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Filling in the Blanks after Prouse: A New Standard for the Drinking-Driving Roadblock

In the fall of 1983, the Wyoming Highway Patrol Administrative Office issued a memorandum authorizing the implementation and use of temporary roadblock "safety checks" for equipment violations, driver's license checks, and drunk driving screening.¹ This action was prompted in Wyoming (and many jurisdictions) by two factors. First, there was mounting public pressure to deter the drunk driver. Second, the United States Supreme Court had decided *Delaware v. Prouse*,² which was interpreted to authorize the roadblocks.

In *Prouse*, the Court held that a police officer could not make a random stop of a vehicle absent a reasonably articulable suspicion that a violation of the law had occurred.³ In dicta, however, the majority of the Court suggested that a viable alternative to a random investigatory stop was a roadblock in which all oncoming traffic could be temporarily detained for questioning.⁴

Several lower courts and law enforcement agencies, including the Wyoming Highway Patrol, have expanded the *Prouse* dicta to sanction all non-random vehicular stops. For example, the Wyoming Highway Patrol has concluded that every third, fifth, or tenth vehicle may be stopped as long as all screening-stops follow a pattern.⁵ This blanket authorization, without more, may result in traffic roadblocks which are unconstitutional. The fourth amendment requires a balancing test for all

1. Major E. L. Ayers, Wyoming Highway Patrol Memorandum, 83-85, Roadside Safety Checks (Sept. 28, 1983).

2. 440 U.S. 648 (1979).

3. *Id.*

4. *Id.* at 663. The Court stated:

This holding does not preclude the State of Delaware or other states from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic in roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

5. Major E. L. Ayers, Wyoming Highway Patrol Memorandum, 83-85, Roadside Safety Check (Sept. 28, 1983). The memo states:

The following guidelines shall be adhered to when establishing roadside safety checks, driver's license checks, DWI screening, etc. The driver of any vehicle may be stopped when the officer has probable cause to believe that the law is being violated by that driver. Vehicles where the above is not apparent must be stopped by a pre-determined selection process, and not at the discretion of the officer.

Example: Every vehicle; every third, fifth, tenth, etc. vehicle may be stopped. Example: stop all vehicles until the parking area is full, check those, after releasing them, stop the next quantity of vehicles that again fills the parking area and so on. In all instances, screening stops should follow a pattern.

Prior to establishing a roadside safety check, permission must be obtained from the division supervisor. In all cases proper traffic control will be established, keeping in mind that the selection of the site for the stop and the safety of the monitoring public will be a main concern.

searches and seizures. *Prouse*, and its forerunners have confirmed that a vehicular stop, however brief, is a seizure, and several fundamental elements must be balanced before a stop can be held constitutional.

In this comment I will trace the history of the constitutional analysis of temporary roadblock seizures. I will suggest that a new "neutral criteria" standard can and has been constitutionally applied to temporary auto seizures if they display certain fundamental characteristics. This neutral criteria standard requires that supervisory law enforcement officers develop a pre-determined roadblock plan. In addition, all vehicles must be stopped pursuant to a neutral, fixed formula in order to meet the standard. Then I will analyze the drinking-driving roadblock to determine whether it fits into the category of fourth amendment seizures to which the neutral criteria standard applies. Finally, I will propose guidelines to enable the drinking-driving roadblock to meet the constitutional requirements.

THE FOURTH AMENDMENT HISTORY OF CAR STOPS— UNDERPINNINGS OF A NEUTRAL CRITERIA STANDARD

The fourth amendment to the United States Constitution⁶ imposes a standard of reasonableness on searches and seizures in order to "safeguard the privacy and security of individuals against arbitrary invasions."⁷ The issue of the reasonableness of a search or seizure has generally been resolved by balancing the importance of the public interest being pursued against the pervasiveness of the privacy intrusion of the person who is searched or seized.⁸

The United States Supreme Court initially addressed the fourth amendment implications of vehicle stops and motorist detentions in *United States v. Brignoni-Ponce*.⁹ In *Brignoni-Ponce*, roving border patrol officers randomly and arbitrarily stopped vehicles along the Mexican border to question the occupants about their citizenship and immigration status. In striking down the stop as unconstitutional, the Court held that the fourth amendment applied to all seizures of persons, including seizures that involve only a brief detention.¹⁰ However, because of the brevity of the seizure, the importance of the government's interest in preventing illegal aliens from entering the United States, and the absence of practical alternatives, the majority accepted the argument that future stops could be made on less than probable cause. "Officers on roving patrol may stop

6. U.S. CONST. amend. IV provides:

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

7. *Camara v. Municipal Court*, 387 U.S. 525, 528 (1967).

8. *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States v. Brignoni-Ponce* 422 U.S. 873, 878 (1975).

9. 422 U.S. 873 (1975).

10. *Id.* at 878.

vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country."¹¹

The United States Supreme Court in *United States v. Martinez-Fuerte*,¹² utilized a much different fourth amendment test in analyzing the constitutionality of border patrol activity at a *permanent motorist* check point. In a seven to two decision, the Court held that a brief investigatory stop of a vehicle at a fixed border check point could be made absent probable cause or any articulable suspicion that criminal activity was present.¹³ Justice Powell, writing for the majority articulated several reasons for applying a lesser standard to this seizure, than the standard announced in *Brignoni-Ponce*.¹⁴ First, requiring law enforcement officials to meet the standard of "a reasonable articulable suspicion that a certain vehicle contains illegal aliens" is impracticable on a major highway where traffic flow is heavy.¹⁵ Second, while the objective intrusion, i.e. the stop itself, questioning, and the visual inspection of the occupants is similar to that experienced by the defendants in *Brignoni-Ponce*,¹⁶ the subjective intrusion is appreciably less in a stop made at a permanent check point.¹⁷ Third, the site is selected by high ranking officials and not officers in the field, thereby eliminating much of the discretion which contributes to unreasonable seizures.¹⁸ Finally, permanent check points have been demonstrated as one of the most effective alternatives in reducing the

11. *Id.* at 884. The *Brignoni-Ponce* majority elaborated on several factors that could be considered in determining whether there was a reasonably articulable suspicion that would justify a brief investigatory stop. These included: proximity to the border, usual pattern of traffic, information about recent illegal border crossings, driver's behavior, aspects of the vehicle, and characteristics of the driver and passengers including mode of dress and haircut. The court stressed that reliance on merely one factor would not justify an investigatory stop.

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

13. *Id.* at 566-67.

14. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); see *supra* text accompanying notes 9-10.

15. *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976).

16. 442 U.S. 873 (1975).

17. 428 U.S. 543, 558 (1976). The *Martinez-Fuerte* Court stated:

The circumstances surrounding a check point stop and search are far less intrusive than those attending a roving patrol stop. Roving patrols often operate at night on seldom traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officer's authority, and he is much less likely to be frightened or annoyed by the intrusion.

Id. quoting *United States v. Ortiz*, 422 U.S. 891, 894-895 (1975.)

The *Martinez-Fuerte* majority noted that several physical characteristics of a permanent checkpoint contribute to reducing the subjective intrusiveness of the stop. These include: 1) large signs illuminated by flashing lights, placed well in advance of the stopping point, indicating that all approaching vehicles must stop; 2) stop signs at the checkpoint which state "United States officers are present"; 3) official border patrol vehicles parked nearby with the red lights flashing; 4) border patrol agents in full dress uniform and at or near the stopsign; 5) during nighttime operation, floodlights illuminate the station; 6) all vehicles are stopped and this is observed by other motorists.

18. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976).

19. Approximately ten million cars pass through the San Clemente checkpoint yearly. Although the operation is only in effect about seventy percent of the time, approximately 17,000 illegal aliens were apprehended there in 1973. *Id.* at 554.

flow of illegal aliens.¹⁹ These distinctions along with the compelling interest in eliminating the surge of illegal aliens into the United States tipped the fourth amendment balancing scale to the extreme favor of the government, and thereby obviated the need for any type of suspicion on the part of the government as to the occupant's status.²⁰

Two years after *Martinez-Fuerte*, the Court in *Delaware v. Prouse*,²¹ addressed the constitutionality of motor vehicle stops for purposes of checking licenses. In *Delaware v. Prouse*, a patrolman stopped a vehicle at random in order to check the registration and the operator's license. The patrolman acknowledged that he did not have probable cause or even a reasonable articulable suspicion to believe the occupants of the vehicle had committed a crime.²² The United States Supreme Court held that the initial stop was an unconstitutional seizure.²³ While recognizing that the State of Delaware claimed an important interest in promoting traffic safety, the Court refused to expose motorists to "unfettered governmental intrusions every time [they] enter an automobile."²⁴

The *Delaware v. Prouse* Court gave several reasons for its holding. Of major concern was the "grave danger of abuse of discretion" if random stops were allowed to persist.²⁵ Justice White, speaking for the majority stated, "this kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed at least to some extent."²⁶

The Court also concluded that the individualized random stops would result in a greater subjective intrusion than stops made pursuant to the permanent roadblocks in *Martinez-Fuerte*.²⁷

We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. Both of these stops generally entail law enforcement officers, signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority. Both interfere with freedom of movement, are inconvenient, and consume time. Both may create substantial anxiety. For fourth amendment purposes we also see insuffi-

20. It should be noted that the Court acknowledged that state law enforcement agencies lacking any articulable suspicion often utilized stops to enforce laws regarding driver's licenses, safety requirements, and weight limits. The Court however, reserved question on the constitutionality of such stops. 428 U.S. at 561 n.14.

21. 440 U.S. 648 (1979).

22. *Id.* at 650, 651. The patrolman stated: "I saw the car in the area and wasn't answering any complaints so I decided to pull them off."

23. *Id.* at 648.

24. *Id.* at 662-63.

25. *Id.* at 662.

26. *Id.* at 661 citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973); *Camara v. Municipal Court*, 387 U.S. 523, 532-33 (1967).

27. See *supra* note 17.

cient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or a near halt, and all are subjected to a show of the police power of the community.²⁸

Another area of concern to the majority was the availability of another less intrusive means for checking driver's licenses and vehicle registrations. "The foremost method of enforcing traffic and vehicle safety regulations, it must be recalled, is acting upon observed violations. Vehicle stops for traffic violations occur countless times each day; and on these occasions, licenses and registration papers are subject to inspection and drivers without them will be ascertained."²⁹

Finally, the Court reasoned that spot checks were unconstitutional because random stops were unproductive. The majority thought that the percentage of drivers who would be driving without a license was very small when compared to the total number of licensed persons who would be stopped at the roadblock.³⁰

Based on these observations, the majority held that

except in those situations in which there is at least an articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or the occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the fourth amendment.³¹

The Court suggested, however, that other investigatory methods that involved less intrusion or that did not display unconstrained discretion were not precluded by the holding. Specifically, the Court noted that questioning all oncoming drivers was a possible alternative.³²

RESOLVING THE ISSUES LEFT UNANSWERED BY PROUSE

The *Delaware v. Prouse* decision has created a number of questions regarding the constitutionality of temporary roadblocks on less than a reasonably articulable suspicion. Several jurisdictions have attempted to resolve these issues on their own. This has resulted in a wide variety of fourth amendment approaches as evidenced by the three following opinions.

28. 440 U.S. 648, 657 (1979).

29. *Id.* at 659.

30. *Id.* at 660.

31. *Id.* at 663.

32. *Id.* See *supra* note 4. Justice Powell provided even further support for temporary roadblocks when he stated in his concurring opinion that "I necessarily assume that the court's reservation also includes other not purely random stops (such as every tenth car to pass a given point) that equate with but are less intrusive than a 100% roadblock stop." *Delaware v. Prouse* 440 U.S. 648, 664 (1979) (Powell, J., concurring).

*United States v. Prichard*³³

The United States Court of Appeals for the Tenth Circuit has held that a non-random roadblock stop is a reasonable seizure under the fourth amendment.³⁴ In *Prichard*, a roadblock had been initiated with the permission of a law enforcement supervisor. The opinion indicates, however, that the roadblock was conducted at a place and in a manner chosen by two field officers.³⁵ The roadblock was planned so that all westbound vehicles were stopped, until they began to "pile up." Then, in order to prevent an unduly hazardous situation, the officer would wave all of the stopped vehicles through without detaining or checking the occupants. After the parking area was clear, the officers would again stop the vehicles. The purpose of the roadblock was "to conduct a routine drivers' license and car registration check."³⁶ The officers conceded, however, that they intended to watch for and punish any observed violations of the law.³⁷

After reviewing the *Delaware v. Prouse*³⁸ opinion, the court stated that even though this roadblock was not the 100 percent roadblock envisioned by *Prouse*, it was not arbitrary or random. In addition, the state's purpose, i.e. to check driver's licenses and car registration, was deemed to be important.³⁹ For these reasons, the *Prichard* court upheld the roadblock as a constitutionally permissible means of law enforcement.⁴⁰

Contrasting the *Prichard* court's analysis to the Supreme Court's analysis in *Martinez-Fuerte*⁴¹ and *Delaware v. Prouse*,⁴² it should be noted that the *Prichard* majority did not address the following issues which included: (1) the subjective privacy intrusion on the person stopped, (2) productivity of the roadblock, and (3) reasonable alternative law enforcement techniques. These fundamental elements of the fourth amendment balancing test were ignored. Instead, the *Prichard* court focused almost entirely on whether the cars were stopped on the basis of neutral, detached criteria.

*State of Arizona ex rel. Ekstrom v. Justice Court of the State of Arizona*⁴³

On several evenings during August and September 1983, Arizona law enforcement officials conducted roadblocks and stopped every motorist

33. 645 F.2d 854 (10th Cir. 1981).

34. *Id.* at 856-57.

35. *Id.* at 855. The transcript cited in the opinion reads as follows: "[O]n July 29, 1979, at about noon, two New Mexico State police officers established a roadblock on Interstate Highway 40 approximately 8 miles east of Moriarty, New Mexico."

36. *Id.*

37. *Id.* Prichard was stopped at the roadblock. The officers smelled a pungent odor emanating from the vehicle and obtained consent to search the trunk. They discovered 86 pounds of cocaine. Prichard was arrested for possession with intent to distribute.

38. See *supra* text accompanying notes 21-30.

39. *United States v. Prichard*, 645 F.2d 854, 857 (10th Cir. 1981).

40. *Id.*

41. 428 U.S. 593 (1976).

42. 440 U.S. 648 (1979).

43. 663 P.2d 992 (Ariz., 1983).

driving south on Highway 93.⁴⁴ The primary purpose of the roadblocks was to enforce the state's drunk driving laws.⁴⁵ The decision to conduct the roadblock was made by a lieutenant of the Department of Public Safety, but as in *Prichard*,⁴⁶ the details concerning the actual operation of the roadblock were left to the discretion of the field officers.⁴⁷ While the road block was in operation, all southbound vehicles were channeled into a port of entry by pylons and lighted flares.⁴⁸ There, uniform officers stopped the vehicles and detained the drivers from thirty seconds to five minutes while the drivers produced their driver's licenses and vehicle registration.⁴⁹ During the detention, the officers observed the occupants for signs of alcohol or drug influence.⁵⁰

The Arizona Supreme Court held that the roadblocks violated the fourth amendment prohibition against unreasonable searches and seizures.⁵¹ The court reasoned that the roadblock was discretionary because the field officers lacked specific guidelines for the actual operation of the roadblock.⁵² In addition, the state had not shown that the public interest in apprehending drunk drivers outweighed the privacy intrusion inflicted by the roadblock.⁵³ Finally, the majority concluded that traditional DUI enforcement techniques, including observation of erratic driving behavior, are reasonable and less intrusive alternatives to the roadblock. The court did not expressly indicate whether future modified drinking-driving roadblocks would be upheld as constitutional, but the overall tone of the opinion suggested that this was a possibility. Unlike the *Delaware v. Prouse* Court, the Arizona Supreme Court did not hinge the roadblock's constitutionality on physical factors aimed at reducing the subjective intrusion into the privacy rights of the individuals who were stopped. It did, however, look at the discretion involved, alternative law enforcement techniques, and the need for drinking-driving roadblocks.

*State v. Cocomo*⁵⁵

In this case the defendant, Cocomo, was arrested at a roadblock initiated by local police.⁵⁶ The particular roadblock had been authorized by

44. *Id.*

45. *Id.* at 993.

46. 645 F.2d 854, 855 (10th Cir. 1981); *see also supra* note 35.

47. 663 P.2d at 993.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 996.

52. The Arizona Supreme Court stated: "The officers were uncertain whether they should simply question the occupants of motor vehicles or whether they should seize the opportunity to cursorily search the vehicles." *Id.*

53. *Id.* The court suggested that the government may have fared better, if it had introduced statistics indicating the extent of the problem of drunk drivers on Arizona Highways, and how temporary roadblocks could aid in reducing the problem.

54. 440 U.S. 648. *See supra* text accompanying note 28.

55. 177 N.J. Super. 575, 427 A.2d 131 (1980).

56. *Id.* at 579, 427 A.2d at 133.

a written policy statement issued by the Chief of Police.⁵⁷ In accordance with a predetermined plan, every fifth vehicle on Route 46 passing a given point was stopped. The New Jersey Supreme Court held that these stops were constitutionally permissible.⁵⁸

The court recognized that the State of New Jersey had a vital interest in detecting and prosecuting drunk drivers.⁵⁹ This was reflected in part by the state's evidence which showed that there had been seven fatal accidents, most of them involving alcohol, on Route 46 in the two years preceding the the roadblock. This data, when combined with the fact that the roadblock was only in operation during the hours just prior to and after the closing of local taverns, suggested a high probability of success and minimal intrusion on the general public.⁶⁰ The court also considered with approval, the planned physical characteristics of the roadblock which were designed to promote safety and reduce the subjective intrusion on individual privacy rights.⁶¹ After reviewing these considerations, and finding that the fourth amendment balancing scale weighed heavily in favor of the government, the court held that the roadblock employed non-discriminatory neutral criteria and was therefore, constitutionally permissible.⁶²

CONSTITUTIONAL ANALYSIS—THE FOURTH AMENDMENT NEUTRAL CRITERIA

The Arizona, New Jersey, and Court of Appeals for the Tenth Circuit opinions explored above, reflect the confusion and the diverse tests that are being applied as a result of the dicta in *Delaware v. Prouse*.⁶³ Part of the confusion was caused by the United States Supreme Court's rapid dilution of the early "probable cause standard" for fourth amendment searches and seizures, particularly when dealing with motorists. In *Brignoni-Ponce*, the Court stated that the standard was "specific articulable facts, together with rational inferences, that would reasonably warrant suspicion that a crime was being committed."⁶⁴ One year later, the Court, in *Martinez-Fuerte*, held that motorists could be temporarily "seized" at permanent check points without probable cause or even a reasonable articulable suspicion.⁶⁵ While the *Martinez-Fuerte* Court stressed several factors that distinguished the case from *Brignoni-Ponce*, it failed to clearly articulate the fourth amendment standard being applied. Shortly after

57. *Id.* The County Attorney had promoted the roadblock procedures and had forwarded a summary of *Prouse* and a set of roadblock regulations, approved by the Attorney General of New Jersey, to all New Jersey Police Chiefs. The Roxbury Chief of Police sent a memorandum directing that the officers follow the procedures approved by the Attorney General in setting up the roadblock.

58. *Id.* at 583, 427 A.2d at 135.

59. *Id.* at 581, 427 A.2d at 134.

60. *Id.* at 582-83, 427 A.2d at 134-135.

61. *Id.* at 582, 427 A.2d at 135. These procedures included the policy of stopping vehicles only when traffic is light, flares are positioned ahead of a roadblock, and marked patrol cars are stationed along road.

62. *Id.*

63. 440 U.S. 648 (1979); see *supra* note 2.

64. 422 U.S. 873 (1975).

65. 428 U.S. 543 (1976).

Martinez-Fuerte, in the *Delaware v. Prouse* decision, the Court held that roving stops of motorists for non-border patrol purposes were prohibited unless they complied with the *Brignoni-Ponce* standard of articulable facts and rational inferences that criminal activity is afoot.⁶⁶ But, the Court suggested, without alluding to the standard, that the results might be different if a temporary roadblock stop had been used, in which all oncoming vehicles were briefly detained.

The problem with the Court's suggestion regarding road block stops in *Delaware v. Prouse*, is that it does not indicate that it is limited by any of the traditional fourth amendment standards, i.e. probable cause, or reasonable articulable suspicion. Nor does the Court set forth in clear, certain terms, new fourth amendment standards. In any event, the Court in *Martinez-Fuerte* and *Delaware v. Prouse*, has laid the groundwork for a new fourth amendment standard for the seizure of motorists. For purposes of simplicity the standard can be termed the *neutral-criteria* standard. It has been best described by the Iowa Supreme Court in *State v. Hillesheim*⁶⁷ as, "a predetermination by policy administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards based on neutral criteria."⁶⁸

The cornerstone of this standard is curbing police discretion, but its application hinges on many factors which combine to decisively tip the fourth amendment balancing scales in favor of the government. The United States Supreme Court has indicated that only when the government's interest is compelling, the alternative means of enforcement are unsatisfactory, and the invasion of the privacy interest is very minimal (both objectively and subjectively) will a neutral-criteria standard be constitutionally applied.⁶⁹ If the neutral-criteria standard is contingent on the presence of these factors, then it is necessary to analyze the drinking-driving roadblock generally, in order to determine whether it fulfills these conditions.

The States' Interest in Deterring and Apprehending the Drinking Driver

In both *Martinez-Fuerte* and *Delaware v. Prouse*, the United States Supreme Court stressed that an important governmental interest is necessary to justify the drinking-driving roadblock. Several lower courts

66. *Delaware v. Prouse*, 440 U.S. 648 (1979).

67. 291 N.W.2d 314 (Iowa 1980).

68. *Id.* at 318. The Iowa Supreme Court did not recognize this to be the standard *per se*. Rather, the court concluded that this and two other factors played a significant role in determining whether a stop was constitutional. Those two other factors were: 1) safety considerations, and 2) the nature of the subjective privacy intrusion.

69. A number of courts including the United States Court of Appeals for the Tenth Circuit have viewed the neutral-criteria standard as the entire test in itself. The neutral-criteria standard is merely a standard to be applied once various factors are considered in the balancing test, and the results indicate it is the appropriate standard.

70. See *supra* text accompanying notes 11, 24.

71. *State v. Deskins*, 673 P.2d 1174, 1185 (Kan. 1983); *State v. Baker*, No. 24-6693-82 (Idaho Magis. Ct. May 11, 1983); *State v. Cocomo*, 174 N.J. Super. 575, 427 A.2d 131 (1980).

have held that the deterrence and apprehension of drinking drivers meets this requirement.⁷¹ Recent statistics support these opinions by indicating that drunk driving is a national epidemic.

Drunk drivers contributed to over half of the nation's fatal motor vehicle accidents in 1982 and 1983.⁷² Experts estimate that every hour of every day approximately three Americans are killed and an additional eighty are injured by drunk drivers.⁷³ It is also estimated that one out of every two Americans will be victimized by a drunk driver during his or her lifetime.⁷⁴ These projections are not surprising in view of the National Highway Traffic Safety Administration survey which showed that up to ten percent of all drivers on weekend nights are legally intoxicated.⁷⁵

The story is much the same in Wyoming. A total of 865 persons were killed and 6,834 more were injured in alcohol related car accidents on Wyoming highways from 1975 to 1983.⁷⁶ According to the Wyoming Highway Patrol, alcohol consumption is the single largest contributing factor in fatal traffic accidents in Wyoming.⁷⁷

The public has reacted to these tragic statistics on both the state and national levels by demanding more effective law enforcement techniques, a higher legal drinking age, and tougher penalties to curb the drunk driver.⁷⁸ Due, in part, to this public concern, there has been a decline in some of the alcohol-related accident statistics. Yet, most of the statistics remain unsatisfactorily high. For this reason, it is clear the government's interest in deterring and apprehending the drinking driver is sufficiently important to satisfy the first factor in the fourth amendment balancing test.

72. 100 Newsweek, Sept. 13, 1982, at 34. In 1980, approximately 26,300 persons died in alcohol-related auto crashes. During the past decade alcohol has contributed to over a quarter of a million deaths on the Nation's highways.

73. *Id.*

74. *Id.*

75. *Id.* See U.S. DEP'T OF TRANS., NHTSA, PUB. NO. DOT HS 806 433, TASK FORCE IMPLEMENTATION GUIDELINES FOR THE DEVELOPMENT OF STATE AND COMMUNITY ALCOHOL HIGHWAY SAFETY PROGRAMS 2 (Sept., 1983).

76. STATE HIGHWAY DEP'T, WYO. HIGHWAY SAFETY BRANCH, WYOMING ALCOHOL-RELATED TRAFFIC ACCIDENTS 1 (1984).

77. *Id.*

78. A recent Gallup poll indicates that seventy-seven percent of all Americans support mandatory prison sentences for first time offenders. 100 Newsweek Sept. 13, 1982, at 35. A survey by the NHTSA indicates that eighty-five percent of those responding felt that drunk driving should be considered an extremely important or very important social problem. U.S. DEP'T OF TRANS., NHTSA, PUB. NO. DOT HS 802 110, AN ACTIVISTS GUIDE FOR CURBING THE DRUNK DRIVER 3 (April, 1977).

The drunk-driving problem has also prompted the launching of several political community activist groups including: Mothers Against Drunk Drivers (MADD); Remove Intoxicated Drivers (RID); Students Against Drunk Drivers (SADD); and Citizens for Safe Drivers (CSD). 100 Newsweek, Sept. 13, 1982 at 36-37.

In addition, President Reagan has declared the campaign against drunk driving to be a national priority. PRESIDENTIAL COMMISSION ON DRUNK DRIVING, AN INTERIM REPORT TO THE NATION 4-51 (1982).

Congress has also joined the public bandwagon by authorizing the Secretary of Transportation to make basic and supplemental grants to states who adopt and implement programs designed to curb drunk driving activity. 23 U.S.C. § 408 (1982).

Necessity and Effectiveness of the Drinking-Driving Roadblock as a Tool in Apprehending and Deterring the Drunk Driver.

In *Martinez-Fuerte*, the Court held that the permanent roadblock of the type used at San Clemente was one of the most efficient means for reducing the flow of illegal aliens across the Mexican border.⁷⁹ Conversely, the court in *Delaware v. Prouse* suggested that the traditional methods of ascertaining whether a motorist had a valid driver's license and vehicle registration were much more effective and less intrusive than random and arbitrary stops conducted by the officer in *Prouse*.⁸⁰

A drunk driver is usually detected after patrol officers have observed either a violation of the law or specific attributes about the driver and vehicle which indicate that the driver is under the influence of an intoxicant.⁸¹ Some courts have indicated that these traditional detection methods may be adequate and are less intrusive alternatives to the DWI roadblock.⁸²

These opinions are incorrect according to a recent study conducted by the National Highway Traffic Safety Administration which indicates that on a nationwide basis, the probability of a drunk driver being stopped under traditional detection methods is between 1 in 500 and 1 in 2,000.⁸³ These statistics contribute in part to the belief held by one-third of drinking drivers that the chances of being caught and punished are too small to deter them from driving while drunk.⁸⁴

Justice Rehnquist, in his dissenting opinion in *Prouse*, also voiced concern over traditional detection methods for traffic violations in general. Justice Rehnquist stated, "The whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away."⁸⁵ The drunk driver accident statistics would indicate that Justice Rehnquist's statements are also particularly applicable to traditional drunk-driving detection methods. A new, more effective means of deterring and apprehending the drunk driver is obviously desirable. It is apparent that traditional law enforcement techniques have not proven adequate in combatting the drunk-driving problem. An additional question remains as to whether temporary roadblocks are an effective tool in law enforcement's war against drinking drivers.

79. 428 U.S. 543, 554 (1976).

80. *Delaware v. Prouse*, 440 U.S. 648, 660 (1979).

81. *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992 (1983).

82. *Id.*

83. U.S. DEP'T OF TRANS., NHTSA, PUB. NO. DOT HS 806 433, TASK FORCE GUIDELINES FOR THE DEVELOPMENT OF STATE AND COMMUNITY ALCOHOL HIGHWAY SAFETY PROGRAMS 2 (Sept., 1983).

84. U.S. DEP'T OF TRANS., NHTSA, PUB. NO. DOT HS 806-476, TECHNICAL NOTE, THE USE OF SAFETY CHECKPOINTS FOR DWI ENFORCEMENT 2 (Sept., 1983) [hereinafter NHTSA TECHNICAL NOTE].

85. *Delaware v. Prouse*, 440 U.S. 648, 666 (1979) (Rehnquist, J., dissenting).

Effectiveness of the Drinking-Driving Roadblock

Because the drinking-driver roadblock is relatively new, there has been little data generated on its effectiveness in the United States. Preliminary statistics indicate that it is moderately useful as an apprehension technique,⁸⁶ and highly successful as a deterrent to drinking and driving.⁸⁷ States like Maryland and Delaware, the first to use these roadblocks, saw alcohol related traffic fatalities decline as much as seventy-five percent, while alcohol-related-injury accidents declined seventeen to thirty-two percent in counties where roadblocks were frequently used.⁸⁸ Countries like France and Sweden, which have utilized sobriety check points for five years or more, have also determined that roadblocks have a significant deterrent effect on drinking drivers.⁸⁹

These results, while not conclusive, help confirm the National Highway Traffic Safety Administration's belief that the use of DWI roadblocks "rais[es] the perceived probability of apprehension for DWI" and deters persons from driving while under the influence.⁹⁰

Based on the proven need for better law enforcement techniques in apprehending and deterring the drinking driver, and preliminary statistics indicating the DWI roadblock's effectiveness one can only conclude that the second factor in the fourth amendment balancing test is satisfied.

*The Other Half of the Fourth Amendment Balancing Test—
The Privacy Intrusion on the Individuals Stopped.*

In *United States v. Martinez-Fuerte*, the Court noted that although a roadblock stop was a seizure under the fourth amendment and a limited intrusion on the right to privacy and personal security, "it involv[ed] only a brief detention of travelers during which all that [was] required of the vehicle's occupants [was] a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States."⁹¹ The same is true of DWI roadblock stops. The objective intrusion, i.e. the stop itself, the questioning, and the visual inspection is ex-

86. The District of Columbia, in roadblock operations, stopped 572 vehicles. Of those, 172 were detained and ultimately thirty-nine persons were arrested for driving under the influence. Delaware reported 12,654 vehicles stopped, 701 detained and 231 arrested. NTSB REP. NO. 55-84-01, SAFETY STUDY—DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMINISTRATIVE LICENSE REVOCATIONS 10 (1982).

87. *Id.* at 8-10.

88. *Id.*

89. *Id.* Sweden, passed legislation in 1974 permitting police to establish sobriety check points. These check points are the most prominent aspect of the Swedish campaign against drunk driving. Due to this campaign, only two percent of Swedish drivers (weekend nights) have blood-alcohol concentrations greater than .05 percent (versus thirteen percent in the United States). *Id.* citing Address by J.R. Snortum presented at the American Society of Criminology Meeting in Washington, D.C. (November, 1981) (Drinking and Driving in Norway and Sweden. Another Look at "The Scandanavian Myth"). R.B. VOAS, DRINKING AND DRIVING: SCANDINAVIAN LAWS, TOUGH PENALTIES AND UNITED STATES ALTERNATIVE (JULY 1, 1982) (NHTSA REP. DT NH-22-82-P-05079).

90. NHTSA TECHNICAL NOTE, *supra* note 84, at 2.

91. 428 U.S. 543, 558 (1976).

tremely minimal and usually lasts only about two to five minutes.⁹² If during that stop, the officer obtains articulable facts that lead him to reasonably suspect that the driver is under the influence of alcohol, he then refers the motorist to a secondary inspection site for further evaluation. Unless the officer has articulable facts to believe the driver of the vehicle is intoxicated, he may do no more than briefly detain the vehicle, ask for a driver's license and registration, and observe the occupants of the vehicle. It is only under these circumstances that the objective privacy intrusion is minimal enough to allow the application of the neutral-criteria standard.

Minimizing the objective intrusion is not, however, enough. In *Delaware v. Prouse*, and in its forerunners, *United States v. Brignoni-Ponce* and *United States v. Martinez-Fuerte*, the Supreme Court emphasized that the difference between application of the reasonably articulable facts standard and the permanent checkpoint standard (neutral criteria) hinged on the difference in subjective privacy intrusions created by the two types of stops. Courts have suggested several physical implements to significantly reduce the subjective privacy intrusion on the individual stopped. Rather than list here all of the characteristics designed to reduce the subjective privacy intrusion, the reader is referred to the general guidelines below for planning and conducting a DWI roadblock. Those operating a DWI roadblock should note, however, that the neutral-criteria standard will not apply unless both the objective and subjective privacy intrusions are minimal.

Applying the Neutral-Criteria Standard to the Drinking-Driving Roadblock

This article has indicated that drinking-driving roadblocks in general, satisfy the first three conditions for application of the fourth amendment neutral-criteria standard. The governmental interest is compelling, current law enforcement practices are insufficient, and the objective privacy intrusion is minimal. Assuming the state can also prove that the subjective privacy intrusion is minimal, a court should apply the neutral criteria standard to the roadblock. This requires an analysis of the components of the neutral-criteria standard.

The neutral-criteria standard applied by many jurisdictions actually has two elements. The first is implied by its name. The selection process must be on a completely neutral basis, that is, allowing for no discretion by the field officer. The majority in *Delaware v. Prouse* suggested that all oncoming vehicles could be stopped. Lower courts have accepted stops made at a designated interval, or the stopping and checking of all vehicles until the parking area is full, release of the entire group without stopping,

92. Telephone conversation with Officer Major A. E. Ayers, Wyoming Highway Patrol (Sept. 27, 1984).

and then reinitiation of the roadblock. Any of these are acceptable, for purposes of the neutral-criteria standard.⁹³

The other part of the neutral-criteria standard also contributes to neutrality but in a less direct manner. Most courts, including the United States Supreme Court, have indicated that the roadblock should be designed and instituted with the permission of supervisory officers.⁹⁴ The fear is that field officers, who are not removed from the scene, may not be objective and unbiased. In addition, the supervisory officer often has access to statistics and data which promote carefully planned roadblocks.

Once the government has shown the applicability of the neutral-criteria standard, the court should determine if the vehicles were stopped pursuant to a fixed formula and a pre-determined plan generated by supervisory law enforcement officials. If the roadblock does not meet the neutral-criteria standard, it constitutes an unreasonable seizure under the fourth amendment. This is true even if the roadblock promotes a compelling government interest, is a necessary means of law enforcement, and is objectively and subjectively only a brief privacy intrusion.

FOURTH AMENDMENT GUIDELINES FOR THE DRINKING-DRIVING ROADBLOCK

Lower courts have applied several different tests in deciding whether DWI roadblocks are reasonable under the fourth amendment. A number of the considerations voiced in the opinions do overlap each other. In addition, various government agencies and task forces have made several suggestions for the roadblock law enforcement technique. I have compiled a number of these considerations into guidelines and suggestions for law enforcement agencies to use in planning DWI roadblocks. Courts should also consider these factors in order to ascertain the constitutionality of a specific roadblock.⁹⁵

1. Roadblocks should be carefully planned, in writing by administrative officials using a neutrally pre-determined formula. Once the roadblock is initiated, written records should be kept on: (1) the number of vehicles that passed through the roadblock; (2) the number stopped; (3) the interval between stops; (4) the number

93. See generally *U.S. v. Prichard*, 645 F.2d 854 (10th Cir. 1981); *State v. Cocomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980); *State v. Shankle*, 58 Or. App. 134, 647 P.2d 959 (1982). For purposes of weighing the subjective intrusion on individual privacy rights, the choice between stopping all vehicles or vehicles at a small or large interval can become very important.

94. *United States v. Martinez-Fuerte*, 428 U.S. 543, 559 (1976) (location of fixed check point is not chosen by officers in field, but by officials, leaving less room for abusive or harassing stops on individuals); *State v. Deskins* 234 Kan. 529, 673 P.2d 1174, 1185 (1983) (one factor that must be considered is whether standards are set by superior officers); *State v. Hillesheim*, 291 N.W.2d 314, 318 (1980) (a vehicle stop may only be made where there is a pre-determination by policy making administrative officers of roadblock location, time and procedures).

95. These guidelines will assist the roadblock planner in meeting the federal constitutional requirements for drinking-driving roadblocks. Wyoming planners should be careful to consider WYO. STAT. §§ 7-17-101 to -103 (1977) which set forth both authority to establish roadblocks and minimum requirements. This article takes no position as to whether Wyo. STAT. § 7-17-102 (1977) creates a higher standard than the United States Constitution.

referred to secondary investigation; (5) the number of individuals arrested; and (6) the average length of the initial stop. These records are useful in justifying the stop, showing the scope of the objective privacy intrusion, and verifying that neutral criteria were applied.

2. Law enforcement officials should tailor the application of DWI roadblocks to geographical areas and to times that indicate a high incidence of drunk driving.⁹⁶ This can be determined by statistics on alcohol related motor vehicle accidents or by local knowledge regarding the location of popular taverns. The Wyoming Highway Patrol has already compiled statistics which demonstrate that Sweetwater County, Natrona County, and Carbon County (in that order) had the most alcohol-related fatal vehicle accidents in 1983.⁹⁷ The statistics also show that on Saturdays from one a.m. to three a.m. and five p.m. to midnight, more alcohol-related accidents occurred than at any other time.⁹⁸ In addition, those accidents occurred primarily during clear weather and dry road conditions. If used in roadblock plans, data like this would make DWI roadblocks effective, narrowly targeted, and less intrusive on the general population than general roadblocks.

3. Law enforcement officials should take into account safety aspects in site selection and roadblock planning. The National Highway Traffic Safety Administration has issued a report on roadblocks stating that "safety checkpoints cannot be of less public benefit than the behavior they are trying to displace, nor can they create more of a traffic hazard than the results of the driving behavior they are trying to modify."¹⁰⁰ For purposes of determining necessary safety measures, planners must know the average traffic volume on the proposed highway or street. If the volume of traffic is generally high at the desired time for the roadblock, supervisors may want to increase the planned interval for stopping traffic. If the roadblock will be conducted in the dark, adequate lighting and warning devices are necessities.

Planners should also select a site which allows for referral of vehicles to a secondary site for further investigation without impeding the flow of traffic through the roadblock. This can be accomplished by setting up the roadblock near a weigh station, public rest area, or vacant parking lot.

For safety reasons, roadblocks should not be conducted during bad weather. If the weather becomes unfavorable during the

96. *State ex rel. Ekstom v. Justice*, 663 P.2d 992 (Ariz. 1983); *State v. Cocomo* 177 N.J. Super 575, 580, 427 A.2d 131, 134 (1980).

97. STATE HIGHWAY DEP'T, WYO. HIGHWAY SAFETY BRANCH, 1983 PROFILE, ALCOHOL AND WYOMING TRAFFIC ACCIDENTS 2 (1984).

98. *Id.* at 5.

99. *Id.*

100. NHTSA TECHNICAL NOTE, *supra* note 84, at 12.

roadblock, the roadblock must be terminated. The time and reason for terminating the roadblock should be documented. This will aid the law enforcement agency in showing that the termination was not merely arbitrary.

4. Several authorities urge that the use of DWI roadblocks should be "agressively publicized" by local law enforcement agencies.¹⁰¹ This type of publicity will have two effects. First, it will maximize the deterrent nature of the roadblock by increasing the potential drinking drivers' perceived chance of being apprehended. Second, it will help mentally to prepare and to educate the general public, and thereby significantly reduce the subjective intrusion on individual privacy rights.

Law enforcement officials can accomplish these objectives by issuing a local press release indicating that they will be conducting temporary roadblocks to detect and arrest drunk drivers. The release should detail the reason for the roadblocks and the general procedure that will be utilized. In order to prevent evasion, specific dates, times, and locations should not be released.

If a roadblock proves effective in apprehending intoxicated drivers or reducing alcohol-related accidents, these statistics should also be published. Publishing these statistics will allow the community to identify with the positive aspects of the roadblock and will create support for its future use.

5. One of the most important aspects addressed by these guidelines are the measures that can be implemented to reduce the subjective intrusion on individual privacy rights. As I have previously indicated, several courts have insisted that roadblock planners make some effort to include a number of these physical characteristics in the individual roadblock.¹⁰² Only if a court finds that a significant number of these characteristics are present will the neutral-criteria standard apply.

101. *Id.* at 15.

102. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976); *Delaware v. Prouse*, 440 U.S. 648, 657 (1979); *State v. Deskins*, 234 Kan. 529, 551, 673 P.2d 1174, 1185 (1983); *State v. Hillesheim*, 291 N.W.2d 314, 318 (Iowa 1980); *State v. Shanule*, 58 Or. App. 134, 141, 647 P.2d 959, 962 (1982). The Wyoming legislature has also provided for certain minimum requirements for roadblocks. WYO. STAT. § 7-17-103 (1977) provides:

(a) For the purpose of warning and protecting the traveling public, the minimum requirements to be met by officers establishing temporary roadblocks, if time and circumstances allow, are:

(i) The temporary roadblock must be established at a point on the highway or street clearly visible at a distance of not less than two hundred (200) yards in either direction.

(ii) At the point of the temporary roadblock flashing warning lights shall be visible to oncoming traffic for a distance of less than two hundred (200) yards. The emergency warning light on a marked law enforcement vehicle shall suffice; and

(iii) At least one (1) person working a law enforcement roadblock shall be in uniform and visible and at least one (1) vehicle used in a law enforcement roadblock shall be clearly marked as a law enforcement vehicle.

First, signs and flashing lights, which indicate that officials are present and vehicles must stop ahead, should be placed well in advance of a roadblock. Several marked patrol cars should be present with lights flashing and uniformed officers nearby. This will remind the public that the action is official. Once the officer stops the vehicle, the driver should be briefly told the purpose of the stop; i.e. to check for operator's license, registration, and influence of alcohol. The seizure should be limited to the stop, to the request to see papers, and to brief conversation and observation. The time should be kept to a minimum. All of these physical characteristics will serve to reduce anxiety and fear on the part of the individual stopped.

6. If the officer has sufficient facts to believe that the driver is intoxicated or, if the driver cannot produce papers, the officer should request that the motorist move the vehicle to a secondary inspection site. The stopping officer should never ask the occupants to step out of the vehicle or seek consent to search the person or vehicle. The neutral-criteria standard is far too weak to support these more intrusive fourth amendment searches and seizures.¹⁰³

7. One court was particularly distressed when a roadblock's operation was temporarily halted every time an individual was arrested for drunk driving.¹⁰⁴ In order to avoid this situation, there should be a sufficient number of uniformed officers to handle all aspects of an ongoing roadblock.

8. Another planning factor to be considered is the interval between stops. This must be narrowly tailored to the normal traffic volume. If the interval is too great for the particular highway, the individual motorist may feel he or she is the only person being stopped. This would contribute considerably to the subjective intrusion on the individual's privacy rights.

9. Initiating agencies should inform and involve other local enforcement agencies in the planning, and if possible, the operation of the roadblocks. This will encourage further input and cooperation which will prevent agencies from duplicating roadblocks within a certain locale. Duplication could cause the roadblocks to run afoul of the constitutional balancing test by increasing the objective and subjective privacy intrusions without further promoting the effectiveness of the roadblock.

103. The neutral-criteria standard is much weaker than its two forerunners, the probable cause standard, and the reasonably-articulable facts standard. In fact, the neutral-criteria standard does not require even a vague belief that a crime is being committed. This very weak type of standard will only apply to very minimal fourth amendment seizures. Asking a person to step from his vehicle, etc. is a much greater intrusion than the original brief stop, in terms of both objective and subjective privacy intrusions. The police officer must meet the intermediate standard of reasonably-articulable facts to believe a crime is being committed.

104. *State v. Hillesheim*, 291 N.W.2d 314, 319 (Iowa 1980).

CONCLUSION

Temporary roadblocks are currently being employed in several states including Wyoming, for purposes of detecting and apprehending the drunk driver. The United States Supreme Court has not expressly sanctioned this method as constitutional under the fourth amendment. The Court, however, has laid the constitutional foundation for a new lesser standard for seizing traveling motorists in a roadblock-type stop. This standard, termed the neutral-criteria standard, requires that the roadblock be initiated and planned by supervisory officers and conducted so that the individual motorist is stopped according to a neutral and pre-determined criteria.

The neutral-criteria standard will only be applied if the government interest is compelling, the means for achieving the pursued interest is necessary, and the resulting privacy intrusion is minimal both objectively and subjectively. The drinking-driving roadblock can, with careful planning fulfill all these conditions.

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