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SEIZURE BY ROADBLOCK: DECISIONAL LAW ON THE CONSTITUTIONALITY OF DRUNK DRIVING ROADBLOCKS

INTRODUCTION

There has recently been a tremendous increase in public awareness of the drunk driving problem.¹ This increase is largely a result of efforts by lobbying organizations such as Mothers Against Drunk Drivers (MADD), Remove Intoxicated Drivers (RID) and Students Against Drunk Drivers (SADD). These organizations have pressured both elected and law enforcement officials into taking action against drunk drivers.² State legislatures have enacted tough new anti-drunk driving laws,³ and federal law now provides supplemental highway grants to states which implement safety programs designed to reduce alcohol related accidents.⁴

Responding to the mounting public pressure, law enforcement officials have increased their traditional detection and deterrence efforts,⁵ and have also resorted to the use of drunk driving (DUI) roadblocks. Roadblocks set up for the purpose of detecting and deterring drunk drivers have been used in at least

¹It is estimated that over 25,000 persons a year die in alcohol-related traffic accidents. Flaherty, *As Roadblock Proliferate, Questions of Legality Persist*, NAT'L. L.J., July 25, 1983, at 3, 39, col. 1. It is also estimated that drunk drivers cause nearly one million nonfatal injuries and five billion dollars in property damage per year. Lauter, *The Drunk Driving Blitz*, NAT'L. L.J., Mar. 22, 1982, at 1, col. 2.

²For an extensive review of public and governmental reaction to the drunk driving problem, See Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1457-58 (1983) [hereinafter cited as *Curbing the Drunk Driver*].

Grass roots groups such as MADD and RID have formed chapters in every state. Note, *The Constitutionality of Roadblocks Conducted to Detect Drunk Drivers in Indiana*, 17 IND. L. REV. 1065, 1065 n.3. (1984) [hereinafter cited as *Drunk Drivers in Indiana*].

³In 1982, twenty-one states passed laws increasing penalties for drunk driving. Jacobs and Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C.D. L. REV. 595, 596 n.1 [hereinafter cited as *Mass Investigations*].

In 1982, the Ohio legislature enacted a stricter drunk driving law. See OHIO REV. CODE ANN. §§ 4511.19, 4511.191 (Baldwin 1983) for presumption; OHIO REV. CODE ANN. § 4511.99 (Baldwin 1983) for penalties. See also Bender, *Ohio's New Alcohol Impaired Driving Law — A Judicial Perspective*, 15 U. TOL. L. REV. 117 (1983) for an in-depth analysis of the law.

In addition to stricter anti-drunk driving laws, the overall campaign against drunk driving includes: 1) new initiatives at all levels of government; 2) stricter law enforcement; 3) publicity; 4) citizens groups such as MADD and SADD; 5) National Driver Licensing and Control. National driver licensing has been accomplished by the enactment of the National Driver Register (codified at 28 U.S.C. § 408). The National Driver Register is an attempt to keep drivers with suspended licenses from obtaining licenses in other states. U.S. DEPT. OF TRANS. NHJTSA, PUB. NO. DOT HS 809 516, ALCOHOL AND HIGHWAY SAFETY: PROFESSIONAL PAPERS ON STATE AND FEDERAL DRIVER LICENSING PROGRAMS 35 (March 1984).

⁴23 U.S.C. § 408 (1982). In order to qualify a state must adopt four minimum criteria: 1) state law must define intoxication as a blood alcohol level of 0.10%; 2) state law must provide a prompt, minimum license suspension of 90 days for first offenders and one year for repeat offenders; 3) state law must provide for a 48 hour prison term or 10 days community service for second offenders; 4) the state must increase enforcement efforts and conduct public awareness campaigns. *Id.*

⁵The traditional method of detecting and deterring drunk drivers is with roving marked patrols acting on observed violations. State *ex rel.* Ekstrom v. Justice Ct., 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983). Police may stop cars upon a reasonable articulable suspicion of a violation of some law for which either the driver or an occupant would be subject to seizure. *Id.* See Delaware v. Prouse, 440 U.S. 648, 663 (1979).

twenty-one states.⁶ Although there is no typical DUI roadblock,⁷ most involve police officers stopping vehicles in a non-random fashion in order to determine the driver's sobriety.⁸ DUI roadblocks have drawn support from both governmental and private sources⁹ despite serious questions concerning their constitutionality.¹⁰

⁶Op. Cal. Att'y Gen. 471, 472 (citing NATIONAL TRANSP. SAFETY BD., DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMIN. LICENSE REVOCATIONS (1984)).

The Ohio State Highway Patrol has not conducted DUI roadblocks. The only Ohio jurisdiction which has used DUI roadblocks is the City of Mentor, which only conducted a few before the program was cancelled. Telephone interview with Lt. Jack Holland of the Ohio State Highway Patrol (Dec. 31, 1985). The Ohio State Highway Patrol does not consider DUI roadblocks to be as productive as roving patrols given the same expenditure of manpower. *Id.* See also Buraker, *The "Roadblock" Strategy as a Drunken Driver Enforcement Measure*, 51 POLICE CHIEF, Apr. 1984, at 59, 49-62 ("[it has not been] demonstrated . . . that they are especially efficacious as a drunken driver enforcement measure").

⁷Rodgers, *The Drunk Driving Roadblock: Random Seizure or Minimal Intrusion?*, 21 CRIM. L. BULL 197, 204 (1985) [hereinafter cited as *Random Seizure*].

⁸Courts upholding DUI roadblocks have not required that police stop every vehicle. 3 W. LAFAVE, SEARCH AND SEIZURE, 10.8(g) (Supp. 1986).

The National Transportation Safety Board has recommended the following procedures for a constitutionally permissible DUI roadblock:

- 1) Police agencies select the times of operation and locations of checkpoints, based on empirical evidence of high DWI [driving while intoxicated] activity or alcohol-related crashes.
- 2) Checkpoint sites are established with high visibility, including warning signs, flashing lights, flares, police vehicles, and the presence of uniformed officers.
- 3) Police officers conducting the checkpoint either stop all traffic or use some preestablished, nonbiased formula to decide which vehicles to stop; for example, every tenth vehicle.
- 4) After being stopped, a motorist may be requested to produce a driver's license or vehicle registration and is asked questions while the officer looks for signs of alcohol impairment. In some cases where license/registration checks are not made, the stop is very brief (fifteen to thirty seconds).
- 5) Based on his or her observations, the police officer either waves the motorist on or directs him or her to a secondary area for further investigation. In the latter case, a roadside psychomotor test (e.g., walking a straight line) or a breath-alcohol test is usually requested.
- 6) If the driver fails these tests and the officer has probable cause, the motorist is arrested for DWI.
- 7) The arrested driver is then transported to the station for booking and is requested to submit to an evidential breath-alcohol test. Refusal to submit to such a test invokes the State's implied consent penalties.

NATIONAL TRANSP. SAFETY BD., SAFETY STUDY, DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMIN. LICENSE REVOCATIONS (1984).

⁹The use of drunk driving roadblocks is listed as a measure a state may take in order to qualify for supplemental highway funds. 23 C.F.R. § 1309.6(11) (1984). The National Highway Traffic Safety Administration (NHTSA) has published operational procedures for conducting drunk driving roadblocks. OFFICE OF ALCOHOL COUNTERMEASURES AND OFFICE OF DRIVER AND PEDESTRIAN RESEARCH, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT OF TRANSP., THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT (1983).

Various citizens groups such as MADD and RID as well as police officials and prosecutors which comprise the New York Governor's Alcohol and Highway Safety Task Force have endorsed the use of systematic sobriety checkpoints. *Mass Investigations*, *supra* note 3 at 597 n.4.

In 1983 The Presidential Commission on Drunk Driving endorsed the use of roadblocks as part of a comprehensive program to combat drunk driving. *Id.* at 597 (citing PRESIDENTIAL COMMISSION ON DRUNK DRIVING, FINAL REPORT 14 (1983)).

Public reaction to DUI roadblocks has been mixed. See *Curbing the Drunk Driver*, *supra* note 2 at 1458 n.3. However, in the long run, DUI checkpoint stops may annoy drivers, who must wait in line when they have not violated any laws. Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123, 135 (1984) [hereinafter cited as *Sobriety Checkpoints*] (citing the comments of the International Assoc. of Chiefs of Police, "Citizens . . . consider such roadblocks as a nuisance").

¹⁰Flaherty, *As Roadblocks Proliferate, Questions of Legality Persist*, NAT'L L.J. July 25, 1983, at 3, 39; West, *N.H. Court Holds Roadblocks Unconstitutional*, NAT'L L.J., Sept. 8, 1985, at 8; Reskin, *State Supreme Court Split on Roadblocks*, 72 A.B.A.J., Jan. 1986, at 126. Couric, *Flash of Genius*, 71 A.B.A.J. Nov. 1985, at 25.

The extensive use of DUI roadblocks was promoted by dictum in the United States Supreme Court's decision in *Delaware v. Prouse*.¹¹ The *Prouse* Court held that the police practice of randomly stopping vehicles for license and registration checks violated the fourth amendment.¹² However, supporters of DUI roadblocks point to dictum in the *Prouse* decision which states: "This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."¹³

This comment will examine decisions addressing the constitutionality of roadblock stops. First, it will examine *Delaware v. Prouse* and other Supreme Court decisions which have developed what is referred to as the neutral criteria standard for judging the reasonableness of temporary automobile seizures at roadblock-type stops.¹⁴ Under the neutral criteria standard, law enforcement officers may conduct suspicionless seizures of vehicles at roadblocks for certain specific purposes. The neutral criteria standard requires that the seizure be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.¹⁵ Second, the comment will examine decisions which have found roadblocks to be constitutional. Third, decisions will be examined which have found DUI roadblocks to be inherently unconstitutional, suggesting that the neutral criteria standard is not applicable to roadblocks conducted to enforce drunk driving laws.

FEDERAL CASE LAW DEVELOPING A STANDARD FOR SUSPICIONLESS SEARCHES OR SEIZURES — NEUTRAL CRITERIA

Even temporarily stopping a vehicle at a roadblock is a seizure within the

¹¹440 U.S. 648 (1979). See *infra* notes.

In the only pre-*Prouse* decision on the constitutionality of a DUI roadblock, the Supreme Court of South Dakota held that the roadblock involved did not conform to the permanent checkpoint approved in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). See *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

The lack of case law or statutory law authorizing DUI roadblocks before 1979, strongly suggests that DUI roadblocks were rarely conducted. See *Sobriety Checkpoints*, *supra* note 9 at 132 n.64.

¹²*Prouse*, 440 U.S. at 663.

U.S. CONST. amend. IV provides:

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

¹³*Prouse*, 440 U.S. at 663 (footnote omitted).

¹⁴See Comment, *Filling in the Blanks after Prouse: A New Standard for the Drinking-Driving Roadblock*, 20 LAND AND WATER L. REV. 241 (1985) [hereinafter cited as *Filling in the Blanks after Prouse*].

¹⁵*Brown v. Texas*, 443 U.S. 47, 51 (1979). As applied to roadblock seizures of motorists, the neutral criteria standard involves "a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria." *State v. Hilleshiem*, 291 N.W.2d 314, 318 (Iowa 1980). The *Hilleshiem* court did not consider this standard to be determinative of the constitutional issue. The court mentioned two other factors as important: 1) safety considerations relating to lighting and advance warning; 2) the level and nature of the subjective privacy intrusion. *Hilleshiem*, 291 N.W.2d at 317-18. See *Filling in the Blanks after Prouse*, *supra* note 14, at 249 n.68. Published by IdeaExchange@UAKron, 1986

meaning of the fourth amendment; therefore, roadblock stops must be reasonable in order to pass constitutional muster.¹⁶ The essential purpose of the reasonableness requirement is to limit “the exercise of discretion by government officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasion.”¹⁷ The reasonableness of roadblock seizures, like all seizures less intrusive than a traditional arrest, is determined by balancing the importance of the public interest being pursued against the individual’s right to be free from arbitrary interference by law officers.¹⁸ This section examines two areas where the Supreme Court has balanced the competing interests and found temporary roadblock-type seizures to be reasonable absent individualized suspicion: 1) border area illegal alien checkpoints;¹⁹ 2) license and registration checkpoints (*Delaware v. Prouse*).²⁰

Permanent Illegal Alien Checkpoints

*United States v. Brignoni Ponce*²¹ is the first of the so-called border search cases to apply a balancing analysis to temporary vehicle stops. *Brignoni-Ponce* involved the Border Patrol practice of using roving patrols to randomly stop vehicles in order to question the vehicles’ occupants about their citizenship and immigration status.²² Two Border Patrol officers pursued and stopped the defendant’s car because its three occupants appeared to be of Mexican descent. The officers questioned the defendant and his passengers and learned that the passengers were illegal aliens. The officers then arrested the defendant and charged him with knowingly transporting illegal immigrants.²³

¹⁶ See *Martinez-Fuerte*, 428 U.S. 543; *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975).

¹⁷ *Prouse*, 440 U.S. at 654 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)).

¹⁸ See *Brown v. Texas*, 443 U.S. 47, 50 (1979).

The *Brown* Court’s test for searches or seizures subject to the reasonableness-balancing approach contains three parts. “A weighing of [(1)] the gravity of the public concerns 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.” *Id.* at 50-51.

The Supreme Court has developed three distinct objective standards for judging the reasonableness of a particular search or seizure. (1) The traditional approach involving probable cause and a warrant which is required for full-blown searches or seizures. See *Winston v. Lee*, 105 S. Ct. 1611, 1617 (1985); *Dunaway v. New York*, 442 U.S. 200, 209-10 (1979). (2) The reasonable articulable suspicion standard governing searches or seizures less intrusive than a traditional arrest or a full-blown search. See *Terry v. Ohio*, 392 U.S. 1 (1968). (3) A neutral criteria standard governing the reasonableness of permanent illegal alien checkpoints located near the border. See *Martinez-Fuerte*, 428 U.S. 543.

The Supreme Court has consistently used the balancing test when judging the reasonableness of brief investigative seizures of automobiles. See *Prouse*, 440 U.S. 648 (1979) (applying the reasonable suspicion standard); *Martinez-Fuerte*, 428 U.S. 543 (applying the neutral criteria standard).

¹⁹ See *infra* notes 21-53.

²⁰ See *infra* notes 54-63.

²¹ 422 U.S. 873 (1975).

²² *Id.* at 875. In a previous case the Court held that the fourth amendment prohibits the use of roving patrols to search vehicles, without a warrant or probable cause, at points removed from the border or its functional equivalents. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269-75 (1973).

²³ *Brignoni-Ponce*, 422 U.S. at 875.

The government contended that the requirement of individualized suspicion was not applicable because the modest intrusion involved²⁴ was greatly outweighed by the seriousness of the illegal alien problem.²⁵ The Court, however, rejected the notion that residents of border areas²⁶ should be subject to "potentially unlimited interference . . . solely at the discretion of Border Patrol officers."²⁷ Although rejecting the government's contention, the Court balanced the interests involved²⁸ and found that roving patrol stops could be justified by less than the traditional probable cause standard.²⁹ The Court held that the reasonable articulable suspicion standard established in *Terry v. Ohio*³⁰ was sufficient to justify the brief detention involved.³¹ According to this standard a Border Patrol officer may conduct a roving stop and questioning when his "observations lead him reasonably to suspect that a particular vehicle may contain aliens illegally in the country."³²

The Court cited three factors as justifying roving stops based on reasonable suspicion: 1) the importance of the governmental interest; 2) the minimal intrusion of a brief stop; 3) the absence of practical alternatives for policing the border.³³ The Court also considered the *Terry* standard appropriate because "illegal alien traffic and . . . smuggling operations tend to generate articulable grounds for identifying violators."³⁴

*United States v. Martinez-Fuerte*³⁵ is the only case in which the Court has expressly sanctioned the use of suspicionless checkpoint stops.³⁶ *Martinez-*

²⁴*Id.* at 880. "According to the government, all that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States." *Id.* This procedure was to last no more than a minute. *Id.*

²⁵*Id.* at 880-82.

²⁶According to statutory authority cited by the government as authorizing vehicle stops, border areas were defined as anywhere within 100 miles of the 2,000 mile United States — Mexican border. *Id.* at 882-83.

²⁷*Id.* at 882.

²⁸Specifically, the Court balanced the public interest roving patrol stops served by apprehending and deterring illegal alien entries against the interference with individual liberty resulting from the stop and questioning. *Id.* at 878-79.

²⁹*Id.* at 880.

³⁰392 U.S. 1 (1968).

³¹*Brignoni-Ponce*, 422 U.S. at 880. The Court made it clear that reasonable suspicion would only support a "stop and inquiry" "reasonably related in scope to the [original] justification." *Id.* at 881 (quoting *Terry*, 392 U.S. 1, 29). Thus, a further detention or search after a brief stop and questioning must be based on consent or probable cause. *Id.* at 882.

³²*Id.* at 881. The Court concluded that the apparent Mexican ancestry of a vehicle's occupants, standing alone, does not constitute a reasonable suspicion that the occupants are illegally in the country. *Id.*

³³*Id.*

³⁴*Id.* at 883. Thus, roving stops without individualized suspicion were not reasonable because sufficient, less intrusive means were available to enforce immigration laws. *See Id.*

The extent to which a particular illegal activity tends to generate articulable cues often determines whether individualized suspicion will be required. *See infra* notes 68, 98.

³⁵428 U.S. 543 (1976).

³⁶This checkpoint should be distinguished from those at the border or its functional equivalent. "Any person or thing coming into the United States is subject to search by that fact alone," regardless of whether individualized suspicion is present. *United States v. Odland*, 504 F.2d 148 (7th Cir. 1974). *See generally* W. LAFAVE, SEARCH AND SEIZURE § 10.5(a)(1978).

Fuerte involved a permanent immigration checkpoint located on an interstate route near San Clemente, which is sixty-six road miles north of the Mexican border.³⁷ All traffic passing through the checkpoint was slowed down to a virtual halt where a "point agent" would visually screen the vehicles in order to determine whether a further inquiry was necessary.³⁸ Vehicles selected for a further inquiry were directed to a secondary inspection area where their occupants were asked about their citizenship and immigration status.³⁹ The defendants were arrested for illegally transporting aliens after questioning at the secondary inspection area revealed that their passengers were illegal aliens.⁴⁰ Martinez-Fuerte was convicted, but subsequently appealed contending that the operation of the checkpoint violated the fourth amendment.⁴¹

The Court held that a brief stop and questioning may be made at reasonably located checkpoints absent any individualized suspicion that the particular vehicle contains illegal aliens.⁴² The Court reached this conclusion by balancing the degree of intrusion caused by the checkpoint against the government interest in preventing illegal immigration. Contrasting the privacy intrusions at checkpoint stops with the suspicionless roving stops prohibited in *Brigoni-Ponce*, the Court noted that:

[The] objective intrusion — the stop itself, the questioning, and the visual inspection — also existed in roving patrol stops. But we view checkpoint stops in a different light because the subjective intrusion — the generating of concern or even fright on the part of lawful travelers — is appreciably less in the case of a checkpoint stop.⁴³

The Court seems to have based this conclusion on the physical characteristics of a permanent checkpoint⁴⁴ and also on the lower level of discretionary law

³⁷ *Martinez-Fuerte*, 428 U.S. at 545. There were actually two checkpoints before the Court. A companion case involved a checkpoint located on a highway near Sarita, Texas, sixty to ninety miles from the nearest points of the Mexican border. *Id.* at 549-50. The Sarita checkpoint, unlike the San Clemente checkpoint, had not been authorized by a warrant. *Id.* at 550.

³⁸ *Id.* at 546. The vast majority of vehicles passed through the checkpoint without any oral inquiry or close visual inspection. *Id.*

³⁹ *Id.* "Point agents" had complete discretion in deciding which vehicles to direct to the secondary inspection area. They were not required to point to articulable cues. *Id.* at 547.

⁴⁰ *Id.* at 548.

⁴¹ *Id.* In *United States v. Ortiz*, 422 U.S. 891 (1975), the Court held that the practice of routinely searching private vehicles stopped at permanent checkpoints violated the fourth amendment. However, the *Ortiz* Court specifically reserved the question of whether a brief stop and questioning at a checkpoint might be reasonable. *Id.* at 897 n.3.

⁴² *Martinez-Fuerte*, 428 U.S. at 556-60.

⁴³ *Id.* at 558.

⁴⁴ Essential to the holding were the procedures used by the border patrol officers at the fixed checkpoints: 1) a large sign was located one mile before the checkpoint with flashing lights warning, "ALL VEHICLES, STOP AHEAD, 1 MILE"; 2) three quarters of a mile later, two more signs over the highway with flashing lights read "WATCH FOR BRAKE LIGHTS"; 3) the checkpoint was located at a California State weigh station; 4) at the checkpoint, two large flashing signs read "STOP HERE — U.S. OFFICERS"; 5) orange traffic cones were placed on the highway funneling traffic into two lanes where a border patrol agent in full uniform stood beside a sign reading "STOP"; 6) U.S. border patrol vehicles with flashing lights blocked traffic in unused lanes; 7) a permanent building was used for temporary detention facilities; 8) floodlights were

enforcement activity involved.⁴⁵ Field officers had no discretion in choosing the location of the checkpoint and could stop only those cars passing through.⁴⁶ According to the Court, “[t]he regularized manner in which established checkpoints are operated . . . reassure[es] . . . motorists that the stops are duly authorized and believed to be in the public interest.”⁴⁷

The Court found the minimal intrusion involved⁴⁸ to be outweighed by the important government interest in preventing illegal immigration.⁴⁹ Specifically, the Court considered the reasonable suspicion standard required for roving patrol stops to be impractical on major routes where the traffic is heavy.⁵⁰ Given this impracticability, border checkpoints were the only effective method of deterring the well-disguised smuggling operations known to use the major highways.⁵¹

Finally, the Court considered whether advanced authorization by a judicial warrant is required for the operation of fixed border checkpoints. In holding that such a warrant is not required, the Court distinguished *Camara v. Municipal Court*⁵² as “involv[ing] the search of private residences, for which a warrant has traditionally been required.”⁵³ The Court also reasoned that in *Camara* the warrant served as proof of proper authorization, which is unnecessary at checkpoints given the “visible manifestations of the field officers authority.”⁵⁴

License and Registration Checkpoints

In *Delaware v. Prouse*,⁵⁵ the Court was confronted with a police practice very similar to the roving patrol stops outlawed in *Brignoni-Ponce*. In *Prouse*, a patrolman in a police cruiser stopped a vehicle in order to conduct a license and registration check.⁵⁶ The patrolman stopped the vehicle at random as he

used during nighttime operation; 9) a “point agent” usually screened vehicles as he brought them to virtually a complete stop, and if further investigation was necessary, directed motorists to a secondary investigation area; 10) average duration of stop in secondary investigation was three to five minutes. *Id.* at 545-47. *Drunk Drivers in Indiana supra* note 2, at 1070 n. 38.

⁴⁵*Id.* *Martinez-Fuerte*, 428 U.S. at 559.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸According to the government, the average length of an investigation at the secondary inspection area was three to five minutes. *Id.* at 547.

⁴⁹*Id.* at 557-60. *See Brignoni-Ponce*, 422 U.S. at 878. According to one study, as of 1975 “there were as many as 10 to 12 million aliens illegally in the country.” *Martinez-Fuerte*, 428 U.S. at 551 (citing *Brignoni-Ponce*, 422 U.S. at 878).

⁵⁰*Martinez-Fuerte*, 428 U.S. at 557.

⁵¹*See Id.*

⁵²387 U.S. 523 (1967).

⁵³*Martinez-Fuerte*, 428 U.S. at 565. *See, e.g., McDonald v. United States*, 335 U.S. 451 (1948).

⁵⁴*Martinez v. Fuerte*, 428 U.S. at 565.

⁵⁵440 U.S. 648.

⁵⁶Published by IdeaExchange@UAKron, 1986

had neither probable cause or reasonable suspicion to believe that either the vehicle or any of its occupants were subject to seizure.⁵⁷ While walking toward the stopped vehicle, the officer smelled marijuana smoke and seized marijuana lying in plain view.⁵⁸ The defendant's motion to suppress the marijuana was granted by the trial court and affirmed by the Delaware Supreme Court.⁵⁹

The United States Supreme Court affirmed holding that:

[Unless] 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 its occupant is otherwise subject to seizure for violation of the 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.⁶⁰

In reaching this decision the Court reaffirmed the balancing test used in *Brignoni-Ponce* and *Martinez-Fuerte*.⁶¹ The Court engaged in the same analysis of the objective and subjective privacy intrusions caused by roving patrol stops.⁶² The Court found that the roving stops involved in *Prouse* engendered the same subjective intrusion — the concern or even fright on the part of lawful travelers — that was fatal to the border stops in *Brignoni-Ponce*.⁶³ In contrast, the Court noted that at traffic checkpoints the level of subjective intrusion is substantially less as “the motorist can see that other vehicles are being stopped [and] he can see visible signs of the officer's authority.”⁶⁴

Also crucial to the *Prouse* holding is the Court's concern with the officer's unfettered discretion which underlies random spot checks.⁶⁵ The Court noted that motorists are entitled to a reasonable expectation of privacy⁶⁶ which would be seriously circumscribed “were [the motorist] subject to unfettered governmental intrusion every time he entered an automobile.”⁶⁷

Turning to the government interests at stake, the Court agreed that Del-

⁵⁷*Id.* Emphasizing the discretionary nature of the stop the Court quoted the patrolman as explaining: “I saw the car in the area and wasn't answering any complaints, so I decided to pull them off.” *Id.* at 650-51.

⁵⁸*Id.* at 650.

⁵⁹*Id.* at 651.

⁶⁰*Id.* at 663. The Court noted that of the jurisdictions which had considered roving license and registration checks five had held them to be unconstitutional while six had held to the contrary. *Id.* at 651, nn.2, 3.

⁶¹*Id.* at 656-57. The Court noted that it had reserved the question of the permissibility of state officials stopping motorists for document checks in a manner similar to a checkpoint detention, see *Martinez-Fuerte*, 428 U.S. at 560 n.14, or roving-patrol operations, see *Brignoni-Ponce*, 422, U.S. at 883 n.8. *Prouse*, 440 U.S. at 656 n.13.

⁶²See *supra* notes 43-47 and accompanying text.

⁶³See *Prouse*, 440 U.S. at 657.

⁶⁴*Id.* (quoting *Ortiz*, 422 U.S. at 894).

⁶⁵See *Prouse*, 440 U.S. at 661-62.

⁶⁶*Id.* at 662. The Court noted that this “reasonable expectation of privacy [is not lost] simply because automobile[s] and [their] use are subject to government regulations.” *Id.*

⁶⁷*Id.* at 663.

aware and other states have a vital interest in enforcing licensing and registration laws.⁶⁸ However, the Court did not agree with Delaware's contention that this public interest outweighed the privacy intrusion caused by discretionary spot checks.⁶⁹ The Court articulated two reasons for its conclusion. First, there were less intrusive alternative means available for enforcing licensing and registration laws.⁷⁰ Second, random spot checks were found to be unproductive in terms of discovering or deterring unlicensed drivers.⁷¹ In sum, the Court was 'unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment.'⁷²

Adhering to its random versus systematic stop analysis, the Court in dicta suggested that license and registration checkpoints would pass constitutional muster.⁷³ In a subsequent case, *Texas v. Brown*,⁷⁴ a plurality of the Court cited the *Prouse* dicta as authorizing license and registration checks.

Post-Prouse Issues

Although the Court's decisions have made it clear that the permissibility of suspicionless roadblock stops hinges on adherence to "neutral criteria," they have not articulated a clear test for when the neutral criteria standard is applicable.⁷⁵ As a result, courts considering the constitutionality of DUI roadblocks have reached different conclusions.⁷⁶ Since *Delaware v. Prouse* is the most recent Supreme Court decision regarding automobile stops, several issues left unresolved by *Prouse* are highlighted by subsequent decisions.⁷⁷ Some unresolved issues relate to the use of roadblocks in general. First, the *Prouse* Court did not consider the nature of the state interest which might be advanced by DUI roadblocks.⁷⁸ Second, although recognizing the need to limit police discretion and subjective intrusion, *Prouse* did not explain how these elements interrelate to form the necessary neutral criteria.⁷⁹ Third, it is unclear

Id. at 658.

Id. at 658-62.

Id. at 659. The Court noted that "[t]he foremost method of enforcing traffic and safety regulations . . . is acting upon observed violations." *Id.*

Id. at 659-60. The Court reasoned that since the percentage of unlicensed drivers on the road is very small an inordinate number of licensed drivers would need to be stopped in order to find one unlicensed operator. *Id.* at 660.

Id. at 659.

See *supra* note 13 and accompanying text.

460 U.S. 730 (1983) (plurality opinion). In *Brown* the defendant was stopped at a drivers license checkpoint at which time a police officer seized a balloon containing drugs in "plain view." *Id.* at 733. The state court did not 'question . . . the validity of the officer's initial stop of [the] vehicle as part of a license check.'" *Id.* at 39 (citing *Brown v. State*, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981)). The plurality noted its approval of the stop by stating "we agree." *Brown*, 460 U.S. at 739.

See *Filling in the Blanks after Prouse*, *supra* note 14, at 248-49.

Id. at 249.

See *Drunk Drivers In Indiana*, *supra* note 2, at 1074.

See *Curbing the Drunk Driver*, *supra* note 2, at 1470.

Id.

to what extent the checkpoints mentioned in the *Prouse* dicta must conform to the permanent border checkpoints approved in *Martinez-Fuerte*.⁸⁰ Fourth, *Prouse* was unclear as to whether suspicionless roadblock stops must be necessary in the sense that they be more effective than less intrusive alternative methods.⁸¹ Finally, several issues are triggered by problems unique to drunk driving roadblocks.⁸²

APPLYING THE PRECEDENT: COURT DECISIONS ON THE CONSTITUTIONALITY OF ROADBLOCKS

In general, the Courts considering the constitutionality of roadblocks have not varied their analysis according to the purpose of the stop.⁸³ In addi-

⁸⁰*Id.* Another issue is whether some form of prior judicial approval should be required for the operation of DUI or other temporary roadblocks. *Id.* Although *Martinez-Fuerte* rejected a warrant requirement, this may have been a result of the permanence of the checkpoint involved. *See Id.* *See also* State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) (DUI checkpoint invalid without prior authorization by judicial warrant).

⁸¹*See Mass Investigations, supra* note 3, at 645-46. *See also* Commonwealth v. Trumble, 396 Mass. 81, 483 N.E.2d 1102 (1985) ("We construe the questions as not raising [the] issue . . . whether, for constitutional purposes, it matters whether there be a less intrusive but equally effective means of dealing with the problem.")

There is much debate over the degree of effectiveness of DUI roadblocks. Most of this debate focuses on the alleged deterrent effect because it is almost universally recognized that DUI roadblocks produce few DUI arrests. *Mass Investigations, supra* note 3, at 638. *But see Filling in the Blanks after Prouse, supra* note 14, at 252.

The reason for the debate over the deterrent effect is largely due to the lack of empirical data showing a causal relationship between DUI roadblocks and a reduction in alcohol-related accidents. *Sobriety Checkpoints, supra* note 9, at 162-63. Despite claims by those in favor of DUI roadblocks it has not been demonstrated that their use has reduced drunk driving in any jurisdiction. In fact the reported decreases in alcohol-related fatalities "are highly unreliable, based upon unpublished and unsubstantiated claims by agencies entrusted with the job of combating drunk driving and anxious to demonstrate success." *Mass Investigations, supra* note 3, at 642.

⁸²*Curbing the Drunk Driver, supra* note 77, at 1470. Some of these issues are triggered by the inherently discretionary and personal nature of drunk driving investigations. It is clear that drunk driving roadblock investigations are more subjectively and objectively intrusive than the suspicionless searches and seizures that the Supreme Court has approved. *See Mass Investigations, supra* note 3, at 650-58. Unlike license and registration checks, which are limited and impersonal, drunk driving investigations are extensive. They require a police officer to make a highly discretionary evaluation of the driver's personal attributes and behavior. *Id.* at 650.

[This] discretionary assessment of the motorist's sobriety . . . lends itself to nearly as much whim and caprice as the random stopping of vehicles invalidated in *Prouse*. This result is paradoxical, though, because the *Prouse* roadblock was specifically intended to eradicate such police discretion. The discretionary activities purportedly curtailed by adherence to the *Prouse* formula perforce reappear the instant the license and registration check is used to gauge sobriety.

Random Seizures, supra note 7, at 205.

Other unanswered issues relate to the nature and extent of a post-stop investigation where the driver does not exhibit "obvious" signs of intoxication.

Should one be required to step out of his car only if there is an articulable and reasonable suspicion that he is intoxicated, or is it a reasonable seizure under the fourth amendment to require each motorist to leave his vehicle in order to judge the manner of his walk? Should some drivers be required to exit their cars while others are allowed to remain . . . ? Are the observation of eye movements and smelling of breath reasonable at a sobriety checkpoint? If so, what of the recalcitrant driver who refuses to roll his window beyond the few inches necessary to be audible?

Comment, *The Prouse Dicta: From Random Stops to Sobriety Checkpoints?*, 20 IDAHO L. REV. 127, 145-46 (1984).

tion, decisions both upholding roadblocks,⁸⁴ and striking them down⁸⁵ have largely focused on procedural issues regarding officer discretion and subjective and objective intrusion without analyzing the larger constitutional questions involved.⁸⁶

This section presents several decisions which reflect the various approaches used in evaluating the constitutionality of roadblock stops. First, decisions upholding the roadblocks are analyzed. Second, decisions holding DUI roadblocks unconstitutional regardless of the procedures are analyzed, suggesting that the neutral criteria standard is not applicable to DUI roadblocks.

Decisions Holding Roadblocks Constitutional

In *State v. Deskins*,⁸⁷ the Supreme Court of Kansas upheld a roadblock ostensibly set up for the purpose of checking driver's licenses. Since the state conceded that the actual purpose for the roadblock was to catch drunk drivers, the *Deskins* court phrased the issue in terms of the constitutionality of a DUI roadblock under the factual situation before it.⁸⁸

The *Deskins* roadblock was conducted by a combination of thirty-five of officers from three different law enforcement agencies. All vehicles proceeding in both directions were stopped and their drivers checked to determine if they were carrying valid licenses. The defendant was stopped at around 1:20 A.M. A state trooper approached the car and requested the defendant's license. At this point the officer noted signs of intoxication and asked the defendant to step out of the car.⁸⁹ After failing a field sobriety test, the defendant was arrested for driving while intoxicated.⁹⁰

In reaching its decision, the *Deskins* court quoted extensively from *Delaware v. Prouse*⁹¹ and analyzed other federal and state court decisions relevant to the constitutionality of roadblock stops and ultimately concluded that

⁸⁴See *People v. Scott*, 63 N.Y.2d 518, 473, N.E.2d 1, 483 N.Y.S.2d 649 (1984) (DUI roadblock); *State v. Golden*, 171 Ga. App. 27, 318 S.E.2d 693 (1984) (DUI roadblock); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984) (DUI roadblock); *United States v. Prichard*, 645 F.2d 854 (10th Cir.), cert denied, 454 U.S. 832, reh'g denied, 454 U.S. 1069 (1981) (license and registration check); *State v. Shankle*, 58 Or. App. 134, 647 P.2d 959 (1982) (license and registration check); *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979) (Game Warden roadblock to check for compliance with hunting laws).

⁸⁵See *infra* note 125.

⁸⁶*Mass Investigations*, *supra* note 3, at 597-98. This fundamental question is whether a DUI roadblock is inherently unconstitutional because it involves a seizure which is not supported by probable cause or any other degree of individualized suspicion. See *Id.* at 598.

⁸⁷234 Kan. 529, 673 P.2d 1174 (1983).

⁸⁸*Id.* at 531, 673 P.2d 1177.

⁸⁹*Id.* The court notes that before the stop the officer had no reason to suspect that the defendant was intoxicated or violating any other criminal laws. *Id.*

⁹⁰*Id.*

⁹¹440 U.S. 648 (1979). See *supra* notes 54-72 and accompanying text.

"[these] decisions . . . make it clear that not every driver's license check or DUI roadblock is constitutionally impermissible."⁹² The court considered these decisions as authorizing the use of the fourth amendment balancing test to determine the reasonableness of DUI roadblocks.⁹³ Specifically, the court enumerated thirteen factors it considered necessary to determine whether a DUI roadblock meets the balancing test in favor of the state.⁹⁴

In applying its balancing analysis, the *Deskins* court first took judicial notice of the grave public concern caused by drunk driving.⁹⁵ After noting that most courts have found the procedures used at drivers license and DUI roadblocks to violate the tests implied in *Prouse*, the *Deskins* court advanced two ways in which DUI roadblocks serve the public interest. The court stated:

[t]he use of a DUI roadblock has principally two purposes: (1) to apprehend and remove the drunk driver from the streets before injury or property damages results, and (2) in serving as a deterrent to convince the potential drunk driver to refrain from driving in the first place. As a fringe benefit the DUI roadblock also serves to disclose other violations pertaining to licenses, vehicle defects, open containers, etc.⁹⁶

Applying its thirteen factor test to the roadblock before it, the court concluded that the initial stop of the defendant occurred under conditions which met the minimal criteria for a constitutionally permissible momentary seizure.⁹⁷ In support of its conclusion the court recited the procedures used at the roadblock, emphasizing the constraints on officer discretion and steps taken to reduce both subjective and objective intrusion.⁹⁸ The court then

⁹²*Deskins*, 234 Kan. at 542, 673 P.2d at 1184.

⁹³*Id.* The *Deskins* court noted that the applicable test is the three-prong balancing test set out in *Brown v. Texas*. *Id.* at 541, 673 P.2d at 1184. See *supra* note 18.

⁹⁴According to the *Deskins* court these are:

- (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 factor which might bear upon the test.

Deskins, 234 Kan. 541, 673, P.2d at 1185. The court added that not all of the factors need be favorable to the state. However a roadblock involving unbridled officer discretion would be invalid under *Prouse* regardless of other favorable factors. *Id.*

⁹⁵The court stated: "It is obvious, without resort to the record . . . that the problem of the drunk driver is one of enormous magnitude affecting every citizen who ventures forth upon the streets and highways." *Id.* at 536, 672 P.2d at 1181.

⁹⁶*Id.* at 536-37, 673 P.2d at 1182. Several other courts have upheld DUI roadblocks by stressing their effectiveness as a deterrent to driving under the influence. See *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1983); *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984). *Contra* *State v. Koppel*, ___ N.H. ___, 449 A.2d 977 (1985) (the alleged deterrent effect of DUI roadblocks has not been demonstrated).

⁹⁷*Id.* at 542, 673 P.2d at 1185.

⁹⁸The *Deskins* court stressed that the roadblock was a joint effort of three law enforcement agencies. *Id.* The thirty-five participating officers wore uniform and attended a briefing given by supervisory personnel. *Id.*

summed up its balancing analysis by stating:

[w]hen we consider the enormity of the injury and damage caused by the drinking driver and the vital interest of every citizen in being protected so far as possible upon the streets and roadways, we find that the public interest in a properly conducted DUI roadblock containing appropriate safeguards outweighs the individual's right to be free from unfettered intrusion upon his fourth amendment rights.⁹⁹

In dissent, Justice Prager stressed the ineffectiveness of the roadblock. He concluded that the state had failed to meet its burden in establishing that the roadblock promoted the public interest in light of the less intrusive alternatives available to combat the drunk driving problem.¹⁰⁰ These alternatives would not have entailed the stopping of between 2,000 and 3,000 motorists.¹⁰¹ Because drunk drivers generate articulable cues,¹⁰² "the same or greater productivity could have been achieved by distributing the thirty-five officers throughout the city for the sole purpose of observing erratic driving and stopping and checking drivers."¹⁰³ Justice Prager also noted his concern that, by upholding this DUI roadblock, the majority had authorized other police agencies to set up roadblocks to discover violations of other criminal statutes and city ordinances.¹⁰⁴

In *State v. Cocomo*¹⁰⁵ the Superior Court of New Jersey upheld a roadblock conducted pursuant to written guidelines issued by the Roxberg Chief of Police.¹⁰⁶ The purpose of the roadblock was to check the driver for his

At the briefing the officers were advised to check for driver's licenses and signs of drunk driving. *Id.* The roadblock was located on a well-lighted four-lane highway and marked by police cars with flashing red lights. *Id.* There were sufficient officers present to assure only brief intrusions. *Id.* Field officer discretion was minimized because officers were required to stop all vehicles. *Id.* Finally, the location of the roadblock was selected by supervisory personnel and not the officers in the field. *Id.*

⁹⁹*Id.* In a postscript to its decision, the court suggested that the legislature or attorney general establish minimum uniform standards for roadblock operations, rather than leaving this to police officials. *Id.* at 543, 673 P.2d at 1185-86.

¹⁰⁰The roadblock was in effect for four hours and between 2,000 and 3,000 vehicles were stopped. *Id.* at 546, 673 P.2d at 1188. Out of the seventy-four violations discovered only fifteen were for DWI. *Id.* During this period the thirty-five officers on duty logged a total of 140 man hours. *Id.* at 545, 673 P.2d at 1187 (Prager, J., dissenting).

¹⁰¹*Id.*

¹⁰²In this respect Justice Prager distinguished observable DUI violations from "[v]iolations of motor vehicle license laws and the transportation of illegal aliens which are [not] physically apparent through mere observation of traffic." *Id.*

¹⁰³*Id.*

¹⁰⁴*Id.* at 547, 673 P.2d at 1188. Justice Prager illustrated his concern by stating: "If each . . . political subdivision decides to maintain a roadblock, we could have 'Checkpoint Charley' at the boundry of every city and every county." *Id.*

¹⁰⁵177 N.J. Super. 575, 427 A.2d 131 (1980).

¹⁰⁶*Id.* at 579, 427 A.2d at 133. These guidelines were promoted by the county prosecutor who sent a summary of the *Prouse* decision along with a set of regulations approved by the New Jersey Attorney General to all New Jersey Police Chiefs. The Roxbury Chief of Police used these guidelines in a memorandum direct to his officers. This memorandum stated: "should roadcheck be made for driving while intoxicated . . . its shall be this department's procedure to stop every 5th car during light traffic hours." *Id.* at 579 n.1, 427 A.2d at 133 n.1.

license, registration and insurance card, as well as for any signs of intoxication.¹⁰⁷ According to the predetermined procedure, every fifth vehicle going past the checkpoint was stopped and diverted into a parking lot where the driver was asked for the required documentation.¹⁰⁸

After balancing the state's vital interest in detecting and prosecuting drunk drivers with the minor inconvenience which may be caused to every fifth motorist, the court concluded that the roadblock advanced the state's interest sufficiently to outweigh any privacy intrusion.¹⁰⁹ In reaching this conclusion, the court noted that the roadblock was located in an area with several bars and a high incidence of alcohol-related accidents.¹¹⁰ Also important was the timing of the roadblock, which was only effected in the early morning hours coinciding with the closing hours of local taverns.¹¹¹ These factors suggested a high probability of success while minimizing the number of innocent motorists stopped. The court also noted that the planned physical characteristics of the roadblock promoted safety and minimized subjective intrusion,¹¹² while the written procedures minimized officer discretion. The court summed up its analysis by stating: "the Roxbury police follow specific, defined standards in stopping motorists . . . [t]he criterion they employ is purely neutral; no discretion is involved."¹¹³

In a recent decision, *Commonwealth v. Trumble*,¹¹⁴ the Supreme Judicial Court of Massachusetts denied the defendant's motion to suppress the evidence obtained at a DUI roadblock conducted by State Police in Sunderland.¹¹⁵ The roadblock was conducted according to guidelines promulgated by the Secretary of Public Safety.¹¹⁶

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The defendant's car was stopped according to procedure and directed to the secondary inspection area, where he was asked to produce his driving credentials. The requesting officer noticed that the defendant showed signs of intoxication and directed him to step out of the car. The defendant was arrested after he failed several field sobriety tests. *Id.*

¹⁰⁹ *Id.* at 583-84, 427 A.2d at 135.

¹¹⁰ *Id.* at 582, 427 A.2d at 134.

¹¹¹ *Id.* at 583, 427 A.2d at 135.

¹¹² *Id.* These characteristics were: 1) stopping every fifth vehicle only when traffic is light; 2) positioning flares on the road to caution drivers to be alert; 3) positioning a uniformed officer counting cars at the end of the line of flares under a street light; 4) positioning a marked police car at the side of the road; 5) diverting traffic to an adjacent parking lot where they were questioned by uniformed officers. *Id.*

¹¹³ *Id.*

¹¹⁴ 396 Mass. 81, 483 N.E.2d 1102 (1985).

¹¹⁵ *Id.* at ___, 483 N.E.2d at 1108.

¹¹⁶ *Id.* at ___, 483 N.E.2d at 1104. The guidelines were developed in response to the court's decision in *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983), which held a previous roadblock unconstitutional. The *McGeoghegan* court noted that the roadblock area was poorly illuminated and unsafe for motorists; the mechanics of the roadblock were left to field officers; field officers used their own discretion in choosing which cars to stop; motorists were backed up on the highway for two-thirds of a mile. *McGeoghegan*, 389 Mass. at 142, 449 N.E.2d at 353.

The *McGeoghegan* court added that a roadblock would be constitutionally permissible if: 1) the selection of vehicles to be stopped is not arbitrary; 2) safety is assured; 3) motorists' inconvenience is minimized; 4) the procedure is conducted pursuant to a plan devised by supervisory law enforcement personnel. *Id.*

The *Trumble* court first took notice that the traditional methods of dealing with the drunk driving problem have failed.¹¹⁷ In this light, the court balanced the public's interest in curtailing drunk driving against the intrusion caused by a momentary seizure¹¹⁸ at the roadblock, and found that the intrusion was outweighed by the degree to which the roadblock advanced the public interest.¹¹⁹ Supporting its decision, the court first noted that the site of the Sunderland roadblock was selected by supervisory personnel for maximum safety and efficiency.¹²⁰ Second, the court noted that the roadblock was conducted pursuant to operational guidelines designed to minimize field officer discretion and subjective intrusion.¹²¹ According to the operational guidelines, the thirteen uniformed state troopers at the roadblock had no discretion in choosing vehicles to be stopped.¹²² Signs and flares marked the approach to the stopping area.¹²³ Four cruisers were positioned close to the stopping area which was brightly illuminated by lights from a police van.¹²⁴ "In sum, the conduct of the roadblock was most reasonable and entirely responsive to the requirements laid down in *McGeoghegan*."¹²⁵

Decisions Holding Roadblocks Unconstitutional

Several courts have struck down roadblocks while noting that a roadblock conducted with adequate procedural safeguards would be constitutional.¹²⁶

¹¹⁷*Trumble*, 396 Mass. 81, ___, 483 N.E.2d 1102, 1105 (1985).

¹¹⁸The troopers conducting the roadblock were instructed that the initial contact would be no more than one minute for each driver. *Id.* at ___, 483 N.E.2d at 1105. The troopers were also instructed to observe the driver for suspicion that he had been drinking. *Id.* If the trooper suspected that the driver was intoxicated the driver was directed into a detention area where he was asked to produce a license and registration and perform three field sobriety tests. *Id.*

¹¹⁹*Id.* at ___, 483 N.E.2d at 1107. The court noted that it was not deciding whether for constitutional purposes it matters whether there may be a less intrusive but equally effective means available, as the issue was not raised by the parties. *Id.* at ___, 483 N.E.2d at 1105.

However, the *Trumble* dissenters concluded that the Commonwealth had not met its burden of showing that "such a procedure [achieves] a degree of law enforcement and highway safety that is not reasonably attainable by less intrusive means." *Id.* at ___, 483 N.E.2d at 1112 (Lynch, J., dissenting) (quoting *Commonwealth v. McGeoghegan*, 389 Mass. 137, 143-43, 449 N.E.2d 349, 353).

¹²⁰*Id.* at ___, 483 N.E.2d at 1108. Following the operational guidelines the supervisory officer in charge of the roadblock selected the site according to four criteria: 1) high accident rates; 2) high rates of drunk driving arrests; 3) safety conditions; 4) motorists convenience. *Id.* at ___, 493 N.E.2d at 1104.

¹²¹*Id.* at ___, 483 N.E.2d at 1104. The court also noted with approval the advance media attention focused on the roadblocks as a result of press releases and interviews with the roadblock supervisor. *Id.* This advance publicity "ha[s] the virtue of reducing surprise, fear, and inconvenience." *Id.* at 1106.

¹²²*Id.* The roadblock supervisor instructed the troopers to stop every vehicle that approached the site and stressed that there were to be no deviations from the procedures set forth in the guidelines. *Id.* at ___, 483 N.E.2d at 1104. See *supra* note 117.

¹²³*Id.*

¹²⁴*Id.*

¹²⁵*Id.* See *supra* note 115. In a similarly reasoned opinion, the Supreme Court of Arizona upheld a DUI roadblock conducted pursuant to guidelines suggested in a concurring opinion in *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983). See *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984). Also crucial to the Arizona Court's decision was evidence of the roadblock's deterrent effect. *Id.* at 49-50, 691 P.2d at 1076-77.

¹²⁶See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 991 (1983) (DUI roadblock); *Jones v. State*, 459 So. 2d 1068 (Fla. Dist. Ct. App. 1984) (DUI roadblock); *Commonwealth v. McGeoghegan*, 389

However, the decisions that follow have struck down DUI roadblocks as unconstitutional regardless of the procedures used.

In *State v. Koppel*,¹²⁷ the court granted the defendant's motions to suppress evidence obtained at two different DUI roadblocks.¹²⁸ In doing so, the court relied upon the independent protection against unreasonable searches and seizure provided by the state constitution.¹²⁹

The *Koppel* roadblocks were conducted by the Concord Police Department according to "Standard and Operating Procedure[s]" (SOP) drafted by a department research officer.¹³⁰ Both roadblocks consisted of several officers and three or more marked police cars parked near the side of the road with their lights on.¹³¹ When traffic was light, police stopped every car approaching the roadblock.¹³² "If five cars were detained at the roadblock, other traffic was waived on until a car left the roadblock, at which time the next car to approach would be detained."¹³³

The *Koppel* court began its constitutional analysis by noting that several courts had upheld drunk driving roadblocks conducted according to similar procedures by relying on the *Prouse* dictum.¹³⁴ However, the court noted "that unlike the spot checks in *Prouse*, the roadblocks here were conducted to discover evidence to be used in the prosecution of serious criminal offenses."¹³⁵ Distilling its earlier decisions concerning motor vehicle seizures, the court stated:

[t]o justify a search or seizure of a motor vehicle, absent probable cause or even a reasonable suspicion that a criminal offense is being committed, the State must prove that its conduct significantly advances the public in-

Mass. 137, 449 N.E.2d 349 (1983) (DUI roadblock); *State v. Kirk*, 202 N.J. Super. 28, 493 A.2d 1271 (1985) (DUI roadblock); *State v. Hillishiem*, 291 N.W.2d 314 (Iowa 1980) (detection of vandals); *State v. Marchand*, 104 Wash. 2d 434, 706 P.2d 224 (1985) (license and registration check); *State v. Goehring*, 374 N.W.2d 882 (N.D. 1985) (Safety check).

¹²⁷ __ N.H. __, 499 A.2d 977 (1985).

¹²⁸ *Id.* at __, 499 A.2d at 979. The two defendants were stopped at different roadblocks and arrested for driving while intoxicated. *Id.*

¹²⁹ *Id.* at __, 499 A.2d at 981 (relying on N.H. Const. art XIX, part 1).

¹³⁰ *Id.* at __, 499 A.2d at 979. The SOP stressed several points: that the roadblock should involve "minimal intrusion;" that its location should be determined by an official based on objective data (i.e. the number of accidents, injury accidents and/or DWI arrests); "that the decision as to which vehicles will be stopped (e.g. all east-bound vehicles, or every tenth vehicle) cannot be left to the discretion of the officers at the scene but must be made in advance; "and that the checkpoint must be clearly indicated and manned by uniform officers." *Id.* (quoting the Standard Operating Procedures).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at __, 499 A.2d at 981 (citing *State v. Superior Court*, 143 Ariz. 45, 48-49, 691 P.2d 1073, 1076-77 (1984); *Little v. State*, 300 Md. 485, 498, 497 A.2d 903, 909 (1984); *State v. Deskins*, 234 Kan. 529, 540-42, 673 P.2d 1174, 1179 (1983)).

¹³⁵ *Koppel*, __ N.H. at __, 499 A.2d at 981.

terest in a manner that outweighs the accompanying intrusion on individual rights. It must further prove that no less intrusive means is available to accomplish the State's goal.¹³⁶

Applying the above mentioned test, the court first noted that the state had failed to show that the DUI roadblocks were more effective than less intrusive alternative means.¹³⁷ In evaluating alternative methods, the court noted that roadblocks are much less effective in detecting drunk drivers than roving patrols acting on observed violations.¹³⁸ The court also considered the possible deterrent effect of DUI roadblocks and concluded that "there is nothing in this record, or in the decisions from other jurisdictions, to indicate that a roadblock program has any greater deterrent effect than a well-publicized program of highly visible roving patrols."¹³⁹

Turning to the actual degree of intrusion, the court noted that DUI roadblocks involve "a substantially greater degree of subjective intrusion — the generation of concern or even fright on the part of lawful travelers"¹⁴⁰ than do roadblocks conducted to detect unlicensed drivers or illegal aliens.¹⁴¹ This higher degree of subjective intrusion is a result of the nature of DUI roadblocks which, unlike the permanent checkpoint in *Martinez-Fuerte*, are "temporary, . . . usually set up only at night, sometimes poorly illuminated, whose purpose becomes known only when the driver is asked for his or her license."¹⁴² In sum, the *Koppel* court found that "the state had failed to show that drunk driving roadblocks produce sufficient public benefit to outweigh their intrusion on individual rights."¹⁴³

In *State v. Smith*,¹⁴⁴ the Court of Criminal Appeals of Oklahoma held the use of temporary DUI roadblocks *per se* unconstitutional regardless of their specific operational details.¹⁴⁵ The roadblocks at issue were conducted by the Oklahoma Department of Public Safety in conjunction with three law enforcement agencies.¹⁴⁶ The defendant was stopped at a roadblock in Oklahoma City,

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸*Id.* The court noted that Concord police set up forty-seven roadblocks on twenty-one weekend nights. A total of 1,680 vehicles were stopped, resulting in only eighteen DWI arrests. During roughly the same six-month period, the Concord police made 175 DWI arrests using roving patrols. *Id.* at ___, 499 A.2d at 979.

¹³⁹*Id.* at ___, 499 A.2d at 982.

¹⁴⁰*Id.* at ___, 499 A.2d at 983 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558).

¹⁴¹*Id.*

¹⁴²*Id.*

¹⁴³*Id.* See also *State v. Olgaard*, 248 N.W.2d 382 (S.D. 1980). In *Olgaard* the court struck down a temporary DUI roadblock as unconstitutional. *Id.* at 394. The *Olgaard* court considered *Martinez-Fuerte* to require permanent checkpoints. *Id.* The court noted that the subjective intrusion caused at a temporary checkpoint is much greater "for by its very nature the roadblock [is] set up to stop without prior warning, and . . . by surprise, all motorists who happened to pass that particular point on the night in question." *Id.*

¹⁴⁴674 P.2d 562 (Okla. Crim. App. 1984).

¹⁴⁵See *Id.* at 565.

¹⁴⁶Pub. L. 562, The Roadblock was part of a joint effort by the Oklahoma Department of Public Safety, the

one of six conducted that night from 9:30 P.M. through 1:30 A.M.¹⁴⁷ The roadblocks were manned by teams of ten officers, with supervisory personnel at every site.¹⁴⁸ The officers would either stop all cars or stop cars according to an established interval. If traffic backed up, several cars would be allowed to pass through without being stopped.¹⁴⁹

In reaching its decision the *Smith* court contrasted the Oklahoma City roadblocks with the permanent checkpoint approved in *Martinez-Fuerte*. Accordingly, the court inquired as to: "1) the type of checkpoint involved; 2) the purpose of the checkpoint; and, 3) the degree of intrusion and fright endured by individuals passing through the checkpoint."¹⁵⁰ First, the court noted that the roadblocks at issue were temporary, and not the type of permanent checkpoint approved in *Martinez-Fuerte*.¹⁵¹ Second, the court found as a matter of fact that the roadblocks were established for the primary purpose of seeking criminal DUI offenders.¹⁵² Third, the court noted that the permissibility of the suspicionless stops in *Martinez-Fuerte* hinged on the level of subjective intrusion involved.¹⁵³ Subjective intrusion at the *Martinez-Fuerte* checkpoints was reduced because the checkpoints "were permanent; they were regular; they were within the everyday knowledge of the community."¹⁵⁴ Thus, those in the community were not surprised or fearful when passing through as they knew of the roadblock's existence. The court also noted that the stop in *Martinez-Fuerte* was not to seek out criminals, but to enforce immigration laws and deport those illegally in the country.

In contrast to *Martinez-Fuerte*, the *Smith* court stated:

[t]he roadblocks in the present case could well act, and most likely did act, as a total surprise to those passing through. The fear factor involved in this case is heightened by the presence of at least ten officers, chemical testing equipment, and mobile booking and jail vans actually on the scene. To the individual approaching such a roadblock, it is not unlikely that he would reasonably perceive the officers as being desirous of arresting criminals and that anyone passing through could easily be arrested. The United States Supreme Court has never stretched the perma-

Oklahoma Highway Patrol, the Oklahoma City Police Department, and the Oklahoma County Sheriff's Office. *Id.*

¹⁴⁷ *Id.* at 563.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 564. Witnesses for the state maintained that the roadblock was established to check driver's licenses. *Id.* However, the court noted that there was overwhelming evidence that the purpose of the roadblocks was to catch drunk drivers. *Id.* First, the roadblocks were conducted on weekend nights. *Id.* Second, statements made to the media proceeding the roadblocks referred to the need to get drunk drivers off the road. *Id.*

¹⁵³ *Id.* at 565.

¹⁵⁴ *Id.* at 564.

ment roadblock exception to this point. . . . The subjective intrusion . . . imposed upon the individual innocent of misconduct is simply too great.¹⁵⁵

The *Smith* court also noted a more generalized concern with the use of DUI roadblocks. The court stated:

[We] find such activities by law enforcement authorities, while commendable in their ultimate goal of removing DUI offenders from the public highways, draw dangerously close to what may be referred to as a police state. Here, the state agencies have ignored the presumption of innocence, assuming that criminal conduct must be occurring on the roads and highways, and have taken an 'end justifies the means' approach. . . . Were the authorities allowed to maintain such activities as presented in this case, the next logical step would be to allow similar stops for searching out other types of criminal offenders.¹⁵⁶

CONCLUSION

Roadblocks designed to detect and deter drunk drivers are in use in a number of states. These roadblocks are in large part a result of *Delaware v. Prouse* and other case law which develops a neutral criteria standard for judging the reasonableness of suspicionless roadblock-type automobile stops. The key to the permissibility of suspicionless roadblock stops is what the Supreme Court considers to be a lower level of subjective intrusion when motorists are stopped en masse. Thus, in certain circumstances, suspicionless roadblock stops may be reasonable.

In order to invoke the neutral criteria standard there must be: 1) a compelling government interest; 2) which cannot be achieved by less intrusive means; 3) which results in a privacy intrusion which is both objectively and subjectively minimal.¹⁵⁷ Once this is shown, a suspicionless roadblock stop is governed under the neutral criteria standard. The neutral criteria standard requires that motorists be stopped according to a plan devised by supervisory officers involving neutral and predetermined criteria.

¹⁵⁵*Id.* See *People v. Bartley*, 125 Ill. App. 3d 575, 466 N.E.2d 346 (1984). The *Bartley* court held DUI roadblocks *per se* unconstitutional. The *Bartley* court gave two reasons for its holding. First, the court found that *Prouse* and *Martinez-Fuerte* sanction the use of checkpoint stops only when there is no other less intrusive but equally effective means of detecting violators. *Bartley*, 125 Ill. App. 3d at 578, 466 N.E.2d at 348. Since there are practical alternatives (i.e. observing violations) to DUI roadblocks there use is not sanctioned. *Id.* Second, the degree of intrusion at DUI roadblocks is much higher than can be supported by the neutral criteria standard. See *Id.* The *Bartley* court stated:

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.

Bartley, 125 Ill. App. 3d at 579, 466 N.E.2d at 348. See also *State v. McLaughlin*, ___ Ind. App. ___, 471 N.E.2d 1125 (1984). (DUI roadblocks unconstitutional as there are less intrusive methods for combating drunk driving.

¹⁵⁶*Smith*, 674 P.2d 562, 564.

¹⁵⁷Published by *Legal Enhancement* at Almon, 1986. See *Filing in the Blanks After Prouse*, *supra* note 11, at 249.

Eliminating drinking drivers from the road is no doubt a compelling government interest. However, as the *Koppel* and *Smith* courts noted, applying the neutral criteria standard to drunk driving roadblocks may not be proper. This is because of several differences between DUI roadblocks and the license and immigration checkpoints involved in Supreme Court precedents. First, driving while intoxicated is a visible offense which can be detected without resort to roadblock stops. Second, DUI roadblock investigations are personal and seek evidence of a serious crime. Third, DUI roadblocks are usually set up at night in constantly changing locations and thus involve a greater level of subjective intrusion. Finally, regardless of whether the initial stop is conducted according to neutral criteria, the determination of a driver's sobriety is an inherently discretionary action. Until the Supreme Court resolves these differences there will continue to be uncertainty regarding the use of DUI roadblocks.

SCOTT FREED