

Tulsa Law Review

Volume 20 | Issue 2

Winter 1984

The Constitutionality of Drunk Driver Roadblocks in Oklahoma: State v. Smith

Gordon D. Quin

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Gordon D. Quin, *The Constitutionality of Drunk Driver Roadblocks in Oklahoma: State v. Smith*, 20 Tulsa L. J. 286 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol20/iss2/6>

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

THE CONSTITUTIONALITY OF DRUNK DRIVER ROADBLOCKS IN OKLAHOMA: *STATE v. SMITH*

I. INTRODUCTION

The annual loss of life attributable to the drunken driver¹ has recently catalyzed public support in favor of tougher drunk driving laws.²

1. The President's Commission on Drunk Driving estimates that each year 25,000 persons are killed in motor vehicle accidents involving alcohol. *Federal Legislation to Combat Drunk Driving Including National Driver Register: Hearing on S.671, S.672, S.2158 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation*, 97th Cong., 2nd Sess. 65 (1982) (statement of Diane Steed, Deputy Administrator, National Highway Traffic Safety Administration) [hereinafter cited as *Federal Legislation*]. In addition, another 700,000 individuals are injured yearly. N.Y. Times, Dec. 14, 1983, at A24, col. 1. It has also been estimated that between 40 and 55% of drivers fatally injured have a blood alcohol concentration at or above the legal limit of .10%. *Alcohol, Drugs and Driving: Hearing to Examine What Effect Alcohol and Drugs Have on Individuals While Driving Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2nd Sess. 1 (1982) (statement of Sen. Gordon Humphrey, Chairman, Subcommittee on Alcoholism and Drug Abuse). Moreover, on Friday and Saturday nights it is estimated that one out of every 10 drivers is drunk. *Federal Legislation, supra*, at 66. The loss to society is not confined to human lives; economic losses occurring as a result of drunk driver accidents have been estimated to be in excess of \$5 billion yearly. *Id.* at 65.

The National Institute of Alcohol Abuse and Alcoholism reports that Oklahoma ranks seventh highest in the country in terms of per capita chronic alcohol-related health problems (e.g., alcoholism and liver degenerating cirrhosis), and tenth highest in the country in terms of per capita alcohol-related casualties (e.g., drunk driving deaths and alcohol-related suicides). Wall Street Journal, Jan. 25, 1983, at 35, col. 1. In 1982, 49% of Oklahoma's 1,434 fatal accidents involved drivers and pedestrians who had been drinking. SERVICES AND RECORDS DIV., OKLAHOMA DEPARTMENT OF PUBLIC SAFETY, OKLAHOMA TRAFFIC ACCIDENT FACTS 20 (1982).

2. The efforts of anti-drunk driving groups like Mothers Against Drunk Drivers (MADD) and Remove Intoxicated Drivers (RID) have been instrumental in causing a shift in the public's attitude toward drunk driving. *Federal Legislation, supra* note 1, at 66. Over the past several years, 39 states have enacted stricter measures against drunk drivers, while 41 states have established task forces or commissions on drunk driving. THE PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 2 (1983). At the federal level, Congress has established an incentive program which allows the National Highway Traffic Safety Administration to grant additional funding for highway traffic safety to states which adopt and implement alcohol safety traffic programs. 23 U.S.C. § 408 (1982). In order to receive this funding the state must meet four criteria: 1) the state law must suspend a first offender's license for 90 days and for at least one year for repeat offenders, 2) the state law must establish mandatory sentences of 48 consecutive hours in jail or 10 days of community service for those convicted of driving while intoxicated (DWI) more than once in five years, 3) the state law must consider motorists with a blood alcohol concentration of .10% or greater to be intoxicated, and 4) the state must increase enforcement of its drunk driving laws and inform the public of such enforcement. *Id.* § 408(e)(1) (A)-(D). Congress has also provided for the establishment of a national driver log to assist state licensing officials in exchanging driving records and preventing convicted drivers from obtaining licenses in other states. *Id.* § 401. In 1984, Congress enacted additional legislation aimed at establishing a nationwide drinking age of 21. The Child Passenger Safety Act of 1984, Pub. L. No. 98-363, 1984 U.S. CODE

In response to this surge of anti-drunk driving sentiment, some law enforcement agencies have supplemented traditional techniques for enforcing existing drunk driving laws³ with roadblocks specifically designed to apprehend the drunk driver.⁴ Driving while intoxicated (DWI) roadblocks may, however, be unconstitutional under the fourth amendment because they subject individuals stopped at the roadblock

CONG. & AD. NEWS (98 Stat.) 435. Under this legislation, any state maintaining a drinking age of less than 21 in 1987 will be subject to a withholding of 5% of that state's share of federal highway funds for that year and 10% in 1988. *Id.* § 6(a), 1984 U.S. CODE CONG. & AD. NEWS at 437 (to be codified at 23 U.S.C. § 158(a)(1), (2)). This legislation also provides for incentive grants—up to a 5% increase in highway safety funding will be awarded to those states which enact mandatory minimum sentences for persons convicted of drunk driving. *Id.* § 7(b), 1984 U.S. CODE CONG. & AD. NEWS at 438 (to be codified at 23 U.S.C. § 408(d)).

Oklahoma's constitution prohibits the sale of any alcoholic beverage to persons under the age of 21. OKLA. CONST. art. 27, § 5. Furthermore, in 1983 Oklahoma changed the minimum age for purchasing beverages "containing more than one-half of one percent ($\frac{1}{2}$ of 1%) of alcohol measured by volume and not more than three and two-tenths (3.2%) of alcohol measured by weight" from 18 to 21. OKLA. STAT. tit. 37, § 241 (Supp. 1984). The relevant Oklahoma statute on drunk driving reads as follows:

It is unlawful . . . for any person to drive, operate, or be in actual physical control of a motor vehicle within this state who: 1) [h]as a blood or breath alcohol concentration . . . of ten-hundredths (0.10) or more at the time of a test of such person's blood or breath administered within two (2) hours after the arrest of such person; or 2) [i]s under the influence of alcohol; or 3) [i]s under the influence of any other intoxicating substance to a degree which renders such person incapable of safely driving or operating a motor vehicle; or 4) [i]s under the combined influence of alcohol and any other intoxicating substance to a degree which renders such person incapable of safely driving or operating a motor vehicle.

OKLA. STAT. tit. 47, § 11-902(A)(1)-(4) (Supp. 1984). In Oklahoma, it is also a criminal offense for any person to operate "a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol." OKLA. STAT. tit. 47, § 761(A) (1981). "[E]vidence that there was, at the time of the test, an alcohol concentration in excess of five-hundredths (0.05) but less than ten-hundredths (0.10) is relevant evidence that the person's ability to operate a motor vehicle was impaired by alcohol." OKLA. STAT. tit. 47, § 756(b) (Supp. 1984). In contrast, "evidence that there was, at the time of the test, an alcohol concentration of ten-hundredths (0.10) or more shall be admitted as prima facie evidence that the person was under the influence of alcohol." *Id.* § 756(c). See also *Bailey v. State*, 633 P.2d 1249 (Okla. Crim. App. 1981) (contrasting the differences between driving while impaired and driving while under the influence of intoxicating liquor). For the purposes of this Note, the acronym "DWI" is intended to be synonymous with "DUI," the acronym typically used in Oklahoma for driving while under the influence of intoxicating liquor.

3. In Oklahoma, traditional law enforcement techniques, such as the roving patrol acting upon reasonable suspicion or probable cause, accounted for 34,616 DWI arrests in 1982. OKLAHOMA STATE BUREAU OF INVESTIGATION, CRIME IN OKLAHOMA—UNIFORM CRIME REPORT 56 (1982). Nationwide, more than 1,300,000 DWI arrests occurred in 1981. NATIONAL TRANSP. SAFETY BD., SAFETY STUDY—DEFICIENCIES IN ENFORCEMENT, JUDICIAL AND TREATMENT PROGRAMS RELATED TO REPEAT OFFENDERS 4 (1984) [hereinafter cited as SAFETY STUDY].

4. For an expanded discussion of roadblock operation, see *infra* notes 86-131, 178-94 and accompanying text. As of September 1, 1984, "sobriety checkpoints" were being used in Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, and Virginia. SAFETY STUDY, *supra* note 3, at 98.

to a seizure which is executed without some prior form of individualized suspicion.⁵ Nonetheless, law enforcement and traffic safety officials have assumed that the DWI roadblock is constitutionally permissible under guidelines set forth in the Supreme Court dicta of *Delaware v. Prouse*.⁶

In *Prouse*, the Court rejected the police practice of using roving patrols to stop automobiles and check for drivers' licenses and vehicle registrations without some prior individualized suspicion that the driver was unlicensed or that the vehicle was unregistered.⁷ In characterizing this practice as unconstitutional under the fourth amendment, the Court noted in dicta that states were not precluded from developing less intrusive methods of enforcement.⁸ The Court went on to point out that the "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative."⁹

A number of state courts have subsequently interpreted the *Prouse* dicta as legitimizing the use of roadblocks for enforcing DWI laws and have gone on to uphold the constitutionality of particular DWI roadblocks.¹⁰ In the recent Oklahoma decision of *State v. Smith*,¹¹ however,

5. See *infra* notes 33-36 and accompanying text. See generally Howarth, 'Sobriety Roadblocks' Hobble Us All, L.A. Times, Jan. 6, 1985, at IV5, col. 3 (contending DWI roadblocks are unconstitutional); Will, *Is the ACLU Being Reasonable?*, NEWSWEEK, Jan. 31, 1983, at 80 (approving use of the DWI roadblock); *Checkpoints to Catch Drunk Drivers?*, U.S. NEWS & WORLD REP., July 4, 1983, at 65-66 (opposing views on the constitutionality of the DWI roadblock).

6. 440 U.S. 648, 663 (1979). The Presidential Commission on Drunk Driving, citing *Prouse* as a reference, recommended that "[p]olice agencies should apply selective enforcement and other innovative techniques including . . . judicially approved roadblock[s], to achieve a high perception of risk for driving under the influence." THE PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 14-15 (1983). See generally NATIONAL TRANSP. SAFETY BD., SAFETY STUDY: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMINISTRATIVE LICENSE REVOCATIONS (1984) (also advocating the use of sobriety checkpoints).

7. *Prouse*, 440 U.S. at 663. The Court stated:

Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

Id.

8. *Id.* "This holding does not preclude . . . [s]tates from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* (footnote omitted).

9. *Id.*

10. See *infra* notes 109-26 and accompanying text; see also *infra* notes 86-95, 98-102 and accompanying text (discussing those cases in which particular DWI roadblocks have been found to be unconstitutional after implicit or explicit application of the *Prouse* dicta to the roadblock). Two courts have, however, analyzed the constitutionality of the DWI roadblock without explicitly or implicitly relying upon the *Prouse* dicta. See *infra* notes 103-08, 127-31 and accompanying text.

11. 674 P.2d 562 (Okla. Crim. App. 1984).

the Oklahoma Court of Criminal Appeals denounced the use of the DWI roadblock, holding that such stops are an unconstitutional fourth amendment seizure.¹² This Note will review the line of Supreme Court decisions leading up to and including *Prouse*, as well as lower court decisions concerned with the constitutionality of the DWI roadblock. The Note will then analyze the applicability of the *Prouse* dicta to the DWI roadblock, the fourth amendment reasoning used in lower court cases, and the constitutionality of the DWI roadblock. Based on this analysis, the reasoning and implications of *Smith* will then be examined.

II. STATEMENT OF THE CASE

On the night of October 2 and morning of October 3, 1981, Oklahoma law enforcement agencies¹³ established six separate vehicle roadblocks in Oklahoma County, ostensibly designed for vehicle registration and driver's license checks.¹⁴ It was later determined that the real purpose of the roadblocks was to apprehend DWI violators.¹⁵ In operating the roadblocks, the agencies would either stop all cars or every third car. If the roadblock caused excessive traffic congestion, cars would be waved through without being stopped.¹⁶ *Smith* was stopped at one of the roadblocks, where police obtained evidence of intoxication.¹⁷ Prior to the stop, however, the agencies lacked either reasonable articulable suspicion or probable cause to believe that

12. *Id.* at 565.

13. *Id.* at 562. The agencies included in the operation were the Oklahoma Department of Public Safety, the Oklahoma Highway Patrol, the Oklahoma City Police Department and the Oklahoma County Sheriff's Office. *Id.*

14. *Id.*

15. *Id.* at 563-64. The Court of Criminal Appeals noted that the following factors were incongruent with a true license and registration check: 1) the ten officers assigned to each roadblock were accompanied by supervisors; blood testing equipment; personnel trained to administer blood tests; breathalyzer equipment; vans for booking, jailing, and transporting offenders; and wrecker crews, 2) the presence of the District Attorney at the roadblock sites, and the prior orchestration of the roadblocks by the District Attorney's office and the law enforcement agencies, 3) the location of the roadblocks in areas containing drinking establishments, 4) the statement by a police officer that driver's license and vehicle registration violators would not have been arrested, 5) the recent paucity of license and registration roadblocks in Oklahoma County (the last roadblock was some 10-11 years prior to the October 2-3 roadblock), 6) the admission by the officer in charge of the operation that the roadblock was designed to apprehend drunk drivers, 7) advance publicity by the Oklahoma Department of Public Safety indicating that the true purpose of the roadblock was to catch drunk drivers, and (8) the failure of the police captain in charge of planning the operation to consult statistics concerned with traffic flow. *Id.*

16. *Id.* at 563.

17. *Id.*

Smith was intoxicated.¹⁸ Nevertheless, Smith was charged with driving under the influence of alcohol.¹⁹

The Oklahoma County District Court sustained Smith's motion for a directed verdict and dismissed the DWI charge.²⁰ The state thereafter appealed to the Oklahoma Court of Criminal Appeals on a reserved question of law.²¹ The Court of Criminal Appeals affirmed the District Court's ruling, concluding that the stop constituted an unreasonable seizure under the fourth amendment.²²

III. THE DEVELOPMENT OF ROADBLOCK LAW

The fourth amendment prohibits unreasonable searches and seizures.²³ In determining the reasonableness of a particular police seizure,²⁴ the Supreme Court has balanced the public interest in implementing the seizure with the affected "individual's right to personal se-

18. *Id.*

19. *Id.* at 562.

20. *Id.*

21. *Id.*

22. *Id.* at 565.

23. The fourth amendment states that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Over the past several decades, judicial scrutiny of the fourth amendment has taken on new significance because of the effects of the exclusionary rule. Under the original formulation of the exclusionary rule, evidence obtained through an unreasonable search and seizure is inadmissible in a federal prosecution. *Weeks v. United States*, 232 U.S. 383 (1914). The Court extended the *Weeks* doctrine to state prosecutions by holding that states are subject to the fourth amendment through the due process clause of the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). For an exhaustive treatment of the exclusionary rule and of fourth amendment jurisprudence in general, see Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

24. Justice Stewart has observed that a "seizure" occurs "if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion) (footnote omitted). Four justices (Justices White, Marshall, Powell and Stevens) subsequently concurred with the *Mendenhall* opinion. *Florida v. Royer*, 103 S. Ct. 1319, 1324 (1983) (plurality opinion). At least one commentator has interpreted *Royer* as signifying an emerging three-tier approach to police-citizen encounters:

First, are minimally intrusive encounters that are short of seizures and are beyond fourth amendment reach. The second tier involves intrusions severe enough to constitute seizures but not so severe to warrant the probable cause requirement. Third, are arrests and intrusions of a similar magnitude which can be justified only by probable cause.

Latzer, Royer, *Profiles, and the Emerging Three-Tier Approach to the Fourth Amendment*, 11 AM. J. CRIM. L. 149, 163 (1983). See generally Williams, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771 (1982) (discussing the determination of a fourth amendment seizure and distinguishing between seizures that constitute stops and seizures that constitute arrests).

curity free from arbitrary interference by law officers."²⁵ The warrant clause of the fourth amendment further limits police discretion by generally requiring the issuance of a warrant prior to a search and seizure.²⁶ The warrant must describe the place to be searched and the

25. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)). In *Terry*, the Court characterized a brief investigative stop and protective frisk for weapons, "the stop and frisk," as a seizure and search subject to fourth amendment scrutiny. *Terry*, 392 U.S. at 16. The Court went on to note that this particular type of seizure was a lesser intrusion than a full arrest and, therefore, did not require probable cause, the traditional standard necessary for fulfilling the reasonableness requirement when making an arrest. *Id.* at 19-20; *see also infra* notes 26-29 (discussing probable cause, arrest and the warrant requirement). Instead, the Court held that seizures falling short of a full arrest must comply with the fourth amendment reasonableness clause, and that "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry*, 392 U.S. at 21 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)) (bracketed words in original). After applying this balancing approach to the facts in *Terry* and concluding "that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer," the Court held that in undertaking a stop and frisk "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the stop and frisk]." *Terry*, 392 U.S. at 27, 21. But in dispensing with the need for probable cause, a more rigorous objective standard, the *Terry* Court also stipulated that mere "inarticulate hunches" would not suffice in meeting the new standard. *Id.* at 22. For an analysis of *Terry* and its effects, see Miles, Jr., *From Terry to Mimms: The Unacknowledged Erosion of Fourth Amendment Protections Surrounding Police-Citizen Confrontations*, 16 AM. CRIM. L. REV. 127 (1978).

In *Camara v. Municipal Court*, the lessee of an apartment building was arrested after he refused to allow city housing inspectors to inspect his apartment prior to obtaining a search warrant. 387 U.S. at 525-27. The Court held that a search warrant was necessary for this type of administrative search. *Id.* at 534. However, the Court further held that this particular search warrant need not be premised on a showing of probable cause that the *particular* building was in violation of the housing code, but rather that inspectors adhered to reasonable administrative standards for conducting an area search, such search including the building in question. *Id.* at 534-39. Thus, the search warrant in *Camara* could be based on reasonable standards such as "the passage of time [since the previous inspection], the nature of the building . . . , or the condition of the entire area." *Id.* at 538. Accordingly, the Court held that the specific, individualized quantum of suspicion normally necessary for a finding of probable cause in a criminal investigation could be dispensed with for searches made in the administrative setting of *Camara*. *Id.* at 534-39. Moreover, in reaching this result, the *Camara* Court balanced the public interest in maintaining housing inspections against the individual's fourth amendment rights, thereby establishing the prototypical balancing test for ascertaining fourth amendment reasonableness. *Id.* at 536-37; *see also* *See v. City of Seattle*, 387 U.S. 541 (1967) (utilizing the *Camara* balancing approach in the search of business premises). *See generally* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, 61 CALIF. L. REV. 1011 (1973) (tracing the evolution of the balancing test since *Camara* and *See*).

26. U.S. CONST. amend. IV. The warrant requirement has, however, been dispensed with by numerous exceptions. *See, e.g.*, *South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976) (no warrant necessary for inventory search of a vehicle in lawful police custody); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973) (warrant and probable cause to search not required where voluntary consent given to search); *Coolidge v. New Hampshire*, 403 U.S. 443, 464-71 (1971) (warrant not required for the seizure of evidence in plain view during a search incident to arrest); *Chimel v. California*, 395 U.S. 752, 766 (1969) (warrant not required for search incident to valid arrest); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (warrant not required for search of house entered by suspect minutes before police in hot pursuit); *Carroll v. United States*, 267 U.S. 132,

persons or things to be seized, and is issued upon a finding of probable cause²⁷ by a neutral and detached magistrate.²⁸ Although a valid arrest may occur with or without an arrest warrant, a finding of probable cause is always required prior to the arrest.²⁹ In *Terry v. Ohio*,³⁰ however, the Court held that the probable cause standard was no longer necessary for certain warrantless fourth amendment seizures falling short of the intrusion imposed by a full arrest.³¹ The *Terry* standard, known later as "reasonable suspicion," is distinguishable from probable cause because "[r]easonable suspicion requires that the law enforcement officer reasonably *suspect* that a person is engaged in criminal activity, whereas probable cause requires that the officer reasonably *believe* that a crime has been or is being committed."³²

The Court has held that a warrantless, investigative stop of an automobile by a roving law enforcement patrol is a seizure which must be

153-54 (1925) (warrant not required to stop and search moving automobile if probable cause exists; no warrant necessary for search at international border). See generally 2 W. LAFAVE, SEARCH AND SEIZURE § 4.1(a), at 3-6 (1978) (discussing exceptions to the warrant requirement); Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603 (1982) (discussing the need for a warrant).

27. U.S. CONST. amend. IV. Probable cause to seize or arrest a person exists when the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to lead a prudent individual to believe that the suspect has committed or is committing an offense. See *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (citing *Carroll v. United States*, 267 U.S. 132, 162 (1925)); see also *Henry v. United States*, 361 U.S. 98, 102 (1959) ("[e]vidence required to establish guilt is not necessary" for a finding of probable cause).

28. See *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971).

29. The fourth amendment does not require arrest warrants. See U.S. CONST. amend. IV. Arrest warrants are, however, preferable, and a high degree of deference will be given to a magistrate's finding of probable cause. See *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Nonetheless, the obvious logistical problem of obtaining a warrant prior to every arrest makes the arrest warrant impractical in many situations. In such instances, probable cause must be determined by the arresting officer rather than by a magistrate. See, e.g., *United States v. Watson*, 423 U.S. 411, 416-24 (1976) (police may make warrantless public felony arrest based solely on probable cause); *Raymer v. City of Tulsa*, 595 P.2d 810, 812 (Okla. Crim. App. 1979) (police may make warrantless arrest for misdemeanor committed in arresting officer's presence).

30. 392 U.S. 1 (1968); see also *supra* note 25 (discussing the Court's analysis in *Terry*).

31. See *Terry*, 427 U.S. at 20-27.

32. Note, *Airport Seizures of Luggage Without Probable Cause: Are They "Reasonable"?* 1982 DUKE L.J. 1089, 1090 n.8 (emphasis in original). In *Terry*, the officer making the stop and frisk interrupted what he perceived as a prelude to an armed robbery and, therefore, was potentially vulnerable to physical harm. *Terry*, 392 U.S. at 5-7. Thus the Court originally applied the reasonable suspicion standard to the relatively narrow category of police-citizen encounters involving potentially violent crimes and danger to the officer. See, e.g., *Adams v. Williams*, 407 U.S. 143 (1972) (stop and frisk validated on the basis of informant's tip). Recently, however, the scope of the reasonable suspicion test has been broadened to include situations not involving violent crimes or danger to the officer. See *infra* note 33 and accompanying text. See generally Greenberg, *Drug Courier Profiles, Mendenhall and Reid: Analyzing Police Intrusions on Less Than Probable Cause*, 19 AM. CRIM. L. REV. 49, 50-65 (1981) (discussing *Terry*, the reasonable suspicion test and the test's evolution in post-*Terry* cases).

minimally premised upon reasonable suspicion.³³ Because stopping a moving vehicle and detaining its occupants—no matter how briefly—constitutes a seizure under the fourth amendment,³⁴ the law enforcement roadblock has also been implicated as a seizure.³⁵ Yet stops made at an investigatory roadblock, like the DWI roadblock, are rarely based upon some prior individualized suspicion that the driver of the stopped vehicle is engaged in criminal activity.³⁶

When faced with this dilemma, some courts have concluded that particular DWI roadblocks have imposed unreasonable seizures which excessively intrude upon the stopped motorist's fourth amendment rights.³⁷ Other courts have held that particular DWI roadblocks do not violate the fourth amendment.³⁸ This section of the Note begins by considering the Supreme Court's treatment of the law enforcement roadblock. The analysis thereafter shifts to an elucidation of the reasoning lower courts have employed in determining the constitutionality of DWI roadblocks.

A. *The Immigration Control Cases*

Modern case law applicable to the police use of roadblocks has evolved primarily as a result of a stream of immigration control cases brought before the Supreme Court in the 1970's. In 1973, the Court in *Almeida-Sanchez v. United States*³⁹ prohibited the Border Patrol from using roving patrols to make random vehicular searches at points removed from the border or its functional equivalent.⁴⁰ Because the

33. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (discussed *infra* notes 60-69 and accompanying text); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (discussed *infra* notes 50-53 and accompanying text); *see also* *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (upholding roving Border Patrol stop for questioning after inferences based on "totality of the circumstances" yielded a reasonable suspicion).

34. *Prouse*, 440 U.S. at 653.

35. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976).

36. *See, e.g.*, *State v. Cocomo*, 177 N.J. Super. 575, ___, 427 A.2d 131, 133 n.4 (Law Div. 1980) (investigating officer possessed no suspicion to believe that defendant was violating any law prior to being stopped at the DWI roadblock); *State v. Olgaard*, 248 N.W.2d 392, 393 (S.D. 1976) (prior to smelling alcohol on defendant's breath while checking defendant's license, investigating officer possessed no prior suspicion that defendant was violating any law).

37. *See infra* notes 86-108 and accompanying text.

38. *See infra* notes 109-31 and accompanying text.

39. 413 U.S. 266 (1973).

40. *Id.* at 273. The Border patrol utilizes three methods of detection along inland roadways: permanent checkpoints usually at or very near the international border, temporary checkpoints, and roving patrols. *Id.* at 268. The Border Patrol used the latter method to stop defendant's vehicle some 25 miles from the Mexican-U.S. border. *Id.* at 267-68. Although the officers making the stop lacked either probable cause or a search warrant, a search which eventually yielded a quantity of marijuana was conducted. *Id.* at 267. The agents who conducted the search justified

Court could not find adequate precedent to support the Border Patrol's practice,⁴¹ it concluded that the roving patrol vehicular search could only be upheld as constitutional if based upon probable cause, warrant, or consent.⁴² Justice Powell's concurring opinion suggested that the roving patrol searches could be upheld if executed pursuant to an area warrant procedure.⁴³

Two years later, the Supreme Court continued its *Almeida-Sanchez* line of analysis with *United States v. Ortiz*⁴⁴ and *United States v. Brignoni-Ponce*.⁴⁵ In *Ortiz*, the Court extended its *Almeida-Sanchez* probable cause or consent requirement to Border Patrol vehicular searches at traffic checkpoints removed from the border or its functional equivalent.⁴⁶ In support of the Border Patrol practice of making

their actions by citing the Immigration and Nationality Act, "which simply provides for warrantless searches of automobiles and other conveyances 'within a reasonable distance from any external boundary of the United States.'" *Id.* at 268 (citing Immigration and Nationality Act § 287(a)(3), 8 U.S.C. § 1357(a)(3) (1952)). Under regulations set forth by the Attorney General, a "reasonable distance" was defined as "within 100 air miles from any external boundary of the United States." *Id.* (citing 8 C.F.R. § 287.1 (1957)). Defendant, a Mexican citizen with a valid work permit, contended that the search of his vehicle was violative of the fourth amendment, and that the evidence obtained by the search should not have been admitted as evidence against him. *Id.* at 267.

41. *Id.* at 269-73. The Court cited *Carroll v. United States*, 267 U.S. 132 (1925), in observing that a warrantless stop and search of a moving vehicle must be premised upon probable cause. *Almeida-Sanchez*, 413 U.S. at 269-70. The Court then pointed out that the administrative search enunciated in *Camara v. Municipal Court*, 387 U.S. 523 (1967), was similarly at odds with the facts in *Almeida-Sanchez*.

The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara* when it insisted that "the discretion of the official in the field" be circumscribed by obtaining a warrant prior to the inspection.

Almeida-Sanchez, 413 U.S. at 270 (quoting *Camara*, 387 U.S. at 532-33) (footnote omitted). Moreover, as the search of the *Almeida-Sanchez* vehicle took place away from the border or its functional equivalent (e.g., "searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border," or at an interior airport receiving non-stop international flights), the Court was unwilling to apply the border search exception articulated in *Carroll*. *Almeida-Sanchez*, 413 U.S. at 272-73; see also *Carroll*, 267 U.S. at 154 (observing that "travellers may be so stopped 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").

42. *Almeida-Sanchez*, 413 U.S. at 273.

43. *Id.* at 283-85 (Powell, J., concurring). Justice Powell set forth four criteria which might be applicable in determining the existence of probable cause for an area search warrant: 1) the frequency of illegal aliens known to be within a particular area, 2) the proximity of the area to the border, 3) the extensiveness and geographic features of the area, and 4) the probable degree of interference with the rights of innocent motorists. *Id.* at 283-84.

44. 422 U.S. 891 (1975).

45. 422 U.S. 873 (1975).

46. *Ortiz*, 422 U.S. at 896-97. The defendants were stopped by the Border Patrol at a permanently established immigration checkpoint located in San Clemente, California, some 66 miles from the Mexican border. *Id.* at 891-93. Normal checkpoint operation allowed the investigating

such searches without probable cause or consent, the government contended that the predetermined location of the fixed checkpoints reduced field officer discretion in deciding which cars to search.⁴⁷ In addition, the government argued that motorist anxiety at a fixed checkpoint was comparatively less than the anxiety produced by the *Almeida-Sanchez* roving patrol stop and search.⁴⁸ The Court recognized that reduced motorist anxiety and officer discretion would be significant in determining the reasonableness of a vehicle stop, but remained unpersuaded that these factors alone could justify a dismissal of the probable cause requirement necessary for a full vehicular search.⁴⁹

Brignoni-Ponce, however, held that a roving Border Patrol stop of a moving vehicle could be undertaken if the officer was “aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion” that the vehicle contained illegal aliens.⁵⁰ In arriving at this less than probable cause standard, the Court balanced the strong governmental interest in restricting the flow of illegal aliens against the “modest” intrusion of a roving patrol stop

Border Patrol officer to stop a car if anything about the car or its occupants led the officer to believe that the car contained illegal aliens. *Id.* at 893-94. After stopping the car and asking the occupants about their citizenship, the officer could, upon a persistence or furtherance of his suspicion, inspect the car for hidden aliens. *Id.* at 894. Places susceptible to inspection included the trunk, under the hood, and beneath the chassis. *Id.* at 894 n.1. Although the Border Patrol lacked any particular reason to suspect that the defendant’s vehicle contained illegal aliens, the vehicle was searched and found to contain three illegal aliens hidden in the trunk. *Id.* at 892.

47. *Id.* at 894. The government reasoned that since the choice of the checkpoint’s location was “determined by high-level Border Patrol officials,” field officer discretion at the checkpoint was more limited than that of a roving patrol officer. *Id.*

48. *Id.* at 894-95. “Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists.” *Id.* at 894. Whereas at checkpoints, “the motorist can see that other vehicles are being stopped, he can see visible signs of the officers’ authority, and he is much less likely to be frightened or annoyed by the intrusion.” *Id.* at 895.

49. *Id.* The Court noted that the checkpoint’s procedural regularity “does not mitigate the invasion of privacy that a search entails. Nor do checkpoint procedures significantly reduce the likelihood of embarrassment.” *Id.* The Court also observed that the low percentage of vehicles actually stopped for questioning or to be searched at the San Clemente checkpoint (3%) indicated that the officers maintained a substantial degree of discretion in deciding which cars to search. *Id.* at 896.

50. *Brignoni-Ponce*, 422 U.S. at 884. Officers parked at the San Clemente checkpoint pursued and stopped defendant’s car after noting that the three occupants appeared to be of Mexican descent. *Id.* at 874-75. After questioning the occupants about their citizenship, the officers learned that the two passengers were illegal aliens. *Id.* at 875. *Brignoni-Ponce*, the driver, was subsequently charged with transporting illegal aliens. *Id.* As justification for the stop, the government relied on two sections of the Immigration and Nationality Act. These sections permitted a Border Patrol agent, prior to obtaining a warrant, “to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States” and allowed for warrantless automobile searches near United States borders. *Id.* at 876-77 (citing Immigration and Nationality Act § 287(a)(1), (3), 8 U.S.C. § 1357(a)(1), (3) (1952)).

which was brief and investigatory in nature.⁵¹ The Court concluded that the limited nature of the intrusion allowed for brief investigatory stops premised on facts not amounting to probable cause.⁵² In proclaiming "reasonable suspicion" as the standard for Border Patrol investigatory stops, the Court went on to state that once the stop had been made "[t]he officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause."⁵³

In *United States v. Martinez-Fuerte*,⁵⁴ the Court upheld the Border Patrol's practice of stopping a vehicle for brief citizenship questioning at a permanent checkpoint in the absence of an individualized suspicion that the vehicle contained illegal aliens.⁵⁵ The Court decided that in this instance the intrusion on fourth amendment rights was minimal and, therefore, outweighed by the substantial public interest in main-

51. *Brignoni-Ponce*, 422 U.S. at 878-80. The government claimed that roving patrol stops could usually be accomplished within a minute, requiring only a response to a query aimed at the occupant's legal right to be in the United States and the possible production of documentation evidencing that right. *Id.* at 880. Moreover, "visual inspection is limited to those parts of the vehicle that can be seen by anyone standing alongside." *Id.* (footnote omitted).

52. *Id.* The Court also noted "the importance of the governmental interest at stake . . . and the absence of practical alternatives for policing the border." *Id.* at 881.

53. *Id.* at 881-82. "As in *Terry*, the stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *Id.* at 881 (quoting *Terry*, 392 U.S. at 29). The Court also concluded that the mere glimpse of a person within a moving vehicle who appeared to be of Mexican descent did not comport with its "reasonable suspicion" requirement. *Brignoni-Ponce*, 422 U.S. at 885-87.

54. 428 U.S. 543 (1976). In conjunction with *Martinez-Fuerte's* case, the Court also heard *Sifuentes v. United States*, a case in which *Sifuentes* contended that the operation of a permanent immigration checkpoint near Sarita, Texas should have been authorized in advance by judicial warrant. *Martinez-Fuerte*, 428 U.S. at 549-50. The Court rejected this contention, noting first "that the visible manifestations of the field officer's authority at a checkpoint" gave adequate assurances to motorists that the officers were acting lawfully. *Id.* at 564-65. The Court also found that the additional purposes of a warrant, preventing "hindsight from coloring the evaluation of the reasonableness of a search or seizure" and utilizing the judgment of a neutral magistrate instead of the acting officer, were rendered inapplicable by the location and operational method of the checkpoint, and the deference given to "the administrative decisions of higher ranking officials." *Id.* at 565-66.

55. *Id.* at 562. The San Clemente checkpoint was designed so that a "point" officer could either allow oncoming northbound traffic to pass through the checkpoint without an oral inquiry and visual inspection, or be diverted to a secondary area for brief questioning (usually three to five minutes) about citizenship and immigration status. *Id.* at 546-47. Although the government acknowledged that suspicion about a particular vehicle could be used as a basis for diverting the vehicle into the secondary area, it conceded that no such articulable suspicion existed when it directed *Martinez-Fuerte's* vehicle into the secondary area. *Id.* at 547. A check of *Martinez-Fuerte's* documents indicated that he was a lawful resident, but that his two passengers were illegal aliens. *Id.* After being charged with transporting illegal aliens, *Martinez-Fuerte* moved to suppress the evidence obtained at the checkpoint on the basis that the failure to use articulable suspicion violated his fourth amendment rights. *Id.* at 547-48.

taining the checkpoint procedure.⁵⁶ After observing that “the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion,” Justice Powell’s majority opinion, satisfied with the procedural safeguards surrounding the checkpoint stop, concluded that the checkpoint stop and questioning could be carried out in the absence of some individualized suspicion.⁵⁷ But, as in *Brignoni-Ponce*, the Court stipulated that, “[a]ny further detention . . . must be based on consent or probable cause.”⁵⁸ Justices Brennan and Marshall, in their dissenting opinion, denounced any type of departure from an objective standard and urged affirmance of the reasonable suspicion approach adopted previously in *Brignoni-Ponce*.⁵⁹

B. Delaware v. Prouse

The line of immigration control cases was finally interrupted in 1979 by *Delaware v. Prouse*.⁶⁰ In *Prouse*, the Court concerned itself with the police practice of stopping moving vehicles and making driver’s license and vehicle registration checks without reasonable suspicion or probable cause to believe that the driver or the car’s occupants were in violation of any law.⁶¹ The State of Delaware contended that the governmental interest in conducting standardless spot checks

56. *Id.* at 562. Regarding the governmental interest in making checkpoint stops without some individualized quantum of suspicion, the Court noted the necessity of maintaining a traffic checking program as a means to control the influx of illegal aliens. Further, the Court noted the impracticality of requiring the reasonable suspicion standard where “the flow of traffic tends to be too heavy to allow the particularized study of a given car.” *Id.* at 556-57. The Court then referred to *Brignoni-Ponce* and *Ortiz*, contrasting the relatively high “subjective” degree of anxiety and intrusion inflicted by a roving patrol stop, with the much lower level of subjective intrusion found in the brief questioning and visual inspection at a permanent checkpoint stop. *Id.* at 558. Furthermore, the Court indicated, routine permanent checkpoint stops only minimally interfere with legitimate traffic since “motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere.” *Id.* at 558-59. The potential for excessive field officer discretion was found to be minimized by the “regularized manner in which established checkpoints are operated” and the selection of the checkpoint’s location by high level officials. *Id.* at 559.

57. *Id.* at 561-62. The Court also noted that individuals have less expectation of privacy in their automobiles than in their homes and, thus, the former has been afforded a lesser degree of fourth amendment protection. *Id.* at 561.

58. *Id.* at 567 (citing *Brignoni-Ponce*, 422 U.S. at 882).

59. See *Martinez-Fuerte*, 428 U.S. at 569-578 (Brennan, J., and Marshall, J., dissenting). The dissenters noted that “even in the exceptional situations permitting intrusions on less than probable cause, it has long been settled that justification must be measured by objective standards.” *Id.* at 569. Thus, officer “[c]onduct, to be reasonable, must pass muster under objective standards applied to specific facts.” *Id.*

60. 440 U.S. 648 (1979).

61. *Id.* at 650. Prouse was arrested for possession of marijuana after the patrolman who stopped his car smelled marijuana smoke and discovered marijuana in plain view on the car’s floor. *Id.* The patrolman who made the stop later testified that prior to the stop he had observed

to promote highway safety far outweighed the fourth amendment intrusion suffered by the detained person.⁶² After reviewing its holdings in *Brignoni-Ponce* and *Martinez-Fuerte*, the Court initially rejected Delaware's position by observing that the physical and psychological intrusion suffered by the detainee of a spot license check was no less than the degree of intrusion sustained by a roving Border Patrol stop.⁶³ Though agreeing with Delaware's premise that highway safety was important, the Court nevertheless rejected this type of spot check.⁶⁴ The Court noted that neither the probable rate of apprehension of license and registration violators, nor the probable deterrence of potential violators⁶⁵ could justify "subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials."⁶⁶ The Court thereafter held that the roving patrol stop utilized to make license and registration checks would be constitutional only if the investigating officer had a prior "articulable and reasonable suspicion" that the driver was unlicensed or that the car was unregistered.⁶⁷ In dicta, the Court suggested that the preceding holding did not preclude the "States from developing methods for spot checks that involve less intrusion or that do not involve the

no traffic violations and that his only basis for stopping the car was to check the driver's license and registration. *Id.*

62. *Id.* at 655.

63. *Id.* at 657. The Court pointed out that both types of stops involved the possibility for an "unsettling show of authority" and served to restrict freedom of movement. *Id.* The Court also decided that both types of stops were inconvenient, time consuming and likely to "create substantial anxiety." *Id.*

64. *Id.* at 658-59.

65. *Id.* at 661. In evaluating the probable effectiveness of the random license check, the Court noted that the foremost method of enforcing traffic and safety regulations is to act upon observed violations. *Id.* at 659. Since operators "without licenses are presumably the less safe drivers whose propensities may well exhibit themselves . . . it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers." *Id.* Moreover, "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." *Id.* at 659-60. The Court also found the likely deterrent effects of the spot check on license violators to be marginal. *Id.* at 660. Because license plates evidencing proper registration are readily observable without stopping the vehicle, the Court found even less justification for this component of the *Prouse* stop. *Id.*

66. *Id.* at 661.

67. *Id.* at 663. The Court was emphatic in pointing out that individuals operating or traveling in automobiles do not lose all expectation of privacy because the automobile is subject to governmental regulation. *Id.* at 662. "[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles." *Id.* at 663.

unconstrained exercise of discretion,"⁶⁸ and that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative."⁶⁹ The confused state of affairs surrounding contemporary DWI roadblock jurisprudence can be partially attributed to the variety of troublesome issues left unanswered by *Prouse* and its concluding dicta.

While *Prouse* explicitly condemned "the unbridled discretion of police officers" in making random license and registration stops and the excessive degree of intrusion suffered by the stopped motorist,⁷⁰ it left little guidance as to how the suggested alternative to the random stop—the license and vehicle registration roadblock—could be operated in a manner which avoided the pitfalls of excessive officer discretion and motorist intrusion.⁷¹ As the *Prouse* Court neglected to incorporate into its analysis a thorough discussion of the permanent roadblock stop announced as constitutional in *Martinez-Fuerte*,⁷² it can only be presumed that the *Martinez-Fuerte* roadblock was intended to serve as the model for the license and registration roadblock. Even if this presumption is in fact what the *Prouse* Court intended,⁷³ a close reading of *Prouse* indicates that the decision was aimed only at the relatively narrow category of driver's license and vehicle registration checkpoints, not at the DWI roadblock.⁷⁴ Thus, a specific review of the characteristics necessary for the operation of a constitutional DWI roadblock was never undertaken. Correspondingly, the *Prouse* Court did not articulate and evaluate the possible state interests in operating a DWI roadblock, and therefore did not consider how these interests might figure into its fourth amendment balancing test.

68. *Id.*

69. *Id.* Justices Blackmun and Powell, in their concurring opinion, assumed "that the Court's reservation also includes other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop." *Id.* at 664 (Blackmun, J., and Powell, J., concurring).

70. *Id.* at 663.

71. See *infra* notes 179-94 and accompanying text; see also Note, *Fourth Amendment—Search and Seizure—Random Spot Checks for Driver's License and Vehicle Registration Are Unreasonable Absent a Reasonable Suspicion that a Law Has Been Violated*. Delaware v. Prouse, 99 S. Ct. 1391 (1979), 7 AM. J. CRIM. L., 395, 407-11 (1979) (examining the lack of guidelines set forth by the *Prouse* Court).

72. See *Martinez-Fuerte*, 428 U.S. at 562.

73. Note, however, that the *Martinez-Fuerte* roadblock was permanent, whereas a *Prouse*-type roadblock would probably be temporary in nature. Given this probable operational difference, judicial transference of the *Martinez-Fuerte* model to a *Prouse*-type situation would most likely require explicit modification extending beyond mere tacit acceptance.

74. See *infra* notes 140-51 and accompanying text.

C. *The Unsettled Legacy of Prouse*

In the years following the *Prouse* decision, litigation concerning the use of roadblocks has arisen in both state and lower federal courts. This litigation can be roughly divided into cases where the primary purpose of the roadblock was for driver's license and vehicle registration checks,⁷⁵ and cases where the primary purpose was to apprehend individuals for DWI or some other type of violation.⁷⁶ True driver's license and vehicle registration checkpoints have generally been upheld as constitutional.⁷⁷ DWI roadblocks, either overtly designed to apprehend the drunk driver or operated under the guise of checking for licenses and vehicle registrations, have, however, received conflicting reviews.⁷⁸

1. The True Driver's License and Vehicle Registration Roadblock

An example of the reasoning used to uphold the constitutionality

75. See, e.g., *United States v. Prichard*, 645 F.2d 854, 855 (10th Cir.), cert. denied, 454 U.S. 832 (1981); *United States v. Miller*, 608 F.2d 1089, 1093, 1098-99 (5th Cir.), cert. denied, 447 U.S. 926 (1980); see also *infra* notes 79-85 and accompanying text (discussing license and vehicle registration check roadblocks).

76. In addition to employing the roadblock as a method for apprehending drunk drivers, law enforcement officials have constitutionally used the roadblock to apprehend the escaped convict or fleeing suspect. See *United States v. Harper*, 617 F.2d 35, 39-41 (4th Cir.) (roadblock used to apprehend fleeing suspect), cert. denied, 449 U.S. 887 (1980); *Perry v. State*, 422 So. 2d 957, 958 (Fla. 1982) (roadblock used to apprehend escaped convict). See generally 3 W. LAFAYE, SEARCH AND SEIZURE § 9.5 (1978 & Supp. 1984) (discussing roadblocks as a means to detect crime and apprehend offenders). However, "dragnet" roadblocks designed to identify and apprehend criminal violators without a suspicion of individualized criminality prior to the stop, have typically met with disapproval. For instance, Arkansas State Police officers, ostensibly conducting a license-registration checkpoint on an interstate highway, were assisted in the operation of the checkpoint by the Arkansas State Crime Laboratory, the National Auto Theft Bureau, the Arkansas Crime Information Center, six Criminal Investigation officers, and four Arkansas State Police narcotics officers with two narcotics dogs. *Garrett v. Goodwin*, 569 F. Supp. 106, 113 (E.D. Ark. 1982) (consent decree). Prior to the stops, the Arkansas State Police noted "that we will make many arrest[s] for offenses ranging from DWI, Wanted Persons, Stolen Trucks and Cars, Drugs and Narcotics, and so forth," and that the roadblock "will be highly productive insofar as criminal and traffic enforcement are concerned." *Id.* (quoting an internal police memorandum). After arrests generated at the roadblock were contested on fourth amendment grounds, the various agencies involved in the roadblock submitted to a consent decree curtailing the presence of non-traffic enforcement personnel at future license-registration roadblocks. *Id.* at 118. The agencies further agreed not to conduct any further roadblocks for general criminal enforcement purposes. *Id.*; see also *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980) (roadblock procedures designed to catch unknown park vandals found unconstitutional). While both *Garrett* and *Hilleshiem* have added to the scope of roadblock jurisprudence as a whole, this Note will concentrate on the DWI roadblock and disregard the dragnet roadblock, as well as the agricultural inspection checkpoint and the roadblock designed to enforce fish and game laws.

77. See *infra* notes 79-85 and accompanying text.

78. See *infra* notes 86-131 and accompanying text.

of the true driver's license and vehicle registration roadblock in the wake of *Prouse* can be found in *United States v. Prichard*.⁷⁹ In *Prichard*, the United States Court of Appeals for the Tenth Circuit decided that a temporary driver's license and vehicle registration checkpoint located on an interstate highway was constitutionally permissible.⁸⁰ The two policemen who conducted the roadblock stopped all westbound traffic except for semi-trucks, which had been previously stopped at a port of entry.⁸¹ When traffic started to back up beyond ten cars, the officers, who had been given prior supervisory permission to operate the roadblock, would wave all of the traffic through until the area had cleared.⁸² The officers would then resume the stopping of vehicles.⁸³ In reaching its decision that the roadblock was constitutional, the *Prichard* court relied heavily on the concluding dicta in *Prouse* and, thus, compared the random single stop denounced in *Prouse*, with the New Mexico roadblock in which nearly all traffic was stopped in a systematic, non-random fashion.⁸⁴ Consequently, it can be inferred that

79. 645 F.2d 854 (10th Cir.), cert. denied, 454 U.S. 832 (1981).

80. *Id.* at 856-57; accord *United States v. Obregon*, 573 F. Supp. 876, 880-81 (D.N.M. 1983) (New Mexico roadblock operated under circumstances nearly identical to the *Prichard* roadblock upheld as constitutional); see also *United States v. Miller*, 608 F.2d 1089, 1093, 1098-99 (5th Cir. 1979) (temporary (24 hrs.) driver's license and vehicle registration roadblock operated by the Texas Department of Safety deemed permissible), cert. denied, 447 U.S. 926 (1980); cf. *United States v. Silva-Rios*, 551 F. Supp. 159 (W.D. Tex. 1982) (temporary Border Patrol checkpoint located 50 miles from Mexican border and operated for 24 hrs./day for seven days held constitutional under *Prouse* when all vehicles were stopped and when brief checks for citizenship were found to be only minor intrusions).

Oklahoma statutes provide that every motor vehicle operator must have an operator's or chauffeur's license in his possession when operating a motor vehicle, and must display the license upon a peace officer's demand. OKLA. STAT. tit. 47, § 6-112 (1981). In a pre-*Prouse* decision, the Oklahoma Court of Criminal Appeals held that the temporary driver's license and vehicle registration checkpoint was constitutional. *Brantley v. State*, 548 P.2d 675, 676 (Okla. Crim. App. 1976). Driver's license roadblocks in Tulsa County have been conducted by the Oklahoma Highway Patrol for many years. Telephone interview with Lt. Jack Green, Troop B Commander, Oklahoma Highway Patrol (Sept. 10, 1984). These roadblocks are generally conducted at several well-known, non-interstate highway locations during daylight hours. *Id.* The roadblocks are timed to avoid rush hour traffic and may involve up to six patrol cars in some locations. *Id.* All vehicles are stopped at the roadblocks; in the event of excessive traffic build-up, vehicles are waved through until normal traffic flow resumes. *Id.* Officers check the driver's license, vehicle inspection sticker, license plate, tires, and brake lights. *Id.*

81. *Prichard*, 645 F.2d at 855. The roadblock was located on Interstate Highway 40, about eight miles east of Moriarity, New Mexico. *Id.* *Prichard's* vehicle was stopped and, after arousing the two officers' suspicion that the car was stolen, searched with *Prichard's* consent. *Id.* at 855-56. The search ultimately revealed 86 pounds of cocaine worth \$20,000,000. *Id.* at 855. *Prichard* moved to suppress the evidence brought against him on the grounds that it had been obtained by an unreasonable search and seizure. *Id.* at 856.

82. *Id.* at 855.

83. *Id.*

84. *Id.* at 856-57. The court observed that while the *Prichard* roadblock "may not have been a '100% roadblock' of the type referred to in *Prouse*, it is nonetheless a long way from the selective,

the court felt the excessive degree of motorist intrusion and officer discretion feared in *Prouse* had been successfully avoided.⁸⁵

2. The DWI Roadblock

The constitutionality of the DWI roadblock has precipitated a split of opinion. At the heart of the dispute is the tension between the individual's fourth amendment right to be free from the governmental intrusion inflicted by a roadblock, and the use of the DWI roadblock as a means to further highway safety and counter a genuine public menace—the drunken driver. This portion of the Note examines the reasoning employed by state courts which have analyzed the constitutionality of the DWI roadblock.

State v. Olgaard,⁸⁶ a case which predated *Prouse* by three years, is perhaps the first decision to contest the legality of the DWI roadblock. The Supreme Court of South Dakota, while willing to favorably equate the purpose of promoting highway safety with the *Martinez-Fuerte* purpose of stopping the flow of illegal aliens, concluded that the temporary South Dakota roadblock did not meet the degree of permanency mandated by *Martinez-Fuerte*.⁸⁷ The court examined the relevant factors of the *Martinez-Fuerte* decision, including the motorists' prior knowledge of the roadblock and the amount of non-field officer supervision.⁸⁸ It concluded that the DWI roadblock was unconstitutional because motorists lacked any prior notice of the roadblock's existence and because of the apparent lack of non-field officer direction in choosing the roadblock's site.⁸⁹ The court did, however, note that such a roadblock

single car stop denounced in *Prouse*." *Id.* at 856. The court also noted that the purpose of checking licenses and registrations was legitimate and "[i]f, in the process of so doing, the officers saw evidence of other crimes, they had the right to take reasonable investigative steps and were not required to close their eyes." *Id.* at 857.

85. *See id.* at 857.

86. 248 N.W.2d 392 (S.D. 1976).

87. *Id.* at 394. The one-night roadblock was part of an Alcohol Safety Action Program conducted by the South Dakota highway patrol. *Id.* at 393. (For a discussion of the Alcohol Safety Action Program, see *infra* note 201.) The officer making the stop testified that the roadblock was "mainly set up for alcohol related offenses." *Olgaard*, 248 N.W.2d at 393. The roadblock included four officers, several patrol cars with red flashing lights, and a large stop sign. *Id.* All vehicles passing in both directions were stopped. *Id.* Prior to stopping *Olgaard's* car at the roadblock, the investigating officer making the stop possessed no prior suspicion that *Olgaard* was violating any law. *Id.* As the investigating officer was checking *Olgaard's* driver's license, he detected the odor of beer in *Olgaard's* car. *Id.* *Olgaard* was charged with possession of an open container of an alcoholic beverage and possession of marijuana discovered during a further investigation of the car. *Id.*

88. *Id.* at 394.

89. *Id.*

would be constitutional if authorized by a prior judicial warrant.⁹⁰

Although the courts which have found particular DWI roadblocks unconstitutional after *Prouse* have not pursued the idea of a prior judicial warrant, they have echoed the need to reduce both motorist intrusion and field officer discretion. In *Commonwealth v. McGeoghegan*,⁹¹ excessive field officer discretion in deciding which motorists to stop and how to operate the roadblock, poor illumination, and traffic backed up for close to a mile led the Supreme Judicial Court of Massachusetts to conclude that the particular DWI roadblock under review was unconstitutional.⁹² Similarly, in *State ex rel. Ekstrom v. Justice Court of State*,⁹³ the Supreme Court of Arizona observed that a failure to adequately warn oncoming motorists of the roadblock's existence and purpose, coupled with a failure to issue guidelines to inspecting officers for questioning stopped vehicles, were indicative of an impermissible level of officer discretion and motorist intrusion.⁹⁴ Without empirical evidence supporting the superiority of the DWI roadblock over the roving patrol acting upon reasonable suspicion, the *Ekstrom* court was unwilling to sanction the use of a DWI roadblock which involved excessive intrusiveness and discretion.⁹⁵ In addition, in *Jones v. State*,⁹⁶ the ab-

90. *Id.*

91. 389 Mass. 137, 449 N.E.2d 349 (1983).

92. *Id.* at ___, 449 N.E.2d at 353. McGeoghegan was one of over 200 motorists stopped at a one-night roadblock conducted by the Revere, Massachusetts police department. *Id.* at ___, 449 N.E.2d at 350. McGeoghegan was asked for his "papers." *Id.* Subsequently, he showed signs of having consumed some type of alcoholic beverage, and was then taken from his car to a police van, where he was given and failed a breathalyzer test. *Id.* McGeoghegan later moved to suppress the evidence used against him in the resulting DWI charge. *Id.*

93. 136 Ariz. 1, 663 P.2d 992 (1983) (en banc). On August 26, 1982 and September 6, 1982, all southbound traffic on Arizona Highway 93 was stopped at a DWI roadblock operated at the Kingman, Arizona port of entry. *Id.* The port of entry is a permanent facility consisting of a building, illumination for nighttime operation, automobile lanes covered by awning, and flashing traffic control devices. *Id.* The roadblock was operated by the Department of Public Safety, the Motor Vehicle Division of the Department of Transportation and the Cooperative Enforcement Unit (a drug enforcement unit). *Id.* Motorists stopped at the roadblock were asked to show their driver's license and vehicle registration while officers looked for signs of intoxication by smelling the driver's breath for alcohol, shining flashlights in the car, and checking visible containers. *Id.* at ___, 663 P.2d at 993. This detention typically lasted from 30 seconds to 5 minutes. *Id.* In the event that the driver's documentation was found to be inadequate or if the officers believed there was a need for further questioning of the driver, the car was led to a secondary area. *Id.* If the officer had probable cause to believe that the driver was intoxicated or that some other statute had been violated, the driver was then arrested. *Id.* After the defendants were stopped at the Kingman roadblock and subjected to the preceding procedure, three were arrested for DWI while the other was arrested for driving under the influence of drugs and for possession of marijuana. *Id.*

94. *Id.* at ___, 663 P.2d at 996. Other objections included the presence of nontraffic duty officers at the roadblock, and the failure by officers to explain or answer queries about the purpose of the stop. *Id.* at ___, 663 P.2d at 1000 (Feldman, J., specially concurring).

95. *Id.* at ___, 663 P.2d at 996. Of the 5,763 vehicles stopped at a number of DWI roadblocks

sence in the trial court record of information concerning (1) a plan promulgated by administrative personnel; (2) adequate safety features; (3) the number of officers involved; and (4) the number of DWI arrests which could be expected from roving patrols acting upon reasonable suspicion, prompted the Second District Court of Appeal of Florida to declare the particular DWI roadblock under review to be unconstitutional.⁹⁷

While *McGeoghegan*, *Ekstrom*, and *Jones* denounced the use of specific DWI roadblocks, each of these cases stopped short of holding the DWI roadblock unconstitutional per se. The court in *McGeoghegan* indicated that it might uphold the constitutionality of a particular DWI roadblock under specially prescribed circumstances.⁹⁸ The court noted that compliance with the following factors might lead to a finding of constitutionality for a DWI roadblock: (1) nonarbitrary selection of motor vehicles to be stopped, (2) adequate observance of safety precautions, (3) minimization of motorist inconvenience, (4) strict adherence to a preconceived procedural plan, and (5) advance publicity of the date of the roadblock.⁹⁹ Likewise, a specially concurring opinion

operated in Arizona on September 6, 1982, 14 persons were arrested for DWI. *Id.* at ___, 663 P.2d at 993. Three of the fourteen were arrested at the Kingman roadblock. *Id.*; see also *infra* note 199 and accompanying text (providing an expanded analysis of these arrests).

96. No. 83-2547 (Fla. Dist. Ct. App. Sept. 5, 1984) (available on LEXIS, States library, Fla. file). The Tampa Police Department established the contested DWI roadblock on July 4, 1982, at about 2:30 A.M. *Id.*

The three northbound lanes of Dale Mabry were blocked off to form a "funnel" requiring all traffic to travel in one lane and to pass by a police officer stationed on the roadway. That officer was instructed to stop every fifth automobile when traffic was heavy and to stop every third automobile when traffic was light. The stopped cars were directed off the roadway into an otherwise unused parking lot.

Waiting in the parking lot were five police officers who were to determine if the drivers were DUI. The only specific instruction given to those officers was to request the driver's licenses of the drivers of cars diverted from Dale Mabry into the parking lot. Each officer was left to his own method to determine whether he believed a driver was DUI.

Id. Jones' car was diverted into the parking lot where an officer subsequently decided that Jones was intoxicated. *Id.* Jones was then arrested for DUI. *Id.*

97. *Id.* The Florida District Court of Appeal did, however, certify to the Florida Supreme Court as a matter of public importance the following question: "Can a warrantless temporary roadblock which is established to apprehend persons driving while under the influence of alcohol and which stops automobiles without any articulable suspicion of illegal activity produce constitutionally permissible arrests?" *Id.*

98. See *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353.

99. *Id.* In the process of formulating these criteria, the *McGeoghegan* court implied that the concluding dicta in *Prouse* were applicable to the DWI roadblock. See *id.* at ___, 449 N.E.2d at 352-53. Similarly, in the process of evaluating the Arizona DWI roadblock, the *Ekstrom* court also assumed that the *Prouse* dicta sanctioned the use of roadblocks for purposes other than a license-registration check. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 995-96.

The court in *Jones* adopted the *McGeoghegan* approach, but added a factor—the effectiveness of the roadblock as expressed by DWI arrests. *Jones*, No. 83-2547 (Fla. Dist. Ct. App. Sept. 5,

in *Ekstrom* suggested that a DWI roadblock which was implemented for deterrent rather than investigative purposes, and which was designed to minimize motorist intrusion and field officer discretion, could probably survive muster under the fourth amendment.¹⁰⁰ A deterrent roadblock, the opinion argued, could be differentiated from the purely investigative roadblock faced by the *Ekstrom* court, by the use of advance publicity warning of the roadblock's presence.¹⁰¹ Adminis-

1984) (available on LEXIS, States library, Fla. file). The court held that the effectiveness of the DWI roadblock as compared to other less intrusive means of enforcement would be one of the most important criteria in reviewing the constitutionality of a roadblock. *Id.*

100. *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1001 (Feldman, J., specially concurring). The "[o]bject would be to enforce compliance with the laws prohibiting driving under the influence of alcohol or drugs by deterring such people from going upon the highway at all." *Id.* Justice Feldman arrived at the deterrent roadblock concept by applying the balancing test of *Camara v. Municipal Court*, 387 U.S. 523 (1967). *Id.* at ___, 663 P.2d at 998; *see also supra* note 25 (discussing the *Camara* balancing test). After noting the strong governmental interest in deterring drunk driving, Justice Feldman asserted that that interest could not be met by traditional enforcement methods comporting with reasonable suspicion. *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 998-1000. Justice Feldman then proposed that stops involving minimal questioning and visual inspection would be acceptable if "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* at ___, 663 P.2d at 1000 (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)); *see also infra* notes 160-72 and accompanying text (discussing *Brown*).

On November 21, 1984, the Supreme Court of Arizona ruled on the constitutionality of a DWI roadblock operated by the Tucson Police Department. *State v. Superior Court*, No. 17679-SA (Ariz. Nov. 21, 1984) (available on LEXIS, States library, Ariz. file). In accordance with *Ekstrom*, the court reiterated the need for an administratively preconceived set of guidelines for operating the roadblock and advance publicity warning of the roadblock's existence. *Id.* After noting that the Tucson police had followed both of these suggestions, the court engaged in a balancing of interests involving "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* (quoting *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)). Predictably, the court had little trouble in deciding that the first factor had been met. *State v. Superior Court*, No. 17679-SA (Ariz. Nov. 21, 1984) (available on LEXIS, State library, Ariz. file). Despite the admission by the Commander of the Traffic Enforcement Division that "in doing a checkpoint operation you will end up with about half of the amount of the arrests that the same officer deployed in the field would produce," the court decided that the second factor in the balancing test could still be met since "the sobriety stops were intended primarily for deterrence." *Id.* To this end, the court noted that the percentage of alcohol-related motor vehicle injuries decreased slightly after the Tucson roadblocks were implemented. *Id.* Finally, the court observed that both the objective and subjective intrusions endured by motorists stopped at the checkpoint were minimal. *Id.*; *see also Martínez-Fuerte*, 428 U.S. at 558-59 (discussing objective and subjective motorist intrusion). The court concluded that "[g]iven the gravity of the problem, a compelling need for the state to take strong action against drunk drivers, and the minimal intrusion created by these stops, we hold the stops in this case passed constitutional muster." *State v. Superior Court*, No. 17679-SA (Ariz. Nov. 21, 1984) (available on LEXIS, States library, Ariz. file).

101. *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1001 (Feldman, J., specially concurring). Justice Feldman realized that while the purposes behind a deterrent roadblock may be different from those behind the investigative roadblock, the net operational effect of the deterrent roadblock would be similar. *Id.* "Obviously a stop for the purpose of questioning and visual inspection regarding sobriety may lead to particularized suspicion justifying further police action in some cases." *Id.* at ___, 663 P.2d at 1001 n.4. For a further discussion of DWI roadblock deterrence, *see infra* notes 204-06 and accompanying text.

trative planning of the roadblock was also suggested.¹⁰²

Unlike the holdings in *McGeoghegan*, *Ekstrom* and *Jones*, which denounced particular roadblocks, the court in *People v. Bartley*¹⁰³ found the DWI roadblock to be unconstitutional per se.¹⁰⁴ In reaching this outcome, the court implicitly rejected the *Prouse* dicta and, instead, placed direct analytical reliance on a balancing of the interests involved in operating the DWI roadblock.¹⁰⁵ Specifically, the court considered “(1) the gravity of public concern served by the seizure; (2) the degree to which the seizure advances the public interest and; (3) the severity of the interference with individual liberty.”¹⁰⁶ An analysis of these factors led the court to conclude that “DUI roadblocks involve a significant degree of intrusion and are of speculative deterrent value when compared to less intrusive means of enforcement.”¹⁰⁷ Accordingly, “the government interest in detecting drunk drivers by employing roadblocks does not outweigh the resulting public inconvenience and interference with the individual’s Fourth Amendment rights.”¹⁰⁸

The first post-*Prouse* case to support the constitutionality of the

102. *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1001 (Feldman, J., specially concurring).

103. 125 Ill. App. 3d 575, 466 N.E.2d 346 (1984). The contested roadblock was operated in Macomb, Illinois on December 18, 1982 by officers from the McDonough County Sheriff’s Department, Macomb City Police, Illinois State Police and the Illinois Secretary of State Police. *Id.* at ___, 466 N.E.2d at 347. The roadblock was operated from approximately midnight to 2:00 A.M. on a five-lane street “between the city’s only all-night restaurant and the central business district.” *Id.* *Bartley* was stopped at the roadblock and eventually arrested for driving under the influence of intoxicating liquor. *Id.*

104. *Id.* at ___, 466 N.E.2d at 349.

105. *See id.* at ___, 466 N.E.2d at 347-48.

106. *Id.* at ___, 466 N.E.2d at 348 (citing *Brown v. Texas*, 443 U.S. 47 (1979)). For a further discussion of the fourth amendment balancing test, see *infra* notes 152-77 and accompanying text.

107. *Bartley*, 125 Ill. App. 3d at ___, 466 N.E.2d at 349. In assessing the first factor of the balancing test, the court pointed out that while “drunk drivers are a grave menace to the public and that stronger measures are needed to cope with the problem,” enforcement options which are less intrusive than roadblocks are available for detecting drunk drivers. *Id.* at ___, 466 N.E.2d at 348; *see also infra* notes 201-03 and accompanying text (discussing the viability of less intrusive enforcement methods). The court went on to note “that the State has failed to demonstrate the superiority of a roadblock over these less intrusive alternative means of deterrence.” *Bartley*, 125 Ill. App. 3d at ___, 466 N.E.2d at 348. Turning to the third factor, the degree of intrusion caused by the roadblock, the court observed that DWI roadblocks involved a significant, rather than minimal, degree of intrusion:

In reality, DUI roadblocks are designed to be set up at night, without warning and at locations which are constantly changing. Motorists are often unaware of the reason for the stop prior to being asked to display their driver’s license. Lights are shined into their eyes and officers peer into the passenger compartment of their automobile. Although field officers generally have no discretion over who to stop, we are unaware of any criteria used by supervisory officers in determining the need, location, time and duration of a roadblock.

Id.

108. *Id.* at ___, 466 N.E.2d at 349.

DWI roadblock was *State v. Cocomo*.¹⁰⁹ In this trial court decision, the court concluded that the police practice of stopping every fifth car at a temporary DWI roadblock in the early morning hours constituted a minimal fourth amendment intrusion, easily outweighed by the public interest in apprehending drunken drivers.¹¹⁰ The court initially reached this conclusion by placing the DWI roadblock under the aegis of the *Prouse* dicta.¹¹¹ The court then characterized the DWI roadblock in question as “completely objective in its operation”¹¹² and asserted that motorist anxiety was reduced by the presence of uniformed police officers, marked police cars, a line of flares, and a street light above the roadblock.¹¹³ Thus, when balanced against the state interest in maintaining the roadblock, the *Cocomo* court held that “the state’s action must be considered as a reasonable infringement upon the motorist’s expectation of privacy.”¹¹⁴

Like the stance taken in *Cocomo*, the Supreme Court of Kansas, in *State v. Deskins*,¹¹⁵ similarly upheld the constitutionality of a particular DWI roadblock.¹¹⁶ After a thorough review of DWI roadblock

109. 177 N.J. Super. 575, 427 A.2d 131 (Law. Div. 1980).

110. *Id.* at ___, 427 A.2d at 135. The roadblock procedure was carried out according to a written policy formulated by the Roxbury, New Jersey police shortly after the *Prouse* decision. *Id.* at ___, 427 A.2d at 133 n.1 The roadblock in question was established around 1:30 A.M. on April 5, 1980. *Id.* at ___, 427 A.2d at 133. About an hour and a half later, Cocomo’s car was stopped as per the described procedure. *Id.* Cocomo was directed to an adjacent parking lot where he was unable to produce his insurance identification card. *Id.* The investigating officer detected the odor of alcohol on Cocomo’s breath and directed him to step out of the car. *Id.* Cocomo subsequently failed several sobriety tests. *Id.* “At that point, probable cause existed to believe that defendant was under the influence of an alcoholic beverage.” *Id.* at ___, 427 A.2d at 133 n.5.

111. *Id.* at ___, 427 A.2d at 134.

112. *Id.* at ___, 427 A.2d at 135. The court noted that the “police follow specific, defined standards” and that “[t]he criteria they employ is [sic] purely neutral; no discretion is involved.” *Id.*

113. *Id.*

114. *Id.* In upholding the constitutionality of another DWI roadblock, an Idaho trial court found that the level of motorist intrusion involved in the operation of a DWI roadblock was equal to that of the *Prouse* license-registration roadblock and, thus, was minimal. See *Idaho v. Baker*, No. 24-6693 (Idaho 7th Dist. Magis. Ct. May 11, 1983).

115. 234 Kan. 529, 673 P.2d 1174 (1983).

116. *Id.* at ___, 673 P.2d at 1185. The one-night roadblock in question was operated by 35 to 40 police officers at an intersection in Topeka. *Id.* at ___, 673 P.2d at 1177. The operation began at 10:00 P.M. and continued until the early morning hours of the next day. *Id.* The roadblock was located on an illuminated part of a four-lane highway. *Id.* at ___, 673 P.2d at 1185. Police cars with flashing red lights were located at each of the corners of the intersection. *Id.* All of the members of the roadblock team—the sheriff’s department, the Topeka police, and the highway patrol—were in uniform and easily recognizable. *Id.* The team had been previously briefed by the Topeka police supervisor and advised to check for driver’s license violations and signs of drunk driving. *Id.* All vehicles travelling along the north-south part of the intersection were stopped; drivers were then checked for valid operator’s licenses. *Id.* at ___, 673 P.2d at 1177. Deskins, after having his car stopped at the roadblock, produced a valid driver’s license. *Id.* The officer making the stop, however, detected the odor of alcohol emanating from Deskins’ car and

jurisprudence,¹¹⁷ the *Deskins* court set forth a list of factors to be “considered in determining whether a DWI roadblock meets the balancing test in favor of the state.”¹¹⁸ The factors included the following:

- (1) The degree of discretion, if any, left to the officer in the field;
- (2) the location designated for the roadblock;
- (3) the time and duration of the roadblock;
- (4) standards set by superior officers;
- (5) advance notice to the public at large;
- (6) advance warning to the individual approaching motorist;
- (7) maintenance of safety conditions;
- (8) degree of fear or anxiety generated by the mode of operation;
- (9) average length of time each motorist is detained;
- (10) physical factors surrounding the location, type and method of operation;
- (11) the availability of less intrusive methods for combating the problem;
- (12) the degree of effectiveness of the procedure;
- and (13) any other relevant circumstances which might bear upon the test.¹¹⁹

The court went on to note that “[n]ot all of the factors need to be favorable to the state but all which are applicable to a given roadblock should be considered.”¹²⁰ Although a dissenting opinion contended that no specific standards had been established by superior officers, that no advance warning of the roadblock had been given to oncoming motorists, and that the roadblock was temporary not permanent,¹²¹ the majority nevertheless concluded that the factors applicable to the Topeka roadblock had been met in a way that made that checkpoint constitutional.¹²²

The Maryland Court of Appeals, in perhaps the most analytically

asked *Deskins* to step out of the car to take a sobriety test. *Id.* *Deskins* failed the sobriety test and was arrested for DWI. *Id.* Subsequent to his arrest, an inventory search of the car revealed a small quantity of marijuana for which *Deskins* was also charged. *Id.* at ___, 673 P.2d at 1178.

117. *Id.* at ___, 673 P.2d at 1178-84. By implication, the *Deskins* court found the *Prouse* dicta applicable to the DWI roadblock. The court indicated that “[t]he border patrol cases, *Prouse* and decisions from other state and federal appellate courts make it clear that not every driver’s license check or DUI roadblock is constitutionally impermissible.” *Id.* at ___, 673 P.2d at 1184.

118. *Id.* at ___, 673 P.2d at 1185. In formulating the factors for its test the *Deskins* court considered “[a] weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” *Id.* at ___, 673 P.2d at 1184-85 (quoting *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)).

119. *Id.* at ___, 673 P.2d at 1185.

120. *Id.*

121. *Id.* at ___, 673 P.2d 1186-88 (Prager, J., dissenting). Justice Prager also questioned the effectiveness of the Topeka roadblock. *Id.* at ___, 673 P.2d at 1187; *see also infra* notes 195-203 and accompanying text (discussing the effectiveness of the DWI roadblock).

122. *Deskins*, 234 Kan. at ___, 673 P.2d at 1185. The majority noted that officers at the roadblock had been briefed by supervisory personnel of the Topeka police department and specifically advised to check for licenses and signs of drunk driving; that the roadblock was located in an illuminated area and marked by police cars with red flashing lights; that detention time was minimal; that all vehicles were stopped; that the officers were uniformed and easily recognizable; and that the location for the roadblock had been chosen by supervisory personnel. *Id.*

extensive opinion to date, reached a conclusion similar to *Deskins* in *Little v. State*.¹²³ Unlike *Deskins*, however, the *Little* court focused on establishing the roadblock as “a moderately effective technique for detecting and deterring the drunk driver.”¹²⁴ The court further observed that when “[b]alanced against the State’s compelling interest in detecting and deterring drunk driving, the intrusion on individual liberties caused by the checkpoint is minimal.”¹²⁵ Moreover, the court added, neither the temporary nature of the DWI roadblock, nor the

123. 300 Md. 485, 479 A.2d 903 (1984). The DWI roadblocks in question were established in Harford County, Maryland as part of a three month pilot program beginning on December 12, 1982. *Id.* at ___, 479 A.2d at 905. “Checkpoints were . . . in operation between 11:00 P.M. and 4:00 A.M. on December 17, 18, 26 and 31, 1982, on January 6 and 21, 1983 and on February 18, 1983.” *Id.* The roadblocks were given statewide publicity and the location of one of the roadblocks was disclosed. *Id.* Little was stopped at one of the roadblocks at 1:50 A.M. on January 1, 1983. *Id.* at ___, 479 A.2d at 906. After failing a sobriety test, Little was charged with driving while intoxicated. *Id.* Little thereafter filed a motion to suppress all evidence obtained as a result of the stop. *Id.* at ___, 479 A.2d at 906-07.

124. *Id.* at ___, 479 A.2d at 913. The court noted that during the three months the checkpoints were in operation, alcohol-related accidents decreased 17% in comparison with the preceding three months. *Id.* In contrast, alcohol-related accidents decreased 12% in neighboring Frederick County, which lacked sobriety checkpoints. *Id.* Nonempirical evidence of roadblock effectiveness was also cited. Specifically, the court found that “[t]axi companies reported a surge in business from intoxicated persons who had been deterred from driving,” that group bus charters were becoming more popular, and that “[p]olice attending the checkpoints found that many drunk individuals asked a sober spouse or companion to drive instead.” *Id.*

Justice Davidson’s dissenting opinion was quick to point out that both Frederick and Harford Counties had achieved a ten percent reduction in alcohol-related accidents when compared with the same three month period from the previous year. *Id.* at ___, 479 A.2d at 919 (Davidson, J., dissenting). Moreover, Frederick County achieved a 335% decrease in fatal accidents for this time period, while Harford County achieved a 270% increase in fatal accidents. *Id.* As for the majority’s claim of effectiveness in terms of an increase in taxi and charter bus rates and sober driving companions, Justice Davidson observed that “there was absolutely no testimony . . . to indicate what if any portion of this modified behavior was attributable to the existence of the roadblock program.” *Id.* In addition, Justice Davidson pointed out that the effects of a statewide comprehensive program designed to improve traditional DWI enforcement methods probably overshadowed any decrease in traffic fatalities directly attributable to the DWI roadblock. *Id.* at ___, 479 A.2d at 917-18.

125. *Id.* at ___, 479 A.2d at 913. The court indicated that:

As a general rule, the constitutionality of traffic checkpoints has been upheld where: (1) the discretion of the officers in the field is carefully circumscribed by clear objective regulations established by high level administrative officials; (2) approaching drivers are given adequate warning that there is a roadblock ahead; (3) the likelihood of apprehension, fear or surprise is reduced by a display of legitimate police authority at the roadblock; and (4) vehicles are stopped on a systematic, nonrandom basis that shows drivers they are not being singled out for arbitrary reasons.

Id. at ___, 479 A.2d at 911. The court’s analysis of the Harford roadblock led it to conclude that each one of these criteria had been adequately accommodated. *Id.* at ___, 479 A.2d at 913-14. Consequently, the court concluded that the Harford roadblock allowed for a minimal level of motorist intrusion and officer discretion. *Id.* at ___, 479 A.2d at 913. The court also noted that “a driver who stops at the checkpoint but refuses to roll down the car window is allowed to proceed” and “motorists who do not wish to stop may make a U-turn and follow a different route.” *Id.* at ___, 479 A.2d at 913-14.

operation of the checkpoint without a warrant could be considered as inherently fatal to the roadblock's constitutionality.¹²⁶

Finally, the New York Court of Appeals recently upheld the constitutionality of DWI roadblocks in *People v. Scott*.¹²⁷ The court initially concluded "that individualized suspicion is not a prerequisite to a constitutional seizure of an automobile which is 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.'" ¹²⁸ The court went on to decide that the particular procedure used in operating the contested roadblock allowed for a permissibly low level of officer discretion and motorist intrusion.¹²⁹ In addition, the court indicated that the deterrent purpose of the DWI roadblock was also constitutionally permissible,¹³⁰ and that neither its transient and temporary nature, nor its efficiency could be construed in a manner which rendered it unconstitutional.¹³¹

126. *Id.* at ___, 479 A.2d at 914-15. While the court was willing to admit that the surprise inflicted by a temporary roadblock was probably greater than that which was imposed by a permanent roadblock, it concluded that the *Martinez-Fuerte* permanent-temporary distinction was only one of several factors to be used in determining fourth amendment reasonableness. *Id.* at ___, 479 A.2d at 914. The court inferred that a temporary roadblock established under a systematic plan would probably be reasonable and that the intrusiveness of the checkpoint would be "outweighed by the State's compelling interest in preventing drunk driving." *Id.* As for the need for a warrant authorizing operation of the checkpoint, the court held that *Martinez-Fuerte* was entirely dispositive on this point and that a warrant was unnecessary. *Id.* at ___, 479 A.2d at 914-15; see also *Martinez-Fuerte*, 428 U.S. at 564-66.

127. No. 542 (N.Y. Nov. 20, 1984). Between midnight and 3:00 A.M. on Saturday, September 25, 1982, the Genesee County Sheriff operated four successive DWI roadblocks. *Id.* at 2-3. Each roadblock was maintained for approximately 20-30 minutes and operated according to a written police plan roughly conforming with the procedural criteria set forth in another portion of this Note. See *id.* at 2-4; see also *infra* notes 179-94 and accompanying text (discussing procedural criteria). Furthermore, "two patrol cars were stationed in the area to follow and observe for possible violations any vehicle that avoided the roadblock by making a U-turn." *Scott*, No. 542, slip op. at 4 (N.Y. Nov. 20, 1984). *Scott* was stopped at the third roadblock and arrested for DWI after the officer making the stop observed signs of intoxication and after *Scott* failed a sobriety test. *Id.* at 2-3.

128. *Scott*, No. 542, slip op. at 5 (N.Y. Nov. 20, 1984) (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979); citing *Prouse*, 440 U.S. at 663; *Martinez-Fuerte*, 428 U.S. at 558-62). For a further discussion of *Brown* and its implications for the DWI roadblock, see *infra* notes 160-72 and accompanying text.

129. *Scott*, No. 542, slip op. at 6-7 (N.Y. Nov. 20, 1984). As in *Bartley*, the court made no mention of the *Prouse* dicta and relied instead on a balancing of interests approach. *Id.* at 6-10.

130. *Id.* at 7-8.

131. *Id.* at 8-10. With regards to the brief periods of time in which the four Genesee County roadblocks were operated, the court stated that:

The subjective effect upon a vehicle driver approaching a roadblock is unrelated to whether it is permanent or was established but a few minutes before the driver approached it; in either instance his or her observation of it will be measured in minutes if not seconds. The likelihood of there being the kind of fright or annoyance that invalidates a random stop made by a roving patrol is obviated in the case of a temporary checkpoint by the visible signs of authority which the checkpoint entails—signs announcing the purpose, lighting, and identifiable police vehicles and the observable fact

IV. THE *SMITH* DECISION

The Oklahoma Court of Criminal Appeals, in a unanimous decision, found that stops made at the Oklahoma City DWI roadblock constituted unreasonable seizures and, therefore, held the roadblock to be violative of the fourth amendment.¹³² In reaching this conclusion, the court considered: “(1) the type of checkpoint involved, (2) the purpose of the checkpoint, and (3) the degree of intrusion and fright endured by the individuals passing through the checkpoints.”¹³³ Because the roadblocks were “one night affairs,” the court had little difficulty in classifying the contested roadblock as temporary, rather than permanent.¹³⁴ A review of the evidence surrounding the roadblock’s operation led the court to conclude that its true purpose was to apprehend drunk drivers.¹³⁵ The court further noted that the subjective intrusion inflicted upon motorists approaching the roadblock was heightened by the surprise of discovering an unannounced roadblock replete with mobile booking and jail vans.¹³⁶ The court compared this intrusion with the lower level of intrusion suffered by individuals stopped at the permanent, limited purpose *Martinez-Fuerte* roadblock.¹³⁷ In making this

that there is a uniform system for stopping cars. The only subjective difference between temporary and permanent checkpoints is that because its location is known in advance the latter can be avoided entirely by using a different route, but that difference is minimal as concerns anxiety, especially since a temporary checkpoint can also be avoided.

Id. at 8-9 (citations omitted). Turning to Scott’s contention that the roadblock was ineffective as a means of apprehending drunk drivers, the court observed that this contention ignored the deterrent effect of the roadblock. *Id.* at 9. In support of the latter type of effect, the court cited statistical evidence of a 25% decrease in alcohol-involved fatal accidents in New York from 1981 to 1983, as well as other statistical evidence reflecting a decrease in alcohol-involved accidents. *Id.* at 9-10. The court went on to state:

The extent to which those results stem from legislative reforms during that period as distinct from the deterrent effect of roadblocks and other educational and public information programs aimed at combatting the problem is not revealed, but in our view is not of constitutional moment. It is enough that such checkpoints, when their use becomes known, do have a substantial impact on the drunk driving problem. The State is entitled in the interest of public safety to bring all available resources to bear, without having to spell out the exact efficiency co-efficient of each component and of the separate effects of any particular component.

Id. at 10 (citations omitted); see also *infra* note 198 and accompanying text (discussing the difficulty in determining which factors actually cause a reduction in alcohol-related accidents); *infra* notes 204-06 (discussing the problem of ascertaining deterrent effectiveness). For a further discussion of DWI effectiveness as measured by apprehension rates, see *infra* notes 199-203 and accompanying text.

132. *Smith*, 674 P.2d at 565.

133. *Id.* at 563.

134. *Id.*

135. *Id.* at 563-64; see also *supra* note 15 (noting factors instrumental in deciding that the roadblock was actually intended for drunk drivers).

136. *Smith*, 674 P.2d at 564.

137. *Id.* at 565.

comparison, the court decided that the potential level of subjective intrusion suffered by the stopped motorist was simply too great to uphold the seizure as reasonable under the fourth amendment.¹³⁸ The court added that without statutory authority to the contrary, the rationale of using the state's police power to provide for the public safety and welfare via license checkpoints could not be used as a basis for implementing temporary DWI checkpoints in Oklahoma.¹³⁹

V. ANALYSIS OF DWI ROADBLOCK LAW

A. *The Prouse Dicta and the DWI Roadblock*

An earlier portion of this Note contended that the *Prouse* dicta were never intended to cover the use of the DWI roadblock.¹⁴⁰ Instead, it was suggested that the dicta were specifically directed toward the use of the roadblock as a means to check for drivers' licenses and vehicle registrations. In fact, with the exception of two obscure and inconclusive footnotes,¹⁴¹ *Prouse* is completely silent on the general issue of DWI enforcement, let alone the specific use of the DWI roadblock. Furthermore, it must be asked, would the Court consciously choose to address the DWI roadblock and the important constitutional issues it raises through such an inconclusive and indirect forum? While an answer in the affirmative is not inconceivable, it seems unlikely in light of several underlying distinctions between the license-registration checkpoint and the DWI roadblock.

First, the signs of a license violation alone cannot be detected by simply observing a moving vehicle. The only practical method of enforcing the typical state law requiring each driver to carry his driver's license while operating a vehicle,¹⁴² is to actually stop the moving vehi-

138. *Id.*

139. *Id.*; see also *Deskins*, 234 Kan. at ___, 673 P.2d at 1185-86 ("It might well be advisable that minimum uniform standards for the operation of vehicular roadblocks be adopted and established by the legislature or attorney general, rather than leave the determination thereof to local officials"). It has also been noted that while statutory authority for implementing a DWI roadblock might be more defensible in comparison to a non-statutorily defined roadblock, such authority in and of itself does not necessarily make the DWI roadblock constitutional. See *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353 (footnote omitted); *Scott*, No. 542, slip op. at 10 n.4 (N.Y. Nov. 20, 1984).

140. See *supra* text accompanying notes 70-74.

141. *Prouse*, 440 U.S. at 659 n.18, 661 n.24. For a discussion of these two footnotes, the possible argument they provide for incorporating the DWI roadblock into the *Prouse* dicta, and the eventual rejection of this argument, see Comment, *The Prouse Dicta: From Random Stops to Sobriety Checkpoints?*, 20 IDAHO L. REV. 127, 144-45 (1984).

142. See OKLA. STAT. tit. 47, § 6-112 (1981).

cle and examine the driver's license.¹⁴³ In contrast, the signs of drunk driving, such as weaving and erratic driving, would be visible to an officer on patrol.¹⁴⁴ In this instance, enforcement of the typical DWI law¹⁴⁵ is not inherently contingent upon the vehicle stop as the initial means for detecting a violation. Accordingly, while the license-registration checkpoint accomplishes the stop and inquiry inherently necessary for enforcement of the license law, the DWI roadblock imposes a stop and inquiry not inherently necessary for enforcement of the DWI law.

Second, while the focus of a license-registration checkpoint is on the driver's documents, the focus of a DWI checkpoint is clearly on the driver himself. In addition, it is reasonable to assert that the DWI stop is designed to discover evidence of a crime and is, therefore, an affirmative investigative technique quite different from a license-registration check designed to enforce laws which are essentially regulatory in nature. Moreover, after considering the spectrum of criminal offenses, it should be clear that society has placed drunk driving in a far more serious category than the mere violation of a license or registration law. A comparison of the sanctions imposed for drunk driving and driving without a license,¹⁴⁶ reflects the far greater onus of criminality currently attached to a DWI offense. In sum, a drunk driving violation and a license or registration violation are two very different types of criminal offenses: the latter falls within a category composed of offenses which

143. See *Deskins*, 234 Kan. at ___, 673 P.2d at 1187 (Prager, J., dissenting) (“[v]iolations of motor vehicle license laws . . . are in no way physically apparent through mere observation of traffic”); *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975) (license violations undetectable through traffic observation).

144. See *Bartley*, 125 Ill. App. 3d at ___, 466 N.E.2d at 348 (“An intoxicated motorist can be easily discerned by a trained officer without having to stop all traffic at a roadblock.”); *Deskins*, 234 Kan. at ___, 673 P.2d at 1187 (Prager, J., dissenting) (drunk driving behavior detectable even by lay observer).

145. See Act of May 30, 1984, ch. 254, 1984 Okla. Sess. Laws 950-51 (to be codified at OKLA. STAT. tit. 47, § 11-902).

146. Operating a motor vehicle without a license is a misdemeanor punishable by a fine of not less than \$50.00, but not more than \$100.00, and costs for a first offense. *Id.* at 948 (to be codified at OKLA. STAT. tit. 47, § 6-303(a)(1)). A misdemeanor for a second violation within one year of a previous conviction is punishable by a fine of not less than \$150.00 but not more than \$300.00 and costs. *Id.* (to be codified at OKLA. STAT. tit. 47, § 6-303(a)(2)). A misdemeanor for a third violation occurring within one year of a previous conviction is punishable by a jail sentence of not less than five days, but not more than 30 days, and a fine of not less than \$200.00 but not more than \$500.00. *Id.* (to be codified at OKLA. STAT. tit. 47, § 6-303(a)(3)). In contrast, the first DWI conviction is a misdemeanor punishable by jail imprisonment for not less than 10 days but not more than one year and a fine not to exceed \$1,000.00; a second or subsequent conviction is a felony punishable by sentencing to the custody of the Department of Corrections for not less than one year but not more than five years and a fine of not more than \$2,500.00. *Id.* at 950-51 (to be codified at OKLA. STAT. tit. 47, § 11-902(c)) (emphasis added).

are *mala prohibita*,¹⁴⁷ while the former arguably falls closer to and possibly within a category composed of offenses which are *mala in se*.¹⁴⁸ Although our judicial system has approved of the use of the roadblock in enforcing a variety of *mala prohibita* type laws,¹⁴⁹ the same cannot be said for the roadblock designed to apprehend—en masse and without some prior individualized suspicion—the perpetrator of an offense *malum in se*—the thief, the heroin dealer, the rapist, or the murderer.¹⁵⁰ As *Smith* points out, “[t]here is a vast difference in enforcing immigration laws and affirmatively seeking out criminals in the manner done so here.”¹⁵¹

In light of these distinctions, it seems highly probable that the considerations involved in the judicial scrutiny of a DWI roadblock would require a far different scope of analysis than that which was employed in *Prouse*. The analytical need to address the DWI roadblock on its own terms, coupled with a close technical reading of *Prouse*, strongly suggests that the *Prouse* dicta were never intended to serve as approval of the DWI roadblock.

B. *The Fourth Amendment Balancing Test*

Justice White, writing for the majority in *Prouse*, summed up the fourth amendment balancing test and the determination of “reasonableness” as follows:

147. “Acts or omissions which are made criminal by statute but which, of themselves, are not criminal.” BLACK’S LAW DICTIONARY 861-62 (5th ed. 1979).

148. “Wrongs in themselves; acts morally wrong; offenses against conscience.” *Id.* at 861.

149. See, e.g., *Prouse*, 440 U.S. at 663 n.26 (truck weight and inspection regulations); *Martínez-Fuerte*, 428 U.S. 543 (immigration laws); *Stephenson v. Dep’t of Agr. and Consumer Serv.*, 342 So. 2d 60 (Fla. 1977) (agricultural inspection laws); *State v. Tourillot*, 289 Or. 845, 618 P.2d 423 (fish and game laws), *cert. denied*, 451 U.S. 972 (1980).

150. See 3 W. LAFAVE, SEARCH AND SEIZURE § 9.5(b), at 145 (1978); see also *supra* note 76 (observing that dragnet roadblocks have usually been found unconstitutional).

No matter how bad the crime may be which law enforcement officers are trying to stop, they may not abandon Fourth Amendment concerns in their efforts, however commendable in purpose, to stop all citizens, including the vast bulk of them who are innocent, in order to sift out and apprehend violators

Jones, No. 83-2547 (Fla. Dist. Ct. App. Sept. 5, 1984) (available on LEXIS, States library, Fla. file).

151. *Smith*, 674 P.2d at 565. *Smith* goes on to suggest yet another distinction between the DWI roadblock and the license-registration checkpoint:

[In operating the DWI roadblock] 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. The Court is not so naive to think that criminal conduct does not occur regularly in the form of DUI offenders. Yet, a basic tenet of American jurisprudence is that the government cannot assume criminal conduct in effectuating a stop such as the one presented herein.

Id. at 564.

[T]he 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. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."¹⁵²

The *Martinez-Fuerte* immigration control roadblock and the *Prouse* license-registration roadblock are indicative of situations in which other safeguards were relied upon to guarantee the individual's reasonable expectation of privacy. In *Martinez-Fuerte*, for instance, the Court determined that promotion of the governmental interest at stake far outweighed the "minimal" intrusion suffered by motorists subjected to brief questions designed to elicit compliance with a regulatory law.¹⁵³ So long as the San Clemente immigration roadblock was operated in a way which minimized field officer discretion and motorist intrusion, the stops occurring at the roadblock were reasonable despite the absence of any type of prior individualized suspicion.¹⁵⁴

The *Coccoma*, *Deskings*, *Little* and *Scott* courts upheld particular DWI roadblocks as constitutional where no form of individualized suspicion existed prior to the stop.¹⁵⁵ Apparently, these four courts, along with the three post-*Prouse* decisions that held against particular roadblocks,¹⁵⁶ have implicitly assumed that the DWI roadblock stop is comparable in nature to the immigration checkpoint or license-registration checkpoint.¹⁵⁷ As suggested earlier, however, the DWI roadblock is an

152. *Prouse*, 440 U.S. at 654-55 (quoting, respectively, *Terry*, 392 U.S. at 21; *Martinez-Fuerte*, 428 U.S. at 560; *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)).

153. See *Martinez-Fuerte*, 428 U.S. at 556-62.

154. See *id.* at 558-62.

155. See *Deskings*, 234 Kan. at ___, 673 P.2d at 1177; *Little*, 300 Md. at ___, 479 A.2d at 912; *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 133 n.4; *Scott*, No. 542, slip op. at 5-10 (N.Y. Nov. 20, 1984).

156. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 995-96; *Jones*, No. 83-2547 (Fla. Dist. Ct. App. Sept. 5, 1984) (available on LEXIS, States library, Fla. file); *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353.

157. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 995-96; *Jones*, No. 83-2547 (Fla. Dist. Ct. App. Sept. 5, 1984) (available on LEXIS, States library, Fla. file); *Deskings*, 234 Kan. at ___, 673 P.2d at 1184; *Little*, 300 Md. at ___, 479 A.2d at 907-09, 914; *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 352-53; *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 134; *Scott*, No. 542, slip op. at 5-10 (N.Y. Nov. 20, 1984).

investigative tool designed to affirmatively seek out a more traditional form of criminal activity. This type of roadblock is, therefore, not analogous to the permanent immigration checkpoint or the license-registration checkpoint, which are specialized exceptions to the "articulable suspicion" rule and are designed solely to enforce regulative type laws. Professor LaFave has likewise concluded that "it cannot be assumed that those cases [*Prouse* and *Martinez-Fuerte*] inevitably carry over to roadblocks conducted for more ordinary or traditional investigative purposes."¹⁵⁸ Accordingly, in order to constitute a reasonable seizure, it would appear that the stopping of drivers at a DWI roadblock, like other motor vehicle investigatory stops,¹⁵⁹ would require some individualized quantum of suspicion prior to the stop.

The only direct Supreme Court support for concluding otherwise appeared in *Brown v. Texas*.¹⁶⁰ In that case, two police officers patrolling a known narcotics trafficking area stopped the defendant as he was walking away from another man in an alley.¹⁶¹ Although the officers later admitted that they did not suspect the defendant of any specific misconduct, they arrested the defendant when he refused to comply with a Texas statute requiring a person lawfully stopped to give his name and address to an officer requesting that information.¹⁶² In a unanimous decision, the Court found that the stop violated the fourth amendment.¹⁶³ In reaching this conclusion, Chief Justice Burger elaborated upon the need to control field officer discretion:

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 of the particular individual, *or that the*

158. 3 W. LAFAVE, SEARCH AND SEIZURE § 9.5(b), at 85 (Supp. 1984). Professor LaFave noted that *Prouse* and *Martinez-Fuerte* "are grounded on the balancing test of *Camara v. Municipal Court* and a determination that, as in *Camara*, the particular government interests involved could not be adequately protected if an individualized reasonable suspicion test were applicable." *Id.*

[W]e must bear in mind that in cases where the Supreme Court has either expressly or impliedly sanctioned checkpoint stops, the criminal activity targeted was of such a nature that there was no other less intrusive but equally effective means of detecting violators. Transporters of illegal aliens and violators of license and safety equipment laws can rarely be detected by observing traffic.

Bartley, 125 Ill. App. 3d at ___, 466 N.E.2d 348.

159. See *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (roving Border Patrol vehicle stop); *Brignoni-Ponce*, 422 U.S. at 884 (same).

160. 443 U.S. 47 (1979).

161. *Id.* at 48-49.

162. *Id.* at 49. "A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." TEX. PENAL CODE ANN. § 38.02(a) (Vernon 1974).

163. *Brown*, 443 U.S. at 51-53.

*seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.*¹⁶⁴

In keeping with speculation that a roadblock designed for general law enforcement purposes might pass fourth amendment scrutiny if operated without some prior individualized suspicion, but pursuant to a *Brown*-type plan,¹⁶⁵ approximately half of the DWI roadblock cases have explored this analytical tract.¹⁶⁶ The inherent problem with the applicability of *Brown* to the DWI roadblock lies in Chief Justice Burger's reliance upon *Prouse* and *Martinez-Fuerte* in formulating his neutral plan approach.¹⁶⁷ In *Prouse*, for instance, the Court noted that "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion,' other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"¹⁶⁸ As Professor LaFave points out, the reasoning employed in both *Prouse* and *Martinez-Fuerte* "reflects a concern with very special and unique governmental and public interests which could not be adequately protected if a case-by-case reasonable suspicion were required."¹⁶⁹

Thus, a suggestion that a neutral plan could take the place of individualized suspicion in instances where the law enforcement technique is traditional in nature and focuses on particular suspects, would appear to run counter to the teachings of *Prouse* and *Martinez-Fuerte*, as well as *Terry*.¹⁷⁰ Accordingly, as DWI enforcement can be implemented on a case-by-case individualized suspicion basis,¹⁷¹ and as the purpose of the DWI roadblock stop would seem to fall within the cate-

164. *Id.* at 51 (citing *Prouse*, 440 U.S. at 663; *Martinez-Fuerte*, 428 U.S. at 558-62) (emphasis added).

165. See 3 W. LAFAVE, SEARCH AND SEIZURE § 9.5(b), at 84-85 (Supp. 1984); see also *State v. Hilleshiem*, 291 N.W.2d 314, 318 (Iowa 1980) (setting forth a *Brown*-type neutral plan for implementing a generalized law enforcement roadblock).

166. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 998-1000 (Feldman, J., specially concurring); *Deskins*, 234 Kan. at ___, 673 P.2d at 1181, 1184-85; *Little*, 300 Md. at ___, 479 A.2d at 909; *Scott*, No. 542, slip op. at 5-7 (N.Y. Nov. 20, 1984).

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

168. *Prouse*, 440 U.S. at 654-55 (quoting, respectively, *Martinez-Fuerte*, 428 U.S. at 560; *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)).

169. 3 W. LAFAVE, *supra* note 165, § 9.3(g), at 57; see also *supra* note 158 and accompanying text.

170. See 3 W. LAFAVE, *supra* note 169. But see *id.* at 57-60 (suggesting that a *Brown*-type plan might be applicable if the plan addresses "a special problem existing at a certain time and place" like the park vandal problem in *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980)).

171. See *supra* notes 142-45 and accompanying text.

gory of generalized or traditional law enforcement,¹⁷² it seems likely, despite *Brown*, that some quantum of individualized suspicion would continue to be necessary before stopping a motorist suspected of drunk driving.

Nevertheless, most of the courts deciding DWI roadblock constitutionality, whether considering the roadblock in the terms posed by *Brown*,¹⁷³ or by analogy to the operation of the immigration checkpoint in *Martinez-Fuerte* and the license-registration checkpoint in *Prouse*,¹⁷⁴ have minimized their treatment of the apparent need for some objective standard to justify the stop, and concentrated instead on the ways in which the DWI roadblock was or could be operated without some prior quantum of suspicion. The *Coccoma*, *Deskins* and *Little* courts utilized this approach to find the particular DWI roadblocks at issue to be constitutional.¹⁷⁵ The *McGeoghegan* and *Jones* courts, while finding particular roadblocks to be unconstitutional, indicated that under more carefully prescribed operational criteria they too would uphold the constitutionality of the DWI roadblock.¹⁷⁶ Finally, *Ekstrom* denounced the operation of a specific DWI roadblock, but stopped short of holding the DWI roadblock unconstitutional per se.¹⁷⁷ In each instance, the need to minimize field officer discretion and motorist intrusion through procedural safeguards permeated the analysis.

1. Reducing Motorist Intrusion—Procedural Criteria for the DWI Roadblock

Despite the questionable analytical framework employed by the preceding courts, a further investigation of the criteria which those courts have found to be necessary for the operation of a constitutional

172. See *supra* notes 146-51 and accompanying text.

173. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1000 (Feldman, J., specially concurring); *Deskins*, 234 Kan. at ___, 673 P.2d at 1181; *Little*, 300 Md. at ___, 479 A.2d at 909, 913-14; *Scott*, No. 542, slip op. at 5-7 (N.Y. Nov. 20, 1984).

174. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 995-96; *Deskins*, 234 Kan. at ___, 673 P.2d at 1178-81; *Little*, 300 Md. at ___, 479 A.2d at 907-09; *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 351-52; *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 131-34.

175. See *Deskins*, 234 Kan. at ___, 673 P.2d at 1185-86; *Little*, 300 Md. at ___, 479 A.2d at 911-14; *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 134-35; see also *supra* notes 109-26 and accompanying text (discussing the *Coccoma*, *Deskins* and *Little* cases).

176. See *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353; *Jones*, No. 83-2547 (Fla. Dist. Ct. App. Sept. 5, 1984) (available on LEXIS, States library, Fla. file); see also *supra* notes 98-99 and accompanying text (discussing *McGeoghegan* and operational criteria that might lead to a finding of constitutionality for a DWI roadblock).

177. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 995-96; see also *supra* notes 100-02 and accompanying text (discussing specially concurring opinion in *Ekstrom* and a 1984 case which upheld the constitutionality of a later Arizona roadblock).

DWI roadblock is nevertheless apropos. For until the Supreme Court clarifies the situation, jurisdictions reviewing DWI roadblock cases may continue to proceed along the analytical lines taken by some of the cases in this Note. It is imperative, therefore, that those jurisdictions which choose to take a *Deskins*-type approach recognize the factors necessary for minimizing officer discretion and motorist intrusion. As Justice Jackson, upon returning from the Nuremburg trials, remarked:

[Fourth amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.¹⁷⁸

Thus, it is suggested first that the planning and authorization of the DWI roadblock should occur at the administrative level within the relevant law enforcement agency.¹⁷⁹ Administrative personnel should set forth a written plan articulating logistical details like the location and time of the roadblock, as well as the need to systematically stop all cars or, for example, every fifth car.¹⁸⁰ Moreover, administrative personnel should carefully formulate the standards field officers should abide by when ascertaining motorist sobriety at the checkpoint.¹⁸¹ Advance publicity of the roadblock appears to be another essential administrative task.¹⁸² As one final precaution, at least one commentator has stated that a judicial warrant to operate the DWI roadblock should be obtained.¹⁸³

178. *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

179. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1000-01 (Feldman, J., specially concurring); *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353; see also *Martinez-Fuerte*, 428 U.S. at 559 (noting that administrative authorization and planning of a roadblock reduces field officer discretion).

180. See Comment, *supra* note 141, at 154-56; see also *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 141 n.1 (internal memorandum setting forth departmental procedure for stopping every fifth car during light traffic hours).

181. See Comment, *supra* note 141, at 155-56; see also *infra* notes 190-94 and accompanying text (describing standards for motorist-officer encounter).

182. See *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353 (advocating advance publication of date, but not location, of roadblock so as to reduce motorist surprise); see also *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1001 (Feldman, J., specially concurring) (noting probable deterrent effect of advance publicity).

183. Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L. REV. 1457, 1484-85 (1983) (a warrant requirement would allow for

The physical characteristics of the roadblock itself are equally important. As motorist safety is the paramount consideration here, the roadblock should be located in a non-remote, highly visible area, replete with lighting if nighttime operation is intended.¹⁸⁴ Flashing traffic signals or police car lights, flares and signs should be arranged in a manner that effectively alerts oncoming motorists of the roadblock's presence and character.¹⁸⁵ If a high volume of traffic is expected, the roadblocks should be designed and timed to facilitate the flow of traffic.¹⁸⁶ A secondary area will probably be necessary to meet this requirement as well as the need to provide for a safe place for further investigation of motorist sobriety.¹⁸⁷

Field officers stationed at the roadblock should be in uniform and should strictly adhere to the operational standards previously promulgated by administrative officials.¹⁸⁸ Personnel assigned to the roadblock should consist of officers normally assigned to traffic enforcement duties; non-traffic enforcement personnel, such as special narcotics detection teams, should be excluded from the roadblock area.¹⁸⁹

While the preceding factors are certainly relevant to the operation of a DWI roadblock which limits field officer discretion and motorist intrusion up to the point of the actual stop, they are inadequate for regulating the actual motorist-officer encounter. To limit motorist anxiety, officers should attempt to minimize the time motorists are detained and assuage motorist fears by answering queries as to the roadblock's operation and purpose.¹⁹⁰ It is also suggested that the of-

evaluation by a neutral magistrate of the roadblock's probable degree of discretion and intrusion); see also *State v. Olgaard*, 248 N.W.2d 392, 395 (S.D. 1976) (pre-*Prouse* case requiring authorization of DWI roadblock by prior judicial warrant).

184. See *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353 (observing that poor illumination detracted from motorist safety); Comment, *supra* note 141, at 153 (roadblock should be visible for at least 100 yds.).

185. See Comment, *supra* note 141, at 153-54; see also *Deskings*, 254 Kan. at ___, 673 P.2d at 1185 (several police cars with red lights flashing sufficient); *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 135 (flares alone sufficient).

186. See *McGeoghegan*, 389 Mass. at ___, 449 N.E.2d at 353 (poor planning resulted in a traffic jam close to a mile long).

187. See *Coccoma*, 177 N.J. Super. at ___, 427 A.2d at 135 (adjacent parking lot sufficient).

188. See *Deskings*, 234 Kan. at ___, 673 P.2d at 1185 (officers have no discretion in selecting motorists to be stopped and are easily recognizable because of uniform).

189. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1000 (Feldman, J., specially concurring) (presence of non-traffic officers at roadblock evidence of improper roadblock operation); *Garrett v. Goodwin*, 569 F. Supp. 106, 118 (E.D. Ark. 1982) (consent decree) (non-traffic enforcement personnel should not be present at a license-registration checkpoint since "[t]heir presence indicates the roadblock may be pretextual and could easily lead to abuse").

190. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1000 (Feldman, J., specially concurring) (failure by officers to explain purpose of roadblock found improper).

ficer be initially limited to the visual inspection and brief questioning prescribed in *Martinez-Fuerte*.¹⁹¹ At least two commentators have stated that where the behavior of the motorist (slurred speech, blood-shot eyes, or alcohol on breath) would lead to an articulable suspicion on the part of the investigating officer that the motorist was intoxicated, the motorist should then be directed to a secondary area for further investigation.¹⁹² Only then may the officer require the motorist to step out of his vehicle and take the requisite preliminary sobriety tests.¹⁹³ If probable cause can then be established, more intrusive tests, like chemical tests for blood alcohol, can be administered.¹⁹⁴

2. Serving the State Interest

As the preceding guidelines make evident, much of the analytical effort expended by the courts considering the DWI roadblock has centered on ways to reduce the intrusion on the individual's fourth amendment rights. In lieu of requiring some individualized quantum of suspicion prior to the stop at a DWI roadblock, the courts have frequently devised an elaborate set of procedural safeguards designed to reduce motorist intrusion and anxiety along with field officer discretion. But such safeguards are only applicable to one side of the fourth amendment balancing process. The ultimate reasonableness of a fourth amendment seizure can only be ascertained by weighing the fourth amendment intrusion against the other half of the equation: the promotion of the state interest served by the intrusion.¹⁹⁵ Obviously,

191. *Martinez-Fuerte*, 428 U.S. at 557-58.

192. Note, *supra* note 183, at 1486; Comment, *supra* note 141, at 155. One problem, however, in finding articulable suspicion to detain a driver in a secondary area is that evidence-gathering involves a greater degree of officer discretion. One commentator has stated that:

[T]he license and registration check imposes minimal invasion of privacy and involves little opportunity for abuse of discretion. Conversely, the drunk-driving investigation necessarily demands a greater intrusion and requires that the officer exercise his discretion in deciding which motorists must be subjected to further detention. Moreover, the scenario of the roadblock stop invites abuse of that discretion. Not only are citizens reluctant to assert their right not to cooperate, but also that right may prove to be illusory given the understood consequences of noncooperation.

Rogers, *The Drunk-Driving Roadblock: Unconstitutional Random Seizure or Justifiable Minimal Intrusion?*, 3 MICH. RESEARCHER 89, 100 (1984).

193. Comment, *supra* note 141, at 155-56.

194. Note, *supra* note 183, at 1486; Comment, *supra* note 141, at 156; *see also* South Dakota v. Neville, 103 S. Ct. 916 (1983) (refusal to submit to a blood-alcohol test can be used as evidence of guilt and does not offend suspect's fifth amendment right against self-incrimination); Schmerber v. California, 384 U.S. 757 (1966) (states allowed to compel a suspect to submit to a blood-alcohol test without violating suspect's fifth amendment right against self-incrimination).

195. *See, e.g., Prouse*, 440 U.S. at 654; *Bartley*, 125 Ill. App. 3d at ___, 466 N.E.2d at 348; *Little*, 300 Md. at ___, 479 A.2d at 912-14; *Scott*, No. 542, slip op. at 5-10 (N.Y. Nov. 20, 1984).

the state interest in operating the DWI roadblock is grounded in a desire to improve highway safety—a “legitimate” state interest in any estimation given the high incidence of alcohol-related traffic fatalities.¹⁹⁶ The analysis of the government’s half of the balancing test, however, must be extended beyond the mere characterization of the state interest at stake, to include an assessment of the effectiveness of the fourth amendment intrusion in meeting the state interest.¹⁹⁷ The efficacy of the DWI roadblock can be examined in terms of drunk drivers apprehended at the roadblock and potential drunk drivers deterred by the roadblock.¹⁹⁸

Among the cases reviewed previously, only *Ekstrom* and *Deskins* provide any significant empirical evidence regarding the rate of apprehension at the DWI roadblock. In both cases, a rudimentary statistical evaluation suggests that the effectiveness of the DWI roadblock based on arrest rates is actually quite low.¹⁹⁹ Correspondingly, this analysis

196. See *supra* note 1 (reviewing the annual casualties and economic losses attributable to drunk driving). The Supreme Court has taken notice of “the carnage caused by drunk drivers” and pointed out that it has “repeatedly lamented the tragedy.” *South Dakota v. Neville*, 103 S. Ct. 916, 920 (1983) (citing *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979); *Perez v. Campbell*, 402 U.S. 637, 657, 672 (1971) (Blackmun, J., concurring); *Tate v. Short*, 401 U.S. 395, 401 (1957) (Blackmun, J., concurring)). Moreover, the Court has recognized the “compelling” interest in highway safety. *Mackey*, 443 U.S. at 19.

197. See, e.g., *Prouse*, 440 U.S. at 659-60 (discussing marginal advancement of state interests in conducting random license-registration checks).

198. Roadblock efficacy has also been examined in terms of alcohol-related accidents. *Little*, 300 Md. at ___, 479 A.2d at 913; *Scott*, No. 542, slip op. at 9-10 (N.Y. Nov. 20 1984); see also *supra* notes 124 and 131 (discussing, respectively, alcohol-related accident statistics of *Little* and *Scott*). The inherent difficulty in relying upon this statistical data is that a reduction in alcohol-related accidents may ultimately be attributable to a variety of factors. Pointing to the DWI roadblock as the sole cause of any reduction in alcohol-related traffic accidents obviates the possibility that traditional enforcement methods and increased public awareness of drunk driving are also likely to be major contributors to a reduction in alcohol-related accidents. Furthermore, it is entirely possible that these factors act synergistically, thereby impairing any attempt to isolate any one factor as the direct cause for a decrease in alcohol-related accidents. See Cohen, *The Legal Control of Drunken Driving: A Comment on Methodological Concerns in Assessing Deterrence Effectiveness*, 12 J. CRIM. JUST. 149, 150 (1984) (observing “the problem of identification—of being able to isolate the effectiveness of changes in the law from the impact of other factors affecting drunken driving and related motor accidents”); Snortum, *Controlling the Alcohol-Impaired Driver in Scandinavia and the United States: Simple Deterrence and Beyond*, 12 J. CRIM. JUST. 131 (1984) (discussing the interactive network of influences upon alcohol impaired driving). It is suggested, therefore, that for the purpose of assessing roadblock efficacy, statistical emphasis should be placed on effects like apprehension rates which can be directly correlated to the DWI roadblock. But see *Scott*, No. 542, slip op. at 9-10 (N.Y. Nov. 20, 1984) (contending that the specific contribution of the DWI roadblock to a reduction in alcohol-related accidents does not have to be discerned so long as “such checkpoints, when their use becomes known, do have a substantial impact on the drunk driving problem”).

199. In *Deskins*, between 2,000 and 3,000 motorists were stopped at the Topeka roadblock. *Deskins*, 234 Kan. at ___, 673 P.2d at 1187 (Prager, J., dissenting). Of the 74 violations which were discovered at the roadblock, 15 were for DWI. *Id.* Assuming that 2,500 motor vehicles were

indicates that the vast majority of motorists stopped at the roadblocks were law-abiding citizens deprived of their fourth amendment rights by a seizure which was not based on any type of prior individualized suspicion, and which was ultimately more successful at discovering violations other than DWI offenses. Preliminary confirmation of this hypothesis can be found by taking note of the role that timing and location play in affecting arrest rates. For example, a roadblock located near a strip of "drinking establishments" on a Friday or Saturday night is likely to have a far higher arrest rate than a roadblock located in a quiet residential area on a mid-week afternoon. Both the *Deskins* and *Ekstrom* roadblocks approach the optimal time and location for DWI roadblock effectiveness.²⁰⁰ Thus, the statistics from *Deskins* and *Ekstrom* cannot be regarded as unduly biased because of each roadblock's temporal and locational features. Moreover, even if the more successful of the two roadblocks (*Deskins*) could be operated in a way which doubled or tripled the number of arrests, the rate of apprehension would still be very low.²⁰¹

stopped at the roadblock, 15 DWI arrests represents a .6% arrest rate. Of the 74 total violations discovered at the Topeka roadblock, only 20.3% were for DWI. In *Ekstrom*, of the 5,763 vehicles stopped at a number of Arizona DWI roadblocks on September 6, 1982, 14 persons or .24% were arrested for DWI. *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 993. Of the 129 violations discovered during the two days the Kingman, Arizona roadblock was in operation, only 13 arrests or 10% of the total violations were DWI violations. *Id.* In *Jones*, "[t]he arresting officer testified that between 100 and 200 cars were stopped and five or six DUI arrest were made." *Jones*, No. 83-2547 (Fla. Dist. Ct. App. Sept. 5, 1984) (available on LEXIS, States library, Fla. file). Because of the relatively low sample size in *Jones*, as analysis of these DWI arrests will not be undertaken.

200. The *Deskins* roadblock was operated on a major city thoroughfare from 10:00 P.M. Saturday until 2:00 A.M. Sunday. *Deskins*, 234 Kan. at ___, 673 P.2d at 1187 (Prager, J., dissenting). The *Ekstrom* roadblock was operated on a major state highway on Thursday, August 26, 1982 from 7:00 P.M. to 12:00 A.M. and Monday, September 6, 1982 (Labor Day) from 3:00 P.M. to 9:00 P.M. *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 992.

201. Doubling the number of DWI arrests in *Deskins* would result in an arrest rate of 1.2%, while tripling the number of DWI arrests would result in an arrest rate of 1.8%. By comparison, a follow-up study of arrest rates achieved by jurisdictions involved in the Alcohol Safety Action Projects (ASAP) of the 1970's (federally-backed programs designed to improve traditional DWI enforcement), revealed that prior to ASAP implementation arrests ranged from 0-1.5%, but during the ASAP implementation arrests ranged between .5 and 3.5%. NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., ALCOHOL AND HIGHWAY SAFETY: A REVIEW OF THE STATE OF KNOWLEDGE—1978 39 (1979); see *infra* note 203 (discussing effectiveness of roving DWI patrols). As this study indicates, the hypothesized range of DWI roadblock arrest rates can be readily achieved without the use of roadblocks.

Achievement of higher roadblock arrest rates would to some extent be contingent upon a greater allocation of limited police resources and, of course, a greater degree of intrusion upon stopped drivers. While a detailed economic analysis of this problem is obviously beyond the confines of this Note, it seems plausible to suggest that the direct economic costs of diverting scarce manpower to bolster existing roadblocks or establish new roadblocks, coupled with the intangible costs of diverting that manpower from other law enforcement duties, may well present a classic case of diminishing marginal returns. In other words, the cost per arrest in increasing the

At this point it must be asked whether these same fairly low DWI arrest rates could be accomplished in a less constitutionally intrusive manner. As Justice Prager's dissenting opinion in *Deskins* points out:

[B]etween 2,000 and 3,000 motor vehicles were stopped at the roadblock. A total of 74 violations were discovered at the checkpoint, only 15 of which were for driving while intoxicated. During this period of time 35 police officers were on duty, which for the four-hour period involved a total of 140 man hours. Although it does not specifically appear in the record before us, it was not unreasonable for the trial court to assume that the same or greater productivity in arresting drunk drivers could have been achieved by distributing the 35 officers at various places throughout the city for the sole purpose of observing erratic driving and stopping and checking drunk drivers.²⁰²

Justice Prager's logic becomes even more compelling after one notes that DWI arrests at the *Deskins* roadblock averaged about one every nine man hours. It is not unreasonable to assume that an officer on a special DWI roving patrol making stops based on reasonable suspicion or probable cause could equal or surpass this rate.²⁰³

Whether roving patrols have a deterrent effect comparable or su-

arrest rate from, for example, 1.2% to 1.8% will probably be higher than the cost per arrest in increasing the rate from, for example, 0% to .6%. If this is indeed the mathematical progression indigenous to DWI roadblock arrests, at some point the costs for each additional arrest will simply be unjustifiable. The essential economic question, therefore, is to estimate the range in the arrest rate at which cost ineffectiveness begins to predominate. Potentially, this range could be low enough to make the doubling and tripling scenarios posed earlier cost inefficient, as well as inefficient in the sheer number of DWI arrests. A review of two jurisdictions which utilized roadblocks during the ASAP program "found them not to be cost-effective in terms of the number of arrests for DWI, and . . . reported that most of the team's time was spent on other than DWI offenses." NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., RESULTS OF NATIONAL ALCOHOL SAFETY ACTION PROJECTS 13 (1979). For a further discussion of the economic-side of crime control, see generally L. PHILLIPS & H. VOTEY, JR., THE ECONOMIC ASPECTS OF CRIME CONTROL (1981).

202. *Deskins*, 234 Kan. at ___, 673 P.2d at 1187 (Prager, J., dissenting); see also *State v. Superior Court*, No. 17679-SA (Ariz. Nov. 21, 1984) (available on LEXIS, States library, Ariz. file) ("in doing a checkpoint operation you will end up with about half of the amount of the arrests that the same officer deployed in the field would produce' ") (quoting the Commander of the Traffic Enforcement Division).

203. In a 1973 study of the Alcohol Safety Action Project Unit of the Kansas City Police Department, it was determined that officers on a special DWI patrol averaged one DWI arrest every 5.4 man hours. Beitel, Sharp & Glauz, *Probability of Arrest while Driving under the Influence of Alcohol*, 36 J. STUD. ALCOHOL 109, 113 (1975). Similarly, Baltimore County, Maryland found that roving patrols specifically designed to detect the drunk driver were more effective than checkpoints in terms of arrest rates. See *Checkpoints to Curb Drunk Drivers?*, U.S. NEWS & WORLD REP., July 4, 1983, at 66; see also *Little*, 300 Md. at ___, 479 A.2d at 918 (Davidson, J., dissenting) (observing that a comprehensive training program to enhance traditional DWI enforcement techniques in Maryland resulted in a twofold increase in the number of DWI arrests from 1980 to 1982); cf. Sykes, *Saturated Enforcement: The Efficacy of Deterrence and Drunk Driving*, 12 J. CRIM. JUST. 185 (1984) (specially designed DWI enforcement program using roving patrols produced a statistically significant change in drunk driving as measured by accident rates).

terior to that of the DWI roadblock is, however, a different and far more subtle question.²⁰⁴ Undoubtedly, some individuals will be less likely to drive while intoxicated if they are aware of the increased possibility of being stopped and apprehended for DWI at a DWI roadblock.²⁰⁵ On the other hand, it seems just as likely that the same effect can be achieved by roving patrols specifically designed to apprehend the drunk driver. In either instance, the inherent difficulty in measuring the deterrent effect caused by each method makes empirical estimation and comparison unrealistic, if not impossible.²⁰⁶ Thus it must be assumed that the probable deterrent effect of the DWI roadblock is, at

204. It should be noted that the concept of general deterrence is theoretically divisible into deterrence caused by the magnitude and terms of the criminal sanction, and deterrence caused by the probability of rapid apprehension and punishment. See Andenaes, *The General-Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960-70 (1966). It has been observed that the latter form of deterrence has "a moderate deterrent effect for all crimes, while severity acting alone is not associated with lower rates of crime." Antunes & Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States*, 64 J. CRIM. L. & CRIMINOLOGY 486, 492-93 (1973). As Justice Feldman pointed out in *Ekstrom*, "[t]he problem is that deterrence by punishment is often ineffective unless combined with a fear of apprehension." *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 1000 n.3 (Feldman, J., specially concurring). DWI roadblocks are obviously aimed at the "probability of apprehension" component of deterrence.

205. Other drivers, however, will simply change their driving patterns to avoid predisclosed roadblock locations. *E.g.*, State v. Superior Court, No. 17679-SA (Ariz. Nov. 21, 1984) (available on LEXIS, States library, Ariz. file); *Scott*, No. 542, slip op. at 8-9 (N.Y. Nov. 20 1984). Even when the possibility, but not the location, of a DWI roadblock has been made known, some legally intoxicated motorists may be able to recognize the purpose of the roadblock and choose to take evasive action prior to being stopped. In *Little*, for instance, motorists were theoretically free to make a U-turn before reaching the roadblock or roll up their windows and proceed through the roadblock without stopping. *Little*, 300 Md. at ___, 479 A.2d at 906. *But see* State v. Superior Court, No. 17679-SA (Ariz. Nov. 21, 1984) (available on LEXIS, States library, Ariz. file) (motorists stopped if observed turning at "No-Turn" sign and followed if observed turning prior to initial "Reduce Speed Ahead" sign or passing through roadblock without talking to officers). Although it is unclear whether motorists approaching the roadblocks in *Little* were aware of these alternatives to an actual stop, it does seem likely that future motorists approaching the roadblocks will be more likely to exercise evasive action. Accordingly, it can be expected that the deterrent effect of a roadblock like the one operated in *Little* would diminish with increased motorist awareness. *See Little*, 300 Md. at ___, 479 A.2d at 920 (Davidson, J., dissenting); *cf.* H. ROSS, DETERRENCE OF THE DRINKING DRIVER: AN INTERNATIONAL SURVEY 97-99 (1981) (observing that modifications of legal sanctions are generally effective for deterring the drunk driver for the short-term, but not for the long-term). *But see* Phillips, Ray & Votey, Jr., *Forecasting Highway Casualties: The British Road Safety Act and a Sense of Déjà Vu*, 12 J. CRIM. JUST. 101 (1984) (contending that the British Road Safety Act of 1967, which makes it an offense for a driver to have a blood-alcohol content above .08%, created a permanent effect in the reduction of fatal accidents); Votey, Jr., *The Deterioration of Deterrence Effects of Driving Legislation: Have We Been Giving Wrong Signals to Policymakers?*, 12 J. CRIM. JUST. 115 (1984) (suggesting that the deterrent effect on drunk driving will be difficult to detect if exogenous variables like increases in alcohol consumption, highway traffic density and driver behavior are allowed to statistically mask the control effect provided by drunk driving legislation).

206. *See generally* Cohen, *supra* note 198, at 149 (noting the methodological and measurement problems in demonstrating the deterrent effectiveness of criminal sanctions on drunk driving); Nagin, *General Deterrence: A Review of the Empirical Evidence*, in DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 95 (1978) (dis-

best, no better than the deterrent effect provided by roving DWI patrols, and, at worst, marginal or insignificant. In view of this nebulous range of deterrent effectiveness, practicality suggests that an assessment of DWI roadblock efficacy should be limited to an evaluation of apprehension rates.

Accordingly, the two cases which have provided empirical evidence of apprehension rates at the DWI roadblock indicate that the effectiveness of the DWI roadblock may be quite limited.²⁰⁷ It is suggested, moreover, that less constitutionally restrictive means could be employed to achieve the same, if not superior, results. On the other side of the scale, it seems equally clear that the intrusion afforded by a DWI roadblock seizure, even when executed under the optimal circumstances set forth in the procedural guidelines, far outweighs the minimal advancement of the state interest in making the intrusion. Thus, it is plausible to conclude that the DWI roadblock represents an unreasonable and, therefore, unconstitutional seizure under the fourth amendment.

C. *Analysis of the Holding in Smith*

Although *Smith* ultimately arrives at the correct result in holding that the Oklahoma City roadblock and the DWI roadblock are per se unconstitutional, it does so in an analytical manner different from the model analysis just developed. Moreover, the strong language used by the *Smith* court in holding the DWI roadblock unconstitutional is exceptional.²⁰⁸ This section of the Note examines *Smith* in light of the preceding fourth amendment analysis and then reviews the implications of the court's unequivocal holding.

From an analytical standpoint, *Smith* is perhaps most remarkable for its less than full development of the fourth amendment balancing test. After determining that the Oklahoma City roadblock was temporary in nature, the *Smith* court devotes nearly half of its opinion to a

cussing the problems associated with empirical verification of the deterrence theory and the general scientific inadequacy of data collected in deterrence studies).

207. See *Ekstrom*, 136 Ariz. at ___, 663 P.2d at 993; *Deskins*, 234 Kan. at ___, 673 P.2d at 1187 (Prager, J., dissenting).

208. *Smith*, 674 P.2d at 565. The court stated:

[T]he Fourth Amendment protection against an unreasonable seizure of the person is violated by the use of a temporary roadblock as a means to stop all traffic (or traffic at established intervals) without any articulable facts giving rise to a reasonable suspicion for the stop, for the purpose of seeking out criminal DUI offenders.

Id.; see also *Bartley*, 125 Ill. App. 3d at ___, 466 N.E.2d at 348 (finding DWI roadblocks to be unconstitutional per se).

lengthy refutation of the license-registration guise.²⁰⁹ The court then begins the process of evaluating the reasonableness of the stop by noting the subjective intrusion suffered by motorists passing through the roadblock.²¹⁰ But here the court stops the balancing process short and jumps to a more theoretical series of policy arguments concerned with the presumption of innocence until proven otherwise and the general fear that the DWI roadblock, if approved, could be extended to other forms of criminal conduct.²¹¹ While these are certainly important underlying considerations, they cannot replace the analytical need to continue with an examination of the degree of officer discretion involved and the actual effectiveness of the roadblock.

The *Smith* court's use of precedent is equally puzzling. Near total reliance is placed on *Martinez-Fuerte* and the distinctions found relevant in that case: the permanent/temporary dichotomy and the emphasis on the subjective intrusion suffered by motorists.²¹² But in choosing to follow this path, one that was taken earlier by the 1976 decision in *Olgaard*,²¹³ the *Smith* court overlooks the potential implications of *Brown*,²¹⁴ the quintessential *Prouse* dicta,²¹⁵ and a detailed development of DWI roadblock jurisprudence in other states.²¹⁶ It would seem that a more thorough discussion of recent case law, perhaps along lines similar to *Deskins*,²¹⁷ would have been more in keeping with the current importance of the issues encompassed in DWI roadblocks.

Nonetheless, the *Smith* court correctly concludes that, at least for the short term, the use of the temporary DWI roadblock in Oklahoma is unconstitutional.²¹⁸ Alternatively, the long term outlook for Oklahoma, as well as for other states, is not so certain. States other than Oklahoma will undoubtedly continue to experiment with the

209. *Smith*, 674 P.2d at 564-65; see also *supra* note 15 (noting factors which court found to be incongruent with a true license and registration check).

210. *Smith*, 674 P.2d at 564-65.

211. *See id.*

212. *See id.* at 563-65; see also *supra* notes 54-59 and accompanying text (discussing *Martinez-Fuerte*).

213. *See supra* notes 86-90 and accompanying text.

214. *See supra* notes 160-72 and accompanying text.

215. *See supra* notes 140-51 and accompanying text.

216. *See supra* notes 86-95, 98-102, 109-22 and accompanying text.

217. *See Deskins*, 234 Kan. at ___, 673 P.2d at 1178-85.

218. However, because of its explicit use of the word "temporary" in its holding, *see supra* note 208, and because of its reliance on the permanent-temporary distinction, the *Smith* court does seem to leave open the possibility of a permanent DWI roadblock. In Oklahoma, the most likely locality for a permanent checkpoint would be at a toll booth. Use of toll booths as DWI checkpoints has met with some success in New York City. *See Checkpoints to Curb Drunk Drivers?*, U.S. NEWS & WORLD REP., July 4, 1983, at 65.

DWI roadblock. Litigation, in turn, will follow this experimentation, adding to the already confused state of DWI roadblock jurisprudence. Eventually, the Supreme Court will hear a DWI roadblock case or some other case with similar fourth amendment implications, and resolve the confusion which has followed in the wake of *Prouse* and its controversial dicta. Until that time arrives, however, Oklahoma law enforcement officials must rely upon the roving patrol stop made with reasonable suspicion or probable cause as the primary means for enforcing the state's drunk driving laws. Under *Prouse*, roadblocks which are designed solely for the purpose of checking drivers' licenses and vehicle registrations will continue to remain permissible. But as *Smith* makes evident, Oklahoma law enforcement agencies found misusing the license and registration checkpoint will meet with strong judicial disapproval.

VI. CONCLUSION

Nowhere, perhaps, is the collision between the individual's right to personal integrity and the interests of the modern state more soundly felt than in the process of ascertaining the reasonableness of a search and seizure. In this Note, it is contended that the fragments of one such fourth amendment collision, the *Prouse* dicta, were never intended to serve as judicial approval of the DWI roadblock. Nevertheless, some state courts faced with ascertaining the constitutionality of the DWI roadblock have assumed the opposite, effectively replacing the need for some individualized suspicion prior to an investigative stop with an elaborate set of operational criteria designed to minimize officer discretion and motorist intrusion. But in making this quantum leap, these same courts have generally overlooked the essence of determining the reasonableness of a fourth amendment seizure: balancing the extensiveness of the intrusion upon the individual against the degree to which the intrusion furthers the state interest. This Note completes that step by evaluating empirical evidence of the DWI roadblock's effectiveness, and concludes that the DWI roadblock is a minimally effective enforcement device. When coupled with additional evidence suggesting that less constitutionally restrictive roving DWI patrol stops based on reasonable suspicion or probable cause are viable alternatives to the DWI roadblock, it is believed that the DWI roadblock imposes an unreasonable seizure under the fourth amendment.

The *Smith* court arrives at a similar outcome by denouncing the

use of the temporary DWI roadblock in Oklahoma. Although *Smith* lacks a fully developed fourth amendment analysis and a detailed discussion of recent fourth amendment developments, such technical shortcomings in no way detract from the thrust of that decision: the subjective intrusion imposed upon motorists stopped at a temporary DWI roadblock is intolerable. Accordingly, law enforcement agencies in Oklahoma must continue to rely upon more traditional roving type patrols, acting upon some quantum of individualized suspicion, in combating the drunk driver.

Gordon D. Quin

