizures*, *supra* note 16, at 1478-79.

riod unless the law enforcement agency can demonstrate the checkpoint's productivity in terms of either increased drunk driving arrests or decreased alcohol-related crashes.

While the warrant procedure would require the police to articulate justifications for every roadblock, it probably would have only a limited practical impact. The requirement that police justify the choice of a particular location for a roadblock through evidence of a drunk driving problem would probably be easily satisfied. When drunk driving roadblocks are set up for general deterrence purposes, the police logically cannot be required to justify one location rather than another. They might choose the safest road in town for a checkpoint as long as it would yield high visibility. It would be very difficult to dispute effectively a police chief's claim that a roadblock has a general deterrence effect. Furthermore, constraints on where roadblocks can be safely set up, insufficient data on the location of disproportionate numbers of alcohol-related accidents, and the general feeling that the problem is pervasive, would probably eviscerate any requirement that police justify particular roadblock operations. Therefore, even if courts were willing to require the police to demonstrate specifically the need for a particular roadblock, such demonstrations might become mere formalities.

D. Permanent Location or Advance Notice

The permanent location of the Border Patrol checkpoints in *Martinez-Fuerte*³²⁵ was crucial to the Supreme Court's approval.³²⁶ The Court stressed that subjective intrusiveness was significantly reduced because motorists "know, or may obtain knowledge of, the location of the checkpoints."³²⁷ At least one court has held that any drunk driving roadblock must be in a permanently fixed location to survive constitutional scrutiny.³²⁸

The special advantage of the permanently located checkpoints upheld in *Martinez-Fuerte* was the high degree of advance notice they afforded. Likewise, a permanently located sobriety checkpoint would reduce subjective intrusiveness by providing an unusually high degree of advance notice.³²⁹ Whereas the advance publication of temporary drunk

³²⁵ 428 U.S. 543 (1976).

³²⁶ See *supra* text accompanying notes 84-89.

³²⁷ *Martinez-Fuerte*, 428 U.S. at 559.

³²⁸ *State v. Smith*, 674 P.2d 562, 563 (Okla. Crim. App. 1984). *Contra Little v. State*, 300 Md. 485, 506-08, 479 A.2d 903, 914 (1984); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984).

³²⁹ Certain existing structures, such as tollbooths, could be used as permanent drunk

driving roadblock sites probably would reach only a small portion of the driving public, the location of a fixed checkpoint probably would become common knowledge. Motorists' advance knowledge of the checkpoint's location would enable those who wished to avoid it to choose an alternative route.³³⁰

For those aware of a permanent sobriety checkpoint, the decision to pass through it would be essentially voluntary,³³¹ implicating fourth amendment interests only to the same reduced extent as other consensual searches and seizures.³³² Because it is precisely the nonconsensual subjection of motorists to coercive police power that makes drunk driving roadblocks constitutionally objectionable, permanently located roadblocks would be less troublesome than the usual temporary roadblocks.³³³ The same advantage could also be achieved without imposing the requirement of permanence. Substantial advance notice of a sobriety checkpoint could be provided through media publicity as well as on-site signs.³³⁴

driving roadblocks. From 1983-85, New York City police operated drunk driving roadblocks at bridge and tunnel tollbooths. Telephone interview with Lanie Kirschner, New York Department of Transportation (Apr. 15, 1985).

³³⁰ *But see supra* note 155. If a drunk driver has advance notice of a roadblock, he may yield the driver's seat to a sober passenger. While such an arrangement would frustrate the law enforcement goal of apprehending drunk drivers, it would promote the goal of removing drunk drivers from the road (or, more precisely, from behind the steering wheel).

³³¹ A permanently located drunk driving roadblock would be similar to airport screenings in this regard. *See supra* text accompanying notes 122-23. The more that any detour to avoid a drunk driving roadblock inconveniences a particular motorist, the more that roadblock burdens his fourth amendment interests. The individual's right to remain free from suspicionless searches and seizures would be rendered nugatory if he had to suffer substantial inconvenience in order to exercise that right.

³³² Regarding consensual searches and seizures, see generally W. LAFAVE, *supra* note 98, §§ 8.1-6, at 610-778 (1978).

³³³ A drunk driving roadblock's law enforcement productivity would be substantially undermined if it were voluntary. *See, e.g., supra* note 84. However, under a balancing analysis, the less a search or seizure infringes upon personal freedom or privacy, the less justification it requires.

³³⁴ Some jurisdictions have implemented truly voluntary drunk driving roadblocks, which approaching motorists are free to avoid altogether, or which they may choose to drive through without stopping or rolling down their windows. Some courts have held the voluntary nature of these roadblocks to be essential to their constitutionality. *Stark v. Perpich*, 590 F. Supp. 1057, 1061 (D. Minn. 1984) ("[T]he most important feature . . . that tips the balance in favor of allowing" police to make automobile stops pursuant to drinking-driving survey "is that participation is completely voluntary."); *Little v. State*, 300 Md. 485, 491-92, 504-06, 479 A.2d 903, 906, 913 (1984).

E. Exclusionary Rule

The Supreme Court has emphasized that the scope of permissible searches and seizures not based upon probable cause must be strictly confined in light of the specific law enforcement goals for which they are authorized.³³⁵ This limitation is all the more important in the context of suspicionless searches and seizures. Because drunk driving roadblock investigations can easily be used as pretexts for investigating other crimes,³³⁶ it is particularly important to devise measures that will assist in confining the scope of these investigations to their stated law enforcement purpose. Here, the exclusionary rule has an important role. At the very least, police officers conducting sobriety checkpoint investigations should be prohibited from using evidence of crimes³³⁷ other than drunk driving.³³⁸

³³⁵ See *supra* text accompanying notes 293-96; see also, e.g., *Terry v. Ohio*, 392 U.S. 1, 26, 29 (1968).

³³⁶ See *supra* text accompanying notes 231-45.

³³⁷ Although drunk driving roadblocks should not be utilized to enforce criminal laws other than those regarding drunk driving, they could permissibly be utilized to enforce administrative requirements such as those governing driver's licenses and vehicle registrations. A roadblock expressly intended to enforce these administrative requirements would be independently justifiable. See *supra* note 90 and accompanying text. For example, guidelines developed by the county prosecutor's office in Syracuse, New York provide for roadblocks designed to serve both administrative and anti-drunk driving purposes:

[To] determine the validity of inspection and registration stickers of the vehicles observed; identify those vehicles operating with obvious equipment defects; identify vehicle operators who appear to be intoxicated; provide concentrated enforcement visibility; enforce compliance with child restraint laws; inspect vehicular documents; increase the awareness of the motoring public of the provisions of the vehicle and traffic law; provide for safer operation of vehicles; reduction of accidents; and increase the public's perceived risk of arrest for DRIVING WHILE INTOXICATED.

ONONDAGA COUNTY, NEW YORK STOP-DWI PROGRAM VEHICULAR SAFETY ROAD-CHECK PROCEDURE 1 (1982) (copy on file with *U.C. Davis Law Review*) (capitalization in original).

³³⁸ Professor Amsterdam has proposed such a rule with respect to every search and seizure permitted on less than probable cause. He argues that the exclusionary rule is necessary to confine any such search or seizure to the specific purpose that constituted its justification:

I would apply the exclusionary rule . . . to stop-and-frisk, and also to other search-and-seizure practices — such as driver's license checks, if they are to be permitted at all — where the inability of the courts to devise and enforce any other effective constraint against the perversion of limited-purpose police powers into general search warrants leaves — to use James Otis' classic phrase — the liberty of every man in the hands of

Fourth amendment values would be even better protected by a broad exclusionary rule, prohibiting the use of evidence obtained at a sobriety checkpoint for any criminal prosecution, including for drunk driving. Under such an exclusionary rule, drunk drivers detected at a roadblock would be removed from the road and subjected to the full range of administrative sanctions, including license suspension and revocation, but they would not face criminal prosecution. In essence, this would convert drunk driving roadblock investigations into administrative inspections, designed primarily to detect a dangerous condition and to prevent future harm.³³⁹ Some state judges have indicated that a drunk driving roadblock stop should be upheld if its purpose is to remove drunk drivers from the road, but invalidated if its purpose is to impose criminal penalties.³⁴⁰ While this single factor should probably not determine constitutionality,³⁴¹ it is significant. In contrast with a drunk driv-

every petty officer.

Amsterdam, *supra* note 23, at 438. In the context of other types of suspicionless mass searches, judges and scholars have also suggested that an exclusionary rule bar the prosecutorial use of any "proceeds towards which the search was not, and could not have been independently, directed." *United States v. Skipwith*, 482 F.2d 1272, 1280 (5th Cir. 1973) (Aldrich, J., dissenting) (airport screening); *see also* Note, *The Fourth Amendment and Housing Inspections*, 77 *YALE L.J.* 521, 535 (1968) (blanket *Camara*-type housing inspections to enforce administrative codes).

³³⁹ Some experts believe that drunk driving could be dealt with most effectively if it were altogether decriminalized. *See supra* note 224.

³⁴⁰ *See State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 10, 663 P.2d 992, 1001 (1983) (Feldman, J., concurring) (fourth amendment would allow properly planned and operated roadblocks established for deterrent rather than investigative or apprehension purposes); *cf. State v. Smith*, 674 P.2d 562, 565 (Okla. Crim. App. 1984) (in holding that fourth amendment was violated by sobriety checkpoint investigations "for the purpose of seeking out criminal DUI offenders," court stressed that critical distinction from *Martinez-Fuerte* was that checkpoints were not primarily seeking out criminals).

³⁴¹ The right to be free from official intrusion into personal privacy, security, and liberty without particularized cause, which underlies the fourth amendment, would still be violated by a suspicionless sobriety checkpoint investigation, regardless of any constraints on how the police could utilize the evidence obtained through that investigation. *See Stark v. Perpich*, 590 F. Supp. 1057 (D. Minn. 1984) (imposing restrictions upon car stops and questioning of drivers even though for research purposes only, and not for law enforcement). Furthermore, the fact that a search is not aimed at the discovery of evidence of some crime is only one of the four factors that the Court stressed in *Camara v. Municipal Court*, 387 U.S. 523 (1967), as a basis for upholding suspicionless administrative inspections. The other factors would still be absent from the drunk driving roadblock context, even if drunk driving were decriminalized. *See supra* text accompanying notes 59-65. Similarly, under a balancing analysis, although decriminalization should reduce the subjective intrusiveness of a drunk driving roadblock investigation, it

ing roadblock aimed at criminal prosecutions, a roadblock operated for the limited purpose of removing drunk drivers from the road would be more closely analogous to the suspicionless administrative inspections that the Supreme Court has sustained.³⁴²

CONCLUSION

If widely approved, sobriety checkpoints could be set up at shifting locations all over the country. Neither Border Patrol checkpoint stops nor any other types of suspicionless investigations that the Supreme Court has authorized have touched the lives of so many citizens or been aimed at criminal law enforcement. The acceptance of drunk driving roadblocks could pave the way for other dragnet searches and seizures to enforce other criminal laws.

While submission to sobriety checkpoint investigations might seem a small price to pay for an alleged "solution" to the serious drunk driving problem, similar "solutions" could be offered for every crime problem. This Article has pointed out that the effectiveness of drunk driving roadblocks has not been demonstrated and that enforcement strategies consistent with the probable cause or reasonable suspicion standard are at least as productive. The Article has also shown that, notwithstanding Supreme Court decisions approving other types of suspicionless searches and seizures, there are strong constitutional as well as policy reasons to reject drunk driving roadblocks.

Routine roadblocks call to mind the way police and soldiers are deployed in authoritarian societies. Even if they were conducted in a uniform and "friendly" manner,³⁴³ they would be inconsistent with

would not eliminate subjective intrusiveness. *See supra* notes 261-63 and accompanying text. Moreover, one would also have to consider the objective intrusiveness of these investigations, *see supra* text accompanying notes 229-45, and their "productivity" in reducing the drunk driving problem. *See supra* text accompanying notes 167-79.

³⁴² *See, supra* text accompanying notes 56-60. For this reason, investigations at such a roadblock would fare better under the balancing analysis than would drunk driving investigations aimed at criminal prosecutions. From the individual driver's perspective, drunk driving roadblock investigations that could not lead to criminal prosecution and punishment should be subjectively less intrusive than those which could. *See, e.g., supra* notes 60, 99, 151, & 263. On the other side of the "reasonableness" balance, such investigations would be at least as "productive" in removing drunk drivers from the road as would roadblock investigations directed at criminal enforcement. In fact, they could even be more productive in achieving this purpose if drunk drivers would make fewer efforts to avoid such roadblocks.

³⁴³ *See* *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting) ("Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent.").

American constitutional and political traditions. We would do well to recall Justice Robert Jackson's admonition in *United States v. Di Re*:³⁴⁴

We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.

³⁴⁴ 332 U.S. 581, 595 (1948); *see also supra* notes 15, 193, & 290 and text accompanying note 290.