The Constitutionality of Roadblocks Conducted to Detect Drunk Drivers in Indiana

I. Introduction

Public concern regarding the drunk driver and the potential hazards he poses to others on the road has escalated during the last decade. This concern is well-founded; in 1982, drunk driving incidents caused more than twenty-five thousand deaths,[1] in addition to nearly one million other injuries and more than five billion dollars in property damage.[2] As a result, citizens, government officials, and the courts have begun efforts to curb the dangers associated with drunk driving.

Activist groups have formed in every state to educate the public about the drunk driver and to lobby for tougher legislation dealing with the problem.[3] Congress has formed an incentive program which provides funds to states that adopt and implement effective programs to reduce alcohol-related traffic safety problems.[4] State programs, however, must meet strict minimum criteria to qualify for these federal funds.[5] The National Highway Traffic Safety Administration has also formulated measures to address the problem, including suggested procedures to be used for roadblocks designed to detect drunk drivers; implementation of these procedures may permit a state to qualify for supplemental grants.[6] The United States Supreme Court has also recognized the drunk

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[1]H.R. Rep. No. 867, 97th Cong., 2d Sess., 7, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3367, 3367.

[2]Lauter, *The Drunk Driving Blitz*, Nat'l L.J., Mar. 22, 1982, at 1, col. 2.

[3]*See Drunk Driving in America, Study by Insurance Information Institute, reprinted in* Bus. Wk., Oct. 17, 1983, at 176. Grass Roots Groups such as MADD (Mothers Against Drunk Drivers), SADD (Students Against Driving Drunk), and RID (Remove Intoxicated Drivers) have formed, with SADD having a chapter in every state. Most important are the effects these groups have had on the attitudes of people who once condoned drunk driving. A similar group in the early stages of formation is REDDI (Report Every Drunk Driver Immediately) which works in conjunction with law enforcement officials.

[4]Alcohol Traffic Safety-National Driver Register Act of 1982, Pub. L. No. 97-364, 96 Stat. 1738 (codified at 23 U.S.C. § 408 (1982)).

[5]Four minimum criteria must be met to qualify for federal funds: 1) state law must define intoxication as 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) the 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. 23 U.S.C. § 408 (1982).

[6]23 C.F.R. § 1309 (1984). The National Highway Traffic Safety Administration (NHTSA) released an article which suggested operational procedures for the conduct of roadblocks designed to enforce drunk driving statutes. Office of Alcohol Countermeasures and Office of Driver and Pedestrian Research, Nat'l Highway Traffic Safety Ad., U.S. Dep't of Transp., The Use of Safety Checkpoints for DWI Enforcement (1983) [hereinafter cited to as NHTSA Issue Paper].

driving problem. In *South Dakota v. Neville*,[7] the Court held that a driver's refusal to submit to a blood alcohol test can be disclosed at trial as evidence of guilt, thus indicating its hardline stance against drunk driving.

Since public outcry is at a peak, solutions to the problem of drunk driving are being sought in a wide variety of ways. One method of dealing with the problem is to use roadblocks to stop motorists for a brief period to check their sobriety. The use of roadblocks has increased as the method has become more publicized and its potential for deterrence is established. Questions remain, however, concerning the effect that these roadblocks have on the privacy rights of those citizens, both sober and drunk, who are subjected to this method of detection and law enforcement.

Although the Supreme Court has issued opinions concerning the constitutional permissibility of roadblocks which were designed to further other objectives such as detecting illegal aliens[8] and enforcing public safety laws,[9] the Court has not yet decided the constitutionality of roadblocks designed to detect drunk drivers.[10] Nevertheless, state and local agencies continue to conduct roadblocks designed to detect drunk drivers while their constitutional permissibility remains unresolved. This Note examines the evolution of both federal and state law as it relates to the roadblock enforcement method, reviews the constitutionality of drunk driver roadblocks in Indiana, and suggests certain circumstances and procedures under which these roadblocks might be constitutionally permissible.

II. Federal Evolution of the Law Concerning Roadblock-Type Investigatory Stops

Whenever a government official or law enforcement officer stops an individual and restrains his freedom of mobility, the officer has seized that person within the meaning of the fourth amendment.[11] Hence, the

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[7]103 S. Ct. 916 (1983).

[8]*See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Oritz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[9]*See* Delaware v. Prouse, 440 U.S. 648 (1979). *See also* United States v. Prichard, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981); United States v. Miller, 608 F.2d 1089 (5th Cir. 1979), *cert. denied*, 447 U.S. 926 (1980); State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980).

[10]Flaherty, *As Roadblocks Proliferate, Questions of Legality Persist*, Nat'l L.J., July 25, 1983, at 3, 39, col. 3.

[11]U.S. Const. amend. IV:

> 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 af-

individual's constitutional rights may be affected because the fourth amendment requires that the seizure be reasonable.[12] The purpose of the fourth amendment proscription against unreasonable searches and seizures is to safeguard the privacy and security of individual citizens against arbitrary invasions by government authorities.[13] The Supreme Court has repeatedly held that a detention occasioned by the use of roadblock-type investigatory methods constitutes a seizure within the meaning of the fourth amendment and, therefore, must be reasonable.[14]

A. The Constitutionality of Roadblocks and Checkpoints Conducted to Detect Illegal Aliens

Federal law concerning the authority of law enforcement agencies to stop a vehicle and subject its occupants to questioning is rooted in cases involving the detection of illegal aliens near the Mexican border. In *Almeida-Sanchez v. United States*,[15] border patrol officers on roving patrol stopped and searched the defendant's vehicle at a point twenty-five miles north of the Mexican border. During this detention, the officers discovered a large quantity of marijuana as a result of a thorough search of the vehicle.[16] The defendant moved to suppress the evidence gathered as a result of the stop, alleging that the detention violated his fourth amendment rights because his vehicle had been stopped without probable cause.[17]

The Supreme Court found the detention unconstitutional, noting that the fourth amendment requires either probable cause or consent to justify random vehicle searches for illegal aliens by roving border patrol of-

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> firmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[12]Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16 (1968). *See also* Brown v. Texas, 443 U.S. 47, 51 (1979) (The reasonableness of a fourth amendment seizure is assessed by balancing the interest served by the intrusion against the privacy rights of the individual subjected to the seizure.).

[13]*See* Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)). *See also* Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978).

[14]*See* Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); Terry v. Ohio, 392 U.S. 1, 16-19 (1968).

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

[16]*Id.* at 267-68.

[17]*Id.* at 267. The Court rejected the government's contention that § 287(a)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a)(3) (1952), which authorized warrantless automobile searches "within a reasonable distance from any external boundary of the United States," permitted vehicle searches without probable cause. 413 U.S. at 268, 272-75.

ficers.[18] In a concurring opinion, Justice Powell suggested that an area warrant procedure[19] might be used as a means of limiting police discretion in addition to relieving border patrol officers of the burden of demonstrating probable cause for each vehicle searched.[20] The judicial decision to issue an area warrant must be based on a balancing of interests between legitimate law enforcement interests and the protected fourth amendment rights of the citizens.[21]

The *Almeida-Sanchez* requirements for the brief detention of vehicles were modified in *United States v. Brignoni-Ponce*,[22] another case involving the detention of a defendant's vehicle by two border patrol officers, but at a location away from the border patrol's regular checkpoint. The officers stated that the only reason for stopping the vehicle was that it contained three occupants of Mexican descent. The defendant was subsequently charged with knowingly transporting illegal aliens.[23]

In reaching its decision, the Court utilized a balancing of interests test: the valid public interest of the investigatory stop balanced against the interference with individual liberties that results when an officer stops a vehicle and questions its occupants.[24] After the government presented statistics concerning levels of illegal immigration, the Court recognized the important governmental interest in preventing the mass

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[18]*See* Carroll v. United States, 267 U.S. 132, 153-54 (1925) (warrant not required to stop and search vehicle if probable cause exists). *See generally* 2 W. LaFave, Search and Seizure § 4.1a (1978) (warrantless searches and seizures).

[19]*See* Camara v. Municipal Court, 387 U.S. 523 (1967). The Supreme Court allowed a routine annual inspection of an apartment building without probable cause to believe the city housing code was being violated. However, the Court required that a judicial area warrant be issued to ensure the government interest was legitimate, no alternative enforcement methods were available, and that the inspections involved minimal invasion into personal privacy. *Id.* at 534-38.

[20]413 U.S. at 275, 283-85 (Powell, J., concurring). Powell also identified four factors that might be used to determine the existence of probable cause for a vehicle area search warrant: 1) frequency with which illegal aliens are known or reasonably believed to be transported in the area; 2) proximity of the area to the border; 3) extensiveness and geographic characteristics of area; and, 4) probable degree of interference with the rights of innocent motorists. *Id.* at 283-84.

[21]*Id.* at 284. Two years later in United States v. Ortiz, 422 U.S. 891 (1975), the Supreme Court affirmed its prior decision to require probable cause or consent for vehicle searches and detentions at immigration checkpoints. *Id.* at 891-92. The Court recognized that fixed positions of checkpoints may aid in limiting officer discretion in selecting which vehicles to stop, but added that nothing in the procedures used by the officers lessened the invasion of privacy caused by a full vehicle search. *Id.* at 896-97.

[22]422 U.S. 873 (1975).

[23]*Id.* at 875.

[24]*Id.* at 878-80. Other Supreme Court decisions have utilized this balancing of interests mode of analysis. *See* Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); United States v. Ramsey, 431 U.S. 606 (1977); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Cady v. Dombrowski, 413 U.S. 433 (1973); Terry v. Ohio, 392 U.S. 1 (1968); Camara v. Municipal Court, 387 U.S. 523 (1967).

entry of illegal aliens into the country.[25] As a result, the Court concluded that the minimal intrusion caused by the brief investigatory stop made pursuant to the officers' reasonable suspicion may be permissible because of the lack of alternative methods of enforcing the immigration laws.[26] The Court explained its holding in that the intrusiveness of investigatory stops is modest and "'[a]ll 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.'"[27]

The Court ultimately held that the stop was unconstitutional. The apparent Mexican ancestry of the defendant did not furnish a reasonable suspicion which would justify the detention.[28] Therefore, although the stop in the instant case was held to be unconstitutional, the *Brignoni-Ponce* Court modified the analysis promulgated by *Almeida-Sanchez* in determining the constitutionality of such detentions. The requirements of probable cause or consent were replaced by the requirement that officers base their stops on a reasonable suspicion that an immigration law has been violated.[29] This lesser requirement allowed the government an adequate means of protecting the public interest, and at the same time reduced the potential for indiscriminate officer interference with residents of border patrol areas.[30] The Court added that a further detention or search of the vehicle or its occupants after the initial investigatory stop must be based on probable cause.[31]

This requirement of individualized suspicion established in *Brignoni-Ponce* was later rejected by the Supreme Court in *United States v. Martinez-Fuerte*.[32] In this case, the border patrol routinely stopped vehicles at a permanent checkpoint on a major highway away from the Mexican border for brief questioning of the vehicle's occupants. The defendant was charged with illegally transporting aliens and other immigration offenses. The defendant attempted to suppress the evidence which he contended was gained through the unconstitutional use of a checkpoint or roadblock stop and seizure.[33]

The Court held that the detention of a vehicle stopped at a fixed

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[25]422 U.S. at 878-79.

[26]*Id.* at 879-80.

[27]*Id.* at 880 (quoting Brief for United States at 25).

[28]422 U.S at 885-87.

[29]*Id.* at 883.

[30]*Id.* In striking down the requirement of probable cause as provided in *Almeida-Sanchez*, the Court cited its decision in Terry v. Ohio, 392 U.S. 1 (1968), which permitted some limited types of searches and seizures without probable cause. The *Terry* decision held that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21 (footnote omitted).

[31]422 U.S. at 881-82.

[32]428 U.S. 543 (1976).

[33]*Id.* at 545-49.

checkpoint, even without reasonable suspicion that the vehicle contained illegal aliens, is consistent with the fourth amendment, and that the fixed checkpoint did not require prior authorization by judicial warrant.[34] This holding was based on the Court's decision in *Brignoni-Ponce* which utilized the balancing of interests analysis, weighing the public interest in preventing illegal immigration with the privacy rights assured to individuals by the fourth amendment.[35]

In evaluating the infringement of privacy rights, the Court stated:

> This objective intrusion—the stop itself, the questioning, and the visual inspection—also existed in the 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.[36]

The basis of this conclusion by the Court is derived from the procedures used at the permanent checkpoint.[37] A series of signs was used to alert motorists before they reached the checkpoint. Uniformed officers and official vehicles displayed government authority. The checkpoint and detention facilities were located at permanent structures. Floodlights were used for nighttime operation.[38] These characteristics, the Court noted, served to reduce the amount of subjective intrusion on the individual privacy rights of those individuals subjected to checkpoint stops.[39]

In evaluating the public interest of preventing illegal immigration, the Court cited statistics from the Immigration and Naturalization Service illustrating the severity of the illegal immigration problem.[40] The degree

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[34] *Id.* at 562-67.

[35] *See* United States v. Brignoni-Ponce, 422 U.S. at 878; *see supra* note 24.

[36] 428 U.S. at 558.

[37] *Id.* at 559-60.

[38] *Id.* at 545-46. Essential to the holding were the procedures used by the border patrol officers at the fixed checkpoint: 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 used during nighttime operation; 9) "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.*

[39] *Id.* at 560.

[40] *Id.* at 551. The Court noted that a conservative estimate in 1972 produced a figure of one million illegal immigrants, but the Immigration and Naturalization Service in 1976 estimated more than ten to twelve million persons in the U.S. were illegal aliens. *Id.* (citing United States v. Brignoni-Ponce, 422 U.S. at 878).

of effectiveness of checkpoint stops in apprehending illegal aliens was also stressed in addition to the lack of any alternative methods in enforcing immigration laws.[41] As a result, the Court recognized the great public interest which was served by the use of checkpoint stops near the Mexican border.[42]

Furthermore, the Court in *Martinez-Fuerte* rejected the requirement of prior judicial authorization to conduct permanent checkpoint operations.[43] This decision was supported by the argument that strong fourth amendment interests which mandate warrants for private residence searches[44] were not present in the minor intrusion caused by an investigatory vehicle stop.[45] The Court noted that the assurance of proper authority provided by a judicial warrant was satisfied by the "visible manifestation" of state authority at the checkpoints.[46]

As illustrated by this series of cases, the Supreme Court has modified its requirements for the detention of vehicles for investigatory purposes. Initially, the Court in *Almeida-Sanchez* required probable cause,[47] but reduced the requirements in *Martinez-Fuerte* to allow investigatory stops at fixed location checkpoints which were not even based on articulable suspicion.[48] Although these cases involve the evolution of law concerning roadblocks, their real value exists in the establishment of a mode of analysis in determining the constitutional permissibility of the detention itself.

B. The Prouse *Decision: Answer or Ambiguity?*

The most influential and recent United States Supreme Court opinion supporting the continued use of roadblocks and checkpoints not involving illegal immigration is *Delaware v. Prouse*.[49] In this case, a patrolman in a police cruiser stopped the defendant's vehicle to conduct a routine license and registration check. The patrolman had no probable cause or reasonable suspicion that the defendant or any passengers in the vehicle had violated any law or regulation at the time of the stop. However, as the patrolman was walking alongside the vehicle, he smelled marijuana smoke and subsequently seized a bag of marijuana lying in plain view on the floor of the car.[50] The defendant was indicted for illegal possession of a controlled substance, but moved to suppress the evidence obtained

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[41]428 U.S. at 554.
[42]*Id.* at 562.
[43]*Id.* at 564-67.
[44]*See, e.g.*, McDonald v. United States, 335 U.S. 451 (1948).
[45]428 U.S. at 565-66.
[46]*Id.* at 565.
[47]413 U.S. at 266.
[48]428 U.S. 543.
[49]440 U.S. 648 (1979).
[50]*Id.* at 650.

as a result of the investigatory stop, alleging the stop was unconstitutional.[51] At the suppression hearing, the patrolman stated that he was not acting pursuant to any standards, guidelines, or procedures pertaining to "spot checks" or roving patrol stops.[52] The trial court granted the motion to suppress the evidence and found the stop "wholly capricious and therefore violative of the fourth amendment."[53]

On appeal, the Delaware Supreme Court held the stop to be violative of the fourth[54] and fourteenth amendments[55] of the United States Constitution.[56] The United States Supreme Court granted certiorari[57] and subsequently affirmed the Delaware Supreme Court, holding that the search and seizure was unconstitutional.[58] In reaching its decision, the Court again applied a balancing of interests test, previously used in immigration spot check cases. The Court stated, "[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."[59]

In considering the privacy interests of individuals subjected to the random stops, the Court recognized the importance of travel and suggested that people find a greater sense of security while traveling in an automobile than they do as pedestrians.[60] In addition, the Court noted that simply because motor vehicles and highways are subject to government regulation, individuals are not shorn of their expectations of privacy when they step into an automobile.[61] Analyzing the subjective intrusion occasioned by the random stops, the Court referred to *Martinez-Fuerte*[62] and noted that random spot checks were not the same as

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[51] *Id.*

[52] *Id.*

[53] *Id.* at 651.

[54] *See supra* note 11.

[55] U.S. CONST. amend. XIV, § 1. This section provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[56] 382 A.2d 1359, 1364 (Del. 1978).

[57] 439 U.S. 816 (1978).

[58] 440 U.S. at 648-49.

[59] *Id.* at 654 (footnote omitted). *See supra* note 24.

[60] 440 U.S. at 662.

[61] *Id.* at 662-63. *But see* Rakes v. Illinois, 439 U.S. 128, 154 n.2 (1978) (Powell, J., concurring) (public nature of vehicles and state regulation and inspection of motor vehicles reduce motorists' reasonable expectations of privacy). Katz v. United States, 389 U.S. 347, 351-53 (1967) (what a person knowingly exposes to the public is not subject to fourth amendment protection); *Id.* at 361 (Harlan, J., concurring) (fourth amendment only protects reasonable expectations of privacy).

[62] 428 U.S. 543.

roadblocks which stop all vehicles.[63] The Court suggested, "'At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'"[64] Therefore, the Court reasoned that subjective intrusion incurred by motorists subjected to roadblocks is substantially less than that caused by random spot checks.

Regarding the promotion of legitimate governmental interests, Delaware argued the importance of highway safety which is promoted by licensing and registration regulations.[65] Delaware maintained that the enforcement of these motor vehicle laws justified police discretion in randomly detaining vehicles and outweighs the resulting intrusion on individual privacy.[66] In response to this contention, the Court reasoned that discretionary spot checks are not a sufficiently productive mechanism to justify the accompanying intrusion on fourth amendment rights.[67] The Court noted that the foremost method of enforcing licensing and registration regulations is through vehicle checks following observed violations.[68] Thus, the Court found that a more effective alternative means of enforcing the state's motor vehicle laws existed which did not result in unbridled police discretion in selecting which vehicles to stop.[69]

After engaging in the balancing of interests test, 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 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. 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. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.[70]

This holding, and more importantly the dicta concerning roadblocks,

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[63] 440 U.S. at 657.

[64] *Id.* (quoting United States v. Martinez-Fuerte, 428 U.S. at 558).

[65] 440 U.S. at 658.

[66] *Id.* at 655, 658.

[67] *Id.* at 658.

[68] *Id.* at 659-60.

[69] *Id.* at 661.

[70] *Id.* at 663 (footnote omitted).

has become the sole basis for the continuing use of roadblocks to stop vehicles for various law enforcement objectives.[71]

With this being the final word by the Supreme Court concerning the permissibility of roadblock stops, the law is in a state of confusion with regard to law enforcement techniques involving the detention of vehicles. Because *Prouse* did not involve the use of roadblocks to detect drunk drivers, many questions which will inevitably be raised in future litigation remain unanswered. For example, the legitimacy of a viable state interest that justifies roadblocks designed to detect drunk drivers has yet to be established. Although *Prouse* did recognize the important state interests of limiting police discretion in the intrusion on individual privacy rights, it did not suggest how these safeguards interrelate to ensure constitutionally permissible roadblocks.[72]

In addition, it has yet to be established to what extent the physical characteristics of a constitutionally permissible roadblock must conform to permanent checkpoints as illustrated in *Martinez-Fuerte*.[73] Although judicial warrants were deemed unnecessary to conduct permanent checkpoint stops in *Martinez-Fuerte*,[74] the law remains unclear regarding whether some form of judicial authorization is necessary to conduct temporary roadblocks.[75] Finally, questions remain concerning how factors unique to roadblocks designed to detect drunk drivers might affect the balancing of interests analysis.[76] *Prouse* and the immigration cases merely established a mode of analysis to assess the constitutionality of roadblock stops and random spot check intrusions. As a result, lower federal and state courts are in conflict concerning the constitutional permissibility of roadblocks.[77]

III. Evolution of Lower Federal and State Court Law Concerning Roadblocks

Lower federal and state courts are in conflict concerning the permissibility and constitutionality of roadblocks, regardless of their pur-

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[71]However, the *Prouse* decision was construed by the Court in Brown v. Texas, 443 U.S. 47 (1979). In *Brown*, the officers observed the defendant in a high drug trafficking area and seized him without reasonable suspicion or probable cause. The Court upheld the seizure stating that "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 seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* at 51 (citing Delaware v. Prouse, 440 U.S. at 663; United States v. Martinez-Fuerte, 428 U.S. at 558-62).

[72]Note, *Curbing the Drunk Driver under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 Geo. L.J. 1457, 1470 (1983).

[73]*Id.*

[74]*See supra* notes 43-46 and accompanying text.

[75]Note, *supra* note 72, at 1470.

[76]*Id.*

[77]*See infra* notes 78-79.

pose.[78] Only recently have roadblocks designed to detect drunk drivers been challenged, and state courts have confronted the issue of constitutionality with varying results. As the use of such roadblocks proliferates, court decisions analyzing their constitutionality should become standardized. The following cases illustrate the various modes of analysis used in determining the constitutionality of roadblocks conducted for various purposes.

A. Court Decisions Which Have Found Roadblocks Unconstitutional

State ex rel. Ekstrom v. Justice Court of State[79] is a recent and articulate decision by a state court concerning the constitutionality of roadblocks. In this case, a justice of the peace ruled that a roadblock conducted to detect drunk drivers was unconstitutional under the fourth amendment.[80]

The issue on appeal before the Arizona Supreme Court was whether or not the fourth amendment was violated by roadblocks which stopped vehicles at a temporary checkpoint for brief questioning of the occupants, although there was no reason to believe the driver was drunk or had committed any other offense.[81] The court affirmed the lower court's decision that the roadblock violated the fourth amendment, utilizing the balance of interests analysis established in earlier cases.[82] The court found that the intrusion created by the roadblock was not minimal, citing the amount of discretionary law enforcement activity and the irregular manner of administration.[83] The roadblock was set up at the discretion of the patrolman without specific procedural guidelines. Officers were uncertain how extensively they could legally search cars. Motorists were taken by surprise because no prior notification of the location or purpose of the roadblock had been given.[84]

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[78]Courts which have found roadblocks to be unconstitutional include State *ex rel.* Ekstrom v. Justice Court of State, 136 Ariz. 1, 663 P.2d 992 (1983) (DWI roadblock); State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980) (detection of vandals); Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983); State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) (DWI roadblock).

Courts which have found roadblocks to be constitutional include United States v. Prichard, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981) (license and registration check); State v. Deskins, 234 Kan. 529, 637 P.2d 1174 (1983) (license check); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980) (DWI roadblock). *See also* People v. Peil, 122 Misc. 2d 617 (1984) (DWI roadblock); People v. Scott, 122 Misc. 2d 731 (1983) (DWI roadblock); People v. John BB, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (criminal identification checkpoint); State v. Shankle, 58 Or. App. 134, 647 P.2d 959 (1982) (license and registration check).

[79]136 Ariz. 1, 663 P.2d 992 (1983).

[80]*Id.* at 2, 663 P.2d at 993.

[81]*Id.* at 3, 663 P.2d at 994.

[82]*See supra* note 24.

[83]136 Ariz. at 5, 663 P.2d at 996.

[84]*Id.* at 5, 663 P.2d at 993.

The court also based its holding on the state's failure to provide evidence of the state's interest in stopping drunk driving or evidence of the intrusion resulting from the roadblock.[85] The state attempted to justify the use of roadblocks by relying on its authority to check drivers' licences and vehicle registrations.[86] The court noted that drunk driving detection would be an incidental benefit but stated, "We cannot approve subterfuge even in a worthy cause."[87] Additionally, the state failed to establish the effectiveness of the roadblock compared with roving patrols based on probable cause.[88] The court concluded that because there was an adequate method of enforcing the drunk driving statutes, there was no need to use roadblocks which caused intrusion on individual privacy rights.[89]

A concurring opinion in *Ekstrom* suggested viable guidelines for permissible roadblocks and enumerated situations in which similar searches are permissible without probable cause.[90] Such situations include when the need for inspection is urgent, when the failure to inspect may lead to potentially harmful results, and where there is a lack of any effective alternative enforcement methods.[91] The concurring opinion also included

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[85] *Id.* at 5, 663 P.2d at 995-96.

[86] *Id.* at 5, 663 P.2d at 996.

[87] *Id.* at 5, 663 P.2d at 996.

[88] *Id.* at 5, 663 P.2d at 995-96.

[89] *Id.* at 5, 663 P.2d at 996. The court noted that the state had stipulated that:

> DPS officials, by observing and patrolling, regularly arrest drivers for DWI [driving while intoxicated] when there are no roadblocks. DPS officers are trained to detect drunk drivers on the road on the basis of observation. An experienced DPS officer becomes highly skilled at detecting drunk drivers by watching how a person drives. Without roadblocks, an experienced DPS officer can detect many drunk drivers.

Id. at 5, 663 P.2d at 996. As a result, the court responded that the state had stipulated itself out of court and, "If there is an adequate method of enforcing the drunk driving statute, there is no pressing need for the use of an intrusive roadblock device." *Id.*

[90] *Id.* at 6-7, 663 P.2d at 998 (Feldman, J., specially concurring).

[91] *Id.* at 7, 663 P.2d at 998. Justice Feldman also noted suggestions for constitutionally permissible roadblocks which included placement of roadblocks for deterrence, located at times and places based upon the need to supplement random investigatory stops. He also suggested that the efficiency of deterrent roadblocks is heightened by advance publication in the media and on the highways. Such publicity would warn those who might potentially be detected by roadblocks. Such warnings may decrease the chance of apprehending ordinary criminals, but should not have a considerable deterrent effect by either dissuading people not to drink as much, or persuading them to drink at home or to take taxis. Advance notice also limits the intrusion upon personal dignity and security because those persons stopped would anticipate and understand the nature of the investigatory stop. *Id.* at 10, 663 P.2d at 1001.

Examples of reasonable searches and seizures based on a standard other than individualized suspicion include: 1) enforcement of building codes through inspection of premises, Camara v. Municipal Court, 387 U.S. 523 (1967); 2) airport luggage check and metal detection searches, United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United

a reference to Arizona's new statute increasing punishment for driving while intoxicated, but was quick to note that deterrence by punishment is often ineffective unless combined with the fear of apprehension.[92] "An occasional stop at a roadblock for minimal questioning and visual inspection—not search—may well be the price which we have to pay to enforce compliance with the law and rid ourselves of the presently intolerable danger created by drunk drivers."[93] While such stops may be necessary, they must first pass constitutional challenges.

In *State v. Hilleshiem*,[94] the Iowa Supreme Court held that the vehicle stops, set up by low level police officers, of three separate defendants violated their fourth amendment rights and were, therefore, unconstitutional.[95] The first roadblock was initiated without direction from the chief of police or higher authority. The purpose of the roadblock was to identify persons in the vicinity of a highly vandalized area. The second roadblock, on directive of the assistant chief of police, did not stop all vehicles; when one vehicle was stopped, all others were allowed to pass. The roadblocks were not conducted in response to specific vandalism or in an effort to detect violations of motor vehicle laws.[96]

The *Hilleshiem* court analyzed the roadblocks using two sets of criteria: police discretion and the subjective intrusion caused to detained

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States v. Epperson, 454 F.2d 679 (4th Cir. 1972); and 3) use of roadblock stops to enforce immigration laws, United States v. Martinez-Fuerte, 428 U.S. 543. Although there is no founded suspicion of criminal activity in these situations, the need for inspection is urgent, potential harmful effects are great, and alternative enforcement methods are few. 136 Ariz. at 6-7, 663 P.2d at 997-98.

[92]*Id.* at 8-9 n.3, 663 P.2d at 999-1000 n.3.

[93]*Id.* at 9, 663 P.2d at 1000. In a similarly reasoned decision, the Supreme Judicial Court of Massachusetts in Suffolk in Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983), granted the defendant's motion to suppress evidence obtained at a roadblock designed to detect drunk drivers. The defendant was stopped without probable cause or articulable suspicion. *Id.* at 138, 449 N.E.2d at 350. In holding the roadblock unconstitutional, the court noted that the procedures involved caused motorists a high level of subjective intrusion; officers were allowed too much discretion; the roadblock was poorly illuminated and unsafe for motorists; mechanics of the roadblock were left to the discretion of the officers involved; officers used their own discretion in deciding which vehicles to stop; and motorists were backed up at least two-thirds of one mile, posing a traffic hazard. *Id.* at 142, 449 N.E.2d at 353.

Suggestions for a constitutionally permissible roadblock included: 1) selection of motor vehicles to be stopped must not be arbitrary; 2) safety must be assured; 3) motorists' inconvenience must be minimized; 4) assurance must be given that the procedure is being conducted pursuant to a plan devised by law enforcement supervisory personnel, and 5) advance notice is not a constitutional necessity, but advance publication of the date of the intended roadblock, even without announcing its precise location, might reduce surprise, fear, and inconvenience. *Id.* at 142, 449 N.E.2d at 353.

[94]291 N.W.2d 314 (Iowa 1980).

[95]*Id.* at 319.

[96]*Id.* at 315.

motorists by the roadblocks.[97] Citing *Martinez-Fuerte*,[98] the court stressed the importance of the visibility of the checkpoint, its fixed location selected by administrative officials which results in the limitation of officer discretion and provides motorists with additional notice, and adequate warning signs to provide early warning of the nature of the impending intrusion.[99]

In distilling the earlier United States Supreme Court decisions in this area, the *Hilleshiem* court provided the following guidelines for a constitutionally permissible roadblock: 1) checkpoint location should be selected for its safety and visibility to oncoming motorists; 2) advance warning signs, illuminated at night, should be used to timely inform motorists of the nature of the impending intrusion; 3) uniformed officers in official vehicles should be used to adequately "show . . . the police power of the community";[100] and, 4) the roadblock location, time, and procedures should be predetermined by policy-making administration pursuant to carefully formulated standards and neutral criteria.[101] The court concluded that it was clear that the roadblocks involved did not meet the necessary fourth amendment requirements.[102]

In a unique decision, the South Dakota Supreme Court in *State v. Olgaard*[103] held a roadblock operated by the Alcohol Safety Action Program was unconstitutional. The roadblock was formed by several patrol cars parked with red flashing lights at a point where officers had set up a large stop sign to mark the roadblock. The four officers who were present stopped all vehicles from both directions.[104] If facts which constituted probable cause were discovered, such as the odor of alcohol or observation of awkward actions by motorists indicating inebriation, motorists were directed to secondary detention areas.[105]

The court stated several reasons for finding the roadblock uncon-

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[97] *Id.* at 317-18. *Contra* United States v. Prichard, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981) (court disregarded subjective intrusion); People v. John BB, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (court disregarded subjective intrusion).

[98] *See supra* notes 36-39 and accompanying text.

[99] 291 N.W.2d at 318. *See* United States v. Maxwell, 565 F.2d 596 (9th Cir.); United States v. Vasquez-Guerrero, 554 F.2d 917 (9th Cir. 1977), *cert. denied*, 434 U.S. 865 (1977); United States v. Sandoval-Ruano, 436 F. Supp. 734 (S.D. Cal. 1977). *See also* State v. Olgaard, 248 N.W.2d 392 (S.D. 1976). *See generally* W. RINGEL, SEARCHES, ARRESTS, AND CONFESSIONS §§ 11.2(d), 15.5(a)(2) (2d ed. 1979). *Contra* State v. Halverson, 277 N.W.2d 723 (S.D. 1979) (construing *Prouse* not to require permanent location; validating a temporary game check site).

[100] 291 N.W.2d at 318.

[101] *Id.*

[102] *Id.*

[103] 248 N.W.2d 392 (S.D. 1976).

[104] *Id.* at 393.

[105] *Id.*

stitutional. First, the roadblock was not at a permanent location.[106] Second, motorists had no prior knowledge of the roadblock and could not have acquired knowledge because it was set up to stop motorists without warning who passed the roadblock location that night.[107] Finally, no evidence was offered to indicate by whose authority the location of the checkpoint was established.[108]

The unique aspects of the *Olgaard* court's decision were its requirements that roadblocks be established for the purpose of investigating all motorists for liquor law violations and that they be authorized by prior judicial warrant.[109] These requirements would purportedly limit the discretion of officers in determining the location of the roadblock and would thus provide a means of warning motorists in an attempt to reduce the subjective intrusion upon their privacy rights.[110]

B. *Court Decisions Which Have Found Roadblocks Constitutional*

In a well-reasoned and thorough decision which outlined the evolution of the law regarding roadblock stops, the Supreme Court of Kansas in *State v. Deskins*[111] reversed the findings of a district court and determined that the roadblock at issue was not violative of the fourth amendment.[112] The facts of the case indicate that the defendant was arrested after his auto was stopped by police officers at a roadblock ostensibly set up for the purpose of checking drivers' licenses. The district court found that the state candidly conceded that the roadblock was set up to detect drunk drivers and the the drivers' license check was a facade for such purposes.[113]

At this particular roadblock, thirty-five to forty police officers from the Kansas State Highway Patrol, Shawnee County Sheriff's Office and the Topeka Police Department were present, presumably to check for drivers' licenses.[114] All traffic passing in both directions was stopped. The defendant was stopped and asked to produce his driver's license. Although the officer had not observed the defendant driving his car and therefore had no facts or knowledge which would constitute probable cause, after approaching the vehicle, the officer smelled a strong odor

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[106]*Id.* at 394.

[107]*Id.*

[108]*Id.* at 394-95. If the location of the roadblock is chosen by lower-level officers, the roadblock has characteristics of the roving patrol, causing unconstitutional intrusion upon privacy rights. *Id.*

[109]*Id.* at 395.

[110]*Id.* at 394.

[111]234 Kan. 529, 673 P.2d 1174 (1983).

[112]*Id.* at 542, 673 P.2d at 1185.

[113]*Id.* at 533, 673 P.2d at 1177.

[114]*Id.*

of alcohol and noticed certain physical characteristics of the driver which indicated his inebriation. After subjecting the defendant to a field sobriety test with unsatisfactory results, the defendant was arrested for driving while under the influence and his vehicle was searched.[115] The defendant claimed that this roadblock stop violated his constitutional rights under the fourteenth amendment.

After extensively quoting the *Prouse* decision,[116] and analyzing the evolution of the law concerning immigration checkpoint cases and state court decisions regarding roadblock stops, the *Deskins* court stated:

> There can be no doubt that there is an overwhelming public and governmental interest in pursuing methods to curtail the drunk driver. Most states, however, which have considered the validity of roadblocks to "check drivers' licenses and auto registration" or to check for drunk drivers have found the methods used to be violative of Fourth Amendment rights and as failing to meet the implied tests set forth in the extensive dicta in *Prouse*. The use of a DUI roadblock has principally two purposes: (1) to apprehend and remove the drunk driver from the streets before injury or property damage 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.[117]

Further, the court, in recognizing the balancing of interests analysis used by prior courts,[118] enumerated thirteen factors which it deemed necessary to utilize in determining whether a DUI roadblock meets the balancing test in favor of the state.[119] In conclusion, the court stated

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[115]*Id.*

[116]*Id.* at 534, 673 P.2d at 1178-81.

[117]*Id.* at 535, 673 P.2d at 1181-82.

[118]*See supra* note 24.

[119]The court suggested the following factors be considered in determining whether a roadblock conducted to detect drunk drivers meets the balancing test in favor of the state: (1) the degree of discretion 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 given to the public; (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. The court also noted that all of the above-mentioned factors need not be favorable for the roadblock to be constitutionally permissible, but all factors should be considered. However, certain factors, such as unbridled officer discretion in the field, would be highly determinative of the roadblock's impermissibility because of the requirements set forth in *Prouse*, regardless of other favorable factors. 234 Kan. 542, 673 P.2d at 1185.

that the roadblock in this case passed constitutional muster. Supporting its decision, the court noted that the roadblock was a joint effort of three law enforcement agencies and that the thirty-five to forty officers involved had been briefed, prior to the roadblock, by supervisory personnel concerning their specific duties.[120] Additionally, the roadblock was established in a well-lighted area of a four-lane highway and several police cars were utilized, including cars with flashing lights positioned at the four corners of the roadblock.[121] The time of detention was minimal because sufficient officers were available to assure quick questioning.[122] The court also noted that all vehicles traveling in both directions were stopped, denying officers in the field any discretion in the selection process.[123] Finally, the court acknowledged that the officers involved were in uniform and were readily recognizable as police officers, and that the location of the roadblock was selected by supervisory personnel.[124]

Summarizing the balancing of interests analysis and the above mentioned factors, the court stated:

> When 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.[125]

The court then stated that the roadblock in this instance was not unreasonable under the fourth amendment. The court continued in dictum stating that it might be advisable for the state to adopt minimum uniform standards for the operation of such vehicular roadblocks rather than leaving the determination of such policies and procedures to local officials.[126]

In a strong dissent, Justice Prager noted his fear that the majority decision would erode the constitutionally guaranteed right of an individual to be free from unfettered intrusions on his or her right of privacy by government officials.[127] While noting the strong public interest in discovering and deterring drunk driving, Justice Prager emphasized the ineffectiveness of accomplishing the desired goal by using roadblocks.[128]

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[120]*Id.*, 673 P.2d at 1185.

[121]*Id.*, 673 P.2d at 1185.

[122]*Id.*, 673 P.2d at 1185.

[123]*Id.*, 673 P.2d at 1185.

[124]*Id.*, 673 P.2d at 1185.

[125]*Id.*, 673 P.2d at 1185.

[126]*Id.* at 542 673 P.2d at 1185-86.

[127]*Id.* at 543, 673 P.2d at 1186 (Prager, J., dissenting).

[128]*Id.* at 544, 673 P.2d at 1187. At this particular roadblock, between 2000 and 3000 thousand vehicles were stopped. A total of 74 violations were discovered, but only 15 were violations involving driving while intoxicated. The duration of the roadblock was

Less intrusive and more productive alternatives exist to detect drunk drivers; "distributing the 35 officers at various places throughout the city for the sole purpose of observing erratic driving and stopping and checking drunk drivers" was one possible alternative.[129]

Justice Prager further stated that the state had failed to meet its burden of proof in establishing that the roadblock/checkpoint promoted the public interests in light of available less drastic alternative measures.[130] Justice Prager concluded by noting his fear that if roadblocks designed to detect drunk drivers are found to be permissible, law enforcement agencies could easily extend this method to discover violations of other criminal statutes and city ordinances.[131] "If each of these political subdivisions decides to maintain a roadblock, we could have 'Checkpoint Charley' at the boundary of every city and every county."[132]

In *United States v. Prichard*,[133] the Tenth Circuit Court of Appeals upheld the use of a roadblock, basing its decision on the dicta in *Prouse* concerning roadblocks.[134] The roadblock involved an attempt by state police to stop all westbound traffic on a highway to check for drivers' licenses and car registrations. When traffic became congested, stopped vehicles were allowed to pass through.[135] The defendant, stopped by the roadblock, was convicted of possession of cocaine with intent to distribute. The court held that the roadblock stop of the defendant's vehicle was proper because reasonable investigative steps were taken after probable cause was found during the detention.[136] Minimal attention was focused on the constitutional permissibility of the initial detention.

The court recognized that the purpose of the roadblock, to check drivers' licenses and car registrations, was legitimate.[137] In addition, the court stated that if in the process of stopping vehicles the officers saw evidence of other crimes, they had the right to take reasonable investigative steps.[138] In a brief analysis of the actual roadblock, the court scrutinized the systematic manner of the administration of the roadblock. In finding an adequate limitation of police discretion,[139] the court held that the roadblock was constitutional and consistent with the dicta in *Prouse* which prohibited the unconstrained exercise of discretion.[140] The

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four hours. Thirty-five officers conducted the operation, resulting in an expenditure of 140 man hours. *Id.*, 673 P.2d at 1187.

[129] *Id.*, 673 P.2d at 1187.

[130] *Id.*, 673 P.2d at 1187.

[131] *Id.*, 673 P.2d at 1187.

[132] *Id.*, 673 P.2d at 1188.

[133] 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981).

[134] *See supra* note 70 and accompanying text.

[135] 645 F.2d at 855.

[136] *Id.* at 857.

[137] *Id.*

[138] *Id.* (citing United States v. Merryman, 630 F.2d 780, 782-85 (10th Cir. 1980)).

[139] 645 F.2d at 857.

[140] *See supra* note 70 and accompanying text.

court completely failed to evaluate the intrusiveness of the stop by investigating the physical characteristics and procedures used in the roadblocks.[141] As a result, the court failed to utilize the balancing of interests test as required by earlier cases.[142] This failure lessens the precedential value of the case.

In a decision which focused on the procedures used in roadblocks and the resulting intrusion on individual privacy rights, the Superior Court of New Jersey in *State v. Coccomo*[143] denied the defendant's motion to suppress evidence obtained as a result of a roadblock.[144] After balancing the state's interests with the individual interests concerning a roadblock which stopped every fifth vehicle and caused minimal intrusion on the individual's privacy, the court found the roadblock to be a reasonable and productive means for identifying intoxicated drivers.[145] The court indicated that its holding was greatly influenced by the procedures employed in conducting the roadblock,[146] which were pursuant to a written policy of the local police department.[147]

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[141]*See also* State v. Shankle, 58 Or. App. 134, 647 P.2d 959 (1982). The defendant was stopped by two officers who were conducting operator's license and vehicle registration inspections. The detention amounted to a limited roadblock, stopping only one car at a time. The roadblock was administered pursuant to provisions of the Oregon State Policy Manual. The defendant was convicted of operating a motor vehicle while his license was suspended. The roadblock did not include the use of warning signs, but merely the officers' gestures to stop. The court found the roadblock was systematic and the nature of the intrusion was minimal. The court also looked at the government interest advanced by the roadblock. *Id.* at 138, 647 P.2d at 961-62.

In a similar holding and rationale, the New York Court of Appeals in People v. John BB, 56 N.Y.2d 482, 438 N.E.2d 865, 453 N.Y.S.2d 158 (1982), permitted police to use roving random roadblocks in a rural area in response to recent burglaries. The court recognized the state interest in establishing the identities of persons in the vicinity and based its holding on the element of officer discretion. The procedures used were permissible because all vehicles were stopped and no effective alternatives for accomplishing the purpose existed. The court failed to analyze the amount of subjective intrusion on individual privacy rights and based its decision on the limitation of police discretion and the existence of an important state interest. *Id.* at 439, 438 N.E.2d at 876, N.Y.S.2d at 161.

[142]*See supra* notes 24, 35.

[143]177 N.J. Super. 575, 427 A.2d 131 (1980).

[144]*Id.* at 584, 427 A.2d at 135.

[145]*Id.* at 583-84, 427 A.2d at 134.

[146]*Id.* at 583, 427 A.2d at 135. The procedures used in the roadblock in *Coccomo* included: 1) guidelines were designed to promote safety and reduce anxiety; 2) flares were positioned on the road to alert drivers to use caution and to be alert; 3) uniformed police officers, who counted cars and waved over every fifth, stood at the end of the flares under a street light; 4) drivers of diverted vehicles were directed to an adjacent parking lot where they were questioned by other uniformed officers. The court concluded that these were specific, defined standards in stopping motorists and the system was completely objective in its operation; the criterion employed was purely neutral and involved no discretion. *Id.*, 417 A.2d at 135.

[147]*Id.* at 579 n.1, 427 A.2d at 133 n.1. In September, 1979, the Morris County Prosecutor urged the municipal police department to adopt rules and procedures to adjust their police practices to the *Prouse* proscriptions. A set of regulations approved by the

As these state and federal cases suggest, roadblocks conducted to detect drunk drivers may be constitutional. The integral factors used to determine the constitutional permissibility include the state's interest in the enforcement of laws and the amount of subjective intrusion on individual privacy rights caused by the roadblocks. The latter factor may be determined by the amount of officer discretion involved in the administration of the roadblock and the procedures used to conduct the roadblock. Although Indiana has used and continues to use roadblocks for various law enforcement purposes, Indiana courts have yet to reach a definite conclusion regarding the constitutional permissibility of such stops.

IV. Evolution of Indiana Law Concerning the Use of Roadblocks

Indiana law regarding the use of roadblocks for investigatory purposes is largely undeveloped. It appears that the controlling Indiana statute was Indiana Code § 35-3-1-1, the "Stop and Frisk Statute."[148] However, this statute was repealed and not replaced,[149] and hence, case law now controls the area of the law concerning the detention or "seizure" of persons without probable cause.

Although Indiana case law concerning roadblocks designed to detect drunk drivers is sparse, a few cases can be applied through analogy to develop the law. In *Morgan v. State*,[150] police officers pulled over the defendant's vehicle after he had left the scene of a drug transaction involving an undercover officer. The defendant moved for the suppression of evidence based on the unconstitutionality of the stop, contending the officers did not have probable cause.[151] The court held that under appropriate circumstances, police officers may detain a vehicle for purposes of briefly investigating the possibility of criminal activity without having probable cause to make the arrest.[152] The court continued, how-

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New Jersey Attorney General was forwarded to the chief. The chief then issued a memorandum directing his officers to make the established procedure a part of a pilot program to stem the rising number of fatal and other vehicular accidents. The chief's memorandum stated, "should road checks be made for driving while intoxicated, or other checks it shall be this department's procedure to stop every 5th car during light traffic hours." *Id.*, 427 A.2d at 133 n.1.

[148]Ind. Code § 35-3-1-1 authorized an investigatory stop when a police officer "reasonably infers, from the observation of unusual conduct under the circumstances and in the light of his experience, that criminal activity has been, is being, or is about to be committed." Ind. Code § 35-3-1-1 (1978).

[149]Ind. Code § 35-3-1-1, *repealed by* Act of May 5, 1981, Pub. L. No. 298-1981 § 9(a) 1981 Ind. Acts 2314, 2391.

[150]427 N.E.2d 14 (Ind. Ct. App. 1981).

[151]*Id.* at 15.

[152]*Id.* at 15-16. *See* Terry v. Ohio, 392 U.S. 1, 22 (1968); Edwards v. State, 411 N.E.2d 666, 668 (Ind. Ct. App. 1980); Mayfield v. State, 402 N.E.2d 1301, 1306 (Ind. Ct. App. 1980).

ever, by adding that in order to justify an investigatory stop, the "officers must be able to point to specific and articulable facts which, when considered together with the rational inferences drawn from those facts, create a reasonable suspicion of criminal conduct on the part of the vehicle's occupants."[153]

In a similar case, the Indiana Supreme Court held in *Rutledge v. State*[154] that the stopping of a truck with a new lawnmower in the back, soon after a robbery in the vicinity had been reported, was not an unconstitutional detention or seizure of the defendant.[155] In so holding, the court recognized that the detention of a single vehicle on a street constitutes a physical and psychological intrusion upon the occupants of the vehicle and involves the interference with freedom of movement.[156] Even a brief investigatory stop of a vehicle and its occupants constitutes a seizure and is unreasonable if not based on specific articulable facts which support an inference that some form of criminal activity has occurred.[157] In ascertaining a test used to evaluate the reasonableness of a warrantless intrusion, the court provided that the facts known to the officer at the time of the stop must be examined to determine whether they reasonably warrant a suspicion of unlawful conduct.[158]

In an attempt to temper the permissibility of intrusions upon privacy rights without probable cause, later courts required that additional criteria be met. In *United States v. Posey*,[159] the court asserted that when an investigatory stop is based upon less than probable cause, the state's interest is secondary to the individual's privacy interest, and the latter must be viewed as "paramount."[160] In *Cooper v. State*,[161] the court held that if a warrantless search or seizure occurs, it is the state's burden to demonstrate "that the police action fell within one of the well established exceptions to the warrant requirement."[162]

The case most on point concerning Indiana's view on the permissibility of roadblocks in general is *Irwin v. State*.[163] However, it must

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[153]427 N.E.2d at 16. *See* Reid v. Georgia, 448 U.S. 438, 440 (1980); Mayfield v. State, 402 N.E.2d 1301, 1305 (Ind. Ct. App. 1980).

[154]426 N.E.2d 638 (Ind. 1981).

[155]*Id.* at 642.

[156]*Id.* at 641.

[157]*Id. See generally* United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); State v. Smithers, 256 Ind. 512, 515, 269 N.E.2d 874, 876 (1971).

[158]426 N.E.2d at 641. *See* United States v. Brignoni-Ponce, 422 U.S. at 884-85; Terry v. Ohio, 392 U.S. 1, 20-22 (1968); Lawrence v. State, 268 Ind. 330, 332-33, 375 N.E.2d 208, 210 (1978).

[159]663 F.2d 37 (7th Cir. 1981), *cert. denied*, 455 U.S. 959 (1982).

[160]663 F.2d at 41 (citing Brown v. Texas, 443 U.S. 47, 51-52 (1979); Delaware v. Prouse, 440 U.S. 648, 663 (1979)).

[161]171 Ind. App. 350, 357 N.E.2d 260 (1976).

[162]*Id.* at 356, 357 N.E.2d at 264 (citing Vale v. Louisiana, 399 U.S. 30 (1970); Ludlow v. State, 262 Ind. 266, 314 N.E.2d 750 (1974); Smith v. State, 256 Ind. 603, 271 N.E.2d 133 (1971); State v. Smithers, 256 Ind. 512, 269 N.E.2d 874 (1971)).

[163]178 Ind. App. 676, 383 N.E.2d 1086 (1978).

be noted that this case was decided before *Prouse* and thus the court did not have the benefit of the analysis provided by the *Prouse* dictum.[164] In this case, two officers had been instructed to conduct a routine traffic roadblock to check for drivers' licenses, registrations, and inspection stickers of all vehicles reaching the roadblock during a specified time. The two officers viewed the defendant executing a turn near their position and decided to begin their roadblock before the designated time.[165] The officers stopped the defendant without probable cause, admitting later that they were aware of no traffic law violation or any evidence of criminal activity.[166] After asking the defendant to produce his license and registration, the officers smelled alcohol on his breath. The officers asked Irwin if he had been drinking and he replied affirmatively. The officers found marijuana in his vehicle after he had exited the vehicle to take a field sobriety test.[167] The court granted Irwin's motion to suppress the evidence on the finding that the stop and search were unlawful.[168]

The *Irwin* court summarized the Indiana law by stating:

> "Our society has a right to protect itself. What is 'unreasonable' under the Fourth Amendment is a function of the totality of conditions existing within our society at any moment in history. Social interests under the police power should give law officers the right to stop users of the highways to check, for instance, their right to use the highway or to check the vehicles for safety standards."[169]

The court continued, stating that "[c]onsequently, no one questions the right of law enforcement officers to establish a roadblock to conduct a routine traffic check of all vehicles and drivers passing through that point during a given period of time."[170]

Because of the amount of discretion allowed to the officers, the subjective intrusion of the defendant's privacy rights, and the lack of articulable suspicion in making the arrest, the court's decision appears to be sound. But the dicta concerning the permissibility of the use of roadblocks is not based on any Indiana or federal precedent.[171] The

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[164] *Id.* at 681 n.3, 383 N.E.2d at 1089 n.3; *see also supra* note 70 and accompanying text.

[165] 178 Ind. App. at 678-79, 383 N.E.2d at 1087-88.

[166] *Id.* at 679, 383 N.E.2d at 1087-88.

[167] *Id.*, 383 N.E.2d at 1088.

[168] *Id.* at 676-80, 383 N.E.2d at 1087-88. The court assumed arguendo that the seizure of the defendant was permissible, but objected to the procedures used by the officers in conducting the search of the defendant's vehicle.

[169] *Id.* at 681, 383 N.E.2d at 1089 (quoting Williams v. State, 261 Ind. 547, 551-52, 307 N.E.2d 457, 460 (1974)).

[170] 178 Ind. App. at 681, 383 N.E.2d at 1089.

[171] The *Irwin* decision was decided before Delaware v. Prouse, 440 U.S. 648 (1979), which is the leading United States Supreme Court case concerning the constitutional permissibility of roadblocks.

court failed to utilize a balancing of interests approach concerning the constitutional issues which roadblocks involve. No analysis of the procedures used to conduct the roadblock was made to determine the subjective intrusion caused to the defendant involved. As a result, the court's reasoning behind its decision does not correlate with the methods used by courts today. Hence, the precedential value of this decision is quite limited.

As illustrated by these cases, Indiana recognizes the constitutionality of investigatory stops. Moreover, Indiana recognizes the ability of law enforcement agencies to conduct roadblocks. While this position may generally conform to the *Prouse* decision,[172] the mode of analysis to be used by Indiana courts in evaluating the constitutionality of procedures used to conduct roadblocks remains confused and unclear.

V. The Use of Roadblocks in Indiana

Numerous roadblocks have been conducted throughout the State of Indiana for various purposes during the last three years in response to a precedent set by the Marion County Prosecutor's Office. The most recent and articulate analysis of the constitutional permissibility of roadblocks in Indiana is illustrated in *State v. McLaughlin*,[173] a case involving a roadblock conducted in Tippecanoe County. The defendant was stopped during a roadblock admittedly conducted to detect drunk drivers. This particular roadblock stopped 115 cars which resulted in three arrests for driving while intoxicated. The officer responsible for conducting the roadblock, a sergeant with the Indiana State Police with sixteen and one-half year's experience, testified that he was solely responsible for the selection of the site of the roadblock. Authorization for the roadblock was pursuant to a directive from the Indiana State Police headquarters in Indianapolis. The officer also admitted that the only guidelines which he incorporated into the administration of the roadblock were those provided by the Marion County Prosecutor's Office.[174]

The procedures used in conducting this roadblock included the presence of several police cars parked alongside the roadway. After the

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[172]*See supra* notes 49-71 and accompanying text.

[173]Cause No. TC-MT 9515-82, (Tippecanoe County Ct.,), *aff'd on other grounds*, 471 N.E.2d 1125 (Ind. Ct. App. 1984). *See Infra* note 190.

[174]Brief for Appellant at 5, 16, Exhibit 1, State v. McLaughlin, Cause No. TC-MT 9515-82. The officer referred to guidelines printed in *Prosecutor's Review*, a monthly publication of the Marion County Prosecutor's Office. This publication analyzed *Delaware v. Prouse*. The subject was stated as "Roadblocks to Check for Traffic Violations." This newsletter stressed that the stops must be systematic, although not all vehicles must be stopped. The newsletter also advised that the roadblock stops should be as reasonable and unobtrusive as possible. In addition, the newsletter discussed further detention after the initial investigatory stop and determination of probable cause. The total length of the newsletter was one page.

vehicles were stopped, the drivers were asked to produce their driver's license and registration. If everything was in order, the driver was allowed to proceed. Each detention lasted approximately one to four minutes. Only when an officer detected the odor of alcohol or some other violation was the driver directed to a secondary detention area for further investigation.[175]

The officer who stopped the defendant stated that the only reason for his detention was the roadblock and that the defendant had not been driving in an unusual or erratic manner. The trooper added that he could not conclusively state that the defendant's ability to drive was impaired. After failing the breathalyzer test, the defendant was indicted for driving while intoxicated, but moved to suppress the evidence alleging that the stop was unconstitutional.[176]

The state's argument emphasized that Indiana has a paramount interest in protecting innocent citizens from the potential harm posed by drunk drivers.[177] It also recognized the balancing of interests analysis used by previous courts,[178] suggesting that the court consider the scope of the intrusion, the manner in which the roadblock was conducted, the justification for initiating the roadblock, and the location at which the roadblock was conducted.[179] The state also pointed to earlier decisions, both state and federal, which permitted similar investigatory stops upon less than probable cause.[180]

The defense invoked the sanctity of the fourth amendment, emphasizing that it provides citizens security against arbitrary intrusion by police and also prevents the use of evidence seized illegally, even though the evidence is logically relevant and essential to conviction.[181] In asserting the defendant's fourth amendment rights, the defense added that such rights are not forfeited by entering an automobile and that a citizen's protection against unreasonable seizures still exists.[182]

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[175]Brief for Appellant at 7-8, State v. McLaughlin, Cause No. TC-MT 9515-82.

[176]Defendant's Statement of Facts at 2, State v. McLaughlin, Cause No. TC-MT 9515-82.

[177]State's Response to Defendant's Motion To Suppress at 3-4, *included in*, Appellant's Pre-Appeal Statement, State v. McLaughlin, Cause No. TC-MT 9515-82 (citing Myrick v. United States, 370 F.2d 901 (5th Cir. 1967)).

[178]*See supra* note 24 and accompanying text.

[179]State's Response to Defendant's Motion To Suppress at 2, *included in*, Appellant's Pre-Appeal Statement, State v. McLaughlin, Cause No. TC-MT 9515-82 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

[180]State's Response to Defendant's Motion To Suppress at 4, *included in*, Appellant's Pre-Appeal Statement, State v. McLaughlin, Cause No. TC-MT 9515-82 (citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Irwin v. State, 178 Ind. App. 676, 383 N.E.2d 1086 (1978); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131 (1980)).

[181]Defendant's Memorandum at 4-5, State v. McLaughlin, Cause No. TC-MT 9515-82.

[182]*Id.*

The defense also noted the differences between the procedures used and those suggested by the *Hilleshiem* court.[183] The location of the roadblock was not a place highly visible and safe for oncoming motorists. No advance warning signs were used to inform approaching motorists of the nature of the impending intrusion. There was no predetermination by administrative personnel of the roadblock's location, time, or procedures to be employed pursuant to carefully formulated standards and neutral criteria. The selection of the site was based merely on the experience of the officer in charge and the fact that this location had been a problem area in the past. As a result, the defendant asserted that, according to the procedures required by the *Hilleshiem* court, the roadblock was constitutionally impermissible.[184]

In his holding, Tippecanoe County Court Judge Kenneth Thayer acknowledged that such a roadblock detention of vehicles is a seizure which triggers the constitutional protection of the fourth and fourteenth amendments.[185] Judge Thayer also acknowledged that there is indeed conflicting dicta and commentary on the constitutional permissibility of roadblock searches:

> However recent dicta suggests regulatory inspections may be acceptable if guided by previously specified Neutral Criteria. . . . The court has been unable to find any guideline that the State of Indiana has established for the Police to follow in conducting investigatory or roadblock stops. The court does not believe the guideline used here qualifies as previously specified Neutral Criteria.[186]

Accordingly, the court granted the defendant's motion to suppress the evidence.[187]

Although the court's decision appears to be correct, the reasoning behind its decision appears unsound. For example, the Superior Court of New Jersey in *State v. Coccomo*[188] upheld the state's roadblock procedures, stating that the detention of every fifth car for drunk driver investigation was a "neutral" seizure involving no police discretion.[188] In the instant case, all approaching vehicles were stopped, eliminating

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[183]*Id.* at 3-4.

[184]*Id.*

[185]Brief for Appellant at 2-3, State v. McLaughlin, Cause No. TC-MT 9515-82.

[186]*Id.* at 3.

[187]*Id. See* Sharp, *Evidence from Police Roadblock Ruled Inadmissible*, The Indianapolis Star, Mar. 24, 1983, at 1, col. 5C. Thayer stated, "Police and prosecutors are on the same side of the fence. Perhaps the state can develop neutral criteria. I'm not going to determine exactly who could do it." Thayer also made reference to the roadblock's pretenses of checking for licenses and registration when actually attempting to detect drunk driving. *Id.*

[188]177 N.J. Super. 575, 427 A.2d 131 (1980).

[189]*Id.* at 583, 427 A.2d at 135.

any officer discretion in the selection of victims. This constitutes a "neutral criteria." However, the court failed to analyze the subjective intrusion involved in the roadblock stops, the physical characteristics contributing to the intrusiveness, or to identify and note any procedures for roadblocks which it viewed as constitutionally permissible.[190]

Roadblocks have also been deployed in the Marion County area. The effectiveness and productivity of such roadblocks has yet to be established. Furthermore, various persons responsible for the administration and implementation of roadblocks have expressed the view that probable cause stops are much more effective than roadblocks conducted to detect drunk drivers.[191] Law enforcement agencies, however, have begun to solicit the public's views, in addition to the views of persons actually detained by roadblocks, regarding the effectiveness and degree of anxiety caused by roadblocks conducted to detect drunk drivers.[192]

The location of roadblocks conducted in Marion County is determined by the desires of the Marion County Prosecutor's Office and the Indianapolis Police Department with the assistance of a traffic computer.[193] No prior judicial approval or authorization for the selection of the roadblock location is necessary. Procedures used to conduct the

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[190]Because of this Note's advanced stage of production, it was not possible to incorporate the Indiana Court of Appeals' decision in State v. McLaughlin, 471 N.E.2d 1125 (Ind. Ct. App. 1984). The reader is urged to review this decision as it presents the most extensivecand current judicial discussion on the drunk driving roadblock issue to date in Indiana.

[191]Lt. Max Brenton, formerly in charge of the Marion County Dangerous Driver Task Force, stated that "roaming policemen have been just as effective as roadblocks as a law enforcement tool. They don't get the publicity of the roadblocks, but they have resulted in arrests of drivers who have tested out with higher Breathalyzer readings." *Police Holiday Roadblocks Result in Arrests*, The Indianapolis Star, Dec. 20, 1982, at 1, col. 3C.

Deputy Prosecutor John Bailey, assigned to the drunk driving cases, stated that, "It's not clear whether the roadblocks or regular probable-cause stops are more effective." Stuteville, *Roadblocks No Fun, But They Get Dangerous Drivers Off The Streets*, The Indianapolis Star, Aug. 16, 1982, at 6, col. 3.

Paul A. Annee, Deputy Chief of the Indianapolis Police Department, noted that three roadblocks in Marion County had resulted in 30 arrests, as opposed to nearly 1000 arrests which had been produced by special probable cause late night patrols. Annee stated that the primary importance of roadblocks is their deterrent effect and their perception by the public. Stuteville, *ICLU Calls Roadblocks Aimed At Drunks Ineffective, Illegal*, The Indianapolis Star, June 2, 1984, at 17, col. 1. *See supra* note 89 (court disallowed roadblock because effective alternative available).

[192]Drivers stopped at roadblock received pamphlets containing questionnaires which could be returned to the police department. The questionnaire included five questions regarding the public views on the deterrent effect on drunk driving caused by roadblocks and the degree of inconvenience caused by the roadblock. The pamphlets also included reasons for the blockade and a list of questions police ask at roadblocks. *Police Give Drivers Chance To Comment*, The Indianapolis Star-News, June 10, 1984, at 6B.

[193]Stuteville, *Police Conducting Computer Study of Drunk Driving*, The Indianapolis Star, Dec. 5, 1983, at 21 (computer primarily used to target late night probable cause patrols); telephone interview with John Bailey, Marion County Deputy Prosecutor (Sept. 22, 1983).

roadblocks are not pursuant to a written policy.[194] Due to a federally funded program, officers have received some training regarding acceptable procedures at roadblocks, but more emphasis has been placed upon drunk driver recognition, a skill to be used in conducting probable cause stops. The officers who do receive this training are then advised to informally instruct the remaining officers who do not receive formal training.[195]

These procedures used to conduct roadblocks do not entirely conform to those suggested by other courts.[196] But until the procedures are evaluated by the courts in Indiana using the modes of analysis established by other jurisdictions, the constitutional permissibility of the procedures will remain unclear and Indiana's law on roadblocks will be left undeveloped.

VI. Analysis and Suggested Procedures for Roadblocks

The Indiana courts or legislature need to expressly promulgate procedures for constitutionally permissible roadblocks because case law is insufficient to adequately determine what is acceptable.[197] When confronted with cases involving roadblocks, courts need to concentrate on

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[194]Stuteville, *Roadblocks No Fun But They Get Dangerous Drivers Off The Streets, supra* note 191, at 1, 6. Procedures for roadblocks used by the Marion County Dangerous Driver Task Force included: 1) police lined right lane of street with flares stretching fifteen car lengths from the intersection; 2) squad cars were located before and after the roadblock as pursuit vehicles; 3) left lane of street was left open to allow traffic through which was not stopped; 4) eight to twelve policemen positioned themselves on both sides of the right lane where cars were checked; 5) the first officer asked drivers to have licenses and registration papers ready for the two officers at the end of the line; 6) police diverted ten cars at a time and then let other traffic pass; 7) police checked the interior of the halted vehicles for liquor, weapons, or other contraband; 8) police monitored actions of occupants for sudden attempts to conceal contraband; 9) least amount of time any group of ten vehicles was detained was eight minutes; 10) at end of line, policeman leaned into the vehicle to ask for "papers" after identifying himself and explaining the purpose of the stop; 11) police asked drivers if they had been drinking and if so how much, and if they were transporting any liquor, drugs, or weapons. This particular roadblock was located on a street in the middle of the block and the detention area was on a dead end street. *Id.*

[195]City, county, and state law enforcement officials announced that Indianapolis was the recipient of a one year $75,000 federally funded program to reduce alcohol related deaths by removing drunk drivers from the road. Indianapolis was one of three cities selected by the National Traffic Safety Council for program funding. The funding was used to train local law enforcement officers to increase their abilities to stop, arrest, and process drunk drivers. Roadblock screening and processing techniques were also taught. Better equipment, such as portable breathalyzers and a computer to analyze and identify chronic drunk drivers and locations where alcohol related incidents occur, will be acquired using program funds. *Roadblocks Slated To Stop Intoxicated*, The Indianapolis Star, May 31, 1984, at 21; Trusnik, *Program Aimed at Drinking Drivers*, The Indianapolis News, April 30, 1984, at 1.

[196]*See, e.g., supra* notes 93, 119, 146.

[197]*See supra* note 126 and accompanying text.

the tests used to evaluate the permissibility of the roadblock: a balancing of interests test which incorporates the elements of subjective intrusion and officer discretion.[198] If courts do not consider the subjective intrusiveness as well as the element of officer discretion, many roadblock intrusions may be upheld which are grossly unreasonable under the fourth amendment.[199] Written procedures are stressed because in this manner, officer discretion may be further reduced.[200] In addition, motorists must be aware of the constraints on officer discretion; drivers must perceive a pattern of systematic detentions to assure them that they are not being "singled out." Visible signs of state authority reduce motorists' fright and apprehension.[201]

When determining the amount of subjective intrusion caused to motorists or the level of officer discretion exhibited in the field, application of precedent involving roadblocks designed to detect illegal aliens or public safety law offenders to cases involving roadblocks to detect drunk drivers may not be justifiable or correct. Apprehension and detection of intoxicated drivers usually requires extended investigation involving a variety of field sobriety or chemical tests. This intrusion goes far beyond the brief questioning of motorists or display of documents at immigration checkpoints, which requires no individualized suspicion.[202] Additionally, driving while under the influence of alcohol is a criminal offense compared to the mere infraction involved in the violation of public safety laws.

The other side of the balancing of interests test requires the courts to weigh the state's interest in justifying the roadblock. This interest is then "balanced" against the resulting intrusion upon the individual's privacy rights. Rarely do roadblocks designed to detect drunk drivers fail to promote a legitimate state interest. However, a roadblock should not be used if a less intrusive alternative enforcement method exists.[203]

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[198] *See supra* note 24.

[199] Note, *supra* note 72, at 1475. *Compare* United States v. Prichard, 645 F.2d 854 (10th Cir.), *cert. denied*, 454 U.S. 832 (1981); People v. John BB, 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982) (court upheld roadblock without analyzing amount of subjective intrusion caused by roadblock).

[200] *See, e.g., supra* note 147 and accompanying text. *See also* People v. Scott, 122 Misc. 2d 731 (1983) (roadblock's constitutionality upheld; written guidelines used for implementation of roadblock); Garrett v. Goodwin, 569 F. Supp. 106 (E.D. Ark. 1982) (court required Arkansas State Police to promulgate written policy governing the administration of license and registration roadblocks).

[201] United States v. Ortiz, 422 U.S. 891 (1975) (motorists less annoyed by intrusion when detention of other vehicles observed); United States v. Maxwell, 565 F.2d 596 (9th Cir. 1977) (routine vehicle detention of little comfort to motorists who know nothing about systematic plan because of light traffic on highway); United States v. Martinez-Fuerte, 428 U.S. 543, 558-59 (1976) (appearance, as well as actuality, of limited police discretion is important because of the appearance of limited discretion affects subjective intrusion of roadblock).

[202] Note, *supra* note 72, at 1485.

[203] *See supra* note 89 and accompanying text.

The fourth and fourteenth amendment rights of intoxicated drivers are just as important as those individuals who have completed other crimes in which probable cause is a prerequisite to their arrest. Hence, courts need to focus on the use of roadblocks designed to detect drunk drivers and formulate a mode of analysis which clearly eliminates the inappropriate application of the analysis used in immigration roadblock cases to cases involving roadblocks conducted to detect drunk drivers.

Numerous procedures exist which could be used to reduce the subjective intrusion of roadblocks conducted for the purpose of detecting drunk drivers. Roadblock location should be chosen so as to ensure the safety of motorists.[204] Advance publication of the date on which roadblocks will be conducted would reduce the anxiety of motorists but not decrease the deterrent effect.[205] Warning signs should be used to notify motorists of the impending intrusion;[206] roadblocks could be situated so the motorist has no opportunity to avoid the investigatory stop after being informed of its purpose.[207] Floodlights should be used for nighttime roadblock operations because inadequate illumination contributes to motorist anxiety and increases danger.[208]

The location of roadblocks should be decided by administrative officials and, in addition, be pursuant to a judicial warrant. Although it has been established that there is no need for individualized suspicion in legitimate roadblock operations,[209] a judicial warrant would decrease the possibility of discretionary manipulation in the location selection process. Administrative personnel should have to substantiate their request for the location of a roadblock with empirical data. The judge could then assess the suggested roadblock sites to evaluate discriminatory effects and to minimize the fright and apprehension of potentially detained motorists.[210]

Results of roadblock operations should be logged in order to assess their effectiveness and productivity. As the roadblock's deterrent effect increases, fewer drunk drivers will be apprehended and hence, the roadblock's productivity will decrease. As a result, the roadblock operations

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[204]State v. Hilleshiem, 291 N.W.2d 314, 318 (Iowa 1980); Commonwealth v. McGeoghegan, 389 Mass. 137, 141, 449 N.E.2d 349, 352 (1983); NHTSA Issue Paper, *supra* note 6, at 12 (roadblocks should not create greater traffic hazard than the drunk driving they are trying to curtail).

[205]State ex rel Ekstrom v. Justice Court of State, 136 Ariz. 1, 10, 663 P.2d 992, 1001 (1983), (Feldman, J., specially concurring).

[206]State v. Deskins, 234 Kan. 529, 545, 673 P.2d 1174, 1187-88 (1983) (Prager, J., dissenting) (signs should be used to give approaching motorists advance warning to reduce anxiety and subjective intrusion). *See also supra* note 99 and accompanying text.

[207]*See* NHTSA Issue Paper, *supra* note 6, at 13 (warning signs logically should be placed to give advance warning, but not provide opportunity to avoid checkpoint).

[208]State v. Coccomo, 177 N.J. Super. 575, 583, 427 A.2d 131, 135 (1980); Commonwealth v. McGeoghegan, 389 Mass. 137, 142, 449 N.E.2d 349, 353 (1983).

[209]United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

[210]Note, *supra* note 72, at 1484; State v. Olgaard, 248 N.W.2d 392, 395 (S.D. 1976).

will affect the privacy rights of more and more completely innocent persons. The productivity of the stops affects the balancing of interests analysis used by the courts. The state's interest in conducting roadblocks will be much less if there are substantially fewer drunk drivers on the road because the potential for accidents and injuries caused by drunk drivers will be decreased. Individual privacy rights will be increasingly affected as more innocent persons are subjected to roadblock operations designed to detect drunk drivers. Inevitably, the scales upon which individuals' fourth and fourteenth amendment interests are balanced against the state's interests in reducing drunk driving will tip in favor of the individuals. Drunk driving will be substantially reduced and individuals shall be free from detentions caused by roadblocks conducted to detect drunk drivers.[211]

VII. Conclusion

Roadblocks designed to detect drunk drivers are constitutionally permissible when conducted pursuant to certain procedures and guidelines which prevent excessive intrusion on citizens' constitutionally guaranteed privacy rights. Merely limiting officer discretion does not necessarily decrease the subjective intrusion upon these individual privacy rights. Adoption of procedures which focus on the physical characteristics of roadblocks and which cause minimal fear and anxiety to the motorist is essential to establish uniformity and constitutionality.

There is no question that the state has a legitimate interest in reducing deaths, injuries, and property damage caused by drunk driving. However, individuals also have a valid interest in assuring that their privacy rights are not disregarded by government agencies and officials. The general method to determine the constitutional permissibility of roadblocks as set forth by the courts entails a balancing of interests test: the state's interest in law enforcement is balanced with the individual's privacy interest. In this manner, the constitutionality of specific roadblocks may be affected by the particular differing interests involved. Consequently, this mode of analysis will serve to protect individual privacy rights while allowing the state's enforcement of drunk driving laws.

Bradley S. Fuson

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[211]Points not discussed in this Note but meriting consideration relate to the specific objectives of roadblocks designed to detect drunk drivers. Questions remain as to whether roadblocks should be used to detect and apprehend drunk drivers or merely serve as a deterrent to drunk driving. Additional questions arise concerning what constitutes a drunk driver. Some definitions require that the individual's driving abilities be substantially impaired, while others simply define a drunk driver as an individual's who is unable to pass a chemical sobriety test. These questions must be answered before drunk driver-roadblock issues can be entirely resolved. *See* Note, *supra* note 72, at 1471 n.103 and accompanying text.