

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—NEW JERSEY  
CONSTITUTION CONSTRUED TO LIMIT SCOPE OF DWI ROAD-  
BLOCKS—*State v. Kirk*, 202 N.J. Super. 28, 493 A.2d 1271  
(App. Div. 1985).

The use of automobiles as an efficient and economical means of transportation has become an integral part of American life in the twentieth century.<sup>1</sup> Providing people with a mobility and a convenience never before realized, the automobile is now the most popular means of transportation in this country.<sup>2</sup> This growth in the use of the automobile has not occurred without its concomitant problems, however.<sup>3</sup> One problem of major concern to the government and the American public is the growing phenomenon of driving while intoxicated (DWI).<sup>4</sup> Every year, thousands of people are needlessly injured or killed in automobile accidents caused by drunken drivers.<sup>5</sup>

Although the government has outlawed DWI<sup>6</sup> and passed other laws to ensure traffic safety,<sup>7</sup> efforts to enforce these laws through sobriety checkpoints and roadblocks have received a great deal of constitutional scrutiny.<sup>8</sup> The debate concerning

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<sup>1</sup> See Westendorf & Westendorf, *The Prouse Dicta: From Random Stops to Sobriety Checkpoints?*, 20 IDAHO L. REV. 127, 127 (1984) (noting that "[e]very day the vast majority of Americans use our nation's highways either as passengers or drivers of automobiles").

<sup>2</sup> See *id.* The authors recognize that the automobile provides "[an] economical means of transportation, [which] has allowed us to become the most mobile society in history[.]" *Id.*

<sup>3</sup> See *id.*

<sup>4</sup> See *Driving Drunks Off the Road*, CHANGING TIMES, July 1982, at 50 (noting public concern for the problem of drunken driving); Case Note, *The Fourth Amendment Roadblock Against Detecting Drunk Drivers: Commonwealth v. McGeoghegan*, 18 SUFFOLK U.L. REV. 475, 475 (1984) (noting government concern for the problem of drunken driving).

<sup>5</sup> NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEP'T OF TRANSP., TASK FORCE IMPLEMENTATION GUIDELINES FOR THE DEVELOPMENT OF STATE AND COMMUNITY ALCOHOL HIGHWAY SAFETY PROGRAMS 2 (1983) [hereinafter cited as GUIDELINES] (stating that "[r]esearch indicates that more than 250,000 Americans have died in alcohol-related traffic crashes during the last decade").

<sup>6</sup> N.J. STAT. ANN. § 39:4-50 (West Cum. Supp. 1985-1986).

<sup>7</sup> See, e.g., N.J. STAT. ANN. §§ 39:3-43 to -79.8 (West 1973 & Cum. Supp. 1985-1986) (regulations pertaining to automobile equipment violations); *Id.* §§ 39:4-95 to -104 (regulations concerning vehicle speed violations).

<sup>8</sup> See Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457, 1460 (1983) (stating that "although some jurisdictions have accepted the use of some types of roadblocks, the constitutionality of roadblock stops for DWI enforcement remains unclear"). The several states are by no means in accord regarding the constitutionality of roadblock stops and seizures. Compare *State v. Olgaard*, 248 N.W.2d 392, 395 (S.D. 1976) (holding that

these methods of inspection focuses on the judicial tug-of-war between effective enforcement of the laws and the right of private citizens to be free from unreasonable searches.<sup>9</sup> Recently, a New Jersey appellate court examined the constitutionality of vehicular checkpoints.<sup>10</sup> In *State v. Kirk*,<sup>11</sup> the appellate division set forth specific criteria upon which the constitutional validity of stationary roadblocks would be upheld.<sup>12</sup>

At approximately 5:25 p.m. on October 15, 1983, Troopers Mayes and Martinez of the New Jersey State Police established a roadblock on Route 550 in Cape May County.<sup>13</sup> The decision to establish the checkpoint was the product of an informal discussion between the two troopers.<sup>14</sup> The purpose of the roadblock was to stop all vehicles traveling in both directions and check drivers' licenses, automobile registrations, and insurance cards while concurrently inspecting for equipment violations and signs of driver intoxication.<sup>15</sup> The troopers selected Route 550 because it was a two-lane, lightly-traveled road; consequently, no substantial traffic congestion would be created as a result of the checkpoint.<sup>16</sup> Upon agreeing to conduct the roadblock, Trooper

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DWI roadblocks are unconstitutional "unless authorized by prior judicial warrant") with *State v. Hilleshiem*, 291 N.W.2d 314, 318 (Iowa 1980) (holding that a constitutional roadblock may be based solely upon "a predetermination by policy-making administrative officers").

<sup>9</sup> See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *State v. Hilleshiem*, 291 N.W.2d 314, 317 (Iowa 1980); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 141, 449 N.E.2d 349, 351 (1983); *State v. Cocco*, 177 N.J. Super. 575, 582, 427 A.2d 131, 134 (Law Div. 1980); *State v. Olgaard*, 248 N.W.2d 392, 394 (S.D. 1976).

<sup>10</sup> See *State v. Kirk*, 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985).

<sup>11</sup> 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985).

<sup>12</sup> See *id.* at 37, 493 A.2d at 1275.

<sup>13</sup> Brief and Appendix on Behalf of the Attorney General, *Amicus Curiae* at 2, *State v. Kirk*, 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985) [hereinafter cited as Attorney General's Brief].

<sup>14</sup> *Kirk*, 202 N.J. Super. at 33-34, 493 A.2d at 1273. When asked how he determined to initiate the roadblock, Trooper Mayes replied, "Basically [Trooper Martinez and I] just discuss it and we'll have one." *Id.*

<sup>15</sup> Attorney General's Brief, *supra* note 13, at 2 n.1. Trooper Mayes provided the following description of the purpose and procedure of this checkpoint:

[W]hat we do is we set up at that time it was only two troopers, me and another trooper, we take both lanes north and south bound in this instance and stop every car that comes down the road asking for driver's license, registration, insurance card and at this time we also check for any equipment violation such as balled (sic) tires and such, anybody who is—appears to be intoxicated and any drugs, anything in plain view of such sort.

*Id.* (citation omitted).

<sup>16</sup> *Kirk*, 202 N.J. Super. at 32-33, 493 A.2d at 1273.

Mayes stopped his car on one side of the highway and positioned himself in the center of the road.<sup>17</sup> Trooper Martinez parked his car and stationed himself on the opposite side of the highway.<sup>18</sup> The officers did not use flares or warning signs at the checkpoint, and they provided no other advance notice to oncoming motorists.<sup>19</sup>

Approximately ten minutes after the traffic check was initiated, Trooper Mayes stopped the first approaching vehicle, which was driven by Francis Kirk.<sup>20</sup> Pursuant to the officer's instruction, Kirk pulled his car to the side of the road, where he was questioned.<sup>21</sup> During this interrogation, Mayes perceived Kirk to be intoxicated and ordered him to perform roadside sobriety tests.<sup>22</sup> Based on his observations, Mayes arrested Kirk under a suspicion of drunken driving.<sup>23</sup> Immediately thereafter, the officers discontinued the roadblock and took Kirk to the police barracks for booking.<sup>24</sup> During the entire administration of the checkpoint, the officers stopped only one other automobile.<sup>25</sup> Kirk was later charged with driving while intoxicated.<sup>26</sup>

Kirk filed a motion for suppression of the evidence procured as a result of the traffic check.<sup>27</sup> He alleged that the stop lacked "probable cause or particularized suspicion of illegal activity" and thus violated his constitutional rights.<sup>28</sup> The trial court denied Kirk's motion to suppress, and Kirk pled guilty to operating an automobile while intoxicated.<sup>29</sup> Notwithstanding his guilty plea, Kirk sought appellate review of the constitutionality of the checkpoint established by Mayes and Martinez.<sup>30</sup> Subsequently, the appellate division reversed the order denying suppression<sup>31</sup> and held that a temporary roadblock, initiated through "the exercise of absolute, unbridled discretion of . . . officers in the field" violated the New Jersey Constitution's provision prohibiting un-

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<sup>17</sup> Attorney General's Brief, *supra* note 13, at 3.

<sup>18</sup> *Id.*

<sup>19</sup> *Kirk*, 202 N.J. Super. at 34, 493 A.2d at 1273.

<sup>20</sup> *Id.* at 33, 493 A.2d at 1273.

<sup>21</sup> See Attorney General's Brief, *supra* note 13, at 3.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.*

<sup>24</sup> *Kirk*, 202 N.J. Super. at 33, 493 A.2d at 1273.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.*

<sup>27</sup> Attorney General's Brief, *supra* note 13, at 4.

<sup>28</sup> *Kirk*, 202 N.J. Super. at 32, 493 A.2d at 1272.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, 493 A.2d at 1273.

<sup>31</sup> *Id.* at 58, 493 A.2d at 1288.

reasonable seizures.<sup>32</sup> The court recognized, however, that road-blocks established pursuant to predetermined administrative guidelines would be constitutionally permissible, provided that the guidelines ensured sufficient, nondiscretionary supervisory control over officers in the field.<sup>33</sup>

The fourth amendment to the United States Constitution specifically prohibits the government from subjecting individuals to unreasonable searches and seizures.<sup>34</sup> Article I, paragraph 7 of the New Jersey Constitution sets forth a parallel prohibition of unreasonable government searches and seizures.<sup>35</sup> The purpose of these provisions is to protect the privacy of individuals against random invasions by governmental authorities.<sup>36</sup> It is well-settled in Federal and New Jersey jurisprudence that these constitutional restrictions apply to police stops and searches of automobiles.<sup>37</sup> In interpreting these provisions, however, courts have had a difficult time determining what specific circumstances will justify the stop of an automobile as "reasonable."<sup>38</sup> Faced with this quandary, courts analyzing the reasonableness of automobile stops have generally resolved the issue by balancing the importance of the public interest to be preserved against the pervasiveness of the privacy intrusion.<sup>39</sup> Under this approach, if the public interest involved outweighs the government's infringement on the mo-

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<sup>32</sup> *Id.* at 37, 493 A.2d at 1275. The court was careful to state, "We wish to be clear that our decision is rendered on State constitutional grounds exclusively, not on federal constitutional grounds." *Id.* at 34, 493 A.2d at 1274; *see infra* notes 94-95 and accompanying text.

<sup>33</sup> *See Kirk*, 202 N.J. Super. at 55-56, 493 A.2d at 1286-87.

<sup>34</sup> U.S. CONST. amend. IV. The fourth amendment to the United States Constitution 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.

*Id.*

<sup>35</sup> N.J. CONST. art. I, ¶ 7.

<sup>36</sup> *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978)); *see also Kirk*, 202 N.J. Super. at 35-36, 493 A.2d at 1274-75 (outlining fundamental purpose of art. I, ¶ 7 of the New Jersey Constitution of 1947).

<sup>37</sup> *See Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Coccomio*, 177 N.J. Super. 575, 584, 427 A.2d 131, 135 (Law Div. 1980).

<sup>38</sup> *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *State v. Alston*, 88 N.J. 211, 230-32, 440 A.2d 1311, 1321-22 (1981); *State v. Carpentieri*, 82 N.J. 546, 548, 414 A.2d 966, 967 (1980).

<sup>39</sup> *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *State v. Coccomio*, 177 N.J. Super. 575, 582, 427 A.2d 131, 134 (Law Div. 1980).

torist's privacy, then the search is reasonable and constitutional.<sup>40</sup> If, on the other hand, the government's intrusion on the motorist's right to privacy outweighs the public interest involved, then the search is unreasonable and cannot be upheld.<sup>41</sup>

In the last ten years, a distinct line of United States Supreme Court cases has provided the groundwork for Federal and state decisions concerning the reasonableness of automobile stops by the police.<sup>42</sup> The Supreme Court initially addressed the fourth amendment implications of vehicle stops and motorist detentions in cases involving immigration control.<sup>43</sup> In *United States v. Brignoni-Ponce*,<sup>44</sup> two border patrol officers in a parked patrol car observed Brignoni-Ponce's vehicle traveling northbound on the main highway between Mexico and Southern California.<sup>45</sup> The officers pursued and stopped the vehicle based on their observation that "[the] three occupants appeared to be of Mexican descent."<sup>46</sup> Questioning revealed that the passengers had entered the United States illegally, and the officers arrested Brignoni-Ponce and charged him with two counts of transporting illegal aliens.<sup>47</sup> At trial, the defendant was convicted of carrying illegal immigrants into the country.<sup>48</sup> Brignoni-Ponce subsequently appealed his conviction to the Ninth Circuit.<sup>49</sup>

On appeal, the central issue was the difference between a

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<sup>40</sup> *State v. Coccomo*, 177 N.J. Super. 575, 583-84, 427 A.2d 131, 135 (Law Div. 1980); see also *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (noting the difficulty courts traditionally have had in determining what constitutes an "unreasonable" search and seizure). The *Camara* court stated:

Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of [the Supreme] Court.

*Id.*

<sup>41</sup> See *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979).

<sup>42</sup> See, e.g., *Delaware v. Prouse*, 440 U.S. 648 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

<sup>43</sup> See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

<sup>44</sup> 422 U.S. 873 (1975).

<sup>45</sup> *Id.* at 874-75.

<sup>46</sup> *Id.* at 875.

<sup>47</sup> *Id.* Knowingly transporting illegal aliens into this country is a violation of Federal law. See 8 U.S.C. § 1324 (a) (1982).

<sup>48</sup> *Brignoni-Ponce*, 422 U.S. at 875.

<sup>49</sup> See *id.*

fixed checkpoint and a roving patrol stop.<sup>50</sup> Classifying the stop of Brignoni-Ponce's car as one made by a roving patrol,<sup>51</sup> the court noted that the fourth amendment prohibits the use of such patrols to search vehicles without a warrant or probable cause.<sup>52</sup> Accordingly, the Ninth Circuit held that the detention of a vehicle for the sole purpose of interrogating its occupants, without a "founded suspicion" of illegal activity, is violative of the fourth amendment.<sup>53</sup> The court declined to hold that Mexican ancestry alone constituted a "founded suspicion" sufficient to sustain the stop of Brignoni-Ponce's vehicle.<sup>54</sup>

After granting certiorari, the United States Supreme Court affirmed the Ninth Circuit's determination.<sup>55</sup> Initially, the Court recognized that the fourth amendment applies to all seizures of persons, including brief detentions such as that of Brignoni-Ponce.<sup>56</sup> The opinion noted that the key to a seizure's legality for the purposes of the fourth amendment is the reasonableness of the police action under the circumstances.<sup>57</sup> The Court further observed that "the reasonableness of such seizures depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."<sup>58</sup> In this instance, the Court believed that the stop of the defendant's automobile, based solely on the Mexican appearance of its occupants, was too arbitrary to be condoned.<sup>59</sup> Nevertheless, because of the Government's interest in curbing the flow of illegal aliens, the Court admonished that future stops based on less than probable cause may be permitted if conducted in a less

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<sup>50</sup> *Id.* at 875 n.1.

<sup>51</sup> *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1110 (9th Cir. 1974), *aff'd*, 422 U.S. 873 (1975).

<sup>52</sup> *See id.* at 1110-11. The Ninth Circuit compared this case with the United States Supreme Court's decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). In *Almeida-Sanchez*, the Supreme Court held that a warrantless police seizure of an automobile within 20 miles of the Mexican border violated the fourth amendment. *See id.* at 273-75. Relying upon *Almeida-Sanchez*, the Ninth Circuit invalidated the police search of Brignoni-Ponce's automobile and stated that this type of search was "entirely inconsistent with the Supreme Court's opinion in *Almeida-Sanchez*." *United States v. Brignoni-Ponce*, 499 F.2d 1109, 1111 (9th Cir. 1974), *aff'd*, 422 U.S. 873 (1975).

<sup>53</sup> *See United States v. Brignoni-Ponce*, 499 F.2d 1109, 1112 (9th Cir. 1974), *aff'd*, 422 U.S. 873 (1975).

<sup>54</sup> *Id.*

<sup>55</sup> *Brignoni-Ponce*, 422 U.S. at 876, 887.

<sup>56</sup> *Id.* at 878.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 885-86.

arbitrary fashion than this one.<sup>60</sup> The court was also careful to note in its opinion that “[t]he *only issue* presented for decision [in this case] is whether a roving patrol may stop a vehicle *in an area near the border* and question its occupants *when the only ground for suspicion is that the occupants appear to be of Mexican ancestry.*”<sup>61</sup>

One year after its decision in *Brignoni-Ponce*, the Supreme Court examined the constitutionality of border patrol stops and searches at permanent motorist checkpoints.<sup>62</sup> In *United States v. Martinez-Fuerte*,<sup>63</sup> the Court held that a brief investigatory stop of a vehicle at a fixed border checkpoint could be made without probable cause or any articulable suspicion of criminal activity.<sup>64</sup> The Court noted that a roadblock-type stop involves the same degree of “objective intrusion” as is occasioned in a roving patrol stop.<sup>65</sup> Nevertheless, the Court distinguished these checkpoint investigatory stops from the random detention in *Brignoni-Ponce*, reasoning that the permanent location of checkpoints reduces the subjective intrusiveness of the seizure.<sup>66</sup> Further, the Court stated that the selection of the checkpoint site by administrative officials eliminates any discretionary actions by field officers that might contribute to unreasonable seizures.<sup>67</sup> These

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<sup>60</sup> See *id.* at 884. More specifically, the *Brignoni-Ponce* Court stated that “officers on roving patrol may stop 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.” *Id.* The Court outlined several factors that might be considered in determining whether there was a reasonable, articulable suspicion that would justify a brief investigatory stop. See *id.* at 884-85. These factors included “[the vehicle’s] proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic.” *Id.* The Court also noted that “information about recent illegal border crossings in the area” and a particular driver’s actions and mannerisms could be relevant. *Id.* (citations omitted). The Court stressed that reliance on merely one factor would not justify an investigatory stop. *Id.* at 885-86.

<sup>61</sup> *Id.* at 876 (emphasis added).

<sup>62</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>63</sup> 428 U.S. 543 (1976).

<sup>64</sup> See *id.* at 566-67.

<sup>65</sup> *Id.* at 557-58. The *Martinez-Fuerte* Court explained that the “objective intrusion” experienced at a roadblock-type stop includes “the stop itself, the questioning, and the visual inspection.” *Id.* at 558.

<sup>66</sup> *Id.* at 558-59. The Court described subjective intrusion as “the generating of concern or even fright on the part of lawful travelers.” *Id.* at 558. The Court also listed many features of the permanent immigration checkpoint that lessen the subjective intrusiveness of the stop. *Id.* at 545-46. These included road signs providing advance warning of the impending stop, the presence of uniformed border patrol officers and border patrol vehicles equipped with flashing lights, a permanent structure housing a border patrol office, and flood lights for use at night. *Id.*

<sup>67</sup> *Id.* at 559. Although field officers at a permanent immigration checkpoint may stop only vehicles passing the checkpoint, they still have some discretion to

distinctions, along with the compelling governmental interest in eliminating the surge of illegal aliens into the United States, tipped the fourth amendment balancing scale in favor of the checkpoint searches.<sup>68</sup> As a result, the Court's decision obviated the constitutional need for any type of criminal suspicion in order to uphold a seizure as reasonable.<sup>69</sup>

In *Martinez-Fuerte*, as in *Brignoni-Ponce*, the Supreme Court evaluated only the use of traffic stops and roadblocks as they relate to immigration control. The Court specifically reserved the question concerning the constitutionality of similar police techniques when used for the enforcement of routine traffic safety regulations.<sup>70</sup> The most significant Supreme Court decision addressing this issue was *Delaware v. Prouse*.<sup>71</sup> In *Prouse*, a patrolman randomly stopped a vehicle in order to inspect the operator's license and registration.<sup>72</sup> The patrolman acknowledged that he had neither probable cause to stop the vehicle nor a reasonable suspicion of illegal activity.<sup>73</sup> The United States Supreme Court subsequently held that this initial stop was proscribed by the fourth amendment.<sup>74</sup> Relying on *Martinez-Fuerte*, the Court recog-

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choose which vehicles to investigate. *See id.* at 560, 563 (selective referral of some vehicles to secondary inspection area for limited inquiry into residence status deemed reasonable without particularized reason for referral). The Court indicated that suspicion of Mexican ancestry was a valid justification for such selective referrals. *Id.* at 563.

<sup>68</sup> *See id.* at 562.

<sup>69</sup> The Court acknowledged that state law enforcement agencies lacking any articulable suspicion of illegal activity often conducted random stops "to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters." *Id.* at 560 n.14. The Court, however, reserved the question of the constitutionality of such stops. *Id.*

<sup>70</sup> *Id.*; *see also* *Delaware v. Prouse*, 440 U.S. 648, 656-57 n.13 (1979) (noting that previous Supreme Court decisions involving border patrol stops failed to affect "the permissibility of state and local officials stopping motorists for document questioning"); *United States v. Ortiz*, 422 U.S. 891, 897 n.3 (1975) (probable cause requirement for vehicle searches may not apply to routine safety inspections); *United States v. Brignoni-Ponce*, 422 U.S. 873, 883 n.8 (1975) (holding does not deprive state and local officials of power to conduct limited stops necessary to enforce licensing, registration, and truck weight regulations).

<sup>71</sup> 440 U.S. 648 (1979).

<sup>72</sup> *Id.* at 650.

<sup>73</sup> *See id.* at 650-51. The patrolman stated, "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." *Id.*

<sup>74</sup> *Id.* at 663. Striking down this random traffic stop as unconstitutional, the Court stated:

[W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automo-



nized the distinction between individualized random stops and permanent roadblocks, and noted the greater degree of subjective intrusion occasioned by the use of random stops.<sup>75</sup> Although it perceived the compelling state interest in promoting traffic safety, the Court refused to expose motorists to "unfettered governmental intrusion[s] every time [they] entered an automobile."<sup>76</sup> Moreover, the Court recognized that there were alternative, more acceptable means through which to assure highway safety.<sup>77</sup> Specifically, the *Prouse* Court stated that "[t]his holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."<sup>78</sup>

While *Prouse* and the earlier immigration control cases provide the analytical framework for determining the constitutionality of traffic stops and roadblocks, these decisions do not conclusively approve or disapprove of the use of temporary DWI checkpoints.<sup>79</sup> The ambiguity of Supreme Court decisions dealing with this issue has resulted in conflicting Federal and state court roadblock decisions.<sup>80</sup> The depth of analysis and decisive

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bile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

*Id.*

<sup>75</sup> *Id.* at 656-57.

<sup>76</sup> *Id.* at 662-63.

<sup>77</sup> *See id.* at 663 & n.26.

<sup>78</sup> *Id.* at 663 (footnote omitted).

<sup>79</sup> *See Note, supra* note 8, at 1470 (noting the "[c]onfusion in the [w]ake of *Prouse*" with regard to the constitutionality of different types of roadblocks and traffic stops).

<sup>80</sup> *See State v. McLaughlin*, 471 N.E.2d 1125, 1134-36 (Ind. Ct. App. 1984). The *McLaughlin* court surveyed various decisions involving fourth amendment challenges to evidence seized at police roadblocks where the primary or secondary purpose of the roadblock was to check for DWI violations. *Id.* Prior to *McLaughlin*, five decisions had approved the use of the DWI roadblock. *See State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983); *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky. Ct. App. 1983); *State v. Coccoma*, 177 N.J. Super. 575, 427 A.2d 131 (Law Div. 1980); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984); *People v. Peil*, 122 Misc. 2d 617, 471 N.Y.S.2d 532 (J. Ct. 1984). Five other states' decisions had deemed the roadblock in question impermissible under the fourth amendment. *See State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983); *People v. Bartley*, 125 Ill. App. 3d 575, 466 N.E.2d 346 (1984); *Commonwealth v. McGeoghegan*, 389 Mass. 137, 449 N.E.2d 349 (1983); *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976).

Another noteworthy case that qualified the constitutionality of roadblocks was *United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981). In *Prichard*, two New

factors in these cases varies greatly. Some courts, relying only on the Supreme Court's dicta in *Prouse*,<sup>81</sup> have approved certain roadblocks simply because all motorists who approached the checkpoint in question were stopped.<sup>82</sup> Other courts have placed a great deal of emphasis on the presence or absence of guidelines set by superior officers to control the discretion of the field officers actually conducting the roadblock.<sup>83</sup> In addition, two courts have invalidated roadblocks because the prosecution failed to show that the roadblock method was more effective than traditional methods of enforcing drunken driving laws.<sup>84</sup>

*Prouse* also precipitated a radical change in existing New Jersey law.<sup>85</sup> Before the *Prouse* decision, individualized random stops were specifically allowed by the New Jersey judiciary.<sup>86</sup> One

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Mexico state troopers initiated a roadblock on an interstate highway in order to inspect motorists' vehicle registrations and drivers' licenses. *Id.* at 855. The officers received permission to establish the roadblock from a law enforcement supervisor, but the specific details concerning the operation of the checkpoint were not clearly set forth. *Id.* Consequently, not all vehicles that approached the roadblock were stopped. *Id.* The officers chose not to stop "semi-trucks" because they had already been checked at a point of entry. *Id.* Furthermore, some vehicles were arbitrarily waved through the roadblock when traffic became congested. *Id.* The defendant Prichard was driving one of the cars that was stopped at the roadblock. *Id.* The officers subsequently smelled a strong odor coming from the vehicle, and they obtained consent to search the automobile. *Id.* at 856. In the cargo area, the officers discovered a large amount of cocaine, and they arrested Prichard for possession with the intent to distribute. *Id.* Prichard subsequently sought judicial review of the roadblock, alleging that it was constitutionally infirm. *Id.*

The trial court denied Prichard's motion to suppress the evidence seized as a result of the search. *Id.* at 855. On appeal, the Tenth Circuit stated that the roadblock's validity was governed by the dicta in *Prouse* allowing for traffic checking techniques that are less discretionary or less intrusive than random spot checks. *Id.* at 856. The court held that the failure to stop trucks and the waving through of vehicles to prevent traffic congestion were reasonable variances from the complete roadblock envisioned in *Prouse*. *Id.* at 856-57. Therefore, the court concluded that the roadblock satisfied the limited discretion rule of *Prouse* and was, in fact, constitutional. *Id.*

<sup>81</sup> See *supra* note 78 and accompanying text.

<sup>82</sup> See, e.g., *Kinslow v. Commonwealth*, 660 S.W.2d 677, 678 (Ky. Ct. App. 1983). The *Kinslow* court stated that "[t]he key [to this roadblock's validity] is the fact that all vehicles were stopped." *Id.*

<sup>83</sup> See, e.g., *State v. Hilleshiem*, 291 N.W.2d 314, 318 (Iowa 1980); *State v. Olgaard*, 248 N.W.2d 392, 394-95 (S.D. 1976).

<sup>84</sup> See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 5, 663 P.2d 992, 996 (1983); *People v. Bartley*, 125 Ill. App. 3d 575, 578, 466 N.E.2d 346, 348 (1984); see also West, *N.H. Court Holds Roadblocks Unconstitutional*, Nat'l L.J., Sept. 9, 1985, at 8, col. 1 (New Hampshire Supreme Court first to declare unconditionally that all roadblocks are unconstitutional because they are not the most effective means of apprehending drunken drivers).

<sup>85</sup> *State v. Carpentieri*, 82 N.J. 546, 548, 414 A.2d 966, 967 (1980).

<sup>86</sup> *Id.*; see *State v. Gray*, 59 N.J. 563, 567, 285 A.2d 1, 3 (1971); *State v. Braxton*,

year after the Supreme Court's decision in *Prouse*, however, a New Jersey court examined the validity of DWI roadblocks in *State v. Coccoma*.<sup>87</sup> In *Coccoma*, the defendant was arrested at a roadblock initiated by local police.<sup>88</sup> The particular roadblock had been authorized through a written policy statement issued by the chief of police, which mandated the stop of every fifth vehicle passing a given point.<sup>89</sup> The *Coccoma* court recognized the importance of removing drunk drivers from the highways in the interest of traffic safety.<sup>90</sup> Empirical data demonstrated that a drunken driving problem existed in the vicinity of the *Coccoma* roadblock, thereby creating a substantial traffic safety hazard.<sup>91</sup> Noting the increase in arrests since the institution of the checkpoint, the court upheld the DWI roadblock as a "productive mechanism" for the apprehension of motorists violating the drunken driving laws.<sup>92</sup>

Based upon this foundation of judicial precedent, the appellate division first addressed the constitutional ramifications of a sobriety roadblock in *State v. Kirk*.<sup>93</sup> The *Kirk* court began its analysis by stating that its decision would be rendered on New Jersey constitutional grounds exclusively rather than on Federal constitutional grounds.<sup>94</sup> Article I, paragraph 7 of the New Jersey Constitution of 1947, prohibiting unreasonable searches and seizures by the government, is remarkably similar in wording to the fourth amendment to the United States Constitution.<sup>95</sup> The court reasoned, however, that in several recent New Jersey decisions, the New Jersey Constitution has been interpreted to safeguard a

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57 N.J. 286, 287, 271 A.2d 713, 713 (1970); *State v. Kabayama*, 98 N.J. Super. 85, 88, 236 A.2d 164, 166 (App. Div. 1967), *aff'd*, 52 N.J. 507, 246 A.2d 714 (1968).

<sup>87</sup> 177 N.J. Super. 575, 427 A.2d 131 (Law Div. 1980).

<sup>88</sup> *Id.* at 580, 427 A.2d at 133. The roadblock was in operation in Roxbury, New Jersey on April 5, 1980. *Id.* at 579, 427 A.2d at 133. It was set up by the police on a road frequented by patrons of local taverns. *Id.* at 582, 427 A.2d at 134. The defendant was stopped at approximately 2:55 a.m. *Id.* at 580, 427 A.2d at 133.

<sup>89</sup> *Id.* at 579 & n.1, 427 A.2d at 133 & n.1. The Morris County Prosecutor had promoted the roadblock procedures and had forwarded a summary of *Prouse* and a set of roadblock regulations authorized by the Attorney General of New Jersey to all New Jersey police chiefs. *Id.* at 579 n.1, 427 A.2d at 133 n.1. The Roxbury Chief of Police sent a memorandum directing that the officers follow the procedures approved by the Attorney General when setting up the roadblock. *Id.*

<sup>90</sup> *Id.* at 582 n.9, 427 A.2d at 134 n.9.

<sup>91</sup> *Id.* at 582, 427 A.2d at 134.

<sup>92</sup> *Id.*, 427 A.2d at 134-35.

<sup>93</sup> 202 N.J. Super. 28, 493 A.2d 1271 (App. Div. 1985). The court stated, "This case is one of first appellate impression in New Jersey." *Id.* at 36, 493 A.2d at 1275.

<sup>94</sup> *Id.* at 34, 493 A.2d at 1274.

<sup>95</sup> Compare N.J. CONST. art. I, ¶ 7 with U.S. CONST. amend. IV.

wider range of privacy interests than the parallel provision in the Federal Constitution.<sup>96</sup> The appellate division concluded, therefore, that the state constitution "is a more appropriate vehicle to resolve questions concerning the rights of our citizens to travel [on New Jersey's] highways . . . without police interdiction."<sup>97</sup>

The *Kirk* court next addressed the constitutionality of the roadblock that led to the defendant's arrest and conviction for drunken driving.<sup>98</sup> The court opined that the roadblock in *Kirk* "[was] really not distinguishable from the random investigatory stop condemned in *Prouse*."<sup>99</sup> The court further noted that "[t]his temporary road block was set up by the exercise of absolute, unbridled discretion of the officers in the field[,] [t]here was no command or supervisory participation involved[,] [and] [t]here were no procedural limits or directions [for conducting the checkpoint]."<sup>100</sup> Finally, the court found no showing of the need for or efficacy of the roadblock at the time and place chosen.<sup>101</sup> Consequently, the *Kirk* court concluded that these factors evidenced an excess level of discretion in the field officers, which proved fatal to the constitutionality of the roadblock.<sup>102</sup>

The *Kirk* court supported its holding with a lengthy discussion of pertinent United States Supreme Court decisions.<sup>103</sup> Foremost, the court examined the judicial interpretation of the fourth amendment set forth in *Prouse*.<sup>104</sup> The *Prouse* opinion recognized that the fourth amendment's primary purpose is to protect the privacy and security of individuals by requiring that all law enforcement activities conform to a standard of reasonableness.<sup>105</sup> Mindful of this precept, the *Kirk* court re-emphasized that "standardless and unconstrained [sic] discretion" of officers

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<sup>96</sup> *Kirk*, 202 N.J. Super. at 35, 493 A.2d at 1274; see, e.g., *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982); *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975); *State v. Novembrino*, 200 N.J. Super. 229, 491 A.2d 37 (App. Div. 1985).

<sup>97</sup> *Kirk*, 202 N.J. Super. at 36, 493 A.2d at 1275.

<sup>98</sup> *Id.* at 36-37, 493 A.2d at 1275.

<sup>99</sup> *Id.* at 37, 493 A.2d at 1275.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 36-37, 493 A.2d at 1275.

<sup>103</sup> See *id.* at 37-40, 493 A.2d at 1275-77.

<sup>104</sup> See *id.* at 37-39, 493 A.2d at 1275-77.

<sup>105</sup> *Id.* at 38, 493 A.2d at 1276 (citing *Prouse*, 440 U.S. at 654); see *supra* notes 74-77 and accompanying text. The *Kirk* court also engaged in a lengthy analysis of the Supreme Court's decision in *Brown v. Texas*, 443 U.S. 47 (1979). See *Kirk*, 202 N.J. Super. at 39-40, 493 A.2d at 1277. Although the *Brown* case involved police detention of a pedestrian, the *Kirk* court recognized that *Brown* "reaffirmed the principles . . . expressed [in *Prouse*]." *Id.* at 39, 493 A.2d at 1277.

in the field was the "evil" that led other courts to invalidate automobile searches and seizures as unreasonable.<sup>106</sup> Consequently, the court concluded that motorists on public roadways must not be subjected to traffic stops conducted through "the *unbridled discretion of police officers*."<sup>107</sup>

The *Kirk* court next traced several state and Federal court decisions addressing the constitutionality of roadblocks.<sup>108</sup> In particular, the court focused on decisions reviewing roadblocks designed to combat drunken driving.<sup>109</sup> The court observed that an examination of these cases revealed that certain elements are important to most courts in resolving whether a particular roadblock will be approved or disapproved.<sup>110</sup> Summarizing these elements, the court maintained that a roadblock will probably satisfy a constitutional challenge if the state demonstrates the following factors: the roadblock was set up and conducted pursuant to supervisory authority; the roadblock was discretely aimed at a particular area at a specific place and time; the site selection was justified by empirical data showing that public safety needs warranted the checkpoint; and the roadblock was established to carry out reasonably important law enforcement goals.<sup>111</sup> The court recognized that absent these four factors, roadblocks set up by officers in the field have failed to survive constitutional scrutiny.<sup>112</sup>

Another issue considered by the *Kirk* court was the necessity of the DWI roadblock as opposed to conventional, arguably less

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<sup>106</sup> *Kirk*, 202 N.J. Super. at 39, 493 A.2d at 1276.

<sup>107</sup> *Id.*, 493 A.2d at 1277 (quoting *Prouse*, 440 U.S. at 663).

<sup>108</sup> See *id.* at 40-42, 493 A.2d at 1277-78. Before addressing the constitutionality of the *Kirk* roadblock, the court noted several cases in which a fourth amendment challenge was made to the use of a particular roadblock. See *id.* at 41-42, 45-52, 493 A.2d at 1277, 1280-86 (citations omitted).

<sup>109</sup> *Id.* at 40, 493 A.2d at 1277.

<sup>110</sup> *Id.* at 40-41, 493 A.2d at 1277.

<sup>111</sup> *Id.* The *Kirk* court further stated that "[o]ther factors which enhanced judicial approval [of roadblocks] were (1) adequate warnings to avoid frightening the traveling public, (2) advance general publicity designed to deter drunken drivers from getting in cars in the first place, and (3) officially specified neutral and courteous procedures for the intercepting officers to follow when stopping drivers." *Id.* at 41, 493 A.2d at 1277.

<sup>112</sup> *Id.*, 493 A.2d at 1277-78. The court emphasized the participation of supervisory officials as a prerequisite for a roadblock's constitutionality. *Id.* at 41-42, 493 A.2d at 1278 (citing *Coccoma*, 177 N.J. Super. at 583, 427 A.2d at 134-35). Recognizing that *Coccoma* was "New Jersey's sole opinion on the subject [of roadblocks]," the *Kirk* court was strongly persuaded by *Coccoma*'s accent on the need for supervisory control of police-conducted checkpoints. *Id.*

intrusive, means of law enforcement.<sup>113</sup> In this part of its analysis, the court placed particular stress on a work by Professor Wayne R. LaFave examining sobriety checkpoints.<sup>114</sup> Initially, the court noted that abolishing drunken driving is clearly in the public interest.<sup>115</sup> The court recognized, however, that routine patrols and other conventional police methods for combating drunken driving have provided only limited success.<sup>116</sup> In addition, the court stated that such conventional methods of enforcement focus primarily on the apprehension of the drunken driver, but do not function to deter motorists who might be tempted to drive while intoxicated.<sup>117</sup> On the other hand, motorist checkpoints provide successful apprehensions of drunken drivers as well as a substantial deterrent effect through the public's awareness of roadblocks.<sup>118</sup> The *Kirk* court reasoned, therefore, that the governmental and public interest promoted by the use of sobriety roadblocks outweighed the minimal intrusion upon the individual's constitutionally protected rights.<sup>119</sup>

The court next rejected the idea that sobriety checkpoints must be permanent to be constitutional.<sup>120</sup> Rather, it noted that temporary or movable roadblocks are constitutionally permissible provided that the discretion of field officers is sufficiently limited.<sup>121</sup> The court thus reiterated the concept that a pre-established " 'plan formulated or approved by executive-level officers' " is essential to judicial approval of a particular roadblock.<sup>122</sup> Further justifying its belief that roadblocks can be temporary, the court noted that police may establish a checkpoint without obtaining a judicial warrant.<sup>123</sup> Consequently, the court stated that the crucial consideration regarding a roadblock's constitutionality is "the validity of the decision as to when and where

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<sup>113</sup> See *id.* at 42-44, 493 A.2d at 1278-79.

<sup>114</sup> *Id.* at 42-44, 493 A.2d at 1278-79. See generally 3 W. LAFAVE, SEARCH AND SEIZURE § 10.8(g) (Supp. 1985).

<sup>115</sup> *Kirk*, 202 N.J. Super. at 43, 493 A.2d at 1279; see 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 190-92.

<sup>116</sup> *Kirk*, 202 N.J. Super. at 43, 493 A.2d at 1279.

<sup>117</sup> *Id.*; see 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 193.

<sup>118</sup> *Kirk*, 202 N.J. Super. at 43, 493 A.2d at 1279.

<sup>119</sup> *Id.*; see 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 190.

<sup>120</sup> *Kirk*, 202 N.J. Super. at 44, 493 A.2d at 1279; see 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 194.

<sup>121</sup> See *Kirk*, 202 N.J. Super. at 44, 493 A.2d at 1279; see also 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 194.

<sup>122</sup> *Kirk*, 202 N.J. Super. at 44, 493 A.2d at 1280 (quoting 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 194 (citations omitted)).

<sup>123</sup> *Id.*; see 3 W. LAFAVE, *supra* note 114, § 10.8(g), at 195.

it would be operated.”<sup>124</sup>

The *Kirk* court recognized that in the years subsequent to *Prouse*, the fourth amendment considerations in traditional seizure cases have undergone some clarification.<sup>125</sup> Specifically, the court noted that numerous United States Supreme Court and state court cases have examined—and often approved—seizures similar to that at issue in *Kirk*.<sup>126</sup> Comparing these recent cases with the case before it,<sup>127</sup> the *Kirk* court nevertheless remained convinced that this roadblock lacked constitutional validity.<sup>128</sup> The court supported its opinion by observing that the *Kirk* roadblock lacked minimum constitutional safeguards.<sup>129</sup> Specifically, the court emphasized that the *Kirk* roadblock was devoid of even “a modicum of supervisory participation” and without rational justification for the location selected.<sup>130</sup> The court stated that the only justification for the site selected was that it was not a well-traveled highway; hence, the roadblock would not cause substantial traffic congestion.<sup>131</sup> The *Kirk* court was unconvinced that this consideration alone supported the constitutionality of the checkpoint in question.<sup>132</sup> The court opined that without further constitutional safeguards, it would be unable to discern if the roadblock was a reasonable effort at law enforcement or merely a

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<sup>124</sup> *Kirk*, 202 N.J. Super. at 44, 493 A.2d at 1280 (quoting 3 W. LaFAVE, *supra* note 114, § 10.8(g), at 195).

<sup>125</sup> *Id.* at 45, 493 A.2d at 1280; *see also* *State v. McLaughlin*, 471 N.E.2d 1125, 1134 (Ind. Ct. App. 1984) (noting the “refinements” in fourth amendment analysis since *Prouse*).

<sup>126</sup> *Kirk*, 202 N.J. Super. at 45, 493 A.2d at 1280.

<sup>127</sup> *Id.* at 45-55, 493 A.2d at 1280-86. The cases cited by the court included: *Brown v. Texas*, 443 U.S. 47 (1979) (police search of pedestrian must be reasonable); *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984) (approval of roadblock established pursuant to command directives); *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983) (discretionary roadblocks impermissible); *Jones v. State*, 459 So. 2d 1068 (Fla. Dist. Ct. App. 1984) (invalidating sobriety roadblock because of lack of supervisory control); *State v. McLaughlin*, 471 N.E.2d 1125 (Ind. Ct. App. 1984) (holding roadblock unconstitutional because not shown to be more effective than conventional means of enforcement); *State v. Cloukey*, 486 A.2d 143 (Me. 1985) (approving properly conducted traffic safety roadblock); *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984) (upholding decision to conduct roadblock as long as it is made by higher ranking administrative officers); *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) (approving sobriety roadblock conducted in accordance with a written policy).

<sup>128</sup> *See Kirk*, 202 N.J. Super. at 48-49, 493 A.2d at 1282-83.

<sup>129</sup> *Id.* at 48, 493 A.2d at 1282.

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*; *see also supra* note 16 and accompanying text.

<sup>132</sup> *See Kirk* 202 N.J. Super. at 48-49, 493 A.2d at 1282-83.

"subterfuge" for stopping vehicles at random.<sup>133</sup>

In its discussion of relevant decisions from other states, the *Kirk* court delineated several additional characteristics that might increase the probability of judicial approval of sobriety roadblocks.<sup>134</sup> Primarily, the court recognized the need to limit the degree of subjective intrusion by law enforcement officers that might result in concern or fright on the part of lawful travelers.<sup>135</sup> The court noted that warning signs clearly identifying the impending checkpoint would help to minimize this subjective intrusion.<sup>136</sup> Secondly, the court pointed out that advance warning to the public that sobriety roadblocks will periodically be conducted also enhances the constitutionality of these limited seizures.<sup>137</sup> The court opined that such advance notice is essential in promoting the deterrent aspect of sobriety checkpoints.<sup>138</sup> Finally, the court noted that statistics reflecting the effectiveness of the DWI roadblock as compared to less intrusive means of law enforcement are highly desirable.<sup>139</sup>

Completing its analysis, the *Kirk* court held that the state bears the burden of establishing the "overall reasonableness and validity" of a search and seizure conducted without a warrant.<sup>140</sup> The court further noted that in this instance, the state had failed to meet this burden;<sup>141</sup> therefore, the court condemned the *Kirk* roadblock as an unreasonable seizure under article I, paragraph 7 of the New Jersey Constitution.<sup>142</sup> The court once again admonished that to justify a roadblock as reasonable, the state must show that it substantially benefited the public *and* that it was not operated wholly at the discretion of officers in the field.<sup>143</sup> Although the court recognized that the carnage caused by

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<sup>133</sup> *Id.*, 493 A.2d at 1282.

<sup>134</sup> *See id.* at 49-54, 493 A.2d at 1283-86.

<sup>135</sup> *See id.* at 52, 493 A.2d at 1284; *see also* Jones v. State, 459 So. 2d 1068, 1079 (Fla. Dist. Ct. App. 1984) (record disclosed no evidence relating to inconvenience imposed on motorists).

<sup>136</sup> *See Kirk*, 202 N.J. Super. at 46, 493 A.2d at 1281; *see also* State v. Deskins, 234 Kan. 529, 541, 673 P.2d 1174, 1185 (1983) ("advance warning to the individual approaching motorist" is a factor enhancing a roadblock's constitutionality).

<sup>137</sup> *Kirk*, 202 N.J. Super. at 52, 493 A.2d at 1284; *see* Jones v. State, 459 So. 2d 1068, 1079 (Fla. Dist. Ct. App. 1984).

<sup>138</sup> *Kirk*, 202 N.J. Super. at 58, 493 A.2d at 1288.

<sup>139</sup> *See id.* at 50, 493 A.2d at 1283.

<sup>140</sup> *Id.* at 55, 493 A.2d at 1287; *see* State v. Valencia, 93 N.J. 126, 133, 459 A.2d 1149, 1152 (1983).

<sup>141</sup> *Kirk*, 202 N.J. Super. at 55-56, 493 A.2d at 1287.

<sup>142</sup> *See id.*

<sup>143</sup> *Id.* at 55, 493 A.2d at 1286.



drunken drivers is great,<sup>144</sup> it did not believe this problem justified a complete disregard for the privacy rights of motorists.<sup>145</sup> The court stated that while police do not need to show probable cause in order to stop a particular driver, "they must show some rational basis for deploying this type of intrusive law enforcement technique."<sup>146</sup>

While the appellate division condemned the *Kirk* roadblock as violating the mandates of the New Jersey Constitution, the *Kirk* decision expressly authorizes the use of sobriety checkpoints as part of the campaign to deter and apprehend intoxicated drivers.<sup>147</sup> Nevertheless, despite social and judicial advocacy of more effective techniques of law enforcement,<sup>148</sup> the use of DWI checkpoints remains controversial.<sup>149</sup> The controversy regarding the use of these checkpoints emanates from the difficulties courts have experienced in striking a balance between the use of an intrusive but necessary law enforcement technique and an individual's constitutional right to privacy.<sup>150</sup> Many opponents of the DWI roadblocks have argued that this method of law enforcement is entirely arbitrary, unreasonable, and hence unconstitu-

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<sup>144</sup> See *id.* at 56-58, 493 A.2d at 1287-88. In recent years, the judiciary has displayed a heightened concern for the problem of drunken driving. See, e.g., *South Dakota v. Neville*, 459 U.S. 553 (1983) (refusal to submit to blood test deemed admissible as evidence); *Kelly v. Gwinnell*, 96 N.J. 538, 476 A.2d 1219 (1984) (social host liability for intoxicated guest's automobile accident); *In re Kallen*, 92 N.J. 14, 455 A.2d 460 (1983) (refusal to take breathalyzer test results in suspension of license); *Division of Motor Vehicles v. Kleinert*, 198 N.J. Super. 363, 486 A.2d 1324 (App. Div. 1985) (upholding suspension of New Jersey resident's license where resident was convicted of DWI in Vermont); *In re Kovalsky*, 195 N.J. Super. 91, 477 A.2d 1295 (App. Div. 1984) (upholding suspension of New Jersey resident's license where resident forfeited bail in Georgia on similar motor vehicle charge); *Division of Motor Vehicles v. Lawrence*, 194 N.J. Super. 1, 475 A.2d 1265 (App. Div. 1983) (New York conviction for driving while impaired resulted in suspension of New Jersey license); see also *State v. Dively*, 92 N.J. 573, 588, 458 A.2d 502, 510 (1983) (drunken drivers are a "menace to society").

<sup>145</sup> *Kirk*, 202 N.J. Super. at 56, 58, 493 A.2d at 1287, 1288.

<sup>146</sup> *Id.* at 56, 493 A.2d at 1287.

<sup>147</sup> See *id.* at 56-58, 493 A.2d at 1287-88.

<sup>148</sup> See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 8, 663 P.2d 992, 999 (1983) (Feldman, J., specially concurring). Justice Feldman noted that "it [is] obvious that traditional law enforcement methods, involving the arrest by roving officers of only those whom they can stop upon a founded suspicion of drunk driving, fall short of satisfying society's compelling interest in enforcing compliance with the laws prohibiting drunk driving." *Id.* (footnote omitted).

<sup>149</sup> See Note, *supra* note 8 at 1460. The author notes that "although some jurisdictions have accepted the use of some types of roadblocks, the constitutionality of roadblock stops for DWI enforcement remains unclear." *Id.*

<sup>150</sup> See *id.* at 1464.

tional.<sup>151</sup> It is routinely recognized, however, that arbitrarily conducted building inspections to enforce housing safety codes promote a state interest sufficient to justify this intrusion into one's privacy.<sup>152</sup> Likewise, luggage checks and metal detection procedures at airports are interferences with personal liberties.<sup>153</sup> Nonetheless, all persons are subjected to these types of searches, even though there is no founded suspicion that they are engaged in criminal activity.<sup>154</sup> In these situations, the intrusion into an individual's privacy has been rationalized because there is an urgent need for inspection, the potential for damage is great, and there are few, if any, alternatives.<sup>155</sup>

The governmental interest in apprehending and deterring drunken drivers appears at least as important as the interests promoted by building inspections and airport stops and seizures. Indeed, the privacy intrusion occasioned at a DWI roadblock is no more pervasive. In fact, an individual's expectation of privacy in his automobile is usually considered to be less than similar expectations in his home or other constitutionally safeguarded areas.<sup>156</sup> Nevertheless, roadblock opponents continue to assert that the governmental interest promoted by the employment of DWI checkpoints is insufficient to justify the fourth amendment intrusion.<sup>157</sup> These assertions are unpersuasive. As the *Kirk* opinion and empirical data illustrate, the drunk driving problem urgently needs resolution.<sup>158</sup> The potential for damage caused by the intoxicated driver is statistically self-evident.<sup>159</sup> In addition, aside from roadblocks, the methods available to the government for

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<sup>151</sup> See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 6, 663 P.2d 992, 997 (1983) (Feldman, J., specially concurring); West, *supra* note 84, at 8, col.1.

<sup>152</sup> See *Camara v. Municipal Court*, 387 U.S. 523, 535-37 (1967).

<sup>153</sup> See *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 9, 663 P.2d 992, 1000 (1983) (Feldman, J., specially concurring).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *People v. Peil*, 122 Misc. 2d 617, 471 N.Y.S.2d 532 (J. Ct. 1984). The *Peil* court stated that "the highly mobile and visible nature of automobiles has traditionally resulted in an individual's 'lesser expectation of privacy' while driving an automobile than in one's home or other constitutionally protected areas." *Id.* at 620, 471 N.Y.S.2d at 534 (citations omitted).

<sup>157</sup> See *supra* note 151 and accompanying text.

<sup>158</sup> See *Kirk*, 202 N.J. Super. at 56-58, 493 A.2d at 1287-88.

<sup>159</sup> See Comment, *Filling in the Blanks after Prouse: A New Standard for the Drinking-Driving Roadblock*, 20 LAND & WATER L. REV. 241, 250 (1985); see also *The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34, 37 (drunk drivers contribute to over half of the nation's fatal motor vehicle accidents).

detering and apprehending the drunken driver are few.<sup>160</sup> The foremost alternative is still the seizure of a single driver by a roving police patrol responding either to observable equipment or safety violations or to articulable facts manifested by erratic driver behavior.<sup>161</sup> The adequacy of this method of enforcement is questionable. A recent study by the National Highway Traffic Safety Administration indicates that on a national basis, the probability of an intoxicated driver being stopped under traditional detection methods is between 1 in 500 and 1 in 2000.<sup>162</sup> Clearly, such ineffective enforcement of the drunk driving laws would do little to deter the intoxicated driver from operating an automobile and thereby endangering the lives of others.<sup>163</sup>

The *Kirk* opinion correctly emphasized the necessity of the sobriety roadblock as a law enforcement technique because of its potential deterrent effect.<sup>164</sup> Persons faced with the chance of encountering a sobriety roadblock are more likely to reduce their liquor consumption in situations where they will be driving.<sup>165</sup> The *Kirk* opinion notes, however, that this deterrent effect will operate only where drinking motorists have advance warning that they might encounter a roadblock.<sup>166</sup> While it is not suggested that police should announce the precise time and location of each roadblock, some advance publicity of the intention to initiate this law enforcement technique should be given. In this way, the government will best serve its ultimate goal of deterring people from driving while intoxicated.

In general, most courts have found the state interest in keeping drunken drivers off the road sufficient to justify the use of properly conducted roadblock operations.<sup>167</sup> The *Kirk* court indicated, however, that courts will only condone this type of law enforcement technique if it makes a necessary contribution to furthering a valid state interest.<sup>168</sup> Indeed, DWI roadblocks make

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<sup>160</sup> *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 8, 663 P.2d 992, 999 (1983) (Feldman, J., specially concurring).

<sup>161</sup> *See Prouse*, 440 U.S. at 659. The Court noted that "[t]he foremost method of enforcing traffic and vehicle safety regulations. . . is acting upon observed violations." *Id.*

<sup>162</sup> GUIDELINES, *supra* note 5, at 2.

<sup>163</sup> *See Comment*, *supra* note 159, at 251 (stating that "one-third of drinking drivers [believe] that the chances of being caught and punished are too small to deter them from driving while drunk").

<sup>164</sup> *See Kirk*, 202 N.J. Super. at 43, 493 A.2d at 1279 (citation omitted).

<sup>165</sup> *State v. McLaughlin*, 471 N.E.2d 1125, 1138 (Ind. Ct. App. 1984).

<sup>166</sup> *See Kirk*, 202 N.J. Super. at 43, 58, 493 A.2d at 1279, 1288.

<sup>167</sup> *See supra* notes 80 & 127.

<sup>168</sup> *See Kirk*, 202 N.J. Super. at 55, 493 A.2d at 1286.

a necessary contribution to a systematic plan of drunk driving deterrence. Without the use of DWI roadblocks, police cannot detect many intoxicated drivers because these drivers fail to exhibit the visible signs of intoxication necessary to justify a roving patrol stop.<sup>169</sup> When properly conducted, roadblocks best achieve the dual state interests of deterring and apprehending drunken drivers in a relatively unintrusive manner.<sup>170</sup>

DWI roadblocks will not achieve their underlying purposes, however, if they are located in areas that are not frequented by drunken drivers.<sup>171</sup> A DWI checkpoint should be supported by data showing a noticeable incidence of alcohol-related accidents at the particular site chosen.<sup>172</sup> This evidence serves both to legitimize the state's interest in establishing the roadblock and to support the constitutionality of the roadblock itself.<sup>173</sup> The absence of such an empirical basis for conducting a DWI roadblock may obviate the alleged state interest in establishing the particular roadblock as a means of combating DWI.<sup>174</sup>

In view of the injuries and deaths caused each year by drunken drivers,<sup>175</sup> the governmental interest in deterring and apprehending intoxicated motorists clearly outweighs the minor privacy intrusion occasioned at sobriety roadblocks. Until the United States Supreme Court expressly sanctions the use of sobriety checkpoints, however, it is critical that jurisdictions contemplating such stops adopt and follow specific procedures designed to minimize the intrusion into the privacy of motorists. This can best be accomplished by the supervisory creation of predetermined, written policies designed to minimize police discretion at checkpoint operations. If appropriate guidelines are followed, sobriety roadblocks will continue to function as a legitimate and effective means of combating the persistent problem of drunken driving.

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<sup>169</sup> See *Coccoma*, 177 N.J. Super. at 580, 427 A.2d at 133 (intoxicated motorist did not exhibit erratic driving prior to seizure at sobriety checkpoint).

<sup>170</sup> See Comment, *supra* note 159, at 251-52.

<sup>171</sup> See Note, *supra* note 8, at 1472.

<sup>172</sup> See *Coccoma*, 177 N.J. Super. at 582, 427 A.2d at 134 (discussing importance of empirical data for justifying roadblock).

<sup>173</sup> See *id.*

<sup>174</sup> See Note, *supra* note 8, at 1472.

<sup>175</sup> See *supra* note 159 and accompanying text.