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## DUI Roadblocks: Drunk Drivers Take a Toll on the Fourth Amendment, 19 J. Marshall L. Rev. 983 (1986)

Lazaro Fernandez

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## COMMENTS

### DUI ROADBLOCKS: DRUNK DRIVERS TAKE A TOLL ON THE FOURTH AMENDMENT

Drunk driving is a problem of immense proportions.<sup>1</sup> Consequently, public pressure has been mounting on law enforcement agencies to crack down on the drunk driver.<sup>2</sup> Congress and most state legislatures have responded by enacting legislation providing much harsher driving under the influence (DUI) penalties.<sup>3</sup> Simulta-

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1. In the decade prior to 1982 over 250,000 people were killed in alcohol related accidents in America. *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992, 999 (1983) (Feldman, J., specially concurring) (citing *Federal Legislation to Combat Drunk Driving Including National Driver Register: Hearing On S.671, S.672, S.2158 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce Science & Transportation*, 97th Cong., 2nd Sess. 65 (1982)). Moreover, in 1980, over 650,000 people were injured in alcohol related accidents. *Id.* Between 55-65% of the drivers killed in single-vehicle accidents have blood alcohol content (BAC) levels above the legal limit. *Ekstrom*, 663 P.2d at 999, (Feldman, J., specially concurring) (citing *Alcohol, Drugs & Driving: Hearing to Examine What Effect Alcohol & Drugs Have on Individuals While Driving Before the Subcomm. on Alcoholism & Drug Abuse of the Senate Comm. on Labor & Human Resources*, 97th Cong., 2nd Sess. 1 (1982)).

2. Recent years have seen the emergence of very powerful political lobbying groups committed to eliminating drunk driving. See generally *Driving Drunks Off the Road*, *Changing Times*, July 1982, at 50, 50-52 (discussion of anti-drunk driving lobbying groups). These groups include, Mothers Against Drunk Driving (MADD), Students Against Drunk Driving (SADD) and Remove Intoxicated Drivers (RID). *Id.*

3. See 233 U.S.C. § 408 (1982), where Congress has conditioned highway and transportation grants to the states on the states passing strict DUI laws. For example, subsection (3)(e)(1) provides:

For purposes of this section, a State is eligible for a basic grant if such state provides — (A) for prompt suspension, for a period not less than ninety days in the case of a first offender and not less than one year in the case of any repeat offender, of the driver's license of any individual who a law enforcement officer has probable cause under State law to believe has committed [sic] an alcohol-related traffic offense, and (i) to whom is administered one or more chemical tests to determine whether the individual was intoxicated while operating the motor vehicle and who is determined, as a result of such tests, to be intoxicated, or (ii) who refuses to submit to such a test as proposed by the officer; (B) for a mandatory sentence, which shall not be subject to suspension or probation, of (i) imprisonment for not less than forty-eight consecutive hours, or (ii) not less than ten days of community service, of any person convicted of driving while intoxicated more than once in any five-year period; (C) that any person with a blood alcohol concentration of 0.10 or greater when driving a motor vehicle shall be deemed to be driving while intoxicated; and (D) for increased efforts or resources dedicated to the enforcement of alcohol

neously, state and local law enforcement agencies have developed and are employing DUI roadblocks in response to the increased public pressure.<sup>4</sup>

The imposition of roadblocks to investigate DUI, however, implicates the very core of the fourth amendment<sup>5</sup> because literally thousands of drivers are subject to seizure<sup>6</sup> without probable cause or any individualized suspicion.<sup>7</sup> In effect all motorists approaching a DUI roadblock are presumed drunk until they prove otherwise. Supporters of DUI roadblocks seek to justify the suspicionless seizure of drivers because drunk driving is such a tremendous national problem.<sup>8</sup> Although the severity of the problem cannot be questioned, narcotics, theft, and violent crimes also pose serious national problems.<sup>9</sup> If suspicionless seizures of persons at DUI road-

related traffic laws and increased efforts to inform the public of such enforcement.

*Id.* States have enacted legislation to comply with the above requirements. *See, e.g., ILL. REV. STAT. ch. 95 ½ par. 11-501 (1985)* (state statute conforms to minimum requirements of federal law).

4. An indication of the recent popularity of DUI roadblocks is that the overwhelming majority of cases contesting the constitutionality of the roadblocks have taken place in the last four to five years. *See, e.g., State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983); *Jones v. State*, 459 So.2d 1068 (Fla. Dist. Ct. App. 1984); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984); *State v. Kirk*, 202 N.J. Super. 28, 493 A.2d 1275 (1985).

5. The fourth amendment provides:

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

U.S. CONST. amend. IV.

6. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the United States Supreme Court held that "stopping an automobile and detaining its occupants constitute[s] a 'seizure' within the meaning of [the fourth amendment] even though the purpose of the stop is limited and the resulting detention quite brief." *Id.* at 653. *Accord* *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (roadblock stop constitutes a seizure).

7. *See Jones v. State*, 459 So.2d 1068, 1071 (Fla. Dist. Ct. App. 1984) *aff'd*, No. 66, 373 (Fla. Feb. 20, 1986) (available Mar. 24, 1986, on LEXIS, States library, Fla. file). In *Jones* the district court stated that because all motorists are stopped at DUI roadblocks regardless of any level of suspicion the vast majority of those stopped are not driving under the influence. *Id.* The Court then provided:

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

*Id.* (quoting *Ekstrom*, 663 P.2d at 997 (Feldman, J., specially concurring)).

8. *See supra* note 1 for information concerning the extent of the drunk driving problem. *See also infra* notes 60-63 and accompanying text.

9. For example, in 1983, in cities with populations of 250,000 persons or more, there were 1,294 violent crimes for every 100,000 persons. U.S. BUREAU OF THE CEN-

blocks are constitutional, then, under like reasoning, suspicionless non-arbitrary searches and seizures to uncover evidence of narcotics possession or burglary would also be constitutional.<sup>10</sup> The suspicionless seizure of persons creates grave constitutional implications. Unfortunately, a substantial majority of the courts that have examined DUI roadblocks have not carefully analyzed the constitutionality of the roadblocks.<sup>11</sup>

Generally, the courts have focused on the procedural features of the particular roadblock in question rather than how the roadblocks implicate the person's right to privacy.<sup>12</sup> For example, courts have considered who determined the location of the roadblock, whether objective criteria were used in deciding which cars to stop and whether adequate lighting and safety precautions existed.<sup>13</sup> Although procedural safeguards are very important and should not be minimized, the courts have overemphasized the procedural aspects of DUI roadblocks and have not adequately examined their substantive constitutional validity.<sup>14</sup> This comment will first examine the constitutionality of DUI roadblocks under the general fourth

SUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1985 168 (105th ed. 1984).

10. *Ekstrom*, 663 P.2d at 997 (Feldman, J., specially concurring). If suspicionless seizures of persons can be maintained to investigate DUI, then presumably similar stops of all persons could be maintained to investigate other crimes. *See also infra* notes 156-60 and accompanying text.

11. The majority of courts that have considered the constitutionality of DUI roadblocks have concentrated on features which limit the discretion of the officers that work the roadblocks and features that promote the safety of the stops. *See, e.g.*, *Jones v. State*, 459 So.2d 1068, 1078-81 (Fla. Dist. Ct. App. 1984) (struck down roadblock because it did not have the necessary objective criteria) *aff'd* No. 66, 373 (Fla. Feb. 20, 1986) (available Mar. 24, 1986, on LEXIS, States library, Fla. file); *State v. Hilleshiem*, 291 N.W.2d 314, 318-19 (Iowa 1980) (struck down roadblock which did not match criteria); *State v. Cloukey*, 486 A.2d 143 (Me. 1985) (upholding a roadblock because objective criteria were satisfied); *People v. Peil*, 122 Misc. 2d 617, 471 N.Y.S. 2d 532, 534 (Crim. Ct. 1984) (upholding roadblock because necessary elements were present). *Compare* *Commonwealth v. Trumble*, 396 Mass. 81, 483 N.E.2d 1102 (1985) (Supreme Court of Massachusetts upholds a roadblock because it was conducted pursuant to specific guidelines) *with* *Commonwealth v. McGeoghan*, 389 Mass. 137, 449 N.E.2d 349 (1983) (Supreme Court of Massachusetts struck down roadblock because not carried out pursuant to specific guidelines).

12. *See supra* note 11.

13. *See, e.g.*, *People v. Bartley*, 109 Ill. 2d 273, 288-92, 486 N.E.2d 880, 887-89 (1985) (supervisory personnel selected roadblock site, vehicles stopped in preestablished fashion, and guidelines in conducting roadblock existed); *Peil*, 122 Misc. 2d 617, 471 N.Y.S. 2d at 534 (stop was not arbitrary, it was made pursuant to a plan supervisors devised).

14. Only the Court of Criminal Appeals of Oklahoma has ruled that the suspicionless seizure of motorists at DUI roadblocks is *per se* violative of the fourth amendment. *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984). The *Smith* court held that such suspicionless seizures "draw dangerously close to what may be referred to as a police state." *Id.* at 564. The *Smith* court recognized that the wholesale suspicionless seizure of thousands of innocent people to investigate DUI is fundamentally repugnant to the constitution no matter that police discretion may be somewhat circumscribed. *Id.* at 564-65.

amendment reasonableness test that the United States Supreme Court is increasingly employing to replace its "conventional" fourth amendment analysis.<sup>15</sup> Next, this comment will analyze two major exceptions to the general individualized suspicion requirement.<sup>16</sup> Finally, this comment will examine the root of much confusion concerning DUI roadblocks; the undue weight that courts have given dictum from a relevant Supreme Court decision.<sup>17</sup> This comment concludes that because there exist methods to advance the public interest without the wholesale seizure of thousands of motorists, DUI roadblocks unduly interfere with the traveling public's right under the fourth amendment to be free from unreasonable seizure.<sup>18</sup>

### I. DUI ROADBLOCKS UNDER THE REASONABLENESS TEST

Long before the Supreme Court started to employ the reasonableness balancing test in fourth amendment jurisprudence, it employed "conventional" fourth amendment analysis.<sup>19</sup> Under conventional fourth amendment jurisprudence, searches and seizures occurring without a warrant or probable cause were presumed unreasonable and were, therefore, unconstitutional.<sup>20</sup> This is because the reasonableness of a search or seizure, depends in part on the specific commands of the fourth amendment's warrant clause.<sup>21</sup> There are, however, a few "jealously guarded and carefully drawn"<sup>22</sup> exceptions to the warrant and probable cause requirements.<sup>23</sup> These

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15. See *infra* notes 19-101 and accompanying text.

16. See *infra* notes 102-49 and accompanying text.

17. See *infra* notes 150-61 and accompanying text.

18. See *infra* notes 161-63 and accompanying text.

19. See *infra* notes 20-25 and accompanying text (discussion of conventional view of fourth amendment).

20. See *United States v. United States District Court*, 407 U.S. 297, 315 (1971). See also *Texas v. Brown*, 460 U.S. 731, 744-46 (Powell, J., concurring). See generally Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 601 (1982) (thorough analysis of warrant and probable cause requirement of the fourth amendment and historical reasons for it); Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 281-320 (1984) (excellent discussion of the competing interpretations of the fourth amendment and reasons therefor).

21. *United States District Court*, 407 U.S. at 297. This view, which has been described as the "conventional view," has been accepted by the Supreme Court in the majority of the fourth amendment jurisprudence. See, e.g., *Collidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) where the Court stated that "searches conducted . . . without prior approval by a judge or magistrate, are *per se* unreasonable under the fourth amendment, subject to only a few specifically established and well delineated exceptions." (emphasis added) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). See generally Wasserstrom, *supra* note 20 at 282-83 (excellent discussion of fourth amendment's warrant requirement).

22. *Collidge*, 403 U.S. at 455 (quoting *Jones v. United States*, 375 U.S. 493, 494 (1958)).

23. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court created a very limited exception to the probable cause requirement. The Court noted that when an

include, for example, *Terry*-type stop and frisk searches,<sup>24</sup> and searches and seizures occurring when individuals cross the border into the United States.<sup>25</sup> DUI roadblocks, however, do not fall within any recognized exception to the warrant and probable cause requirement, and drivers are routinely seized at DUI roadblocks without a warrant or probable cause. Under the conventional fourth amendment analysis, therefore, DUI roadblocks would violate the fourth amendment.

The United States Supreme Court, however, has recently moved away from this conventional analysis. The trend instead has been to employ a balancing test in order to examine the "reasonableness" of a search or seizure.<sup>26</sup> The Court has not directly addressed the constitutionality of DUI roadblocks but it would likely examine them under the balancing test, because the Court has expressly held that the balancing test applies to all seizures which fall short of traditional arrests.<sup>27</sup>

In this context, reasonableness depends on a balance between the public interest in highway safety and the individual's right to personal security and privacy.<sup>28</sup> Several factors must be weighed in

"officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous" it would be unreasonable to require the officer to procure a search warrant. *Id.* at 24. The *Terry* Court stated that "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.

Another exception is the border search exception created in *Boyd v. United States*, 116 U.S. 616 (1886) and expanded in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1972) and *United States v. Ramsey*, 431 U.S. 606 (1977). The rationale behind the exception is historical, and is based on the unique circumstances which occur at the border. *Boyd*, at 623. These include the government's interest in maintaining the integrity of the border and the government's national self-protection interests coupled with the individual's lower expectation of privacy at the border. See generally *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3309-10 (1985) (border search not subject to usual fourth amendment restraints); *Ramsey*, 431 U.S. at 617 (same). Other exceptions include administrative searches, *Camara v. Municipal Court*, 387 U.S. 523 (1967) (for discussion of *Camara* see *infra* notes 107-22 and accompanying text) and document inspections aboard seagoing vessels, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

24. *Terry v. Ohio*, 392 U.S. 1 (1968). See also *supra* note 23 (brief discussion of *Terry*).

25. See *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985). See also *supra* note 23 for brief discussion of border searches.

26. See, e.g., *Montoya de Hernandez*, 105 S. Ct. 3304 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Delaware v. Prouse*, 440 U.S. 648 (1979). See generally *Wasserstrom*, *supra* note 20, at 309 (asserting that Justices Rehnquist, Burger, and O'Connor would likely be willing to test all types of police intrusions against the test of general reasonableness).

27. See *Dunaway v. New York*, 442 U.S. 200, 210 (1979) (seizures which are "substantially less intrusive than arrests"). See also *Brown v. Texas*, 443 U.S. 47, 50 (1979) (brief detention short of traditional arrest); *Terry*, 392 U.S. at 20 (brief stop and frisk short of arrest).

28. *Brown*, 443 U.S. at 50-51. See also *Pennsylvania v. Mimms*, 434 U.S. 106,

the balance. First, the court must consider the "gravity" of the public interest that the seizure seeks to serve.<sup>29</sup> Second, the court must consider the extent to which the seizure advances that public interest.<sup>30</sup> Finally, the court must consider the severity of the interference with the individual's liberty and privacy.<sup>31</sup> Once these factors are considered, the burden falls upon the state to show that a particular seizure is reasonable.<sup>32</sup>

The Supreme Court has decided several cases that provide guidance in analyzing DUI roadblocks under the balancing test.<sup>33</sup> For example, in *United States v. Brignoni-Ponce*,<sup>34</sup> the Court held that a roving border patrol's suspicionless stop of a vehicle in the vicinity of the Mexican border was unreasonable and therefore unconstitutional under the fourth amendment.<sup>35</sup> The Court recognized a legitimate public interest in stemming the flow of illegal aliens, but concluded that to sanction such suspicionless random stops of all vehicles would subject thousands of legitimate travelers to unlimited police interference.<sup>36</sup> The Court ruled that some quantum of indi-

109 (1977).

29. *Brown*, 443 U.S. at 50-51.

30. *Id.* at 51.

31. *Id.* The *Brown* Court went on to state that in weighing these factors concern must be taken so that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.* at 51.

32. See *Delaware v. Prouse*, 440 U.S. 648, 658-61 (1979). The *Prouse* Court required empirical data from the state showing that the intrusion sought to be justified was effective and reasonable. *Id.* at 659. *Accord* *Koonce v. State*, 651 S.W.2d 46, 46-48 (Tex. Ct. App. 1983) (burden is on the state to show facts authorizing warrantless seizure).

33. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979) (Supreme Court uses balancing test in holding a suspicionless random stop of vehicle for driver's license check unconstitutional); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (Court uses balancing test in upholding suspicionless stops at a permanent immigration checkpoint near the Mexican border); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Court uses balancing test in holding a suspicionless random seizure of vehicle for immigration check unconstitutional). See also *United States v. Almeida-Sanchez*, 413 U.S. 266 (1973). *Almeida-Sanchez* concerned a random stop of a vehicle near the Mexican border by the border patrol to search the vehicle. The Court used the balancing analysis and concluded that the search violated the fourth amendment. *Id.* at 273. Because *Almeida-Sanchez* was a search case rather than a seizure case it is not as useful for analyzing DUI roadblocks. For a discussion of *Brignoni-Ponce*, *Martinez-Fuerte*, and *Prouse*, see *infra* notes 34-59 and accompanying text.

34. 422 U.S. 873 (1975).

35. *Id.* at 886-87. The *Brignoni-Ponce* Court required a "reasonable suspicion" to justify random roving-patrol stops. *Id.* at 882. The officers possessed no suspicion, therefore, the stop was not justified and violated the fourth amendment.

36. *Id.* at 882. The Court stated:

To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of border patrol officers. *Id.* Cf. *Jones v. State*, 459 So.2d 1068, 1071 (Fla. Dist. Ct. App. 1984) (the vast majority of motorists stopped at DUI roadblocks are *not* under the influence of alcohol).

visualized suspicion was required to justify a roving border patrol stop of a vehicle.<sup>37</sup>

Two years later in *United States v. Martinez-Fuerte*<sup>38</sup> the Court confronted a fourth amendment challenge to a permanent immigration checkpoint.<sup>39</sup> Using the balancing test, the Court recognized the same legitimate public purpose as in *Brignoni-Ponce*.<sup>40</sup> *Martinez-Fuerte* was different, however, because stops at a permanent checkpoint were less intrusive than the roving patrol stops in *Brignoni-Ponce*.<sup>41</sup> The *Martinez-Fuerte* Court explained that while the "objective intrusion"<sup>42</sup> of the checkpoint stop was the same as in a roving patrol stop, the "subjective intrusion"<sup>43</sup> of the checkpoint stop was not as great.<sup>44</sup> According to the Court, drivers stopped at a permanent checkpoint would not be as apprehensive or fearful about being stopped because it would not be any surprise to be stopped because the checkpoint location would be widely known.<sup>45</sup> Moreover, officers manning a permanent immigration checkpoint possessed less discretion than roving border patrol officers because at the permanent checkpoint officers could not subjectively determine which cars to stop.<sup>46</sup> The *Martinez-Fuerte* Court concluded that the balance of interests weighed heavily in the government's favor and held that the suspicionless stops were reasonable.<sup>47</sup>

37. *Brignoni-Ponce*, 422 U.S. at 886-87. See also *supra* note 35 (discussing the required level of suspicion).

38. 428 U.S. 543 (1976).

39. *Id.* at 545.

40. *Id.* at 551-52. The public purpose was to prevent the illegal entry of undocumented aliens. *Id.*

41. *Id.* at 558-59.

42. *Id.* at 558. The *Martinez-Fuerte* Court defined "objective intrusion" as the stop itself, the questioning and the visual inspection which takes place at the checkpoint. *Id.*

43. *Id.* The Court explained that "subjective intrusion" was "the generating of concern or even fright on the part of lawful travelers." *Id.*

44. *Id.* In *Martinez-Fuerte* the Court concluded that the subjective intrusion of the immigration checkpoint was "appreciably less" than the subjective intrusion in *Brignoni-Ponce*. *Id.*

45. *Id.* at 559. The Court stated that, "[m]otorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere." *Id.* Cf. *People v. Bartley*, 109 Ill. 2d 273, 291, 486 N.E.2d 880, 888 (1985) (advance publicity of police intentions to conduct DUI roadblocks lessens the subjective intrusion because motorists would be less likely to be surprised); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174, 1182 (1983) (advance warning signs on the highway and publicity in the media would lessen the subjective intrusion).

46. *Martinez-Fuerte*, 428 U.S. at 559. Because all cars passing through the checkpoint were stopped the officers at the checkpoint had less discretion than roving patrols. *Id.* Moreover, for the same reasons there was less room for harassing and abusive stops at the permanent checkpoint. *Id.*

47. *Id.* at 562. The *Martinez-Fuerte* Court went on to limit the extent of its holding by stating that, "our holding today is limited to the type of stops described in this opinion. Any further detention . . . must be based on consent or probable cause." *Id.* at 567 (quoting *Brignoni-Ponce*, 422 U.S. at 882).



In 1979, the Court decided *Delaware v. Prouse*.<sup>48</sup> In *Prouse*, a local police officer randomly stopped a vehicle to check the driver's license and the vehicle registration.<sup>49</sup> The officer conceded that he did not have any individualized suspicion as to the driver or the vehicle.<sup>50</sup> The Court initially recognized that a stop of a vehicle is a "seizure" for fourth amendment purposes regardless of its purpose or duration.<sup>51</sup> The Court then noted that the state had a legitimate interest in ensuring that the drivers on its highways were qualified and that their vehicles were maintained in safe operating condition.<sup>52</sup> The *Prouse* Court concluded, however, that random stops, unsupported by individualized suspicion were too intrusive and did not adequately serve the public interest.<sup>53</sup> The Court stated that, stopping vehicles upon observed violations would be a more effective and less intrusive alternative to such suspicionless stops.<sup>54</sup> The Court therefore held that a random stop of the vehicle and seizure of its occupants, regardless of brevity, without an articulable and individualized suspicion that a vehicle or its driver is in violation of law, violated the fourth amendment.<sup>55</sup>

These cases show that when a vehicle is stopped and its occupants are seized, the fourth amendment requires an articulable and individualized suspicion of wrongdoing unless the stop involves no element of surprise,<sup>56</sup> the stop is made for an administrative purpose,<sup>57</sup> and the stop involves limited police discretion.<sup>58</sup> At DUI

48. 440 U.S. 648 (1979).

49. *Id.* at 650.

50. *Id.* at 650-51. The officer stated that the stop was "routine" and that "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." *Id.*

51. *Id.* at 653. See also *Martinez-Fuerte*, 428 U.S. at 556-58; *Brignoni-Ponce*, 422 U.S. at 878.

52. *Prouse*, 440 U.S. at 658.

53. *Id.* at 659.

54. *Id.* The *Prouse* Court stated:

The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained. Furthermore, drivers without licenses are presumably the less safe drivers whose propensities may well exhibit themselves. Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers.

*Id.*

55. *Id.* at 663.

56. *Cf. Martinez-Fuerte*, 428 U.S. at 559 (motorists not taken by surprise because checkpoint is permanent and its location widely known).

57. See *infra* notes 107-22 and accompanying text (comparing DUI roadblocks to administrative searches). See also *Camara v. Municipal Court*, 387 U.S. 523 (1967) (Court creates administrative search exception).

58. *Cf. Martinez-Fuerte*, 428 U.S. at 559 (police have little discretion because

roadblocks, however, approaching motorists are surprised, are not examined for an administrative purpose but for evidence of criminal activity, and substantial discretion remains with the police.<sup>59</sup> Therefore, under the teaching of these cases the constitutionality of DUI roadblocks is extremely suspect. Moreover, upon weighing the three factors that the Court's balancing test mandates, the unconstitutionality of DUI roadblocks becomes clear.

#### A. *The "Gravity" of the Public Interest*

In applying the balancing test in the context of DUI roadblocks, the first factor to consider is the gravity of the public purpose the seizure seeks to serve.<sup>60</sup> It is beyond dispute that the state has a legitimate public interest in preventing the deaths and injuries that drunk drivers cause.<sup>61</sup> The Supreme Court has recognized these legitimate concerns on numerous occasions.<sup>62</sup> Nevertheless, a legitimate public interest concerning a problem of great magnitude is, without more, insufficient to justify wholesale intrusions into people's privacy. For such intrusions to be justified, the intrusions must also advance the public interest in an effective manner.<sup>63</sup>

#### B. *DUI Roadblocks' Effectiveness in Advancing the Public Interest*

DUI roadblocks have been described as "woefully deficient" in their effectiveness at apprehending drunk drivers.<sup>64</sup> The available data indicate that DUI roadblocks are grossly ineffective at uncovering persons who are driving under the influence.<sup>65</sup> The Supreme Court recognized that the roving suspicionless stops in *Prouse*<sup>66</sup> and

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all cars passing through checkpoint are stopped).

59. See *infra* notes 92-100 and accompanying text.

60. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

61. Cf. *State v. Superior Ct. In & For County of Pima*, 143 Ariz. 45, 691 P.2d 1073, 1076 (1985) (preventing drunk driving is a legitimate public interest which clearly weighs in favor of the state); *State v. McLaughlin*, 471 N.E.2d 1125, 1136 (Ind. Ct. App. 1984) (Indiana's interest in keeping drunk drivers off the road is compelling); *State v. Deskins*, 234 Kan. 529, 536, 673 P.2d 1174, 1181 (1983) (problem of drunk driving is one of enormous magnitude). See also *supra* note 1.

62. In *South Dakota v. Neville*, 459 U.S. 553, 558 (1983), for example, the Court stated that "the situation underlying this case — that of the drunk driver — occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here." *Id.* In *Perez v. Campbell*, 402 U.S. 637, 672 (1971), Justice Blackmun noted that, "the slaughter on the highways of this nation exceeds the death toll of all our wars" (Blackmun, J., concurring) (footnote omitted).

63. *Brown*, 443 U.S. at 50.

64. Comment, *Sobriety Checkpoint Roadblocks: Constitutional In Light of Delaware v. Prouse?*, 28 St. Louis U.L.J. 813, 833 (1984).

65. See *infra* notes 69-71 and accompanying text.

66. 440 U.S. 648 (1979).

*Brignoni-Ponce*<sup>67</sup> did not advance the public interests asserted therein sufficiently to justify such seizures of vehicles without individualized suspicion. This same analysis, applied to suspicionless seizures at DUI roadblocks proves the roadblocks unconstitutional, because they likewise do not sufficiently advance the public interest in apprehending drunk drivers.<sup>68</sup> In *State ex rel. Ekstrom v. Justice Court*,<sup>69</sup> for example, the Arizona Supreme Court noted that out of 5,763 vehicles stopped at a DUI roadblock, only 14 DUI arrests were made.<sup>70</sup> Also, at DUI roadblocks in Maryland, over 6,000 cars were detained, resulting in only 31 DUI arrests.<sup>71</sup> DUI roadblocks have simply not been efficient and effective at apprehending drunk drivers.

The *Prouse* Court concluded that rather than suspicionless stops, stopping vehicles upon observed traffic violations would be a more effective and appropriate way to apprehend motorists who are operating with invalid driver's licenses.<sup>72</sup> It cannot seriously be argued that motorists without valid driver's licenses are more readily observed violating traffic laws than are drunk drivers. Drunk drivers display readily observable signs of intoxication.<sup>73</sup> Thus, under the reasoning of the *Prouse* Court it is manifest that requiring police to act only upon observed traffic violations would be a more efficient

67. 422 U.S. 873 (1975).

68. See *infra* notes 69-79 and accompanying text.

69. 136 Ariz. 1, 663 P.2d 992 (1983).

70. *Id.* at 993.

71. See Comment, *supra* note 64 at 813 n.1.

72. *Prouse*, 440 U.S. 648, 659 (1979). See *supra* note 54 (precise language the Court used).

73. The California Highway Patrol compiled a list of characteristics which indicated that a driver may be intoxicated. Those characteristics include:

1. Unreasonable speed (high).
2. Driving in spurts (slow, then fast, then slow).
3. Frequent lane changing with excessive speed.
4. Improper passing with insufficient clearance; also taking too long or swerving too much in overtaking and passing, e.g., overcontrol.
5. Overshooting or disregarding traffic control signals.
6. Approaching signals unreasonably fast or slow, and stopping or attempting to stop with uneven motion.
7. Driving at night without lights. Delay in turning lights on when starting from a parked position.
8. Failure to dim lights to oncoming traffic.
9. Driving in lower gears without apparent reason, or repeatedly clashing gears.
10. Jerky starting or stopping.
11. Driving unreasonably slow.
12. Driving too close to shoulders or curbs, or appearing to hug the edge of the road or continually straddling the center line.
13. Driving with windows down in cold weather.
14. Driving or riding with head partly or completely out of the window.

Ross, *Law, Science and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1, 11 (1973). See also *State v. McLaughlin*, 471 N.E.2d 1125, 1137 (Ind. Ct. App. 1984) (police officer well trained to identify drunk driving indicators).

and much less constitutionally offensive method of apprehending drunk drivers.<sup>74</sup>

Advocates of DUI roadblocks assert, however, that while the roadblocks may be inefficient at detecting drunk drivers, the deterrent effect of DUI roadblocks is enough to justify them.<sup>75</sup> Their argument is that the high visibility of DUI roadblocks causes the perception of a concentrated police presence, and thereby deters drunk driving. The available studies on the deterrent effect of DUI roadblocks, however, are at best inconclusive and tend to show that the roadblocks are not a useful deterrence tool.<sup>76</sup> One study has shown that increasing the probability of arrest and creating harsher DUI penalties has not succeeded in deterring drunk drivers.<sup>77</sup> When the roadblocks are installed there may be a short term decrease in drunk driving, but the previous drunk driving levels rapidly reappear.<sup>78</sup> This pattern may exist because those who habitually drive drunk are not deterrable. These people usually have serious social and alcohol related problems and are unable to control their drinking.<sup>79</sup> As a result, the deterrent effect of DUI roadblocks is overestimated. There is simply no evidence showing that DUI roadblocks sufficiently deter drunk driving to justify the widespread suspicionless seizures of innocent motorists. Thus, because DUI roadblocks are ineffective at both detection and deterrence, they fail to adequately advance the public interest in preventing drunk driving. However, even if the inefficiency of DUI roadblocks alone is not enough to outweigh the public interest that they arguably advance,

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74. Cf. *Prouse*, 440 U.S. at 659 (acting upon observed traffic violations in order to check for driver's license is a more effective and less intrusive alternative to suspicionless random stops). See also *supra* note 54.

75. See *People v. Bartley*, 109 Ill.2d 273, 287, 486 N.E.2d 880, 886 (1985). In *Bartley* the court expressly noted that while the apprehension aspects of DUI roadblocks may not have been as good as other less intrusive methods, "common sense alone" led to the conclusion that its deterrent potential was great. *Id.* The court relied on a National Transportation Safety Board Safety Study which pointed out that the DUI roadblocks precluded drunk drivers from assuming they could escape detention by driving carefully. *Id.* (citing Report No. NTSB/SS-84/01, National Transportation Safety Board, Safety Study, *Deterrence of Drunk Driving; the Role of Sobriety Checkpoints and Administrative License Revocations*). See also Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1471-72 (1983) (DUI roadblocks increase the perceived risk of detection and therefore deter potential drunk drivers).

76. See Jacobs and Strossen, *Mass Investigation Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C.D. L. Rev. 595, 638-45 (1985) (authors review substantial amounts of available data and assert that results are inconclusive).

77. H.L. ROSS, *DETERRING THE DRINKING DRIVER* 17 at 102-04 (1982) cited in Jacobs and Strossen, *supra* note 76, at 641 nn. 200 and 202.

78. Jacobs and Strossen, *supra* note 76, at 641 n. 202.

79. See Jacobs and Strossen, *supra* note 76 at 644 n.211 (citing Andaneas, *Drinking — and Driving — Laws in Scandinavia*, SCANDANAVIAN STUD. IN L. 13, 21 (1984)).

their intrusiveness tips the balance against their constitutionality.

### C. *The Severity of the Intrusion on Motorists*

The final factor to consider is the severity of the interference with the individual's privacy.<sup>80</sup> The Supreme Court has recognized two types of intrusion. The first is "objective intrusion,"<sup>81</sup> which is the actual physical intrusion of the seizure. The second is "subjective intrusion," which is the intrusion the driver perceives.<sup>82</sup>

At DUI roadblocks the objective intrusion is much greater than in *Brignoni-Ponce*,<sup>83</sup> *Martinez-Fuerte*,<sup>84</sup> or *Prouse*.<sup>85</sup> In each of these three cases the objective intrusion was not personalized because it generally constituted a search for documents<sup>86</sup> and perhaps brief questioning.<sup>87</sup> In *Brignoni-Ponce* and *Martinez-Fuerte*, the stops were made to check driving and automobile documents. Those seizures were simply administrative inquiries<sup>88</sup> and not criminal investigations. In contrast, the objective intrusion at DUI roadblocks is highly personal. At DUI roadblocks the police closely examine the driver's demeanor, coordination, eyes, speech, and breath.<sup>89</sup> Al-

80. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

81. Objective intrusion is the stop itself, the questioning, and the visual inspection which occurs at the checkpoint. It is the actual intrusion. *See Martinez-Fuerte*, 428 U.S. at 558.

82. *Id.* Subjective intrusion is the concern, apprehension, or fright the person stopped feels. It is the intrusion which is perceived. *Id.*

83. 422 U.S. 873 (1975). *See supra* notes 34-37 and accompanying text (discussing *Brignoni-Ponce*).

84. 428 U.S. 543 (1976). *See supra* notes 38-47 and accompanying text (discussing *Martinez-Fuerte* and the application of the reasonableness balancing test).

85. 440 U.S. 648 (1979). *See supra* notes 48-55 and accompanying text (discussing *Prouse* and the application of the reasonableness balancing test).

86. In *Brignoni-Ponce* the detention was to ascertain whether the occupants of the vehicle were legally within the United States. *Brignoni-Ponce*, 422 U.S. at 874-75. A showing of proper immigration documents would have sufficed to satisfy the officers. *Id.*

In *Martinez-Fuerte*, the scope of the checkpoint stop was the same as in *Brignoni-Ponce*. Therefore, a showing of proper documents would suffice.

In *Prouse*, the stop was to ascertain whether the driver possessed a valid driver's license and vehicle registration. *Prouse*, 440 U.S. at 650. Thus, all that was required was that the driver show valid documents.

87. *See Brignoni-Ponce*, 422 U.S. at 880 (all that is required is a brief response to a question or two).

88. *Camara v. Municipal Court*, 387 U.S. 523 (1967), recognized a distinction between administrative searches and searches for other purposes. There the searches were made to discover building code violations — i.e., faulty wiring, poor plumbing — and the Court concluded that for administrative searches no individualized suspicion was needed. *Id.* For a comparison of administrative searches and DUI roadblocks, see *infra* notes 107-22 and accompanying text.

89. *See, e.g., People v. Bartley*, 109 Ill. 2d 273, 279, 486 N.E.2d 880, 883 (1985) (defendant "fumbled" when producing driver's license, speech was slurred, had odor of alcohol on breath); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174, 1177 (1983) (strong odor of alcohol on defendant's breath, eyes were bloodshot and watery); *Little v. State*, 300 Md. 485, 479 A.2d 903, 906 (1984) (defendant's face was flushed red,

though the stop may be brief, the examination is highly personal and intense. Moreover, the purpose of DUI roadblock stops is to discover evidence of a serious criminal offense.<sup>90</sup> Such objective intrusiveness is significantly more substantial than in *Martinez-Fuerte*, heretofore the only vehicle stop the Supreme Court has permitted without requiring individualized suspicion.<sup>91</sup> This is well illustrated in *United States v. Ortiz*.<sup>92</sup> In *Ortiz*, the Court confronted a vehicle stop made at the same checkpoint involved in *Martinez-Fuerte*. Unlike *Martinez-Fuerte*, however, *Ortiz* concerned a search as well as a stop.<sup>93</sup> Noting the higher intrusiveness level of a search, the *Ortiz* Court held that a search for illegal aliens occurring at the permanent checkpoint violated the fourth amendment.<sup>94</sup> The intense personal inspection police conduct at DUI roadblocks to search for signs of DUI, render them much more like the searches disapproved in *Ortiz* than the stops approved in *Martinez-Fuerte*. Moreover, besides being more objectively intrusive, DUI roadblocks are also more subjectively intrusive.

Although the subjective intrusiveness of DUI roadblocks, where all approaching motorists are detained, is less than that of the roving random stops in *Brignoni-Ponce* and *Prouse*, it is much more than what was permissible in *Martinez-Fuerte*. In *Martinez-Fuerte* the Court emphasized the permanence of the checkpoint and the minimal level of subjective intrusion.<sup>95</sup> Because the checkpoint was permanent and its location widely known, motorists were not surprised upon approaching it.<sup>96</sup> DUI roadblocks, however, are not permanent. In fact, they often change locations during a single night,<sup>97</sup> making them in effect "roving roadblocks." This characteristic makes DUI roadblocks substantially similar to the roving stops held to violate the fourth amendment in *Brignoni-Ponce*<sup>98</sup> and *Prouse*.<sup>99</sup> Because of their temporary nature, DUI roadblocks instill the sur-

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eyes were glassy and bloodshot, strong odor of alcohol); *State v. Cocomo*, 177 N.J.Super. 575, 427 A.2d 131, 133 (N.J. Super Ct. 1980) (defendant's eyes were bloodshot, odor of alcohol on his breath); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 12, 483 N.Y.S. 2d 649 (1984) (eyes watery and bloodshot, strong odor of alcohol, fumbled with his wallet).

90. See *supra* note 3 and accompanying text (example of strict DUI statute).

91. 428 U.S. 543 (1976). In *Martinez-Fuerte* the objective intrusion was merely the request for documents and/or the asking of one or two questions. It did not entail the intense examination of the seized individual's person, as in DUI roadblock stops.

92. *Id.* at 558-59.

93. *Id.* at 559.

94. *Id.* at 895.

95. *Id.* at 558-59.

96. *Id.* at 559.

97. See, e.g., *State v. Smith*, 674 P.2d 562, 563 (Okla. Crim. App. 1984) (roadblocks were set for a period of time and then relocated).

98. 422 U.S. 873 (1975).

99. 440 U.S. 648 (1979).

prise, fear, and apprehension that the Court protected against in *Brignoni-Ponce* and *Prouse*. DUI roadblocks are also more subjectively intrusive because once the initial stop is made, police have substantial discretion in examining each driver.

At DUI roadblocks the police closely examine many of the driver's physical characteristics to determine whether he or she is intoxicated.<sup>100</sup> This is quite unlike a stop where one is asked to produce immigration documents.<sup>101</sup> Immigration documents are either valid or they are not. The officer at an immigration checkpoint has no discretion as to whether the documentation is in order. In contrast, the police at DUI roadblocks must rely on their subjective perceptions to determine whether a driver is under the influence. The determination, therefore, is significantly more discretionary than determining whether one has his or her immigration documents. Moreover, at DUI roadblocks decisions regarding how long to detain a particular driver, what questions to ask him or her, and the amount of scrutiny applied to him or her, are decisions which naturally must be left to the individual officer's discretion. This discretion, however, renders DUI roadblocks similar to the stops struck down in *Brignoni-Ponce* and *Prouse*.<sup>102</sup> The stops in *Brignoni-Ponce* and *Prouse* violated the fourth amendment because police had too much discretion in making the stop.<sup>103</sup> At DUI roadblocks, police have too much discretion after making the stop.

In sum, the balancing analysis leads to the conclusion that suspicionless seizures at DUI roadblocks are unreasonable and, therefore, violate the fourth amendment. Although these roadblocks seek to serve a strong and legitimate public interest, they do not adequately advance that interest. Moreover, DUI roadblocks are much more intrusive than any police tactic the Supreme Court has sanctioned without requiring some quantum of individualized suspicion. However, in certain unique circumstances the Court has permitted limited police invasions of people's privacy without requiring indi-

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100. See *supra* note 89 and accompanying text.

101. See *supra* notes 86-89 and accompanying text.

Compare *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (holding the stop of motorists at checkpoint, for purpose of checking immigration documents and asking about citizenship status, without individualized suspicion valid) with *United States v. Ortiz*, 422 U.S. 891 (1975) (holding the search of car stopped at an immigration checkpoint in order to check for illegal aliens was unconstitutional). See *supra* notes 92-94 (discussion of *Ortiz*).

102. Although in *Brignoni-Ponce* and *Prouse* the level of discretion was arguably higher than in roadblock stops where all motorists are seized, the level of discretion remaining with officers at DUI roadblock stops is substantially greater than in *Martinez-Fuerte*. See *supra* notes 81-98 and accompanying text.

103. The stops in those cases were random roving stops. *Prouse*, 440 U.S. at 650-51; *Brignoni-Ponce*, 422 U.S. at 875. Because the stops were made at random, police could subjectively select which cars to stop.

vidualized suspicion.<sup>104</sup> The question then arises whether DUI roadblocks fall within any of these recognized exceptions.

## II. DUI ROADBLOCKS AND THE EXCEPTIONS TO THE INDIVIDUALIZED SUSPICION REQUIREMENT

The United States Supreme Court's fourth amendment jurisprudence has traditionally required specific and particularized information in order for police to justify intrusions into people's privacy.<sup>105</sup> Only a handful of narrow exceptions authorize intrusions into people's privacy without some quantum of individualized suspicion.<sup>106</sup> Two of these exceptions are particularly relevant to our present inquiry.<sup>107</sup> The two are: searches undertaken for administrative purposes,<sup>108</sup> and stops occurring at permanent border patrol checkpoints.<sup>109</sup> Unless DUI roadblocks fall within one of these exceptions they must be held to violate the fourth amendment.

### A. Administrative Searches

In *Camara v. Municipal Court*<sup>110</sup> the Court sanctioned searches

104. The Supreme Court has expressly recognized only four limited exceptions to the individualized suspicion requirement. First, in *Camara v. Municipal Court*, 387 U.S. 523 (1967) the Court carved out an exception for administrative searches. See *infra* notes 107-22 and accompanying text. Second, the Court created an exception for permanent immigration checkpoints. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). See *infra* notes 123-48 and accompanying text.

In *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), the Supreme Court sanctioned the suspicionless search and seizure of a vessel in waters accessible to the open sea. The *Villamonte-Marquez* Court, however, distinguished the search of a vessel accessible to the open sea from a vehicle on the highway. *Id.* at 588-89.

In *INS v. Delgado*, 104 S. Ct. 1758 (1984) the Supreme Court allowed INS "surveys" of workplaces to ascertain if the workers were legally within the United States. DUI roadblocks are readily distinguishable from the "surveys" in *Delgado* because the Court in *Delgado* held that there was no "seizure." *Id.* at 1763-65. The Court held that, "unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave" there was no seizure. *Id.* at 1763. The *Delgado* Court concluded that although there were INS officials blocking the exits to the building, the workers were not seized. *Id.* See generally Note, *Immigration and Naturalization Service v. Delgado: Factory Raids: Seizure or Brief Encounter?* 18 J. MARSHALL L. REV. 509 (1985) (author thoroughly discusses and criticizes the Court's failure to recognize that the encounters constituted seizures).

*Delgado* is readily distinguishable from the DUI roadblock situation, because the Supreme Court has consistently held that the stop of a vehicle for any duration is a "seizure." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979).

105. *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968).

106. See *supra* note 104.

107. See *supra* note 104.

108. *Camara v. Municipal Court*, 387 U.S. 523 (1967). See *infra* notes 107-22 and accompanying text.

109. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). See *infra* notes 123-48 and accompanying text.

110. 387 U.S. 523 (1967).



of buildings for safety code violations without requiring prior individualized suspicion. The Court employed the reasonableness test. In performing the balancing analysis, the Court focused on three salient factors which strongly supported an exception to the individualized suspicion requirement.<sup>111</sup> These factors are of particular significance because DUI roadblocks must satisfy them in order to be found to fall within the exception. First, the intrusion in *Camara* had a long history of acceptance.<sup>112</sup> Second, the public demanded that dangerous conditions be corrected.<sup>113</sup> Third, the intrusion was not personal nor aimed at uncovering criminal activity.<sup>114</sup>

First, the *Camara* Court recognized that building code inspections had a "long history of judicial and public acceptance."<sup>115</sup> DUI roadblocks, however, are a very recent law enforcement development.<sup>116</sup> Being a recent development there is no history of judicial or public acceptance. Thus, DUI roadblocks fail to meet the first *Camara* factor.

Second, the *Camara* Court noted that the public interest demanded that dangerous conditions in buildings be prevented and corrected.<sup>117</sup> In assessing this factor the Court emphasized that there was no other alternative available which would achieve adequate results, because many building code violations could not be ascertained without a search of the building's interior.<sup>118</sup>

As in *Camara*, the dangers DUI roadblocks seek to prevent are significant.<sup>119</sup> The critical distinction, however, is that there are effective alternatives to DUI roadblocks that are much less intrusive.<sup>120</sup> DUI is an observable offense, unlike the building code violations in *Camara* that were absolutely unobservable without the search. Thus, DUI can be detected without eliminating the individualized suspicion requirement.<sup>121</sup> Police are trained to recognize specific characteristics drunk drivers display.<sup>122</sup> Requiring some minimal level of individualized suspicion before a stop to investigate

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111. *Id.* at 537.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See supra* note 4.

117. *Camara*, 387 U.S. at 537.

118. *Id.*

119. *See supra* notes 1 and 60-63 and accompanying text.

120. Police are trained to ascertain characteristics that intoxicated drivers display. *See supra* note 73. Because driving under the influence is an observable offense, a less intrusive alternative to suspicionless seizures would be stops based on some level of individualized suspicion. The level need not be great. Indeed anything greater than the complete lack of suspicion would be less intrusive.

121. *See supra* notes 73 and 117.

122. *See supra* note 73.

DUI can be justified is, therefore, a much less intrusive alternative to the indiscriminate seizure of thousands of persons. Because driving under the influence can be detected without resort to suspicionless seizures, and because alternative detection methods exist, the roadblocks fail to meet the second *Camara* factor.

Finally, in *Camara*, the Court rationalized that administrative searches were not criminal nor personal in nature.<sup>123</sup> In contrast, DUI roadblock examinations are personal in nature and have criminal implications.<sup>124</sup> At DUI roadblocks police question and examine each driver to discover whether he or she is driving under the influence. DUI is a serious criminal offense.<sup>125</sup> It is apparent, therefore, that DUI roadblocks fail to satisfy the third *Camara* factor. In fact, DUI roadblocks do not satisfy any of the *Camara* factors. Thus, DUI roadblocks do not fall within the administrative search exception. The question remains whether DUI roadblocks fall within the narrow exception the Supreme Court has carved out for permanent immigration checkpoints.

### B. Permanent Immigration Checkpoints

In *United States v. Martinez-Fuerte*,<sup>126</sup> the United States Supreme Court permitted border patrol agents to stop all cars which pass through permanent immigration checkpoints without requiring individualized suspicion.<sup>127</sup> The Court's approval of these suspicionless seizures should be strictly limited to the context of border searches.<sup>128</sup> Border searches have historically been subject to relaxed

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123. *Camara*, 387 U.S. at 537.

124. DUI roadblock investigations are of the "person." See *supra* notes 89-90 and accompanying text. See *supra* note 3 (example of a DUI statute and the severity of the applicable criminal sanctions).

125. See *supra* note 3. However, the *Camara* Court recognized that in most jurisdictions refusal to comply with a search request was itself a criminal offense. *Camara*, 387 U.S. at 531. The critical distinction was that searches in *Camara* were aimed at securing compliance with minimum standards for buildings, not for gathering evidence of crimes. *Id.* at 535.

126. 428 U.S. 543 (1976).

127. *Id.*

128. Border searches have historically been subject to relaxed fourth amendment scrutiny. See, e.g., *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *United States v. Ramsey*, 431 U.S. 606 (1977); *Carrol v. United States*, 267 U.S. 132 (1925); *Boyd v. United States*, 116 U.S. 616 (1886).

The uniqueness of the circumstances at the border justifies the relaxed scrutiny. For example, the United States has a unique and compelling interest in national self-protection and protecting the integrity of its borders. See *United States v. Montoya de Hernandez*, 105 S. Ct. 3304, 3312-13 (1985). Moreover, the individual has less of a reasonable expectation of privacy at the border. See *id.* Compare *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985) (defendant's 27 hour detention at Los Angeles International Airport to investigate whether she was smuggling narcotics within her body, upheld on less than probable cause because she had arrived on an

fourth amendment scrutiny.<sup>129</sup> In a series of cases<sup>130</sup> the Supreme Court has created and expanded the border search exception.<sup>131</sup> Because the influence of the border search exception in *Martinez-Fuerte* is strong, reliance upon the case in the DUI roadblock context is misplaced. Many courts, failing to recognize this, have erroneously relied on *Martinez-Fuerte* to sustain DUI roadblocks.<sup>132</sup>

The Supreme Court has held that border searches need not physically take place at the border.<sup>133</sup> In *Almedia-Sanchez v. United States*,<sup>134</sup> the Court held that searches occurring at the "functional equivalents" of the border are nevertheless border searches.<sup>135</sup> The *Almedia-Sanchez* Court noted that searches occurring "at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches."<sup>136</sup>

Although the Court did not expressly label *Martinez-Fuerte* a border search case, it is evident that border search concerns were highly relevant to the Court's decision.<sup>137</sup> After discussing border

international flight and therefore was a border search) with *Florida v. Royer*, 460 U.S. 491 (1983) (defendant's fifteen minute detention at Miami International Airport to investigate drug smuggling held unconstitutional, defendant had arrived on a domestic flight). See generally Note, *United States v. Montoya de Hernandez: Internal Drug Smuggling at the Border: The Supreme Court Lets Nature Take its Course*, 19 J. MARSHALL L. REV. 759 (1986) (discussion of relaxed fourth amendment scrutiny at border).

129. See *United States v. Ramsey*, 431 U.S. 606 (1977). See also *supra* note 125. In *United States v. Boyd*, 116 U.S. 616 (1886), the Court held that border searches were not subject to usual fourth amendment constraints. The Court noted that the first Congress, prior to proposing the Bill of Rights, had enacted the original Customs Act, Act of July 31, 1789, ch. 5 § 24, 1 Stat. 29, which authorized border searches. *Boyd*, 116 U.S. at 623. The Court reasoned, therefore, that such searches were not subject to the strictures of the fourth amendment.

130. *Montoya de Hernandez*, 105 S. Ct. at 3304; *Ramsey*, 431 U.S. at 606; *Carroll*, 267 U.S. at 132; *Boyd*, 116 U.S. at 616 (1886).

131. See, e.g., *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (Court extends border searches to the functional equivalents of the border).

132. See *supra* note 11 and cases cited therein.

133. *Almeida-Sanchez*, 413 U.S. at 272-73.

134. 413 U.S. 266 (1973).

135. *Id.* at 273.

136. *Id.*

137. That the *Martinez-Fuerte* Court failed to expressly discuss border search should not preclude the inference that border search concerns had a strong influence on the Court's decision. In *Almeida-Sanchez* the Court had expressly stated that searches occurring at established stations near the border, or at a point where two or more roads from the border intersected would be considered border searches. 413 U.S. at 273. In *Martinez-Fuerte* the Court noted that the checkpoint was near the intersection of two important roads leading from the border. 428 U.S. at 552. Thus, it would seem that under the *Almeida-Sanchez* rationale the checkpoint stop would be at the functional equivalent of the border and therefore be subject to relaxed fourth amendment scrutiny at the outset.

Compare *Almeida-Sanchez*, 413 U.S. at 273 ("searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border") with *Martinez-Fuerte*, 428 U.S. at 553 (checkpoint was close to the

concerns the *Martinez-Fuerte* Court noted that the checkpoint was "maintained at or near [an] intersection of important roads leading away from the border."<sup>138</sup> This language is virtually identical to the language in *Almedia-Sanchez* which described "functional equivalents" of the border. Unfortunately, this parallel has escaped most courts looking to *Martinez-Fuerte* for guidance in DUI roadblock cases. Reading *Martinez-Fuerte* in its proper border search context significantly distinguishes it from the DUI roadblock scenario because DUI roadblocks occur within the borders. As Chief Justice Taft recognized in *Carroll v. United States*,<sup>139</sup> travelers may be stopped upon crossing an international boundary, but "those lawfully within the country . . . have a right to passage without interruption or search unless there is . . . probable cause for believing that their vehicles are carrying contraband . . ." <sup>140</sup> In addition to the border search distinction, other features unique to border patrol checkpoints distinguish them from DUI roadblocks.

Border patrol checkpoints are permanent.<sup>141</sup> The *Martinez-Fuerte* Court expressly stated that its holding was "confined to permanent checkpoints."<sup>142</sup> The permanence of the checkpoint is significant because discretion at a permanent checkpoint is substantially curtailed<sup>143</sup> and the "subjective intrusion" that permanent checkpoints create is much less than that at temporary roving DUI roadblocks.<sup>144</sup> Motorists can become aware of a checkpoint operated at the same place all the time. As a result, there is no element of surprise in the stop and drivers need not fear or be apprehensive upon approaching the checkpoint.<sup>145</sup>

Another significant distinction is that permanent immigration checkpoints are similar to the administrative searches approved in *Camara v. Municipal Court*.<sup>146</sup> The purpose of searches conducted at immigration checkpoints is to detect persons entering the United States illegally and deport them. This is an administrative purpose, not prosecutorial.<sup>147</sup> DUI roadblocks, however, are conducted to de-

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confluence of two or more roads leading away from the border).

138. *Martinez-Fuerte*, 428 U.S. at 552.

139. 267 U.S. 132 (1925).

140. *Id.* at 154.

141. *Martinez-Fuerte*, 428 U.S. at 545.

142. *Id.* at 566 n.19.

143. *Id.* at 559.

144. *Id.* at 558-59 (motorists stopped at routine permanent checkpoint are not taken by surprise for they know, or may obtain knowledge of, the checkpoint and its location).

145. *Id.*

146. 387 U.S. 523 (1967).

147. *United States v. Alemida-Sanchez*, 413 U.S. 266, 278 (1973) (Powell, J., concurring).

tect criminal conduct.<sup>148</sup> In light of these salient distinctions, DUI roadblocks do not fall within the narrow fourth amendment exception carved out for suspicionless searches and seizures at permanent immigration checkpoints. Many lower courts, however, have used another tactic to uphold DUI roadblocks in the face of fourth amendment challenges. These courts have relied upon dictum in *Delaware v. Prouse* to create yet another exception to the individualized suspicion requirement.<sup>149</sup>

### III. DUI ROADBLOCKS AND THE *Prouse* DICTUM

Rather than focus on the holding of *Delaware v. Prouse*, many courts have, instead, clasped onto dictum that the *Prouse* Court used to limit its holding.<sup>150</sup> The *Prouse* Court stated that although random suspicionless stops to check for drivers' licenses and vehicle registrations violated the fourth amendment, less intrusive means were available to the state.<sup>151</sup> One possible alternative the Court suggested was a roadblock where all approaching vehicles would be stopped.<sup>152</sup> The Court proffered this suggestion merely to illustrate a less intrusive alternative, not to provide a necessarily constitutional one. Moreover, it is important to note that the purpose of the stop in *Prouse* was to check the driver's license and vehicle registration. Stops of this nature are much less intrusive than stops to investigate DUI.<sup>153</sup> Additionally, the Court has not yet closely scrutinized the constitutionality of roadblocks set up to check drivers' licenses and vehicle registrations.<sup>154</sup> It is highly speculative indeed to conclude

148. Illinois, for example, provides a penalty of not more than one year in prison for a DUI conviction. ILL. REV. STAT. ch. 95 ½ par. 11-501 (1985).

149. See, e.g., *State v. Cloukey*, 486 A.2d 143 (Me. 1985); *Little v. State*, 330 Md. 485, 479 A.2d 903 (1984).

150. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). The *Prouse* Court stated: This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.

*Id.* (footnote omitted).

151. *Id.* at 660-63.

152. *Id.* at 663.

153. A stop made for purposes of checking the operator's license is closely analogous to a stop made for purposes of checking the occupant's immigration papers, as in *Martinez-Fuerte*, 428 U.S. 543 (1976). Both seek documents and do not seek to closely examine the occupant's person. See *supra* note 86.

154. In *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion), the Supreme Court approved a stop of a vehicle at a driver's license checkpoint without elaborating upon the subject. *Id.* at 739. Justice Rehnquist, writing for the plurality, cryptically wrote, "the Court of Criminal Appeals stated that it did not 'question . . . the validity of the officer's initial stop of appellant's vehicle as a part of a license check,' . . . We agree." *Id.* Justice Rehnquist then cited to *Prouse* at 654-55. Justice Rehnquist, however, had dissented in *Prouse* because he did not believe that even suspicionless random stops to check for driver's licenses violated the Constitution. *Prouse*, 440 U.S. at 666-67.

from the *Prouse* Court's dictum that the Court would sanction DUI roadblocks.

Even assuming, *arguendo*, that the Court would conclude that driver license/vehicle registration roadblocks pass constitutional muster, this conclusion would not support the constitutionality of DUI roadblocks. The purpose of roadblocks conducted to check drivers' licenses and vehicle registrations is very similar to the purpose of the searches that the Court approved in *Camara*,<sup>155</sup> and the stops it approved in *Martinez-Fuerte*.<sup>156</sup> The purpose is administrative in nature. Checking for driver's licenses is similar to checking for immigration documents. Unlike DUI roadblock stops, these stops are not made primarily for the purpose of detecting criminal activity. Concluding that the Court has sanctioned DUI roadblocks because of the dictum in *Prouse* is to ignore the significant factual differences between the two situations.

Moreover, inferring from the *Prouse* dictum that the Court would sanction suspicionless roadblocks as long as all drivers are stopped, is not only speculative but it could have very serious implications. Justice Feldman of the Arizona Supreme Court voiced a grave concern in *State ex rel. Ekstrom v. Justice Court*,<sup>157</sup> when he stated that if suspicionless stops of persons at DUI roadblocks could pass constitutional muster, then presumably, suspicionless stops to detect other crimes such as narcotics possession or burglary would be constitutional.<sup>158</sup> Unfortunately, a New York Court has already

155. 387 U.S. 523 (1967). See *supra* notes 107-22 and accompanying text.

156. 428 U.S. 543 (1976). See *supra* notes 123-49 and accompanying text.

157. 136 Ariz. 1, 663 P.2d 992, 997 (1983) (Feldman, J., specially concurring).

158. *Id.* Justice Feldman wrote:

The issue here, therefore, is whether the fourth amendment permits officers to stop and question persons whose conduct is innocent, unremarkable, and free from suspicion.

The question has frightening implications. The thought that an American can be compelled to "show his papers" before exercising the right to walk the streets, drive the highways or board the trains is repugnant to American institutions and ideals. If roadblocks can be maintained to stop all persons, regardless of their conduct, for the purpose of investigating or apprehending drunk drivers, then presumably similar stops of all citizens could be undertaken for questioning and surveillance with regard to other crimes . . . . It might be argued that if the law did permit such stops, we would have less crime. Nevertheless, our system is based on the idea that the risk of criminal activity is less of a danger than the risk of unfettered interference with personal liberty. The concept was succinctly expressed by a newspaper columnist who recently used these words in describing his opposition to roadblock stops for apprehension of drunk drivers:

I . . . have often thought that getting killed by some intoxicated idiot who crossed the median divider and hit me head-on would be the worst and most senseless way to die. I mourn for the parents of children who have died at the hands of drunk drivers. But none of this makes a police state acceptable. Freedom doesn't come risk-free. I'm willing to take risks in exchange for my freedom.

done precisely what Justice Feldman feared.

In *People v. John BB*,<sup>159</sup> the New York Court of Appeals, relying on the *Prouse* dictum, sanctioned a roving stop of a vehicle to investigate a series of recent burglaries.<sup>160</sup> The court characterized the stop as a "roving roadblock" stop and concluded that because it was conducted in a uniform and non-discriminatory manner, the officers did not need any individualized suspicion.<sup>161</sup> The result in *John BB* is a clear sign of the dangerousness of inferring too much from the dictum in *Prouse*. The *Prouse* dictum should be limited to the facts of that case. Put another way, the most that can be logically inferred from the *Prouse* dictum is that a roadblock carried out solely to check drivers' licenses and vehicle registrations, where all cars approaching are stopped, is less offensive to the fourth amendment than the particular stop in *Prouse*. To infer more than this is to engage in highly dangerous speculation.

#### CONCLUSION

The constitutionality of the suspicionless seizures occurring at DUI roadblocks is seriously suspect. In light of the historical prohibition against suspicionless seizures, DUI roadblocks have a difficult burden to overcome and must be given exacting constitutional scrutiny. DUI roadblocks subject thousands of innocent drivers, whose conduct raises absolutely no suspicion, to seizure, questioning, and close personal examination. These examinations are undertaken to uncover evidence of a serious criminal offense and thus are quite unlike administrative searches.<sup>162</sup> Moreover, the temporary nature of DUI roadblocks render them substantially similar to the roving patrol stops that the United States Supreme Court has traditionally struck down.<sup>163</sup>

Although police discretion at DUI roadblocks may be proscribed, too much discretion remains to allow suspicionless interference with thousands of legitimate travelers. DUI roadblocks are too intrusive on the legitimate traveler's privacy and do not adequately advance the public interest. Less intrusive alternatives are available to advance the strong public interest.

In short, seizures occurring at DUI roadblocks are essentially

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*Id.* (quoting Rooney, *Roadblocks for Drunk Drivers Nibble Away at Our Freedoms*, Chicago Tribune, reprinted in *The Arizona Republic*, April 4, 1983, A, at 7).

159. 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982).

160. *Id.* at 485, 453 N.Y.S.2d at 160, 438 N.E.2d at 865.

161. *Id.* at 488-89, 453 N.Y.S.2d at 162, 438 N.E.2d at 867.

162. See *supra* notes 107-22 and accompanying text.

163. See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

searches of the person of every driver detained. As such, they cannot be maintained in harmony with the fourth amendment as long as drivers that raise absolutely no suspicion whatever are seized. The Court must not permit drunk drivers from making the fourth amendment their latest casualty.

*Lazaro Fernandez*



