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THE CONSTITUTIONALITY OF SOBRIETY CHECKPOINTS

Increased awareness and heightened concern about the danger of operating a motor vehicle while under the influence of alcohol have thrust the drunk driving menace to the forefront of America's social consciousness.[1] As a result of the increased awareness of traffic fatalities attributable to alcohol consumption, some states have employed roadblocks as devices to detect and to deter drunk driving.[2] Sobriety checkpoints generally entail the slowing and eventual stopping of traffic to check for valid driver's licenses, proper vehicle registration forms, and outward signs of intoxication of the drivers.[3] Stopping an automobile and detaining the occupants at a roadblock constitutes a seizure under the fourth amendment to the United States Constitution.[4] Under the fourth amendment, a search and seizure is pre-

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1. *See How Safe?*, Newsweek, June 2, 1986, at 7 (43,500 people died in automobile accidents in 1985); *A Sober Look at a Drunken Driving Cure-All*, Wall Street J., Dec. 31, 1985, at 8, col. 3 (approximately 25,000 people die each year in alcohol-related traffic accidents); *Drunk Drivers' Deaths Fall 24%*, Wash. Post, Nov. 5, 1985, at A17, col. 1 (43% of fatal traffic accidents involved drunk drivers in 1984, whereas 50% of traffic fatalities involved drunk drivers in 1980); *One Less for the Road?*, Time, May 20, 1985, at 76 (30-50% of traffic fatalities involve drunk drivers); *Drunken Driving Toll Is Down, But Fears Remain*, N.Y. Times, Feb. 6, 1984, at A17, col. 1 (death toll resulting from drunk driving was approximately 21,500 in 1983); Lauter, *The Drunk Driving Blitz*, Nat'l L.J., March 22, 1982, at 1, col. 2 (alcohol-related traffic accidents result in estimated 25,000 deaths each year). In addition to fatalities, drunk drivers cause approximately one million injuries and $5 billion in property damage yearly. Lauter, *supra*, at 1; *see Alcohol Traffic Safety—Nat'l Driving Register Act of 1982*, 1982 U.S. CODE CONG. & AD. NEWS 3367, 3368 (half of traffic fatalities are result of drunk driving). In 1982, Congress enacted legislation to give pecuniary incentives to states to aggressively combat drunk driving. 1982 U.S. CODE CONG. & AD. NEWS at 3368-69 (encouraging states to heighten public's perception of increased enforcement of tougher drunk driving laws). Heightened concern about drunk driving has spawned various citizen groups whose primary purpose is combatting drunk driving. Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1457 (1983) [hereinafter cited as *Roadblock Seizures*]; Note, *The Constitutionality of Roadblocks Conducted to Detect Drunk Drivers in Indiana*, 17 IND. L. REV. 1065, 1065 (1984) [hereinafter cited as *Drunk Drivers in Indiana*]. The citizen groups include Mothers Against Drunk Driving (MADD), Students Against Drunk Driving (SADD), Remove Intoxicated Drivers (RID), Citizens of Safe Driving (CSD), and Report Every Drunk Driver Immediately (REDDI). *Roadblock Seizures*, *supra*, at 1457; *Drunk Drivers in Indiana*, *supra*, at 1065.

2. *See* Kamen, *Court Lets Stand Virginia's Use of Sobriety Roadblock*, Wash. Post, March 25, 1986, at 4, col. 5 (thirty states and the District of Columbia have used drunk driving roadblocks).

3. Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123, 123 (1984); Jacobs & Strossen, *Mass Investigation Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C.D. L. REV. 595, 597 (1985).

4. Delaware v. Prouse, 440 U.S. 648, 653 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); *see* Terry v. Ohio, 392 U.S. 1, 9 (1967) (fourth amendment protects against unreasonable search and seizures). In *Terry*, the United States Supreme Court concluded that a seizure involves the police restraining the liberty of a citizen. 392 U.S. at 19 n.16. For

sumptively unreasonable,[5] and the government has the burden of proving the legitimacy of the seizure.[6] To determine the reasonableness of a seizure under the fourth amendment, the United States Supreme Court has established a three-pronged test. First, the reasonableness of a seizure depends on a favorable balance between the public's interest in the seizure and the individual's right against arbitrary police harassment.[7] Second, reasonableness is contingent upon the existence of legitimate means to implement the compelling state interest.[8] Third, the state must effect the implementation of the compelling societal interest with minimal intrusion on the individual's

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example, when police restrict a person's freedom to walk away, a seizure has occurred. *Id.* at 16; *see infra* note 6 and accompanying text (fourth amendment imposes standard of reasonableness on seizures).

5. State v. Kirk, 202 N.J. Super. 28, 55, 493 A.2d 1271, 1286 (1985) (courts presume warrantless searches and seizures unreasonable); Jacobs & Strossen, *supra* note 3, at 627 (fourth amendment presumes search and seizures are unreasonable).

6. *See* Jacobs & Strossen, *supra* note 3, at 627. The fourth amendment requires that seizures meet a standard of reasonableness. *See* Brown v. Texas, 443 U.S. 47, 50 (1979) (stating that fourth amendment requires that seizures be reasonable); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (fourth amendment imposes standard of reasonableness upon seizures); United States v. Brignoni-Ponce, 442 U.S. 873, 878 (1975) (fourth amendment requires seizures to be reasonable). The United States Supreme Court has not stated whether the government or the individual has the burden of proof in a fourth amendment analysis concerning the reasonableness of a search or seizure. Jacobs & Strossen, *supra* note 3, at 627. The Supreme Court in *Delaware v. Prouse*, however, implied that the burden of proof rests on the government. *Id.* at 267 n.138; *see* Delaware v. Prouse, 440 U.S. 648, 659 (1979) (implying that state must supply empirical data to demonstrate effectiveness of law enforcement technique). *But see Prouse*, 440 U.S. at 667 (Rehnquist, J., dissenting) (Court erroneously placed burden of proof on government to show reasonableness of state interest). In assessing the reasonableness of sobriety checkpoints, some state courts have placed the burden of proof on the government. *See, e.g.*, State v. Jones, 482 So.2d 433, 439 (Fla. 1986) (state failed to prove drunk driving roadblock met fourth amendment standards); State v. McLaughlin, ____Ind. App.____, 471 N.E.2d 1125, 1130, 1137-42 (1984) (state failed to meet burden of proving reasonableness of sobriety roadblock); State v. Deskins, 234 Kan. 529,____, 673 P.2d 1174, 1186 (1983) (Prager, J., dissenting) (majority correctly placed burden of proving reasonableness of drunk driving roadblock on state); Commonwealth v. Amaral, 398 Mass. 98, 101, 495 N.E.2d 276, 279 (1986) (invalidating sobriety checkpoint because state failed to demonstrate reasonableness of checkpoint); Commonwealth v. Trumble, 396 Mass. 81,____, 483 N.E.2d 1102, 1107 (1985) (state bears burden of proving reasonableness of sobriety roadblock); State v. Muzik, 379 N.W.2d 599, 604 (Minn. App. 1985) (invalidating sobriety checkpoint because state failed to meet burden of proving roadblock more effective and less intrusive than alternative methods); State v. Kirk, 202 N.J. Super. 28, 55, 493 A.2d 1271, 1287 (1985) (state failed to demonstrate reasonableness of drunk driving roadblock); Webb v. State, 695 S.W.2d 676, 681 (Tex. Ct. App. 1985) (burden on state to prove validity of warrantless seizure).

7. *See* Brown v. Texas, 443 U.S. 47, 50-51 (1979) (constitutionality of seizure involves weighing public interest against individual interests); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (fourth amendment measures reasonableness of police practice by balancing intrusion upon individual rights against promotion of government interest); United States v. Martinez-Fuerte, 428 U.S. 543, 555 (1976) (constitutionality of seizure depends on balance between public interest and individual rights); United States v. Brignoni-Ponce, 442 U.S. 873, 878 (1975) (reasonableness of police action under fourth amendment depends on balance between public interest and individual's right to be free from arbitrary interference by police).

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

constitutional rights by pursuing neutral, nondiscriminating, nonarbitrary guidelines.[9] If a court finds that a seizure violates the fourth amendment after considering the three factors in the reasonableness test, the court will suppress all evidence obtained from the unconstitutional seizure.[10]

Although the United States Supreme Court has not addressed the constitutionality of a sobriety checkpoint, the Supreme Court has examined the validity of roadblocks under circumstances similar to those surrounding sobriety checkpoints.[11] For example, in *United States v. Martinez-Fuerte*,[12] police had arrested the defendant at an immigration roadblock near the Mexican border.[13] The defendants contested the constitutionality of the roadblock and sought to suppress incriminating evidence that the police obtained at the roadblock.[14] Since the roadblock constituted a seizure,[15] the Supreme Court in *Martinez-Fuerte* employed a balancing test to determine the constitutionality of the roadblock, weighing the public interest against individual interests.[16] The Court concluded that the government's interest in apprehending illegal aliens outweighed the individual's right to freedom from government interference.[17] Furthermore, the Court stated that the means by which the government implemented the compelling government interest was reason-

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9. *Id.*

10. *See infra* note 14 and accompanying text (exclusionary rule is judicially created remedy to suppress evidence obtained from unconstitutional searches and seizures).

11. *See generally* Delaware v. Prouse, 440 U.S. 648 (1979) (finding stops for license checks without reasonable suspicion by roving patrols unconstitutional, but suggesting that roadblocks are viable alternative); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (roadblock designed to interdict illegal alien traffic is constitutional).

12. 428 U.S. 543 (1976).

13. *Id.* at 545.

14. *See id.* In addressing the issue of the suppression of evidence at trial, the United States Supreme Court in *Terry v. Ohio* stated that the fourth amendment serves to deter unreasonable police intrustions. *Terry*, 392 U.S. 1, 12 (1967). The fourth amendment does not proscribe directly police misconduct. *Id.* The suppression of evidence obtained through unreasonable intrusions is a judicially created remedy to protect fourth amendment rights by deterring illegal police activity. United States v. Leon, 104 S. Ct. 3405, 3412 (1984); *Mapp v. Ohio*, 367 U.S. 643, 648 (1961); *see* Weeks v. United States, 232 U.S. 383, 398 (1914) (fourth amendment gives no remedies to individuals against police other than suppression of evidence at trial). In *Weeks v. United States*, the Supreme Court explained that the adoption of the fourth amendment was a historical reaction to prevent governmental intrusions into the lives of private citizens. *Weeks*, 232 U.S. at 390. More specifically, the founding fathers designed the fourth amendment to protect citizens from the equivalent of the English writs of assistance, which allowed unwarranted invasions of private homes in colonial America. *Id.; see* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (all evidence obtained in violation of constitution is inadmissible in federal and state courts). In *Mapp v. Ohio*, the Supreme Court held that the due process clause of the fourteenth amendment enforced the fourth amendment against the states as well as the federal government. *Mapp*, 367 U.S. at 655.

15. *Martinez-Fuerte*, 428 U.S. at 556; *see supra* note 6 and accompanying text (discussion of reasonableness of seizure under fourth amendment).

16. *Martinez-Fuerte*, 428 U.S. at 555; *see supra* text accompanying note 7 (roadblock seizure is constitutional if public interest outweighs individual's interest).

17. *Martinez-Fuerte*, 428 U.S. at 561-62.

able and minimized the resulting intrusion upon the motorists.[18] In analyzing the degree of intrusion upon the motorists, the Supreme Court in *Martinez-Fuerte* noted that, ordinarily, a constitutional seizure requires some showing of reasonable suspicion on the part of the police.[19] To satisfy the fourth amendment reasonableness standard, the police generally must possess probable cause or individualized suspicion.[20] The *Martinez-Fuerte* Court, however, noted that police may dispense with the requirement of probable cause or reasonable suspicion if the police effect the seizure according to specific, neutral guidelines that limit the exercise of arbitrary discretion by individual officers.[21] In *Martinez-Fuerte*, the Court analyzed the roadblock seizure in terms of objective and subjective intrusion.[22] The duration of the detention, the nature of the questioning, and the visual inspection of the vehicle

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18. *Id.* at 562; *see id.* at 557-58 (seizure infringed upon individual's right to travel without interference).

19. *Id.* at 560.

20. *See Brown*, 443 U.S. at 51 (requiring that seizures be based on specific, objective facts justifying intrusion on individual rights); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (police must base seizure on objective standard such as probable cause); United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976) (requiring at least showing of individualized suspicion for constitutional seizure); United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975) (validating seizure based on grounds less than probable cause because of strength of government interest, minimal intrusion, and absence of viable alternate police methods); *see also* Terry v. Ohio, 392 U.S. 1, 20-21 (1967) (probable cause not needed to stop and search, but officer must show "specific and articulable facts" that justify seizure). In *Terry v. Ohio*, a police officer seized and frisked the defendant without a warrant and without probable cause. *Terry*, 392 U.S. at 6-7. The United States Supreme Court concluded that the policeman's actions were constitutional because the spontaneity of the encounter thrust the situation outside the purview of the warrant requirement. *Id.* at 20. The *Terry* Court explained that when an officer has reasonable suspicion that a suspect is armed and presents a threat to the officer and bystanders, the fourth amendment justifies the seizure without probable cause. *Id.* at 24, 29, 30. The Court declared that the test for a seizure based on a lesser standard was whether the circumstances would warrant a "reasonably prudent man" to believe that the suspect presented a danger to the officer or to others. *Id.* at 27.

While the Supreme Court in *Terry* originally designed the less stringent test of reasonable suspicion as a measure primarily to protect police officers and innocent bystanders, the Court now applies the individualized suspicion standard to any situation in which a police officer suspects illegal activity. *Id.* at 29-30; *see Brown*, 443 U.S. at 51 (requiring that police entertain reasonable suspicion of criminal activity before stopping suspect); *Brignoni-Ponce*, 442 U.S. at 881 (reasonable suspicion of illegal activity justifies brief detention of automobile and occupants).

21. *See Brown*, 443 U.S. at 51 (fourth amendment requires that police have probable cause, reasonable suspicion, or some neutral, predetermined plan before seizing individual); *Prouse*, 440 U.S. at 655 (police may implement other standards to restrict discretion of field officers when probable cause or reasonable suspicion inapplicable); *Martinez-Fuerte*, 428 U.S. at 561-62 (while reasonable suspicion usually is minimal requirement for constitutional seizure, fourth amendment allows lesser standard when police follow reasonable procedures in conducting roadblock seizures and government interest outweighs intrusion upon individual rights); *see also infra* text accompanying notes 111-27 (implementation of objective criteria ensures constitutionality of sobriety checkpoint without probable cause or reasonable suspicion).

22. *Martinez-Fuerte*, 428 U.S. at 558.

constitute objective intrusion.[23] The motorist's perception of fear or threat from unwarranted police harassment constitutes subjective intrusion.[24] The Supreme Court concluded that both the objective and subjective intrusions of the roadblock at issue in *Martinez-Fuerte* were minimal because police conducted the roadblock in a systematic, routine manner.[25] Since the police employed legitimate means to implement a compelling government interest and the resulting intrusion upon the individual motorists was minimal, the Supreme Court in *Martinez-Fuerte* held that the initial roadblock seizures required no showing of "individualized suspicion."[26] Furthermore, the Court dismissed the need for a judicial warrant authorizing the roadblock seizures, finding that the visible signs of legitimate police authority provided the same protections that a warrant would have provided.[27] The Supreme Court reaffirmed, however, the requirement of consent or probable cause for searches conducted after the initial detention at the roadblock.[28]

The Supreme Court asserted the converse of the *Martinez-Fuerte* decision in *Delaware v. Prouse*, by requiring that police have at least reasonble suspicion of illegal activity before stopping an automobile in the absence of neutral, predetermined procedures.[29] In *Prouse*, the police stopped the defendant's car without reasonable suspicion of any illegal activity and without adhering to neutral guidelines.[30] The police saw marijuana in plain view in the defendant's car and arrested the defendant for possesison of marijuana.[31] The defendant filed a motion to suppress the marijuana as evidence at trial, claiming that the police violated the fourth amendment by stopping him.[32] The Court stated that whether an intrusion upon an individual's fourth amendment rights is constitutional depends on the application by police of an objective standard such as probable cause or individualized suspicion.[33] When police do not stop an individual on the basis of probable cause or reasonable suspicion, the Court stated that the government must provide other assur-

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23. *Id.*

24. *Id.*

25. *See id.* at 560. The United States Supreme Court in *United States v. Martinez-Fuerte* deemed the roadblock to be minimally intrusive because interference with traffic flow was negligible, police did not surprise motorists with the stop, the roadblock involved minimal discretion on the part of police officers, the systematic nature of the stops reassured drivers that police officials authorized the stops, and administrative officials chose the location of the roadblock. *Id.* at 559; *see infra* text accompanying notes 111-27 (discussion of criteria that courts have required for valid sobriety checkpoints).

26. *Martinez-Fuerte*, 428 U.S. at 562; *see id.* at 557 (requiring police to have reasonable suspicion of illegal activity before stopping traffic at roadblocks set up to detect illegal alien traffic is impractical owing to heavy flow of vehicular traffic).

27. *Id.* at 565.

28. *Id.* at 567.

29. 440 U.S. 648 (1979).

30. *Id.* at 650.

31. *Id.*

32. *Id.* at 650-51.

33. *Id.* at 654; *see* Terry v. Ohio, 392 U.S. 1, 21 (1967) (courts must judge reasonableness of seizure against objective standard).

ances that individual rights are not subject to the arbitrary discretion of the police.[34] Since the detention of the automobile in *Prouse* constituted a seizure under the fourth amendment,[35] the Supreme Court employed a three-part test to assess the reasonableness of the seizure, juxtaposing the interference on the individual's constitutional rights against the assertion of a legitimate government interest.[36] While the Court conceded the existence of a compelling state interest in detaining automobiles for license checks, the Court in *Prouse* noted the ineffectiveness of the means that the police adopted to implement the government interest.[37] The Court did not use the terms objective and subjective intrusion,[38] but discussed the concepts that the terms represent.[39] The Court stated that automobile stops are inconvenient and annoying, and that the detentions generate "substantial anxiety" on the part of the motorists.[40] Given the nature of the intrusion resulting from the random detention and the relative inefficiency of such detention, the Court refused to validate the seizure in *Prouse* unless the police demonstrated that they had reasonable suspicion to stop the defendant.[41] Since the police detained the defendant without possessing reasonable, articulable suspicion of illegal activity, the Court concluded that the detention was unreasonable.[42] Nevertheless, the Supreme Court in *Prouse* stated that its decision did not preclude the use of less intrusive means to effect the state interest in checking licenses, such as stopping all traffic at a roadblock.[43] In sum, the Supreme Court opinions in *Martinez-Fuerte* and *Prouse* indicate that police need not base a roadblock seizure on reasonable suspicion or probable cause, but must operate the roadblock pursuant to nonarbitrary, systematic procedures.[44]

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34. *Prouse*, 440 U.S. at 654-55.

35. *Id.* at 653.

36. *See id.* at 653-54 (fourth amendment requires that police action satisfy standard of reasonableness to protect individual constitutional rights).

37. *See id.* at 659 *(Prouse* Court apparently placed burden of proof on state to demonstrate unavailability of less intrusive, more effective alternatives to government action). *But see id.* at 667 (Rehnquist, J., dissenting) (burden of proof should be on defendant to prove unconstitutionality of state action). In *Delaware v. Prouse*, the United States Supreme Court concluded that absent some empirical basis showing effectiveness, the merits of the practice of randomly stopping vehicles for license checks did not outweigh the resulting intrusion upon an individual's right of freedom from police interference. *Id.* at 659. Furthermore, the Court in *Prouse* stated that the deterrent effect of randomly stopping automobiles on license violations was negligible and could not outweigh the intrusion upon one's constitutional rights. *Id.* at 660.

38. *See supra* text accompanying notes 22-24 (defining objective and subjective intrusion).

39. *See Prouse*, 440 U.S. at 657 (random stops of automobiles generate anxiety in motorists).

40. *Id.*

41. *Id.* at 661.

42. *Id.* at 663; *see id.* at 661 (principal factor from which fourth amendment protects individuals is "standardless and unconstrained discretion" of field officers); *see also* United States v. Brignoni-Ponce, 442 U.S. 873, 882 (1975) (fourth amendment protects individuals from evil of unbridled discretion of field officers).

43. *See Prouse*, 440 U.S. at 663 (emphasizing that roadblock must prevent "unconstrained exercise of discretion"); *see also id.* at 664 (Blackmun, J., concurring) (suggesting that stopping every tenth car at roadblock instead of all vehicles would pass constitutional muster).

44. *See id.* at 663-64 (suggesting that roadblock stopping vehicles in systematic fashion is

When addressing the constitutionality of sobriety checkpoints, several state courts have employed an analysis similar to the analysis that the United States Supreme Court used in *Martinez-Fuerte* and *Prouse*.[45] The Virginia

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constitutionally valid); *Martinez-Fuerte*, 428 U.S. at 562-64 (validating roadblock operated according to reasonable guidelines); State v. Martin, 145 Vt. 562,____, 492 A.2d 442, 446 (1985) (judicial warrant, probable cause, or reasonable suspicion not needed to stop motorist at checkpoint; *see also infra* text accompanying notes 111-27 (state courts finding sobriety checkpoints conducted pursuant to neutral predetermined guidelines constitutional).

45. *See, e.g.*, Klein v. Ronstadt, 149 Ariz. 123, ____, 716 P.2d 1060, 1061 (1986) (upholding lower court's decision that found sobriety checkpoints constitutional); State v. Superior Court for County of Pima, 143 Ariz. 1,____, 691 P.2d 1073, 1077 (1984) (en banc) (finding drunk driving roadblock constitutional under fourth amendment); Ingersoll v. Palmer, 175 Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 667 (1985) (sobriety checkpoint constitutionally valid if operated according to neutral guidelines); State v. Stroman, No. IN 83-02-005T (Del. Super. Ct. May 18, 1984) (available August 26, 1986, on LEXIS, States library, Omni file) (drunk driving roadblocks employed by Delaware State Police constitutionally valid under fourth amendment); State v. Golden, 171 Ga. App. 27, 31, 318 S.E.2d 693, 696 (1984) (drunk driving checkpoint valid under fourth amendment); People v. Bartley, 109 Ill.2d 273,____, 486 N.E.2d 880, 889 (1985) (holding drunk driving roadblock constitutional under fourth amendment), *cert. denied*, 106 S.Ct. 1384 (1986); People v. Lindblade, 492 N.E.2d 1015, 1016 (Ill. App. Ct. 1986) (approving roadblock conducted pursuant to guidelines established in *Bartley*); State v. Garcia, ____ Ind. App. ____, 481 N.E.2d 148, 153 (1985) (sobriety checkpoint valid under fourth amendment); State v. Riley, 377 N.W.2d 242, 244 (Iowa Ct. App. 1985) (sobriety checkpoint valid under fourth amendment); State v. Deskins, 234 Kan. 529,____, 673 P.2d 1174, 1185 (1983) (holding drunk driving roadblock constitutional); Kinslow v. Commonwealth, 660 S.W.2d 677, 678 (Ky. Ct. App. 1983) (sobriety checkpoint valid under fourth amendment), *cert. denied*, 465 U.S. 1105 (1984); Little v. State, 300 Md. 485, 504, 479 A.2d 903, 914 (1984) (holding drunk driving roadblock constitutional under fourth amendment); Commonwealth v. Trumble, 396 Mass. 81, ____, 483 N.E.2d 1102, 1108 (1985) (sobriety checkpoint valid under fourth amendment and state constitution); State v. Coccomo, 177 N.J. Super. 575, 584, 427 A.2d 131, 135 (1980) (drunk driving roadblock is constitutional under fourth amendment and state constitution); People v. Scott, 63 N.Y.2d 518, 529, 483 N.Y.S.2d 649, 654, 473 N.E.2d 1, 6 (1984) (holding drunk driving roadblock constitutional); State v. Alexander, 22 Ohio Misc.2d 34,____, 489 N.E.2d 1093, 1093 (1985) (sobriety checkpoint constitutional under fourth amendment); Lowe v. Commonwealth, 230 Va. 346, 352, 337 S.E.2d 273, 277 (1985) (sobriety checkpoint constitutionally valid), *cert. denied*, 106 S. Ct. 1464 (1986); *see also* State v. Jones, 483 So.2d 433, 439 (Fla. 1986) (drunk driving roadblock would be constitutional if conducted pursuant to neutral criteria); State v. Abelson, 485 So.2d 861, 862 (Fla. Dist. Ct. App. 1986) (finding sobriety checkpoint conducted pursuant to guidelines established in *Jones* constitutionally valid); State v. McLaughlin, ____Ind. App.____, 471 N.E.2d 1125, 1142 (1984) (stating that sobriety checkpoint might be constitutional under fourth amendment if state could demonstrate effectiveness of roadblock); State v. Muzik, 379 N.W.2d 599, 604 (Minn. App. 1985) (sobriety checkpoint violated fourth amendment but would have been constitutional if operated according to predetermined procedures); State v. Crom, 222 Neb. 273, ____, 383 N.W.2d 461, 463 (1986) (per curiam) (invalidating sobriety checkpoint that police conducted pursuant to no predetermined standards, but implying that roadblocks operated according to neutral guidelines would be constitutional); State v. Kirk, 202 N.J. Super, 28, 43, 493 A.2d 1271, 1279 (1985) (drunk driving roadblock is constitutional if properly conducted); State v. Smith, 674 P.2d 562, 565 (Okla. Crim. App. 1984) (sobriety checkpoints would be constitutional if conducted pursuant to statutory authority); State v. Olgaard, 248 N.W.2d 392, 394 (S.D. 1976) (drunk driving checkpoint valid if operated under aegis of judicial warrant); Webb v. State, 695 S.W.2d 676, 681-82 (Tex. Ct. App. 1985) (holding drunk driving roadblock unconstitutional because state

Supreme Court recently endorsed the use of sobriety checkpoints in *Lowe v. Commonwealth*,[46] holding that the effectiveness of the roadblocks in detecting and deterring drunk driving outweighed the minimal intrusion upon privacy rights.[47] In *Lowe*, the police arrested the defendant for driving under the influence of alcohol after stopping the defendant at a sobriety checkpoint.[48] When the police detained the defendant at the sobriety checkpoint, the police detected an odor of alcohol and noticed that the defendant's eyes were red.[49] The police, therefore, directed the defendant to pull the car over and park in an area adjacent to the roadblock.[50] After the defendant parked his car, the police asked the defendant to exit his vehicle and to perform field sobriety tests.[51] When the defendant failed the sobriety tests, the police arrested the defendant and, after obtaining the defendant's consent, administered a breathalizer test in a police van at the scene.[52] The breathalizer test revealed a blood alcohol content of .17 percent.[53] The General District Court of the City of Charlottesville convicted the defendant of driving under the influence of alcohol.[54] The defendant appealed the conviction to the Circuit Court for the City of Charlottesville, filing a motion to suppress all evidence obtained from the roadblock.[55] The defendant claimed that the roadblock violated his constitutional rights against unreasonable seizures.[56] The circuit court affirmed the lower court's conviction, and the defendant appealed to the Virginia Supreme Court.[57] In analyzing the validity of the sobriety

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failed to prove roadblock superior to other techniques); State v. Martin, 145 Vt. 562,____, 496 A.2d 442, 450-51 (1985) (sobriety checkpoints constitutionally valid if conducted pursuant to predetermined criteria). *But see* State v. Koppel, ____N.H.____, 499 A.2d 977, 982 (1985) (drunk driving roadblock constitutionally invalid under state constitution); Nelson v. Lane County, 79 Or. App. 753, 761, 720 P.2d 1291, 1297 (1986) (drunk driving roadblock violates state constitution); Commonwealth v. Tarbert, ____Pa. Super.____, 502 A.2d 221, 225-26 (1985) (sobriety checkpoints invalid under state constitution).

46. 230 Va. 346, 337 S.E.2d 273 (1985), *cert. denied*, 106 S.Ct. 1464 (1986).

47. *Id.* at 277.

48. *Id.* at 274; *see* VA. CODE § 18.2-266 (supp. 1986) (unlawful to operate any motor vehicle with blood alcohol content of .10% or more).

49. *Lowe*, 337 S.E.2d at 274.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*; *see* VA. CODE § 18.2-269 (supp. 1986) (blood alcohol content of .10 or more creates rebuttable presumption of intoxication). The Virginia General Assembly recently enacted a stiffer drunk driving law. *See Tough Drunk Driving Bill Passed*, Wash. Post, Feb. 12, 1986, at A1, col. 4. The law now automatically considers intoxicated a driver with a .10% blood alcohol content. *Id.*

54. *Lowe*, 337 S.E.2d at 274; Brief for Appellee at 1, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985); Brief for Appellant at 1-2; Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985).

55. *Lowe*, 337 S.E.2d at 274; Brief for Appellee at 1, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985); Brief for Appellant at 2, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985).

56. *Lowe*, 337 S.E.2d at 274.

57. *Id.*

checkpoint, the Virginia Supreme Court noted that the Virginia Constitution grants no protections beyond the protections that the fourth amendment to the United States Constitution provides.[58] The *Lowe* court, therefore, examined the roadblock under the fourth amendment.[59] The court noted that stopping a vehicle and detaining the occupants constitutes a seizure under the fourth amendment[60] and, therefore, assessed the reasonableness of the roadblock balancing the state's interest in conducting the roadblock against the resulting intrusions on personal privacy.[61]

In examining the validity of the sobriety checkpoint in *Lowe*, the Virginia Supreme Court noted that the police selected the location of the roadblock after considering the location of previous drunk-driving arrests and alcohol-related accidents.[62] Police officers operating the checkpoint received extensive training by experts on the proper procedure for conducting the roadblock.[63] Although the police did not disclose the specific location at which the police would conduct the sobriety checkpoint, the police gave advance notice of the roadblock,[64] and a lighted sign alerted motorists of the purpose of the roadblock.[65] The roadblock area was well-lighted, and two marked police cars with red lights flashing were present.[66] The police stopped all vehicles travelling in one lane unless traffic backed up, at which time the police allowed vehicles to pass through the checkpoint until the traffic cleared.[67] The police exercised no discretion as to which vehicle to stop, and the detentions lasted approximately thirty seconds.[68] Police discovered more license violations and lower blood alcohol content levels that police normally detected during routine patrols.[69]

In applying the fourth amendment balancing text to the facts of *Lowe*, the Virginia Supreme Court acknowledged the overwhelming state interest in apprehending drunk drivers.[70] The *Lowe* Court, then, addressed the degree

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58. *Id.* at 275.

59. *Id.*

60. *Id.* at 275; *see supra* text accompanying note 4 (roadblock detention is seizure under fourth amendment).

61. *Lowe*, 337 S.E.2d at 277; *see supra* text accompanying note 7 (balancing test determines fourth amendment reasonableness).

62. *Lowe*, 337 S.E.2d at 276.

63. *See id.* In *Lowe v. Commonwealth*, a manual specifically outlined the procedure by which the police conducted the drunk driving roadblock. *Id.* The manual included criteria for the selection of a roadblock site, a provision requiring that a supervisory police official would assign officers to operate the checkpoint, and provisions establishing the manner in which the roadblock would be operated. *Id.* at 277.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.* at 276 n.2. The United States Supreme Court and several state courts have recognized the seriousness of the drunk driving problem. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553, 558 (1982) (acknowledging serious drunk driving problem); State *ex rel.* Ekstrom

to which the roadblock advanced the public interest[71] and the nature of the intrusion imposed upon individual rights.[72] In determining the effectiveness of the drunk driving roadblock, the court placed more emphasis on the checkpoint's deterrent effect than on its actual efficiency in detecting and apprehending drunk drivers.[73] While the court cited no evidence showing the number of motorists arrested for drunk driving or the number of vehicles detained at the roadblock, the *Lowe* court asserted that the sobriety checkpoint would give individuals an incentive not to drive while intoxicated when the drivers were aware that police would stop vehicles at sobriety checkpoints.[74] The court, therefore, concluded that the sobriety checkpoint effec-

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v. Justice Court of State, 136 Ariz. 1,____, 663 P.2d 992, 999 (1983) (en banc) (Feldman, J., concurring) (urging majority to take judicial notice of danger of drunk driving); Ingersoll v. Palmer, 176 Cal. App.3d 1028,____, 221 Cal. Rptr. 659, 666 (1985) (recognizing significant state interest in combatting drunk driving); State v. Stroman, No. IN 83-02-0055T (Del. Super. Ct. May 18, 1984) (available August 26, 1986, on LEXIS, States library, Omni file) (state has overwhelming interest in clearing drunk drivers from highways); State v. Jones, 483 So.2d 433, 439 (Fla. 1986) (state has compelling interest in protecting public from drunk drivers); People v. Conway, 135 Ill. App.3d 887,____, 482 N.E.2d 437, 440 (1985) (state interest in apprehending drunk drivers is substantial); State v. Garcia, ____Ind. App.____, 481 N.E.2d 148, 152 (1985) (state has vital interest in promoting public safety by clearing roads of drunk drivers); State v. McLaughlin, ____Ind. App.____, 471 N.E.2d 1125, 1136 (1984) (taking judicial notice of fact that drunk driving is among worst of current social problems); State v. Riley, 377 N.W.2d 242, 243 (Iowa Ct. App. 1985) (state has substantial interest in controlling drunk driving); State v. Deskins, 234 Kan. 529, ____, 673 P.2d 1174, 1181 (1983) (drunk driving problem creates overwhelming state interest in eradicating problem); Little v. State, 300 Md. 485, 504, 479 A.2d 903, 912 (1984) (state has compelling interest in combatting drunk driving); State v. Crom, 222 Neb. 273, ____, 383 N.W.2d 461, 469 (1986) (per curiam) (Krivosha, C.J., concurring) (drunk driving is serious threat to society); People v. Scott, 63 N.Y.2d 518, 525, 483 N.Y.S.2d 649, 652, 473 N.E.2d 1, 4 (1984) (state has overwhelming interest in controlling drunk driving); State v. Alexander, 22 Ohio Misc.2d 34,____, 489 N.W.2d 1093, 1097 (1985) (taking judicial notice of severity of drunk driving problem); State v. Martin, 145 Vt. 562,____, 496 A.2d 442, 447 (1985) (taking judicial notice of drunk driving problem); 3 LAFAVE, SEARCH & SEIZURE, § 10.8, 204, 206 (supp. 1986) (strong public interest in eliminating drunk driving problem exists). *But see* Jacobs & Strossen, *supra* note 3, at 597 (over-emphasized publicity concerning drunk driving problem has created mystical, perceived threat that precludes careful consideration of intrusiveness of sobriety checkpoints). One commentator laments that questioning the constitutionality and effectiveness of drunk driving roadblocks is an unpopular argument since the sentiment against drunk driving is the prevalent attitude in society. *Id.* at 599.

71. *See Lowe*, 337 S.E.2d at 276 (applying three-pronged test that United States Supreme Court established in *Brown* to determine constitutionality of sobriety checkpoint); *see also supra* text accompanying notes 7-9 (discussing Supreme Court's balancing test).

72. *Lowe*, 337 S.E.2d at 276; *see id.* at 275 (individuals have rights against unwarranted intrusions while operating motor vehicles). In *Lowe*, the Virginia Supreme Court noted that individuals have a reasonable expectation of privacy and a right against unreasonable government intrusion while operating a vehicle. *Id.*

73. *See id.* at 277 *(Lowe* court stating that deterrent effect of sobriety checkpoint is obvious).

74. *Id.*; *see* State *ex rel.* Ekstrom v. Justice Court of State, 136 Ariz. 1,____, 663 P.2d 992, 1001 (1983) (en banc) (Feldman, J., concurring) (advance publicity amplifies deterrent effect of sobriety checkpoint); Ingersol v. Palmer, 175 Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 669 (1985) (advance publicity increases deterrent effect of drunk driving roadblock); State

tively implemented the strong state interest in eliminating drunk driving.[75]

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v. Stroman, No. IN 83-02-0055T (Del. Super. Ct. May 18, 1984) (available August 26, 1986, on LEXIS, States library, Omni file) (drunk driving roadblocks have substantial deterrent effect); State v. McLaughlin, ____Ind. App.____, 471 N.E.2d 1125, 1137-38 (1984) (sobriety roadblock has deterrent effect if police give advance notice of roadblock, even if roadblock is not as effective as ordinary methods of detecting drunk drivers); State v. Garcia, ____ Ind. App. ____, 481 N.E.2d 148, 154 (1985) (sobriety roadblock deters people from driving drunk); Little v. State, 300 Md. 485, 505-06, 479 A.2d 903, 913 (1984) (correlating decrease in alcohol-related accidents with deterrent effect of drunk driving roadblock); State v. Muzik, 379 N.W.2d 599, 604 (Minn. App. 1985) (requiring police to publicize drunk driving roadblock in advance); People v. Scott, 63 N.Y.2d 518, 528-29, 483 N.Y.S.2d 649, 653-54, 473 N.E.2d 1, 6 (1984) (sobriety checkpoints have deterrent effect without substantial intrusion upon personal privacy even though effectiveness of sobriety roadblock in reducing alcohol-related accidents is not known); *Roadblock Seizures*, *supra* note 1, at 1472 (drunk driving roadblocks deter drunk driving and are effective in apprehending drunk drivers).

75. *See Lowe*, 337 S.E.2d at 277; *infra* text accompanying note 105 (courts measure effectiveness of sobriety checkpoints either by effectiveness in detecting and apprehending drunk drivers or by effectiveness in deterring drivers from drinking and driving). States should be more interested in deterring drunk driving than in apprehending motorists who actually drink and drive. *See* State v. Superior Court for County of Pima, 143 Ariz. 45,____, 691 P.2d 1073, 1076 (1984) (en banc) (primary purpose of sobriety checkpoint is deterrence, not arrests); Ingersoll v. Palmer, 175 Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 666 (1985) (common sense suggests that courts should determine effectiveness of drunk driving roadblock according to number of people deterred from drunk driving, not according to number of people arrested for drunk driving); Comment, *Sobriety Checkpoint Roadblocks: Constitutional in Light of* Delaware v. Prouse? 28 ST. LOUIS U. L.J. 813, 833 (1984) (even if police make few arrests for drunk driving as result of sobriety checkpoint, goal of roadblock is achieved if roadblock deters drunk driving).

While the Virginia Supreme Court in *Lowe* offered no empirical demonstration of the effectiveness of the sobriety checkpoint in detecting drunk drivers, several state courts have concluded that drunk driving roadblocks are an effective means to detect drunk drivers and to reduce drunk driving. *See, e.g.*, State v. Superior Court for County of Pima, 143 Ariz. 45, ____, 691 P.2d 1073, 1077 (1984) (en banc) (crediting drunk driving roadblocks for decline in alcohol-related accidents); State v. Stroman, No. IN 83-02-0055T (Del. Super. Ct. May 18, 1984) (available August 26, 1986, on LEXIS, States library, Omni file) (sobriety checkpoints effectively contribute to highway safety); People v. Conway, 135 Ill. App. 3d 887,____, 482 N.E.2d 437, 440 (1985) (drunk driving roadblocks are effective means to apprehend drunk drivers in light of substantial state interest); State v. Garcia, ____Ind. App.____, 481 N.E.2d 148, 152 (1985) (sobriety checkpoint seizures are reasonable given significant number of deaths attributable to drinking and driving); Little v. State, 300 Md. 485, 505, 479 A.2d 903, 913 (1984) (sobriety checkpoint is moderately effective in detecting drunk drivers). *But see* State v. McLaughlin, ___ Ind. App.____, 471 N.E.2d 1125, 1137 (1984) (finding that state failed to prove that roadblock is more effective in apprehending drunk drivers than less intrusive traditional means). The Indiana Court of Appeals in *McLaughlin*, however, stated that evidence showing the effectiveness of sobriety checkpoints would ensure the constitutionality of such roadblocks. *Id.* at 1142. No such evidence existed before the *McLaughlin* court. *Id.*; *see* Conour, *Roadblocks*, 28 RES GESTAE 388, 389 (1985) *(McLaughlin* court implied that empirical proof of roadblock's effectiveness over traditional means of apprehending drunk drivers would ensure constitutionality of roadblock); *see also* State v. Deskins, 234 Kan. 529,____, 677 P.2d 1174, 1188 (1983) (Prager, J., dissenting) (state presented no evidence proving sobriety checkpoint is more effective than traditional method of observing erratic driving behavior); Little v. State, 300 Md. 485, 513, 479 A.2d 903, 920 (1984) (Davidson, J., dissenting) (no empirical evidence existed in record to support effectiveness of drunk driving roadblock in detecting and deterring drunk drivers);

After asserting the compelling state interest in eliminating drunk driving and concluding that the roadblock presented an effective means to carry out the state interest, the Virginia Supreme Court in *Lowe* addressed the issue of the roadblock's intrusion upon individual constitutional rights.[76] The court did not analyze the roadblock seizure under the standard of individualized suspicion,[77] but rather ascertained whether the police operated the sobriety checkpoint according to neutral, predetermined guidelines.[78] The *Lowe* court found that the police adhered to neutral, objective criteria delineated in a police manual outlining proper roadblock procedure.[79] Furthermore, since the intrusion upon motorist's rights to unfettered passage was minimal,[80] the

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Webb v. State, 695 S.W.2d 676, 682 (Tex. Ct. App. 1985) (invalidating roadblock because state failed to prove that sobriety checkpoints are superior to other less intrusive means of detecting and deterring drunk drivers); Grossman, *supra* note 3, at 156-57 (data does not demonstrate effectiveness of sobriety checkpoints in detecting drunk drivers because police arrest less than one percent of motorists stopped at drunk driving roadblocks for drunk driving); Jacobs & Strossen, *supra* note 3, at 640 (statistics do not demonstrate effectiveness of sobriety checkpoints in reducing drunk driving). One commentator has claimed that any number of factors could have contributed to the decrease in alcohol-related accidents that many have attributed to sobriety checkpoints. Grossman, *supra* note 4, at 163. Tougher drunk driving laws, decreased vehicle use, and the increased public awareness of drunk driving resulting from the campaigns of citizen groups may have caused the reduction in alcohol-related accidents. *Id.*

76. *Lowe*, 337 S.E.2d at 276-77.

77. *See supra* note 20 and accompanying text (discussion of reasonable, articulable suspicion of illegal activity).

78. *Lowe*, 337 S.E.2d at 276. The *Lowe* court stated that since the police did not stop the defendant after suspecting some illegal activity, the court would examine the detention to determine if the police employed neutral criteria in operating the roadblock. *Id.*

The principal danger of the sobriety checkpoint is the exercise of unchecked police discretion such as the random and arbitrary harassment of motorists on lightly travelled roads at night. *See supra* note 42 and accompanying text (fourth amendment principally shields individuals from arbitrary government harassment); *see also* State v. Kirk, 202 N.J. Super. 28, 55-56, 493 A.2d 1271, 1275 (1985) (police violated state constitution by exercising unbridled discretion at drunk driving roadblock). In *Kirk*, two New Jersey state troopers conducted a sobriety checkpoint on a lightly travelled, rural road based on no predetermined guidelines and according to the trooper's subjective discretion. *Id.* at 1273. The *Kirk* court stated that although a drunk driving roadblock conducted according to neutral criteria would be constitutional, the roadblock in *Kirk* involved the exercise of unbridled discretion by the police. *Id.* at 1275, 1279. The court, therefore, invalidated the roadblock at issue in *Kirk*. *Id.*; *see* State *ex rel.* Ekstrom v. Justice Court of State, 136 Ariz. 1,____, 663 P.2d 992, 996 (1983) (en banc) (invalidating drunk driving roadblock set up at discretion of field officers and operated without specific guidelines); State v. Crom, 222 Neb. 273, ____, 383 N.W.2d 461,463 (1986) (per curiam) (declaring unconstitutional sobriety checkpoint conducted without adherence to predetermined, objective standards).

79. *Lowe*, 337 S.E.2d at 277. In *Lowe*, the Virginia Supreme Court noted that the police did not exercise the unbridled discretion that the United States Supreme Court condemned in *Delaware v. Prouse* as violative of the fourth amendment. *Id.*; *see Prouse*, 440 U.S. at 663 (principal factor from which fourth amendment protects individuals is "standardless and unconstrained discretion" of field officers).

80. *Lowe*, 337 S.E.2d at 277. In analyzing the constitutionality of the roadblock in *Lowe*, the Virginia Supreme Court did not use the terms objective and subjective intrusion that the United States Supreme Court originated in *Martinez-Fuerte*. *Id.* at 277; *see supra* text accompanying notes 22-24 (definition of objective and subjective intrusion).

court in *Lowe* determined that the sobriety checkpoint did not constitute an "impermissible infringement" on the defendant's constitutional rights.[81]

In addressing the constitutionality of the sobriety checkpoint, the Virginia Supreme Court in *Lowe* correctly applied the three-part test established by the United States Supreme Court.[82] The *Lowe* court correctly determined that states have a substantial interest in eliminating drunk driving and the death and destruction drunk drivers cause.[83] The court, however, should have analyzed more thoroughly the effectiveness of the roadblock in detecting and apprehending drunk drivers.[84] The *Lowe* court asserted the effectiveness of the sobriety checkpoint but cited little supporting evidence.[85] In *Delaware v. Prouse*, the United States Supreme Court invalidated a police practice of randomly stopping motorists for routine license checks on the grounds that the state failed to establish with empirical evidence that random stops were more effective in detecting license violations than less intrusive alternate means.[86] Opponents of the sobriety checkpoint, relying on *Delaware v. Prouse*, claim that since police discover a significant number of drunk drivers by observing erratic driving behavior, the use of the more intrusive, less effective sobriety checkpoint is unconstitutional.[87] Courts, therefore, should

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81. *Lowe*, 337 S.E.2d at 277.

82. *See supra* text accompanying notes 7-9 (discussing three-part, fourth amendment test that Supreme Court established to determine reasonableness of warrantless seizure).

83. *Lowe*, 337 S.E.2d at 277; *see supra* note 1 and accompanying text (documentation of seriousness of drunk driving problem). *But see* Jacobs & Strossen, *supra* note 3, at 635 (only small percentage of drivers on road are drunk and smaller percentage of drunk drivers actually are involved in traffic accidents). Some commentators claim that given the number of drivers on the road and the great number of miles travelled in automobiles each year, the number of deaths resulting from traffic accidents is insignificant. *Id.* at 636. The commentators claim that only 2.9 deaths occur in every 100 million vehicle miles. *Id.* Furthermore, the ratio of traffic fatalities to population, miles driven, and licensed drivers has not increased over the past fifty years. *Id.*

84. *See supra* note 75 and accompanying text (assessments of state courts on effectiveness of sobriety checkpoint).

85. *See supra* text accompanying note 74 *(Lowe* court did not determine ratio between drivers arrested and drivers stopped).

86. *See supra* notes 6 and 37 and accompanying text *(Prouse* seems to require some demonstration that police practice effectively promotes government interest); *see also* Commonwealth v. Trumble, 396 Mass. 81,____, 483 N.E.2d 1102, 1112-13 (1985) (Lynch, J., dissenting) (courts should determine if roadblock is more effective than less intrusive means to detect drunk drivers). In *Trumble*, the dissent claimed that not addressing the issue of effectiveness relieved the state of its burden of proving the reasonableness of the sobriety checkpoint. *Id.* at 1113, n.1; *see also* State v. McLaughlin, ____Ind. App.____, 471 N.E.2d 1125, 1133 (1984) *(Prouse* requires some showing that law enforcement methods promote state interest to greater degree than other means); Jacobs & Strossen, *supra* note 3, at 633 *(Prouse* stressed need to demonstrate substantial effectiveness of police practice with empirical evidence).

87. *See* Grossman, *supra* note 3, at 159 (using roving patrols is more effective and less intrusive method to detect drunk drivers than sobriety checkpoint); Jacobs & Strossen, *supra* note 3, at 609 (1.92 million drunk driving arrests nationwide in 1983 demonstrates effectiveness of traditional law enforcement techniques); *see also supra* note 37 and accompanying text *(Prouse* requires some showing that challenged police practice is more effective and less intrusive than existing methods).

juxtapose the effectiveness of detecting drunk drivers at sobriety roadblocks against the effectiveness of alternate means of apprehending drunk drivers because the existence of more effective, less intrusive law enforcement techniques might undermine the constitutional validity of the roadblocks under *Prouse*.[88] For example, in *State v. Koppel*,[89] the New Hampshire Supreme Court claimed that a sobriety checkpoint was not an effective means of detecting drunk drivers.[90] The *Koppel* court conceded that roadblocks might have a deterrent effect, but ruled that the public interest in detecting drunk drivers did not outweigh the roadblock's intrusion upon personal privacy because traditional methods for detecting and deterring drunk drivers were more effective and less intrusive than drunk driving roadblocks.[91] The New

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88. *See* Ingersoll v. Palmer, 175 Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 666 (1985) (ascertaining existence of equally effective but less intrusive alternatives is inherent in determining to what degree sobriety checkpoint advances public interest); State v. Muzik, 379 N.W.2d 599, 603 (Minn. App. 1985) (when evaluating constitutionality of sobriety checkpoint, most state courts require demonstration of checkpoint's effectiveness in advancing state's interest in controlling drunk driving); *Roadblock Seizures*, *supra* note 1, at 1472 (absence of empirical support for effectiveness of drunk driving roadblock might preclude operation of roadblock).

89. ____ N.H.____, 499 A.2d 977 (1985).

90. *See id.* at 982. The New Hampshire Supreme Court in *State v. Koppel* noted that out of 1680 vehicles stopped at the challenged roadblock, the police made only 18 arrests for drunk driving. *Id.* at 979. The *Koppel* court concluded that the roadblock was ineffective because police made 175 arrests for drunk driving using traditional patrol methods during the same period period of time. *Id.*

91. *Id.* at 982-83. In *Koppel*, the police parked three or four marked police cars at a roadblock with lights flashing. *Id.* Police stopped all vehicles unless traffic backed up. *Id.* at 979. Police placed no signs or warnings alerting drivers of the roadblock and gave no advance publicity. *Id.* Field officers exercised no discretion, and the police conducted the roadblock according to procedures set forth in a manual written by supervisory personnel. *Id.* The New Hampshire Supreme Court evaluated the sobriety checkpoint on state constitutional grounds because the court determined that the New Hampshire Constitution provided greater protections than the fourth amendment to the United States Constitution. *Id.* at 978-80. The *Koppel* court concluded that under the New Hampshire Constitution, the sobriety checkpoint was unconstitutional because the state interest did not outweigh the roadblock's intrusion upon individual privacy rights. *Id.* at 982. *But see* Opinion of the Justices, ____N.H. ____, 509 A.2d 744, 745 (1986) (evaluating proposed legislative bill concerning sobriety checkpoints). The New Hampshire House of Representatives requested the New Hampshire Supreme Court to draft an advisory opinion concerning the constitutionality of a resolution setting forth guidelines for the operation of sobriety checkpoints. *Opinion*, 509 A.2d at 745. The House bill provided that police acquire a judicial warrant authorizing the operation of a drunk driving roadblock. *Id.* In addition, the magistrate or judge issuing the warrant would consider the degree of intrusiveness of the roadblock, safety provisions, the relative effectiveness of the checkpoint and anticipated deterrent effect, and the factors determining the selection of the location of the roadblock. *Id.* The bill would require the issuing judge to find that the roadblock was an effective tool with which to detect and to apprehend drunk drivers and that the public interest in conducting the roadblock outweighed the intrusion upon individual rights. *Id.* The bill also mandated that police issue an advance notice, publicizing the operation of the roadblock. *Id.* The New Hampshire Supreme Court concluded that the bill would not violate the New Hampshire Constitution and that the bill was not inconsistent with the court's opinion in *State v. Koppel*. *Id.* at 745-46.

Hampshire Supreme Court, therefore, invalidated the sobriety checkpoint at issue in *Koppel* on state constitutional grounds.[92]

In examining the effectiveness of sobriety checkpoints in detecting and apprehending drunk drivers as required in *Prouse*, courts should differentiate between the government interest in operating a drunk driving roadblock and in conducting a license checkpoint. In *Prouse*, the United States Supreme Court recognized that states have a substantial interest in enforcing inspection, registration, and licensing requirements.[93] Nevertheless, the Court invalidated the roadblock at issue in *Prouse* because the state failed to prove the relative effectiveness of the roadblock in detecting license and registration violations.[94] The state interest in eliminating drunk driving, however, is more compelling than the state interest in enforcing licensing laws because drunk drivers inflict so much death and destruction on the highways.[95] Courts, therefore, should not subject the effectiveness of sobriety checkpoints in

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92. *See Koppel*, 499 A.2d at 980, 982 (New Hampshire Supreme Court decided *Koppel* on state constitutional grounds even though court used Supreme Court's analysis in *Prouse*); *see also* Commonwealth v. Tarbert, ___Pa. Super.___, 502 A.2d 221, 222 (1985) (invalidating sobriety checkpoint on state constitutional grounds). In *Commonwealth v. Tarbert*, the police arrested the defendant at a drunk driving roadblock for driving under the influence of alcohol. *Tarbert*, 502 A.2d at 222. The police stopped all vehicles at the checkpoint and asked drivers to produce licenses and registration forms. *Id.* In addition, police made physical inspections of the automobiles and observed drivers for outward signs of intoxication. *Id.* The Pennsylvania Superior Court in *Tarbert* decided the case on state constitutional grounds. *Id.* The *Tarbert* court stated that the Pennsylvania Constitution imposed a standard of reasonableness on the exercise of discretion by government officials, and therefore, employed a balancing test, weighing the intrusion upon individual rights against state interests to determine the reasonableness of the sobriety checkpoint. *Id.* at 223-34. The court concluded that the state interest of providing safe highways did not outweigh the roadblock's intrusion upon individual rights. *Id.* at 225. Furthermore, the *Tarbert* court claimed that no amount of control on police activity justifies a warrantless seizure without probable cause or reasonable suspicion. *Id.* at 225-26; *see* Nelson v. Lane County, 79 Or. App. 753, 761, 720 P.2d 1291, 1297 (1986) (invalidating sobriety checkpoint under state constitution). In *Nelson v. Lane County*, the police stopped the plaintiff at a sobriety checkpoint. *Nelson*, 720 P.2d at 1292. The plaintiff brought an action against the county seeking damages and injunctive and declaratory relief. *Id.* at 1292-93. The Court of Appeals of Oregon in *Nelson* found that police failed to demonstrate the effectiveness of the roadblock in detecting and apprehending drunk drivers. *Id.* at 1298. The police conducted the roadblock pursuant to predetermined criteria, but the *Nelson* court noted that guidelines designed to limit the discretion of individual officers were not adequate safeguards against the intrusion upon individual rights. *Id.* The court, therefore, held that the sobriety checkpoint at issue in *Nelson* was unreasonable and invalid under the Oregon Constitution. *Id.* at 1297.

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

94. *Id.* at 659.

95. *See* People v. Conway, 135 Ill. App.3d 887,___, 482 N.E.2d 437, 440 (1985) (state interest in apprehending drunk drivers is at least as compelling as state interest in enforcing licensing and registration requirements); State v. Riley, 377 N.W.2d 242, 243 (Iowa Ct. App. 1985) (state interest in combatting drunk driving is greater than state interest in enforcing licensing requirements); Webb v. State, 695 S.W.2d 676, 685 (Tex. Ct. App. 1985) (Sparling, J., dissenting) (state has greater interest in detecting drunk drivers than in enforcing licensing laws because drunk driver is more dangerous than unlicensed driver); *see also supra* note 1 and accompanying text (drunk driving poses lethal threat on highways).

detecting drunk drivers to the same level of scrutiny as the Supreme Court in *Prouse* applied to the effectiveness of a roadblock in detecting license and registration violations. For example, in *People v. Bartley*,[96] the Illinois Supreme Court evaluated the effectiveness of sobriety checkpoints in detecting drunk drivers.[97] The *Bartley* court employed the fourth amendment reasonableness test to address the constitutionality of a drunk driving roadblock, balancing the public interest against the intrusion upon the flow of trafic.[98] The *Bartley* court found a compelling state intertest in reducing the number of alcohol-related accidents and deterring drunk driving.[99] Although the *Bartley* court conceded that observing erractic driving behavior is more effective in detecting drunk drivers than roadblocks, the court expressed the need to use roadblocks as well as traditional means of apprehending drunk drivers.[100] The Illinois Supreme Court reasoned that the danger of detecting a drunk driver using traditional police practices after the driver already has wrecked warranted the use of all legitimate means to combat drunk driving.[101] Furthermore, the *Bartley* court stated that while the use of statistics in analyzing the constitutionality of sobriety checkpoints would be helpful, the absence of empirical data supporting the effectiveness of the sobriety checkpoints would not invalidate the roadblock in light of the seriousness of the drunk driving problem.[102] Courts, therefore, should not invalidate a sobriety checkpoint when the state fails to demonstrate empirically the roadblock's effectiveness in detecting drunk drivers as long as the operation of the roadblock is minimally intrusive upon the constitutional rights of individual drivers.[103]

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96. 109 Ill.2d 273, 486 N.E.2d 880 (1985), *cert. denied*, 106 S.Ct. 1384 (1986).

97. *See id.* at 886. In *People v. Bartley*, the Illinois Supreme Court considered the constitutionality of a roadblock designed primarily to check drivers licenses. *Id.* at 882. Police stopped all traffic at the roadblock. *Id.* The roadblock was well-lighted and augmented by the flashing red lights of police cars. *Id.* As the police checked the defendant's license, the police noticed that the defendant slurred his speech, fumbled his papers, and stumbled as he walked. *Id.* at 883. Police also detected the odor of alcohol. *Id.* The defendant failed the field sobriety tests, and the police arrested him. *Id.*

98. *Id.* at 885.

99. *Id.*

100. *Id.* at 886.

101. *Id.*; *see* State v. Stroman, No. IN 83-02-0055T (Del. Super. Ct. May 18, 1984) (available August 26, 1986, on LEXIS, States library, Omni file) (severity of drunk driving menace warrants use of all legitimate methods to combat problem, including sobriety checkpoints); Commonwealth v. Trumble, 396 Mass. 81,____, 483 N.E.2d 1102, 1105 (1985) (stating that traditional methods of detecting drunk driving have failed and upholding constitutionality of sobriety checkpoint); State v. Crom, 222 Neb. 273, ____, 383 N.W.2d 461, 472 (per curiam) (Boslaugh, J., concurring) (grave and pervasive drunk driving threat justifies the use of sobriety checkpoints).

102. *See Bartley*, 486 N.E.2d at 885-86. Although the *Bartley* court did not invalidate the sobriety checkpoint, the court did encourage police in the future to keep records documenting the operation of the sobriety checkpoint. *Id.* at 886; *see* Ingersoll v. Palmer, 175 Cal. App.3d 1028, 221 Cal. Rptr. 659, 666 (1985) (courts should allow police to use potentially effective methods even if statistics presently do not establish effectiveness).

103. *See supra* text accompanying note 9 (government must effect compelling public interest in minimally intrusive manner).

Even if the state is unable to demonstrate with empirical evidence the effectiveness of the sobriety checkpoint in detecting and apprehending drunk drivers, the state still can satisfy the second element of the reasonableness balancing test by showing the effectiveness of the roadblock in deterring individuals from drinking and driving.[104] The effectiveness of a sobriety checkpoint can be manifested in either the roadblock's ability to detect and apprehend drunk drivers or in the roadblock's ability to deter drivers from driving while under the influence of alcohol.[105] While the Virginia Supreme Court in *Lowe* failed to determine whether the sobriety checkpoint was effective in detecting drunk drivers, the *Lowe* Court correctly assessed the roadblock's effect in deterring drivers form driving under the influence of alcohol.[106] Although no practical way to measure the deterrent effect attributable to a sobriety roadblock exists,[107] the court in *Lowe* reasonably concluded that the awareness of the operation of a sobriety checkpoint would deter individuals from driving while intoxicated for fear of being arrested.[108]

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104. *See supra* note 74 and accompanying text (sobriety checkpoint deters drunk driving); *see also supra* text accompanying note 8 (government must prove existence of legitimate means with which to effect compelling public interest to prove reasonableness of seizure).

105. *See* LAFAVE, *supra* note 70, at 208-09 (effectiveness of sobriety checkpoint is manifested in either identification or deterrence of drunk drivers).

106. *See supra* note 74 and accompanying text (sobriety checkpoints deter drunk driving).

107. *See* Grossman, *supra* note 3, at 160 (deterrent effect of sobriety checkpoint cannot be supported theoretically or empirically); Jacobs & Strossen, *supra* note 3, at 639 (deterrent value of sobriety checkpoints is not measurable); Carrizosa, *Critics, Supporters Debate Worth of CHP Roadblocks*, L.A. Daily J., December 27, 1984, at p.1, col. 6 (no statistical data concerning deterrent effect of drunk driving roadblocks exist). One commentator has argued that a driver's being intoxicated would reduce any deterrent effect of sobriety checkpoints because a drunk driver might disregard the possibility of detection and apprehension. Jacobs & Strossen, *supra* note 3, at 639 n.197. The flaw in the argument asserted by Jacobs & Strossen is that the deterrent effect may not have its impact at the time when the inebriate decides to drive, but at the time before the driver becomes intoxicated. The motorist, therefore, can plan to moderate his or her drinking or pre-arrange alternative transportation.

Another commentator has asserted that two-thirds of all drunk drivers are problem drinkers and that problem drinkers cause most alcohol-related traffic accidents. Grossman, *supra* note 3, at 161. The commentator claimed that roadblocks have no deterrent effect on problem drinkers and that the overall deterrent effect of sobriety checkpoints, therefore, is reduced. *Id.* at 160.

108. *Lowe*, 337 S.E.2d at 277; *see Bartley*, 486 N.E.2d at 886 (roadblocks have deterrent effect if motorists are aware of roadblock). The Illinois Supreme Court in *Bartley* stated that advance publicity of the operation of a roadblock enhances the deterrent effect of the roadblock. *Id.* at 888. Furthermore, the *Bartley* court reasoned that a sobriety checkpoint may not deter all drivers from drinking and driving, but would deter some. *Id.* at 886; *see* State v. Superior Court for County of Pima, 143 Ariz. 45,____, 691 P.2d 1073, 1076-77 (1984) (en banc) (while sobriety checkpoint is no more effective than roving patrol in detecting drunk drivers, roadblock is more effective in deterring drunk driving); Ingersoll v. Palmer, 175 Cal. App.3d 1028,____, 221 Cal. Rptr. 659, 666 (1985) (sobriety checkpoints have deterrent effect if well-publicized and properly conducted); People v. Scott, 63 N.Y.2d 518, 529, 483 N.Y.S.2d 649, 654, 473 N.E.2d 1, 6 (1984) (reasonable to conclude that checkpoint has deterrent effect); State v. Martin, 145 Vt. 562,____, 496 A.2d 442, 447 (1985) (sobriety checkpoint has deterrent effect on drinking and driving); *see also* Carrizosa, *supra* note 107, at p. 1, col. 6 (deterrent effect extremely important since most courts examine deterrence in addressing constitutionality of sobriety checkpoint).

Even though the Virginia Supreme Court in *Lowe* failed to evaluate thoroughly the effectiveness of the roadblock in arresting drunk drivers, the *Lowe* court, nevertheless, correctly upheld the constitutionality of the roadblock on the grounds that the roadblock constituted an effective means to deter drunk driving.[109]

The Virginia Supreme Court in *Lowe* also correctly concluded that the sobriety checkpoint constituted a minimal intrusion on the personal privacy of the motorist, thus satisfying the third element of the fourth amendment balancing text.[110] To minimize the intrusion upon individual rights of motorists at sobriety checkpoints, the fourth amendment requires that police officers not exercise unrestrained discretion.[111] Police minimize objective intrusion by detaining motorists at sobriety checkpoints only for a minute or less and by restricting the scope of questioning.[112] The Virginia Supreme Court, unfortunately, gave little indication of how the police minimized the objective intrusion upon the motorists detained at the sobriety checkpoint in *Lowe*.[113] In *Bartley*, however, the Illinois Supreme Court noted that the objective intrusion of the drunk driving roadblock was minimal since the detention ordinarily lasted for fifteen to twenty seconds, and the police did not

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109. *See supra* note 75 and accompanying text (roadblock's primary objective is to deter drunk driving).

110. *See supra* text accompanying notes 80-81 (Virginia Supreme Court in *Lowe* determined that sobriety checkpoint is not "impermissible infringement" on constitutional rights); *see also supra* text accompanying note 9 (state must conduct sobriety checkpoint with minimal intrusion upon individual rights to satisfy third element of three-pronged reasonable seizure test).

111. *See* Brown v. Texas, 443 U.S. 47, 50 (1979) (central concern of fourth amendment is to assure protection of individual from random, arbitrary police activity); Delaware v. Prouse, 440 U.S. 648, 661 (1979) (fourth amendment protects individuals from "standardless and unconstrained discretion" of police); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (fourth amendment prevents "arbitrary and oppressive interference" in individual rights by police); United States v, Ortiz, 422 U.S. 891, 895 (1975) (central concern of fourth amendment is to protect personal privacy from random harassment by police); State v. Jones, 483 So.2d 433, 438 (Fla. 1986) (requiring adherence to neutral criteria in operation of drunk driving roadblock to prevent exercise of unbridled discretion by police); People v. Bartley, 109 Ill.2d 273, ____, 486 N.E.2d 880, 887 (1985) (key factor to eliminate in sobriety checkpoint is exercise of police discretion), *cert. denied*, 106 S.Ct. 1384 (1986); Commonwealth v. Trumble, 396 Mass. 81, ____, 483 N.E.2d 1102, 1111 (1985) (Abrams, J., concurring) (principal goal of constitutional roadblock is preventing exercise of unbridled discretion).

112. *See* Ingersoll v. Palmer, 175 Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 669 (1985) (detention should last only long enough to check for signs of intoxication); State v. Jones, 483 So.2d 433, 439 (Fla. 1986) (police should minimize length of detention at sobriety checkpoint); *see also supra* text accompanying note 23 (definition of objective intrusion).

113. *See Lowe*, 337 S.E.2d at 274. In *Lowe*, the police asked the defendant only to display his driver's license before subjecting the defendant to further tests for intoxication. *Id.*; *see infra* text accompanying notes 141-49 (discussion of detention subsequent to initial stop). The *Lowe* court described the initial stop as "momentary," but did not reveal the range or nature of questions that the police asked motorists. 337 S.E.2d at 277. The Virginia Supreme Court did mention that the manual by which the police operated the sobriety checkpoint contained procedures detailing the manner in which police would question motorists. *Id.* The court did not disclose specific provisions of the manual. *Id.*

ask motorists to exit vehicles unless the police suspected the driver of drunk driving.[114]

While restricting the discretion of individual police officers may eliminate the objective intrusion, such a restriction may not reduce substantially the subjective intrusion upon personal privacy rights.[115] The very purpose of sobriety checkpoints causes subjective intrusion.[116] Since police usually will not divulge the precise location of a drunk driving roadblock, the element of surprise causes a heightened degree of intrusion.[117] Because subjective intrusion involves the perception of individual drivers, police must implement means designed to minimize the infringement upon constitutional rights perceived by individual motorists.[118] The appearance of limited police discretion, therefore, is essential to minimize the degree of subjective intrusion.[119] For example, if drivers approaching a sobriety checkpoint notice that police

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114. *Bartley*, 486 N.E.2d at 886; *see* State v. Superior Court for County of Pima, 143 Ariz. 45,____, 691 P.2d 1073, 1077 (1984) (en banc) (objective intrusion minimized at sobriety checkpoint because police detained drivers for five to 20 seconds and asked only one or two questions); State v. Golden, 171 Ga. App. 27, 31, 318 S.E.2d 693, 695 (1984) (initial detention at sobriety checkpoint minimal because police delayed motorists only for one or two minutes); People v. Garcia, ____Ind. App.____, 481 N.E.2d 148, 154 (1985) (police minimized objective intrusion at sobriety checkpoint by detaining drivers for two or three minutes); State v. McLaughlin, ____Ind.____, 471 N.E.2d 1125, 1138 (1984) (objective intrusion minimal since average length of detention at drunk driving roadblock was two to three minutes, and police asked motorists only for licenses and registration forms).

115. *Drunk Drivers in Indiana, supra* note 1, at 1482; *see supra* text accompanying note 24 (definition of subjective intrusion).

116. Grossman, *supra* note 3, at 153.

117. *Id.* at 150.

118. *See Roadblock Seizures, supra* note 1, at 1482 (police can reduce subjective intrusion only if motorists perceive detention as routine, official, and systematic); *see also* State v. Jones, 483 So.2d 433, 439 (Fla. 1986) (approving use of sobriety checkpoint). In *State v. Jones*, the police arrested the defendant for driving under the influence of alcohol at a drunk driving roadblock. *Jones*, 483 So.2d at 434. Although the lower court noted that a properly conducted sobriety checkpoint would be constitutional, the lower court held that the roadblock at issue violated the fourth amendment because the police failed to operate the roadblock according to neutral procedures predetermined by supervisory personnel. Jones v. State, 459 So.2d 1068, 1076, 1079 (Fla. Dist. Ct. App. 1984), *aff'd*, State v. Jones, 483 So.2d 433 (Fla. 1986). In analyzing the constitutionality of the drunk driving roadblock, the Florida Supreme Court stated that a roadblock detention constituted a seizure under the fourth amendment and employed a balancing test, weighing the state's interest against the individual's interest. *Jones*, 483 So.2d at 435. In *Jones*, the Florida Supreme Court emphasized the importance of police adhering to neutral criteria when conducting a sobriety checkpiont. *Id.* at 438. The *Jones* court stated that police must operate a sobriety checkpoint pursuant to written guidelines and must display indicia of official authority. *Id.* at 438-39. In addition, the court stated that the fourth amendment requires police to provide adequate lighting and to place signs ahead of the roadblock to inform approaching motorists of the purpose of the detention. *Id.* at 439. The *Jones* court, however, stated that the fourth amendment did not require police to give advance notice to the media of the operation a checkpoint. *Id.* The Florida Supreme Court mentioned that a determination of the effectiveness of a sobriety checkpoint in detecting drunk drivers would aid the constitutional analysis of the roadblock, but the court stated that a roadblock conducted pursuant to uniform, neutral guidelines would be constitutional. *Id.*

119. *Roadblock Seizures, supra* note 1, at 1474.

stop vehicles according to a systematic procedure and the drivers see signs of official police authority, the roadblock is less likely to frighten the motorists.[120] The roadblock, therefore, should not give the driver the feeling police are singling out motorists for detention.[121]

Courts analyze the subjective intrusion present at a sobriety checkpoint in relation to the physical characteristics of the roadblock and the amount of discretion, either actual or perceived, that the police officers exercise when conducting the roadblock.[122] In finding that the physical characteristics of the roadblock in *Lowe* minimized the subjective intrusion upon the motorists, the Virginia Supreme Court noted that the roadblock area was well-lighted, that a lighted sign informed approaching motorists of the sobriety checkpoint, and that police provided an adequate area for subsequent detentions.[123] More importantly, the *Lowe* court noted that the existence of predetermined, objective procedures designed by supervisory police officers eliminated actual discretion on the part of the field officers.[124] Furthermore, in *Lowe*, the

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120. Delaware v. Prouse, 440 U.S. 648, 657 (1979); United States v. Ortiz, 422 U.S. 891, 894-95 (1975). *But see* Rogers, *The Drunk Driving Roadblock: Random Seizure or Minimal Intrusion*, 21 CRIM. L. BULL. 197, 199 (1985) (Supreme Court's analysis in *Prouse* is faulty in asserting that signs of police authority somehow will reduce subjective intrusion); Jacobs & Strossen, *supra* note 3, at 630 n.154 (likely that many feel threatened by spectacle of flashing lights, flares, police officers, and police cars).

121. *Roadblock Seizures*, *supra* note 1, at 1474-75; Note, *Criminal Law—Random Spot Check for Driver's License and Motor Vehicle Registration Held Unconstitutional*—Delaware v. Prouse, 28 KAN L. REV. 345, 352 (1980).

122. *See* State v. McLaughlin, ___Ind. App.___, 471 N.E.2d 1125, 1139 (1984) (subdividing factors of subjective intrusion into physical characteristics of roadblock, discretion motorists perceive, and discretion police actually exercise).

123. *Lowe*, 337 S.E.2d at 274; *see* State v. Superior Court for County of Pima, 143 Ariz. 45,___, 691 P.2d 1073, 1077 (1984) (en banc) (subjective intrusion reduced by signs indicating purpose of checkpoint); Ingersoll v. Palmer, 175 Cal. App. 3d 1028, ___, 221 Cal. Rptr. 659, 669 (1985) (validating drunk driving roadblock when warning signs informed approaching motorists of existence of roadblock); State v. Jones, 483 So.2d 433, 439 (Fla. 1986) (police should provide adequate lighting and place warning signs in advance of roadblock to reduce intrusion upon motorists); State v. Deskins, 234 Kan. 529,___, 677 P.2d 1174, 1185 (1983) (police should give advance warning of roadblock to approaching motorists); Little v. State, 300 Md. 485, 490, 479 A.2d 903, 905 (1984) (police placed 20 square-foot sign ahead of valid roadblock to inform approaching motorists of purpose of sobriety checkpoint); State v. Muzik, 379 N.W.2d 599, 604 (Minn. App. 1985) (holding roadblock unconstitutional when police gave no advance notice and placed no warning signs); People v. Scott, 63 N.Y.2d 518, 527-28, 483 N.Y.S.2d 649, 653, 473 N.E.2d 1, 5 (1984) (subjective intrusion reduced by visible signs announcing purpose of sobriety checkpoint).

124. *See Lowe*, 337 S.E.2d at 276-77 (police officers received special training and operated roadblock pursuant to instructions in police manual). Topics covered in the procedural manual that the police used in *Lowe* included specifications concerning how police would man and equip the roadblock, procedures for stopping traffic and questioning motorists, and methods by which to determine if a motorist was intoxicated. *Id.* at 277; *see Bartley*, 486 N.E.2d at 887. In *Bartley*, the Illinois Supreme Court found a minimal amount of subjective intrusion because police in *Bartley* exercised no unbridled or arbitrary discretion in operating the sobriety checkpoint. *Bartley*, 486 N.E.2d at 887. In holding the roadblock constitutional, the *Bartley* court noted that supervisory personnel selected the location of the roadblock and that a manual

police chose the roadblock location based on data revealing the locations of previous drunk driving arrests and alcohol-related accidents, thus providing a rational basis for the selection of the site and eliminating the possibility of police randomly choosing the location for a roadblock.[125] Finally, in reducing

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explained police procedure. *Id.* In *Commonwealth v. Trumble*, the Massachusetts Supreme Judicial Court held that the sobriety checkpoint in question met the standards established by the court for evaluating the constitutionality of sobriety roadblocks in *Commonwealth v. McGeoghegan*. *Trumble*, 396 Mass. 81,____, 483 N.E.2d 1102, 1107 (1985); *see McGeoghegan*, 389 Mass. 137,____, 449 N.E.2d 349, 353 (1983) (roadblock deemed unreasonable and unconstitutional). In invalidating a sobriety checkpoint in *McGeoghegan*, the Massachusetts Supreme Judicial Court noted that field officers used discretion in deciding which vehicles to stop at the roadblock, that police provided inadequate lighting and warnings to motorists concerning the purpose of the roadblock, and that the police established an insufficient show of official status. *McGeoghegan*, 449 N.E.2d at 353. The Massachusetts Supreme Judicial Court, however, stated that the guidelines by which the police conducted the sobriety checkpoint in *Trumble* provided for no arbitrary discretion on the part of the police. *Trumble*, 483 N.E.2d at 1107. Supervisory police personnel planned the roadblock in advance, determining such factors as date, location, time, and duration of the detention at the roadblock. *Id.* The *Trumble* court, therefore, found the sobriety checkpoint to be constitutional. *Id.; see* Commonwealth v. Amaral, 398 Mass. 98, 101, 495 N.E.2d 276, 279 (1986) (invalidating sobriety checkpoint under fourth amendment and state constitution). In *Commonwealth v. Amaral*, the police arrested the defendant at a drunk driving roadblock for driving under the influence of alcohol. *Amaral*, 495 N.E.2d at 277. The trial court denied the defendant's motion to suppress the incriminating evidence that the police obtained at the roadblock. *Id.* The Massachusetts Supreme Judicial Court, however, reversed the lower court because the state failed to prove the reasonableness of the roadblock. *Id.* at 278. The *Amaral* court noted that the police conducted the sobriety checkpoint in a well-lighted location and that the police placed signs that information motorists of the roadblock. *Id.* The police also parked marked vehicles with lights flashing at the scene of the roadblock and stopped all vehicles entering the roadblock. *Id.* The court, nevertheless, invalidated the roadblock at issue in *Amaral* because the state failed to demonstrate that the police operated the sobriety checkpoint pursuant to predetermined guidelines promulgated by administrative or supervisory personnel. *Id.* at 279. The *Amaral* court stated that the government failed to prove adherence to specific guidelines that the Massachusetts Supreme Judicial Court approved in *Trumble* that mitigate the exercise of discretion by police officers. *Id.*; *see* State v. Superior Court for County of Pima, 143 Ariz. 45,____, 691 P.2d 1073, 1075 (1984) (en banc) (validating roadblock conducted pursuant to procedural manual written by detached police official); Ingersoll v. Palmer, 175 Cal. App.3d 1028, ____, 221 Cal. Rptr. 659, 667 (1985) (promulgation of sobriety checkpoint guidelines by supervisory personnel reduces possibility of arbitrary police harassment); State v. Jones, 483 So.2d 433, 438 (Fla. 1986) (police must conduct sobriety checkpoint according to written guidelines outlining reasonably specific procedures); State v. Golden, 171 Ga. App. 27, 29-30, 318 S.E.2d 693, 695 (1984) (sobriety checkpoints must operate according to specific pre-arranged procedures promulgated by supervisory personnel); State v. Garcia, ____Ind. App.____, 481 N.E.2d 148, 154 (1985) (approving roadblock conducted pursuant to predetermined plan designed by supervisory personnel); State v. Deskins, 234 Kan. 529,____, 677 P.2d 1174, 1185 (1983) (supervisory police officer must set checkpoint guidelines); Little v. State, 300 Md. 485, 506, 479 A.2d 903, 913 (1984) (drunk driving roadblocks must operate according to regulations approved by supervisory administrators); State v. Muzik, 379 N.E.2d 599, 604 (Minn. App. 1985) (invalidating drunk driving roadblock not operated according to specific administrative procedures).

125. *Lowe*, 337 S.E.2d at 276; *see* State v. Superior Court for County of Pima, 143 Ariz. 45,____, 691 P.2d 1073, 1075 (1984) (en banc) (checkpoint site chosen where high percentage of accidents related to alcohol occurred); Little v. State, 300 Md. 485, 489, 479 A.2d 903, 905

the danger that motorists might perceive police officers exercising discretion at the sobriety checkpoint, the *Lowe* court noted that the police systematically stopped all vehicles or vehicles at regular intervals and made a sufficient showing of official status with uniformed officers and flashing police car lights.[126] Since the police employed neutral criteria that minimized the intrusion on motorists, the *Lowe* court correctly held that the compelling state interest in combatting drunk driving outweighed the intrusion on individual constitutional rights.[127]

(1984) (holding checkpoint valid when police selected site for roadblock on basis of previous alcohol-related accidents); State v. Muzik, 379 N.W.2d 599, 604 (Minn. App. 1985) (invalidating sobriety checkpoint because of insufficient evidence showing roadblock site selected rationally); State v. Coccomo, 177 N.J. Super. 575, 582, 427 A.2d 131, 134 (1980) (valid roadblock set up where some fatal alcohol-related accidents previously had occurred).

126. *Lowe*, 337 S.E.2d at 277; *see* Ingersoll v. Palmer, 175 Cal. App.3d 1028,____, 221 Cal. Rptr. 659, 669 (1985) (validating drunk driving roadblock when flashing lights, flares, police vehicles, and uniformed officers reassured motorists that roadblock was official); State v. Jones, 483 So.2d 433, 439 (Fla. 1986) (police must display visible signs of authority such as wearing uniforms to reduce fears of motorists); People v. Conway, 135 Ill. App.3d 887,____, 482 N.E.2d 437, 438 (1985) (approving roadblock when all vehicles stopped and police cars parked with lights flashing); State v. McLaughlin, ____Ind. App.____, 471 N.E.2d 1125, 1139 (1984) (subjective intrusion reduced when motorists could see that police stopped all vehicles at roadblock, placed flares in road, and flashed lights on police cars); State v. Garcia, ____Ind. App. ____, 481 N.E.2d 148, 154 (1985) (approving roadblock when vehicles stopped in groups of five and roadblock manned by uniformed officers); Little v. State, 300 Md. 485, 491, 479 A.2d 903, 913 (1984) (approving police practice of stopping all vehicles at checkpoint); State v. Coccomo, 177 N.J. Super. 575, 583, 428 A.2d 131, 135 (1980) (uniformed officers and marked cars present at valid sobriety checkpoint); People v. Scott, 63 N.Y.2d 518, 524, 483 N.Y.S.2d 649, 651, 473 N.E.2d 1, 5 (1984) (subjective intrusion reduced by visible fact that police stopped cars systematically and by presence of marked police cars); State v. Alexander, 22 Ohio Misc.2d 34, ____, 489 N.W.2d 1093, 1096 (1985) (subjective intrusion reduced when police stopped all vehicles at sobriety checkpoint).

127. *Lowe*, 337 S.E.2d at 277. *See generally* State v. Martin, 145 Vt. 562, ____, 496 A.2d 442 (1985). The Vermont Supreme Court recently evaluated a roadblock designed to detect drunk driving in *State v. Martin*. 496 A.2d at 445. In *Martin*, the Vermont State Police set up a roadblock without prior notice. *Id.* at 449. The police parked two marked police cars with lights flashing alongside the road and directed traffic into an adjacent parking lot. *Id.* The police informed the motorists of the purpose of the roadblock, inspected the motorists' licenses and registration forms, and checked for signs of intoxication. *Id.* In remanding the case for rehearing, the *Martin* court suggested several criteria for the trial court to consider when addressing the constitutionality of the drunk driving roadblock. *Id.* The *Martin* court stated that police should explain the nature of the roadblock to motorists, police should operate the roadblock according to objective guidelines to eliminate the exercise of subjective discretion by field officers, police should place signs on the road to warn motorists of the roadblock ahead, police should stop systematically, not randomly, all vehicles at the roadblock, and that police should display legitimate authority to reduce subjective intrusion. *Id.* at 448. The *Martin* court explained that the criteria were not absolute requirements, but suggested that the Vermont state courts apply the standards on a case by case basis to determine the constitutional validity of sobriety checkpoints. *Id.*; *see also* State v. Hillesheim, 291 N.W.2d 314, 318 (Iowa 1980) (setting forth criteria for lower courts to use when evaluating roadblock seizures). In *State v. Hillesheim*, the police set up a roadblock in response to a recent outbreak of vandalism in the area. 291 N.W.2d at 315. The Iowa Supreme Court invalidated the roadblock under the fourth amendment. *Id.*

While the Virginia Supreme Court correctly approved the sobriety checkpoint in *Lowe v. Commonwealth*, the court should have addressed more carefully the procedures by which the police conducted the roadblock and especially the appropriate procedures for subsequent detentions.[128] The *Lowe* court did not prescribe any roadblock criteria, but merely ratified the procedures that the police used.[129] Police and motorists in Virginia would benefit from a more scrutinizing analysis from the court.

As a further measure to restrict the exercise of discretion at a roadblock, police should acquire a judicial warrant before conducting a sobriety checkpoint.[130] To obtain a judicial warrant, police should demonstrate the seriousness

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at 319. The *Hillesheim* court noted that when police have no probable cause or reasonable suspicion to stop a vehicle, police, nevertheless, may detain a vehicle and its occupants when police follow certain criteria. *Id.* at 318. The court's criteria included selecting a safe roadblock site, placing advance warning signs ahead of the roadblock that inform approaching motorists of the purpose of the detention, making a sufficient display of authority with uniformed officers and marked police vehicles, and conducting the roadblock pursuant to neutral, predetermined guidelines promulgated by administrative officials. *Id.; see* State v. Crom, 222 Neb. 273, ____, 383 N.W.2d 461, 463 (1986) (per curiam) (invalidating sobriety checkpoint at which police employed no neutral guidelines to prevent exercise of discretion). In *State v. Crom*, the police arrested the defendant at a sobriety checkpoint for operating an automobile under the influence of alcohol. *Crom*, 383 N.W.2d at 462. At the roadblock, the police stopped every fourth vehicle on the pretext of checking driver's licenses and vehicle registration forms, but the actual purpose of the roadblock was to detect and apprehend drunk drivers. *Id.* at 461; *see infra* note 132 and accompanying text (courts invalidate sobriety checkpoints set up in guise of license check). The police conducted the roadblock pursuant to no predetermined standards established by supervisory personnel, but rather operated the roadblock at their discretion. *Crom*, 383 N.W.2d at 463. The Nebraska Supreme Court found the drunk driving roadblock at issue in *Crom* unconstitutional under the fourth amendment because the police unreasonably and arbitrarily invaded the defendant's right to privacy. *Id.* The *Crom* court, therefore, affirmed the lower court's reversal of the defendant's conviction. *Id.*; *see supra* note 111 and accompanying text (principal concern of fourth amendment is prevention of arbitrary police harassment).

128. *See infra* text accompanying notes 141-47 (discussion of detention subsequent to initial stop at drunk driving roadblock).

129. *Lowe*, 337 S.E.2d at 277.

130. *See* Jacobs & Strossen, *supra* note 3, at 674 (police should obtain authorization of sobriety checkpoint by securing judicial warrant for operation of roadblock); *Roadblock Seizures*, *supra* note 1, at 1484 (police should obtain judicial warrant justifying roadblock); *Drunk Drivers in Indiana*, *supra* note 1, at 1093 (judicial warrant for sobriety checkpoint would minimize police discretion). Some courts require a judicial warrant for the operation of a sobriety checkpoint. *See* State v. Olgaard, 248 N.W.2d 392, 395 (S.D. 1976) (police must acquire judicial warrant before conducting drunk driving roadblock); Webb v. State, 695 S.W.2d 676, 683 (Tex. Ct. App. 1985) (implying that police should obtain judicial warrant before conducting sobriety checkpoint). *But see* Little v. State, 300 Md. 485, 508-09, 479 A.2d 903, 915 (1984) (judicial warrant not required for operation of sobriety roadblock).

The United States Supreme Court in *Martinez-Fuerte* held that the visibility of official police authority supplanted the need for a judicial warrant when operating a permanent roadblock. *Martinez-Fuerte*, 428 U.S. at 565. Given the possibility of the exercise of discretion by police in operating temporary roadblocks such as sobriety checkpoints, however, a judicial warrant would reduce the possibility of police randomly setting up roadblock sites. A greater chance for the exercise of police discretion exists with a temporary roadblock than with one that is permanent. The permanance of a roadblock, however, is not a significant factor affecting the constitutionality of the checkpoint if police properly conduct the roadblock operation. Ingersoll v. Palmer, 175

of the drunk driving problem in the vicinity of the proposed roadblock and submit neutral, objective procedures by which police plan to conduct the roadblock.[131] Before issuing a warrant, courts must require police to state the purpose of the sobriety checkpoint, which would prevent the police from using the roadblock as a subterfuge for detecting other crimes.[132] Police should document the number of vehicles stopped, the number of arrests made, and the length of the average detention at drunk driving roadblocks to generate a pool of data to evaluate empirically the effectiveness of the sobriety checkpoint and to demonstrate adherence to predetermined guidelines.[133] Furthermore, an utmost concern of police should be safety for the officers and motorists at the sobriety checkpoint.[134]

The State Attorney General's office or state legislature could aid police by writing the standards by which police should operate a sobriety checkpoint.[135] These standards, of course, should establish objective criteria to

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Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 668 (1985); Little v. State, 300 Md. 485, 508, 479 A.2d 903, 914 (1984); People v. Scott, 63 N.Y.2d 518, 527-28, 483 N.Y.S.2d 649, 653, 473 N.E.2d 1, 5 (1984). The critical factor in the operation of a sobriety checkpoint is the absence of police discretion. LAFAVE, *supra* note 70, at 210. A judicial warrant would supplement the roadblock procedures that courts prescribe as protections against random and arbitrary police action. *See supra* text accompanying notes 111-27 (discussing guidelines that reduce police discretion at drunk driving roadblocks).

131. Jacobs & Strossen, *supra* note 3, at 674; *Roadblock Seizures, supra* note 1, at 1479, 1485.

132. *See* State *ex rel.* Ekstrom v. Justice Court of State, 136 Ariz. 1,____, 663 P.2d 992, 996 (1983) (en banc) (invalidating use of license check roadblock to detect drunk drivers); State v. Baldwin, 124 N.H. 770,____, 475 A.2d 522, 526-27 (1984) (police cannot extend roadblock beyond predetermined purpose); Webb v. State, 695 S.W.2d 676, 678 (Tex. Ct. App. 1985) (invalidating sobriety checkpoint set up in guise of license check).

133. *Roadblock Seizures, supra* note 1, at 1483.

134. *See Lowe*, 337 S.E.2d at 277 (police provided adequate space and lighting for detention, and officers wore reflecting vests). As an additional safety precaution, the police in *Lowe* established the roadblock on a street where the speed limit was 25 miles per hour. Brief for Appellee at 5, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985); *see also* Jones v. State, 459 So.2d 1068, 1079 (Fla. Dist. Ct. App. 1984) (roadblock marked with barricades and cones, but police should have used flares, flashing lights, or signs), *aff'd*, State v. Jones, 483 So.2d 433 (Fla. 1986); State v. Deskins, 234 Kan. 529,____, 677 P.2d 1174, 1185 (1983) (police should employ safety measures at sobriety checkpoints); Little v. State, 300 Md. 485, 490, 479 A.2d 903, 905 (1984) (safety was primary concern since police set up valid roadblock to provide adequate space for detentions and to prevent traffic congestion); Webb v. State, 695 S.W.2d 676, 683 (Tex. Ct. App. 1985) (invalidating roadblock when police did not maintain safety conditions).

135. *See* Ingersoll v. Palmer, 175 Cal. App. 3d 1028, ____, 221 Cal. Rptr. 659, 670 (1985) (validating sobriety checkpoint conducted pursuant to guidelines that California Attorney General established); *see also id.* at 671-72 (White, J., dissenting) (legislature should endorse use of sobriety roadblock); State v. Deskins, 234 Kan. 529,____, 673 P.2d 1174, 1185-86 (1983) (suggesting that legislature or state attorney general establish procedures for drunk driving roadblock); Little v.State, 300 Md. 485, 490, 479 A.2d 903, 905 (1984) (guidelines for valid sobriety checkpoint reviewed and approved by governor and attorney general); Jacobs & Strossen, *supra* note 3, at 669 (state legislatures should prescribe guidelines for operation of drunk driving roadblock).

limit the discretion of field officers.[136] Some states have enacted statutes that authorize the use of roadblocks to check licenses and registration forms.[137] While police conceivably could observe motorists for signs of intoxication at a statutorily authorized license checkpoint and arrest drivers for driving under the influence of alcohol after noticing outward manifestations of intoxication,[138] many courts have invalidated such a practice.[139] Since states have authorized license checkpoints by statute, state legislatures similarly should help ensure the constitutionality of sobriety checkpoints by enacting statutes that give police the power to operate drunk driving roadblocks.[140]

In addition to analyzing the constitutionality of the initial detention at a sobriety checkpoint, the reasonableness of a subsequent detention for the purpose of testing motorists suspected of drunk driving is an essential element in the validity of the sobriety checkpoint as a whole. An extended detention at a drunk driving roadblock is more intrusive than the initial stop because police usually subject motorists to a variety of field tests.[141] Because the detention of a driver suspected of intoxication involves an exercise of discretion by police, courts should require that police have a reasonable, articulable basis for subjecting the suspected driver to sobriety tests to limit the exercise of police discretion.[142] For example, the United States Supreme

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136. *See supra* text accompanying notes 111-27 (discussing criteria mitigating exercise of discretion by police at drunk driving roadblocks).

137. *See* State v. Coccomo, 177 N.J. Super. 575, 584, 427 A.2d 131, 132 (1980) (statute authorized police to check licenses, registration forms, and insurance cards at roadblock); Brief for Appellee at 10, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985) (statute authorized roadblock designed to check licenses).

138. *See* United States v. Prichard, 645 F.2d 854, 855 (10th Cir. 1981) (upholding conviction for possession of cocaine seized at license checkpoint). In *Prichard*, the United States Court of Appeals for the Tenth Circuit stated that police had the power to investigate any crimes for which the police had reasonable suspicion at a valid license checkpoint. *Id.* at 857.

139. *See supra* note 132 and accompanying text (state courts invalidate sobriety checkpoint set up in guise of license checkpoint). In *Lowe v. Commonwealth*, the police conducted a roadblock to check licenses and to check for intoxication. *Lowe*, 337 S.E.2d at 274. The Virginia Supreme Court held that the roadblock was constitutional even though the roadblock consisted of a sobriety checkpoint coupled with a statutorily authorized license check. *Id.*; Brief for Appellee at 10, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985).

140. *See* State v. Smith, 674 P.2d 562, 565 (Okla. Crim. App. 1984) (drunk driving roadblock would be constitutional if statutorily authorized); Jacobs & Strossen, *supra* note 3, at 669 (legislatures should authorize sobriety checkpoints by statute).

141. *Roadblock Seizures*, *supra* note 1, at 1481; *see* People v. Carlson, 677 P.2d 310, 316 (Colo. 1984) (en banc) (field sobriety tests involve examination of person's coordination to determine if person is intoxicated). The Colorado Supreme Court in *People v. Carlson* listed four tests that police employ to determine if a person is intoxicated. *Carlson*, 677 P.2d at 316 n.6. The tests included reciting the alphabet, walking a straight line, standing erect with head tilted back, and placing the finger to the nose and ear lobe. *Id.*; *see* Jacobs & Strossen, *supra* note 3, at 610 (listing field sobriety tests).

142. Jacobs & Strossen, *supra* note 3, at 656, 668; Rogers, *supra* note 120, at 205, 207; *see* Ingersoll v. Palmer, 175 Cal. App.3d 1028,____, 221 Cal. Rptr. 659, 669 (1985) (general principles of arrest and detention govern further detention of person after initial stop); State v. Golden, 171 Ga. App. 27, 31, 319 S.E.2d 693, 696 (1984) (subsequent detention of motorist at

Court in *United States v. Ortiz*[143] held that while police need not exercise reasonable suspicion to stop vehicles at a properly conducted roadblock, police must obtain consent or have probable cause to search a vehicle after the initial stop at the roadblock.[144] The *Ortiz* Court claimed that while the initial detention at a roadblock involves less intrusion upon motorists than stops by roving patrols, a search subsequent to the initial stop at a checkpoint constitutes a substantial invasion of privacy.[145] The Court reasoned that because predetermined guidelines for a checkpoint may not limit the discretion of officers in selecting vehicles for subsequent detentions,[146] police must justify a subsequent detention according to some objective criterion such as probable cause.[147] Because the administration of field sobriety tests constitutes a

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roadblock was lawful because police had reasonable and articulable belief that defendant was drunk); LAFAVE, *supra* note 70, at 215 (police should have reasonable suspicion of intoxication before subjecting motorist to field sobriety tests after initial stop at sobriety roadblock); *see also supra* note 20 and accompanying text (discussing requirement of reasonable, articulable suspicion).

143. 422 U.S. 891 (1975).

144. *See id.* at 896-97. In *United States v. Ortiz*, the police stopped the defendant's car at an immigration roadblock and found three illegal aliens upon searching the vehicle. *Id.* at 891-92. The police arrested the defendant/driver, and the trial court convicted the defendant of illegally transporting aliens. *Id.* at 892. In *Ortiz*, the United States Supreme Court affirmed the appellate court's reversal of the conviction stemming from an arrest that followed an automobile search without probable cause. *Id.*

145. *Id.* at 895.

146. *Id.* at 895-96; *see supra* note 111 and accompanying text (fourth amendment restricts exercise of discretion by police).

147. *Ortiz*, 422 U.S. at 896-97. A question remains as to whether a motorist may avoid a sobriety checkpoint by turning around before entering the roadblock and whether the driver must answer the policeman's questions and comply with a request to display a license or registration. Grossman, *supra* note 3, at 140. In *Berkemer v. McCarty*, the United States Supreme Court stated that in a *Terry* stop situation, the suspect lawfully may refuse to respond to questions that police ask. *Berkemer*, 468 U.S. 420, 439 (1984); *see supra* note 20 and accompanying text (discussing *Terry* seizure). Furthermore, the Court in *Berkemer* reasoned that unless the suspect's answers, or the lack thereof, to the questions give police probable cause to arrest, the police must release the suspect. *Berkemer*, 468 U.S. at 439-40; *see* Stark v. Perpich, 590 F. Supp. 1057, 1062 (D. Minn. 1984) (failure of motorist to stop or enter sobriety checkpoint is not grounds for arrest). The states are divided on the issue of whether motorists may evade a sobriety checkpoint. *See, e.g.*, State v. Superior Court for County of Pima, 143 Ariz. 45,____, 691 P.2d 1073, 1075 (1984) (en banc) (if driver did not speak to police at sobriety checkpoint or if motorist turned to avoid roadblock, police followed driver and would stop driver only if officer observed some infraction); State v. Golden, 171 Ga. App. 27, 28, 318 S.E.2d 693, 694 (1984) (police stopped drivers who tried to avoid drunk driving roadblock); Little v. State, 300 Md. 485, 490, 479 A.2d 903, 905-06, 914 (1984) (police provided room for drivers to turn around and avoid sobriety roadblock, motorists not required to roll down windows and talk to police, and police did not follow cars that turned around unless drivers drove erratically); People v. Peil, 122 Misc.2d 617, 621, 471 N.Y.S. 532, 535 (1984) (if drivers did not roll down windows of car or speak to police, police would have allowed motorists to proceed); Brief for Appellant at 7, Lowe v. Commonwealth, 230 Va. 346, 337 S.E.2d 273 (1985) (if motorist had turned around to avoid roadblock, police would have stopped motorist). Police should require that motorists pass through a sobriety checkpoint because allowing drivers to avoid the roadblock would undermine the roadblock's deterrent effect on drunk driving since

minimal intrusion, police need only reasonable suspicion of intoxication to direct a motorist to a detention area to perform such tests.[148] Administering a blood alcohol test, however, is a full search and requires police to have probable cause to believe the suspect is intoxicated.[149]

The constitutionality of a sobriety checkpoint hinges on the balance between the state's interest in providing for safe highways and the roadblock's intrusion upon personal privacy.[150] Because the drunk driving roadblock is not as effective in detecting and apprehending drunk drivers as is a routine roving patrol that stops drivers based on erratic driving behavior, the state must rely on the fact that the deterrence effect of the roadblock outweighs

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motorists would know that they could escape detection of intoxication. Little v. State, 300 Md. 485, 518, 479 A.2d 903, 920 (1984) (Davidson, J., dissenting); *see supra* notes 74 and 108 (sobriety checkpoints deter drunk driving).

148. LAFAVE, *supra* note 70, at 215; *see supra* note 142 and accompanying text (courts require police to have reasonable suspicion that driver is intoxicated before subjecting driver to further investigation of intoxication); *see also Lowe*, 337 S.E.2d at 274. While the Virginia Supreme Court in *Lowe* did not discuss the validity of the subsequent detention, the police in *Lowe* had reasonable, articulable suspicion to detain the defendant and to investigate for intoxication. For example, the police in *Lowe* smelled alcohol and noticed that the defendant's eyes were red. *Lowe*, 337 S.E.2d at 274. In observing drivers for intoxication, police look for outward manifestations of intoxication such as bloodshot or watery eyes, slurred speech, the odor of alcohol on the breath of the driver, and fumbling to retrieve a license or registration form from a glove compartment, purse, or wallet. State v. Golden, 171 Ga. App. 27, 28, 318 S.E.2d 693, 696 (1984); State v. Deskins, 234 Kan. 539,____, 673 P.2d 1174, 1177, 1186 (1983); Little v. State, 300 Md. 485, 492, 479 A.2d 903, 906 (1984); State v. Coccomo, 177 N.J. Super. 575, 580, 427 A.2d 131, 133 n.5; State v. Alexander, 22 Ohio Misc.2d 34,____, 489 N.W.2d 1093, 1095 (1985); Jacobs & Strossen, *supra* note 3, at 609; *see supra* note 141 and accompanying text (police use coordination tests to determine if driver is intoxicated after observing outward manifestations of intoxication).

149. *See* State v. Golden, 171 Ga. App. 27, 31 318 S.E.2d 693, 696 (1984) (subsequent detention at sobriety checkpoint is justified by reasonable suspicion of intoxication); State v. Alexander, 22 Ohio Misc.2d 34,____, 489 N.W.2d 1093, 1097 (1985) (police did not subject drivers to field sobriety tests unless police had reasonable suspicion that driver was intoxicated); State v. Niles, 74 Or. App. 383,____, 703 P.2d 1030, 1032 (1985) (police only need reasonable suspicion that driver is intoxicated to subject driver to field sobriety tests); LAFAVE, *supra* note 70, at 215 (police need only reasonable suspicion of intoxication to subject driver to field sobriety tests). *But see* People v. Carlson, 677 P.2d 310, 317 (Colo. 1984) (en banc) (roadside sobriety testing constitutes full search). In *People v. Carlson*, the Colorado Supreme Court equated roadside sobriety testing with chemical testing to determine if a driver is intoxicated. *Id.* The Colorado Supreme Court reasoned that the ordinary citizen would desire to keep the administration of the tests private and that the purpose of the tests was to gather incriminating evidence. *Id.* The *Carlson* court, therefore, required police to have probable cause to arrest a motorist for driving while intoxicated before subjecting the driver to field sobriety tests. *Id.*; *see also* Jones v. State, 459 So.2d 1068, 1080 (Fla. Dist. Ct,. App. 1984) (police may conduct field sobriety tests only when police have probable cause to believe the driver is intoxicated), *aff'd*, 483 So.2d 433 (Fla. 1986). The dissent in *Carlson*, however, sagaciously noted that if police have probable cause to arrest the driver, the police may arrest the driver without administering the field sobriety tests. *Carlson*, 677 P.2d at 319 (Rovira, J., dissenting). The dissent, therefore, concluded that police need only reasonable suspicion that the driver is intoxicated before subjecting the motorist to the tests. *Id.*

150. *See supra* text accompanying notes 7-9 (discussing fourth amendment balancing test).

the intrusion of the seizure.[151] Accordingly, police should notify the media of the intent to employ the roadblock to enhance the checkpoint's deterrent effect, but need not disclose the actual location of the roadblock.[152] Since the constitutionally impermissible factors of the sobriety checkpoint include the excessive intrusion upon personal freedom and the possibility of police exercising unbridled discretion, neutral and objective procedures for the operation of the roadblock aimed at reducing discretion and intrusion are necessary to ensure the constitutional validity of a sobriety checkpoint.[153] Police, therefore, should conduct a sobriety checkpoint pursuant to procedures designed by supervisory police department administrators and sanctioned by a judicial warrant or according to guidelines enacted by the state legislature to eliminate the possibility of police officers exercising unfettered discretion in the field.[154]

At present, the public is concerned about the drunk driving problem, and the courts recognize the seriousness of the public's concern.[155] In the future, however, the constitutionality of sobriety checkpoints might depend on the public's perception of the drunk driving menace. For example, if the public's concern about the drunk driving problem diminishes, the intrusion of a drunk driving roadblock upon individual rights might vitiate the constitutionality of the roadblock, even if police conduct the roadblock pursuant to the neutral and objective criteria that minimize intrusion.[156] Ironically, sobriety check-

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151. *See supra* text accompanying notes 107-08 (roadblocks deter drunk driving); *see also* LAFAVE, *supra* note 70, at 208 (courts need not make strong showing of effectiveness in detecting drunk drivers to validate sobriety checkpoint). One commentator has stated that since the United States Supreme Court in *Delaware v. Prouse* suggested that nonarbitrary roadblocks would be constitutional, the minimally intrusive sobriety checkpoint requires no evidence that the roadblock is more effective in detecting and apprehending drunk drivers than traditional means. LAFAVE, *supra* note 70, at 208; *see Prouse*, 440 U.S. at 663 (suggesting that use of roadblocks to enforce license and registration requirements would be constitutional).

152. *See Lowe*, 337 S.E.2d at 277 (police alerted media of roadblock but did not disclose location); *see also* State v. Superior Court for County of Pima, 146 Ariz. 45,____, 691 P.2d 1073, 1075 (1984) (en banc) (press releases announced existence of roadblocks). In *Pima*, the Arizona Supreme Court stated that police need not reveal the exact location of the sobriety checkpoint because disclosure might detract from the deterrent effect. *Pima*, 691 P.2d at 1077; *see* State v. Garcia, ____Ind. App.____, 481 N.E.2d 148, 154 (1985) (approving roadblock when police advertised sobriety checkpoint); State v. Deskins, 234 Kan. 529,____, 677 P.2d 1174, 1185 (1983) (approving roadblock when police issued advance notice to public of sobriety checkpoint); Webb v. State, 695 S.W.2d 676, 683 (Tex. App. 1985) (invalidating roadblock for which police gave no advance notice).

153. *See supra* text accompanying notes 111-27 (objective, neutral guidelines mitigate field officer's discretion).

154. *See* LAFAVE, *supra* note 70, at 205 (sobriety checkpoint is constitutional if properly conducted).

155. *See supra* note 1 and accompanying text (documentation of drunk driving problem); *supra* note 70 and accompanying text (courts recognize seriousness of drunk driving problem); *see also supra* note 45 and accompanying text (listing vast majority of states that endorse sobriety checkpoints or would endorse legitimate sobriety checkpoints).

156. *See supra* text accompanying notes 111-27 (adherence to predetermined guidelines minimizes intrusion of sobriety checkpoints); *see also supra* text accompanying notes 7-9 (discussing Supreme Court's balancing test to determine reasonableness of seizure).

points might prove to be so effective in combatting drunk driving and in reducing the number of alcohol-related accidents and fatalities that the court might invalidate the roadblocks because the courts no longer perceive a compelling state interest in eliminating drunk driving. The state's interest is to protect the public, however, and invalidating the sobriety checkpoint and negating its deterrent effect might result in a reversion to the serious problem that the roadblock had helped rectify. In the future, therefore, courts should consider carefully all possible factors contributing to a decrease in drunk driving. If the heightened public concern about drunk driving has dissipated, but the reduction in incidences of drunk driving is attributable to sobriety checkpoints, courts should not invalidate sobriety checkpoints because the courts unwittingly may proscribe the very element that has caused and is maintaining the reduction in drunk driving accidents.

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