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DELAWARE V. PROUSE: DILUTION OF FOURTH AMENDMENT

INTRODUCTION

Since the pronouncement of the exclusionary rule,[1] the parameters of fourth amendment protections against unreasonable search and seizure have increasingly required refinement. Grappling with various factual contexts in which confrontations between police procedures and individual fourth amendment rights have occurred, the Supreme Court has sought to develop unifying analytical principles broadly applicable to the myriad of fourth amendment questions. In the process of delineating the scope of the fourth amendment, the Court anticipated and expressly reserved[2] the issue presented by *Delaware v. Prouse*.[3] *Prouse* is significant because the Court at last applied its evolutionary fourth amendment analysis to the question, thereby exposing a new facet of the fourth amendment edifice.

Prouse involved the constitutionality of a seemingly mundane police procedure—the "random stop" of a motor vehicle by the police for the ostensible purpose of verifying the validity of the driver's license and the vehicle registration. The Court analyzed the reasonableness of the random stop procedure by balancing the state's legitimate interest in enhancing highway safety against the individual's interest in being free from unreasonable intrusions by agents of the state.[4] This balancing analysis, which demarcated the boundary of individual freedom by assessing the relative constitutional weights of the state and individual interests, is the focus of the following discussion.

I. THE FACTUAL SETTING

Prouse was both an occupant in and the registered owner of[5] an auto-

1. The exclusionary rule prohibits prosecutorial use of evidence obtained in violation of an accused's fourth amendment rights. The rule was first recognized in Weeks v. United States, 232 U.S. 383 (1914) and was extended to state prosecutions in Mapp v. Ohio, 367 U.S. 643 (1961).

2. United States v. Martinez-Fuerte, 428 U.S. 543, 560 n.14 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 883 n.8 (1975).

3. 440 U.S. 648 (1979).

4. The fourth amendment provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV.

5. Delaware v. Prouse, 440 U.S. at 650 n.1. Neither the majority nor the dissent in *Prouse* discussed Rakas v. Illinois, 439 U.S. 128 (1978). *Rakas* denied standing to certain automobile passengers to challenge the constitutionality of a search of the vehicle in which they were passengers. The search yielded the evidence used to convict these passengers of armed robbery. The Court initially found that the passengers had no possessory interest in the vehicle and had asserted none in the evidence. *Id.* at 130. The Court then found that "passengers *qua* passengers simply would not normally have a legitimate expectation of privacy" in the areas from which the evidence was obtained (the glove compartment and the space under the vehicle's seat). *Id.* at 149. The Court concluded that the passengers' personal fourth amendment inter-

mobile which was "randomly" stopped by a policeman.[6] The officer who made the stop lacked probable cause to believe that any violations of the law had occurred; furthermore, the officer had no reason to suspect that illegal activity was occurring or was imminent.[7] The officer's asserted justification for the stop was his interest in randomly verifying compliance with state license and registration laws.[8] Although the officer characterized the stop as "routine," he admitted that the stop was not effected in accordance with any guidelines promulgated by his superiors to govern such routine stops; in fact, no such guidelines existed.[9] As the officer approached the stopped vehicle, he smelled burning marijuana.[10] The officer subsequently seized marijuana which was in plain view on the car floor,[11] searched Prouse, and seized additional marijuana discovered on Prouse's person.[12] Prouse was indicted for possession but was successful in having the evidence suppressed by the trial court on the grounds that the marijuana had been obtained in violation of his fourth amendment right not to be arbitrarily seized. On appeal by the

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ests had not been violated *by the search* of these areas and, thus, that they lacked standing to constitutionally question the search. *Id.* at 149-150.

Given Prouse's status as a passenger, *Rakas* would seem to be relevant to the resolution of the fourth amendment question in *Prouse*. Thus, it is troublesome, at first glance, that the *Prouse* Court does not even cite *Rakas*, particularly since Mr. Justice Rehnquist wrote for the Court in *Rakas* but dissented vociferously in *Prouse*.

Prouse and *Rakas* can be superficially reconciled since Prouse, as registered owner of the vehicle, had a possessory interest in the automobile sufficient to allow standing under *Rakas*. However, a more profound distinction exists. *Rakas* did not involve the issue central to *Prouse*—the legitimacy of the original seizure of the automobile and its occupants. *See Rakas*, 439 U.S. at 130-31. Rather, *Rakas* focused on the validity of a search for and seizure of evidence subsequent to the stop. *Id.* While there is an interesting fluctuation between *Rakas* and *Prouse* regarding reasonable expectations of privacy and the fourth amendment, such an inquiry is beyond the scope of this comment. It is enough here to note that *Rakas* did not draw into question the basic principle that all persons have a constitutionally recognized interest which precludes unreasonable seizures of their persons.

6. 440 U.S. at 650.

7. *Id.* The Court has recognized that the application of the warrant clause of the fourth amendment to automobile stops would be unrealistic due to the inherent mobility of automobiles and the consequent likelihood that ongoing or imminent illegalities would escape prosecution if warrants had to be obtained to seize automobiles in all circumstances. Carroll v. United States, 267 U.S. 132, 156 (1925); *see* Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 837-38 (1974) [hereinafter cited as *Warrantless Searches*].

8. 440 U.S. at 650.

9. *Id.* In light of the Court's concern with minimizing police officers' discretion in the regulatory stop context, two views of the regularity of the random stop at issue in *Prouse* are enlightening. According to the Delaware Supreme Court, the officer "candidly testified . . . that he regularly made similar stops . . . ." State v. Prouse, 382 A.2d 1359, 1361 (Del. 1978), *aff'd sub nom.* Delaware v. Prouse, 440 U.S. 648 (1979). In contrast, the officer had actually testified: "I have done it before. I wouldn't say often." Transcript of Suppression Hearing, State v. Prouse, No. 176-12-0213 (Del. Super. Ct., Feb. 15, 1977), *reprinted in* Petitioner's Petition for Writ of Certiorari app. A at 9, Delaware v. Prouse, 440 U.S. 648 (hereinafter cited as Transcript). That "routine, random stops" were actually infrequently made by the officer who stopped Prouse's vehicle underscores both the Court's concern with the potentially arbitrary application of the procedure, 440 U.S. at 661, and the argument that the extreme difficulty involved in ferreting out the actual reason why the police make a particular stop militates against granting police a broad, discretionary right to stop automobiles, Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666, 669 (1974) [hereinafter cited as *Automobile License Checks*]; *see* 3 W. LAFAVE, SEARCH AND SEIZURE 386 (1978).

10. 440 U.S. at 650.

11. *Id.*

12. Transcript, *supra* note 9, at 8-9.

state, the Delaware Supreme Court affirmed the suppression.[13] The United States Supreme Court also affirmed the trial court's decision, holding 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."[14]

II. THE FOURTH AMENDMENT BACKGROUND

A. *Generally*

Even a brief authoritative detention of an automobile and its occupants is cognizable as a fourth amendment seizure.[15] Consequently, regulatory stops of automobiles must be effected by procedures that are reasonable because "reasonableness in all circumstances of the particular invasion of a citizen's personal security"[16] is the "touchstone"[17] of fourth amendment analysis.[18]

In instances in which the intrusion by a given police procedure falls "far short of the kind of intrusions associated with an arrest," the constitutional reasonableness of the procedure is determined by application of a balancing test.[19] This balancing involves a judicial weighing of the degree to which the procedure intrudes on individual interests against the degree to which it promotes legitimate governmental interests.[20] To facilitate balancing, objectively measurable facts must be advanced to justify the application of the procedure to the particular individual in the particular circumstances.[21] Thus, the burden rests on the state to show that the procedure does further legitimate state interests and does not unreasonably impair individual rights.[22]

B. *Automobile Seizures*

The law governing police stops of automobiles has long been in flux.

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13. 440 U.S. at 651.

14. *Id.* The Court initially rejected the argument that it lacked jurisdiction because of the existence of an independent and adequate state ground for the decision below. *Id.* at 651-53. The Delaware Supreme Court had actually analogized its constitutional provision (DEL. CONST. art. I, § 6) to the fourth amendment and then had specifically stated that the question before it was the validity of the random stop procedure under the fourth amendment. State v. Prouse, 382 A.2d 1359, 1362 (Del. 1978) *aff'd sub nom.* Delaware v. Prouse, 440 U.S. 648 (1979). *Prouse* is thus distinguishable from cases such as State v. Opperman, 89 S.D. 25, 228 N.W.2d 152 (1975), *rev'd*, South Dakota v. Opperman, 428 U.S. 364, *judgment reinstated under state constitution*, State v. Opperman, 247 N.W.2d 673 (S.D. 1976), in which the South Dakota Supreme Court initially relied solely on the fourth amendment but on remand explicitly reinstated its former judgment on the basis of the state constitutional provision (S.D. CONST. art. VI, § 11).

15. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975); *cf.* Terry v. Ohio, 392 U.S. 1, 16 (1968) (stopping a pedestrian constituted a fourth amendment seizure).

16. Terry v. Ohio, 392 U.S. 1, 19 (1968).

17. Pennsylvania v. Mimms, 434 U.S. 106, 108 (1977).

18. *See* note 4 *supra*.

19. Dunaway v. New York, 442 U.S. 200, 212 (1979). *Contra*, *id.* at 219-20 (White, J., concurring) (citing Delaware v. Prouse, 440 U.S. at 654).

20. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

21. Terry v. Ohio, 392 U.S. 1, 21 (1968).

22. *See* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

While the Court has noted that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears,"[23] it has also frankly admitted that "this branch of the law is something less than a seamless web."[24] As a result, there are no decisive constitutional rules clearly governing the fourth amendment questions involved in all automobile stops. Instead, the constitutionality of a given automobile stop depends upon all of the circumstances. This is particularly so when probable cause did not exist to justify the stop.

An analytical distinction between residences and automobiles has been recognized for fourth amendment purposes.[25] Because of their inherent mobility, automobiles and their occupants are subject to warrantless searches and seizures when probable cause exists to believe that contraband or evidence of crime will be found and exigent circumstances require a warrantless search and seizure to insure obtaining the evidence.[26] Even in the absence of probable cause, warrantless regulatory seizures of automobiles have been held to be constitutional because states have legitimate interests in intensively regulating automobile use and because the motoring public apparently acquiesces in the procedure.[27]

Procedures for effecting warrantless regulatory seizures of automobiles have recently been subjected to fourth amendment analysis. In a series of border patrol cases,[28] the Court distinguished between "roving patrols" and "fixed checkpoint operations" conducted to curb the transportation of illegal aliens. In *United States v. Brignoni-Ponce*,[29] the Court recognized the legitimate public interest in curtailing illegal alien traffic but nevertheless invalidated roving border patrol stops prompted by the exercise of an individual officer's discretion rather than by his observation of specific facts which gave rise to a reasonable suspicion of illegal activity.[30] This holding explicitly extended the rationale of *Terry v. Ohio*[31] to roving-patrol regulatory stops of automobiles. In contrast, in *United States v. Martinez-Fuerte*[32] the halting of all automobiles at fixed checkpoints to screen for illegal alien traffic was held to be permissible although reasonable suspicion did not justify the seizure of each vehicle and its occupants.[33] Factors present in roving patrol stops but absent from checkpoint operations legitimized the latter procedure. Checkpoint operations were held to involve less "subjective intrusion—the generat-

23. *Id.* at 461-62.

24. Cady v. Dombrowski, 413 U.S. 433, 440 (1978).

25. *See* Chambers v. Maroney, 399 U.S. 42, 52 (1970); Carroll v. United States, 267 U.S. 132, 147 (1925).

26. Coolidge v. New Hampshire, 403 U.S. 443, 460 (1971); Note, *Warrantless Searches*, *supra* note 7, at 835.

27. United States v. Martinez-Fuerte, 428 U.S. 543, 560 n.14 (1976).

28. 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).

29. 422 U.S. 873 (1975).

30. *Id.* at 878-82.

31. 392 U.S. 1 (1968) (stop of individual and subsequent frisk for weapons reasonable since the officer, on the basis of articulable facts, reasonably suspected that the individual was contemplating imminent criminal activity and was illegally and dangerously armed to that end).

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

33. *Id.* at 557-58.

ing of concern or even fright" and less "discretionary enforcement" than roving patrols.[34] In addition to upholding the fixed checkpoint procedure, the Court in *Martinez-Fuerte* validated "selective referrals" of some vehicles "on the basis of criteria that would not sustain a roving-patrol stop."[35]

The broad rule of the border patrol cases is that, given a static government interest in curbing illegal alien traffic, individual automobiles may not be selected for a regulatory stop by a roving patrol in the absence of reasonable suspicion of illegal activity; however, all automobiles passing a fixed checkpoint may be initially detained and then either allowed to proceed immediately or selected for further investigation, despite the absence of the reasonable suspicion necessary for a roving-patrol stop. The rationale underlying this distinction is that although it is unreasonable under the fourth amendment to intrude on individual interests without the requisite suspicion when the application of the intrusive procedure is both measurably disturbing and potentially discriminatory, it is reasonable to utilize a procedure which is both less disturbing and less arbitrary.

Lower courts which dealt with the legitimacy of random stops for license and registration checks differed on the constitutionality of the practice.[36] The rationale for upholding random vehicle stops has generally been that the police, as protectors of public safety, have inherent authority to randomly stop moving automobiles to verify compliance with license and registration laws and that individual fourth amendment interests are not unreasonably infringed by such stops since the public interest is great and the intrusions, minimal.[37] To the contrary are decisions which required at least a reasonable suspicion of a violation of applicable laws as a prerequisite to regulatory seizures because of the inherent potential for arbitrary and capricious application of the technique.[38]

Pro random stop cases usually involved fact situations in which the police seizures probably could have been justified by *Terry*'s reasonable suspicion analysis.[39] The judicial willingness to legitimize these automobile stop procedures on an inherent authority basis rather than a reasonable suspicion

34. *Id.* at 558-59.

35. *Id.* at 560. The Court curiously reasoned that selective referrals enhance fourth amendment interests of the motoring public at large since the selective referral of a few automobiles for more intensive investigation would free unreferred motorists to proceed after a brief detention. *Id.* The Court seemed to suggest that the selective referral procedure is reasonable since it obviates the need to investigate all motorists. This is difficult to reconcile with the Court's reasoning that minimal officer discretion is a virtue of checkpoint operations. *Id.* at 559. Indeed, the Court's holding that border patrol officers need "wide discretion" in selecting motorists for referral, *id.* at 564, directly contradicts one of its basic justifications for checkpoint stops. Mr. Justice Brennan, dissenting, realized that "[t]he Court's view that 'selective referrals . . . tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public,' . . . stands the Fourth Amendment on its head." *Id.* at 573 n.2 (Brennan, J. dissenting).

36. Delaware v. Prouse, 440 U.S. 648, 651 n.2, 3 (1979).

37. *See* Note, *Automobile License Checks*, *supra* note 9, at 673-77.

38. *See, e.g.*, People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975); Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).

39. 3 W. LAFAVE, *supra* note 9, at 379-80.

rationale lends credence to the conclusion[40] that a reasonable suspicion standard is essential to curtail police use of automobile stops as pretexts for investigations of unrelated criminal activity. It is evident that such pretextual use occurs quite frequently;[41] however, explicit judicial recognition of pretextual use has been rare because an individual stop could never disclose any pattern of abuse to negate the asserted randomness of the stop.[42] The use of license and registration checks to mask investigations of unrelated crimes cannot be reconciled with the fourth amendment;[43] thus, it is alarming that the random stop procedure thrived with judicial support.

C. *Toward a Resolution*

While the border patrol cases provided an impetus for lower courts to extend the reasonable suspicion requirement to regulatory stops,[44] the cases had actually disclaimed prejudgment of the issue in *Prouse*. The Court had warned that the border patrol analysis did not impugn the validity of "state and local . . . power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration . . . and similar matters."[45] In juxtaposition, however, the Court had expressly recognized automobile stops as fourth amendment seizures[46] and had thereby assured the increased application of fourth amendment analysis to license and registration check stops. With lower court analysis in conflict and reasonable suspicion analysis gaining acceptance, the issue was ripe for Supreme Court resolution. *Prouse* presented a unique opportunity for the Court to clarify the law regarding the pervasive police practice of random vehicle stops. The Delaware Supreme Court had outlined a cogent justification for the reasonable suspicion position while the state had presented a suprisingly glib justification for the random stop.

III. RIGHTS IN THE BALANCE

In *Prouse*, the Court weighed the utility of random stops in promoting highway safety against the concomitant intrusion on a motorist's reasonable expectations of privacy. The state's interest in highway safety was acknowledged, but the random stop procedure was found to be insufficiently productive to justify the inherent risk of discriminatory application.[47] Given a dearth of evidence relating driver licensing and vehicle registration to safety benefits,[48] the Court refused to conclude that these legal requirements con-

40. *See, e.g.*, People v. Ingle, 36 N.Y.2d 413, 416, 330 N.E.2d 39, 41, 369 N.Y.S.2d 67, 71 (1975); Note, *Automobile License Checks*, *supra* note 9, at 673-78.

41. *See* L. TIFFANY, D. MCINTYRE, D. ROTENBERG, DETECTION OF CRIME 15 (1967); Note, *Automobile License Checks*, *supra* note 9, at 673-78.

42. 3 W. LAFAVE, *supra* note 9, at 386-88.

43. *Id.* at 387.

44. *See, e.g.*, United States v. Montgomery, 561 F.2d at 875, 879 (1977), (citing United States v. Brignoni-Ponce, 422 U.S. 873 (1975)).

45. United States v. Brignoni-Ponce, 422 U.S. 873, 883 n.8 (1975).

46. *E.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976).

47. 440 U.S. at 658-61.

48. Though the *Prouse* dissent argued that random stops aim at "remov[ing] from the road the unlicensed driver before he demonstrates why he is unlicensed" and that the majority would

tribute more than an "incremental" or "marginal" increase in safety.[49] Concerned with the " 'grave danger' of abuse of discretion"[50] by police, the Court decided that individual fourth amendment rights, manifested in reasonable expectations of privacy, outweighed unproven safety benefits.

A. *Random Stops: Discretionary Form Serves Discriminatory Functions*

The spectre of the police state casts a long shadow over fourth amendment analysis. As Mr. Justice Jackson aptly noted: "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[51] Justice Jackson's concern with limiting police discretion was based on a realistic view of human nature embodied in the fact that "the authority . . . to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible . . . ."[52] In short, if we are to preserve liberty we must know what the police are doing and why they are doing it.

In the spirit of Justice Jackson's analysis, *Prouse* reasserted the importance of preserving individual freedoms by limiting police conduct to actions that are objectively explainable. The *Prouse* result was animated by the realization that an uncontrolled police procedure may become the tool of uncontrollable, evil purposes. It is evident that police officers, like all human beings, are motivated by subjective biases.[53] In form, a random stop is a discretionary show of authority by an individual policeman; consequently, the functions served by random stops are as varied as each individual officer's subjective motivations. Pretextual use of random stops by police has been a recognized problem[54] with which the courts must deal within the context of fourth amendment analysis.[55] Unfortunately, some courts have been overly solicitous to pretextual use of the random stop.[56] Such police subterfuge combined with judicial validation of the practice presents a constitutional vilification.

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prefer license and registration checks made "as the wreckage is being towed away," 440 U.S. at 666 (Rehnquist, J., dissenting), the state did not present evidence linking the incidence of moving violations or auto accidents to violations of license or registration laws. The State merely touted random stops as "the only effective means" of assuring compliance with these laws and proceeded to belittle the stops' intrusions as "mere inconveniences." *See* Brief for Petitioner at 9-14, Delaware v. Prouse, 440 U.S. 648 (1979) [hereinafter cited as *Brief for Petitioner*].

49. 440 U.S. at 659-61.

50. *Id.* at 662 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976)).

51. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

52. *Id.* at 182.

53. L. TIFFANY, D. MCINTYRE, D. ROTENBERG, *supra* note 41, at 19. *See generally* Brief for Respondent app. A, Delaware v. Prouse, 440 U.S. 648 (1979).

54. *See, e.g.*, 3 W. LAFAVE, *supra* note 9, at 386-87.

55. *See* Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting) ("[A] search against Brinegar's car must be regarded as a search of the car of Everyman").

56. *See, e.g.*, State v. Kretchmar, 201 Neb. 308, 267 N.W.2d 740 (1978), *vacated mem. and remanded to Supreme Court of Nebraska for further consideration in light of* Delaware v. Prouse, 440 U.S. 648 (1979), Kretchmar v. Nebraska, 440 U.S. 978 (1979). In *Kretchmar*, a state patrol officer who had observed Kretchmar driving in compliance with all applicable laws had the "initial reaction" that Kretchmar was possibly an illegal alien driving a stolen auto. 267 N.W.2d at 741-42. The Supreme Court of Nebraska held that the officer's use of a license check stop for the purpose of investigating his suspicions was proper. *Id.* at 743. The dissent noted that "[t]he majority here would equate intuition with reasonable suspicion." *Id.* at 745 (White, J., dissenting).

Since an unjustified discretionary police procedure is odious because of the very mystery involved in its application, the random stop seems to have inherent negative weight on the constitutional balance employed by the Court. In *Prouse* the random stop could not be linked to any provable enhancement of safety goals.[57] Furthermore, random stops in general suffer from the discretionary form/discriminatory functions defect discussed above. Therefore, it must be concluded that random stop procedures are productive, not of a legitimate state purpose, but of an atmosphere conducive to abuse and harassment. The random stop rises like a hot air balloon when it is placed on the fourth amendment balance.

B. *What is the Real Balance?*

In *Prouse*, the Court was unfortunately reluctant to specifically articulate the abusive potential of the random stop. Rather, the Court facilely sidestepped the constitutional quagmire because the state failed to quantifiably justify the random stop and thereby obviated the need for any protracted balancing analysis. Indeed, the Court only briefly dwelt on the fourth amendment rights involved. As Mr. Justice Rehnquist commented, "[t]he Court advance[d] only the most diaphanous of citizen interests";[58] if the individual interest were "diaphanous," the state's proven safety interest in the random stop was nihilistic.

There is some constitutional solace for civil libertarians in the Court's use of the balancing approach in *Prouse*. While the balance required a real state interest such as proven safety benefits resultant from random stops, the mere potential for unconstitutional intrusions on individual interests provided the counterbalance. Of course, this potentiality is as real as the state's phantom safety benefits would have been had they materialized. However, it must be admitted that potentiality is very difficult to quantify. Indeed, the very difficulty inherent in exposing the discriminatory potential of the random stop procedure had been recognized as a factor which facilitated the procedure's emasculation of fourth amendment rights.[59] The balancing approach in *Prouse*, then, appears to favor individual interests; yet, this is a necessary result of the rule that the burden is ever on the government of justify warrantless searches and seizures.[60]

If the result of the balancing in *Prouse* is comforting, the fact that balancing analysis is employed at all is to an extent disquieting. The balancing analysis is uniquely suited to the fourth amendment reasonableness inquiry since reasonableness is a concept in flux with facts and circumstances. Viewing *Prouse* as an end product of the balancing approach, however, one wonders whether it was merely the absence of a sufficiently productive police procedure that produced the decision favoring individual rights. In its simplest terms, the balancing test implies that a random stop procedure which

57. *See* note 48 *supra* and accompanying text.

58. 440 U.S. at 666 (Rehnquist, J., dissenting).

59. *See* State v. Prouse, 382 A.2d 1359, 1364 (Del. 1978), *aff'd sub nom.* Delaware v. Prouse, 440 U.S. 648 (1979); Note, *Automobile License Checks*, *supra* note 9, at 669.

60. *See* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).

had been proven to be devastatingly effective at enhancing highway safety would have been entitled to great constitutional weight. It is interesting to use this conclusion as a point of departure into some brief hypothesizing regarding the nature of balancing.

Has the Court in *Prouse* spared the motoring public from the arbitrary indignities of the random stop merely because of a fortuitous lack of causality between the procedure as it has been employed in the past and quantifiable highway safety gains? In answer, it is first arguable that a more effective random stop procedure would per se entail decreased arbitrariness since a greater proportion of the population would have to be stopped to effect measurable safety gains. Thus, while the incidence of intrusion would rise, discriminatory application would theoretically abate. To the contrary, it is also arguable that increasing the number of random stops made to a level productive of safety benefits would only disperse arbitrary intrusions over an ever-increasing population. In this situation, it is likewise arguable that increased safety would necessarily lag behind and, therefore, remain constitutionally subordinate to the increasing intrusion on freedom. Whichever scenario is accepted, the fact that the balancing test lends itself to such prospective calculation forebodes that the test internalizes within fourth amendment analysis the seeds for result-oriented decisions.[61] Thus, every application of the test is accompanied by the danger that an ends-justify-means analysis will tinge the outcome.

C. *Correcting the Imbalance*

1. Articulable Reasonableness

Although *Prouse*'s mandate of "at least articulable and reasonable suspicion" of illegal activity to justify roving patrol stops[62] is commendable, this standard may be so vague as to impose no meaningful limitation on police discretion. It is here submitted that the *Prouse* standard will effectively and sufficiently protect individual's fourth amendment interests if it is perceptively applied by the courts.

It can be persuasively argued that *Prouse* roving stop standard is inherently vague and will permit police to continue to make arbitrary stops which courts will uphold in deference to the judgment of officers in the field.[63] This criticism is supported by lower court approval of pretextual stops under the pro random stop rationale[64] and minimization of the degree of suspicion necessary under the reasonable suspicion standard.[65] While the vagueness

61. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The Court, after extolling the virtues of minimally discretionary checkpoint stops, *id.* at 559, upheld discretionary selective referrals, *id.* at 560. With apparent comfort the Court pointed out that such referrals revealed illegal aliens in 20% of the referred vehicles during a recent period. *Id.* at 564 n.17.

62. 440 U.S. at 663.

63. *See* 3 W. LAFAVE, *supra* note 9, at 59.

64. *See* note 56 *supra*.

65. *See, e.g.*, People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975): "It should be emphasized that . . . the degree of suspicion required to justify the stop is minimal." *Id.* at 415, 330 N.E.2d at 40, 369 N.Y.S.2d at 69. *Compare Ingle*, 36 N.Y.2d at 420, 330 N.E.2d at 44, 369 N.Y.S.2d at 74 ("the factual basis . . . for a 'routine traffic stop' is minimal. An actual violation . . . need not be detectable.") *with* Delaware v. Prouse, 440 U.S. at 659 ("[t]he fore-

criticism is predictable and somewhat justified, it is not helpful because it suggests no practical alternatives to principled application of the reasonable suspicion standard by the courts. Unless the Court desires to overrule *Terry v. Ohio* and impose probable cause requirements on all automobile seizures, the *Prouse* standard for roving-patrol stops is clearly the most vigorous that could have been imposed. If this standard is diligently applied, it should adequately protect fourth amendment interests in all cases, excluding instances of judicial abdication and/or particularly effective police perjury.[66]

Cases which have applied the standard approved in *Prouse* bear out the potential for its effective application. Articulable reasonableness has been found wanting in the following police-stop situations: an automobile encountered by police at a late hour (4:00 a.m.);[67] an older-model automobile unusual and unique in appearance;[68] a late-model pickup truck generally fitting a police profile of stolen vehicles;[69] the presence of a black person driving an expensive automobile in a high crime area;[70] an automobile driving on a suburban roadway at a noticably slow, though legal, speed.[71] No definitive collection is intended by the foregoing; however, these decisions indicate that many apparently routine reasons for stopping automobiles are jeopardized by *Prouse*. A question which can only be answered by further experience is whether policemen will become more adept at both perceiving the articulable indicia of legitimate stops and persuading courts of the reasonableness of their reliance on those factors under the circumstances.

Prouse clearly requires that an officer who effects a roving-patrol stop must be able to articulate specific facts which motivated his action; "inartic-

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most method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations").

66. It is possible, if not probable, that *Prouse* will have an effect on police perjury analogous to that of Mapp v. Ohio, 367 U.S. 643 (1961). A statistical study of the incidence of pre-*Mapp* and post-*Mapp* "dropsy" testimony by narcotics officers (testimony in which the officer claims that an accused dropped and thereby abandoned narcotics in the officer's presence rendering the officer's acquisition of the evidence outside the area of fourth amendment seizures and, therefore, immune from *Mapp*'s exclusionary rule) showed that such testimony increased markedly after *Mapp* was decided. Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEORGETOWN L.J. 507, 514 (1971). The study attributed the increase to the difficulty in making post-*Mapp* narcotics arrests without the aid of an accused's "abandonment" of the evidence needed to establish probable cause to arrest. *Id.* It has been persuasively argued that the exclusionary rule in fact invites police perjury:

> [I]t has been suggested that the exclusionary rule might often influence only what the police officer says in court and not what he does on the streets. Moreover, it is indisputable that at a suppression hearing a police officer is presented a unique opportunity to perjure himself and to make his actions seemingly conform to the law.

Id. at 513. *See also* P. CHEVIGNY, POLICE POWER 183 (1969). This argument and the "dropsy" data indicate that the application of the reasonable suspicion standard will probably result in increased police perjury regarding reasonable suspicions of violations of law justifying automobile stops. In applying the reasonable suspicion standard and assessing police testimony thereunder, the judiciary will need to be ever wary of the great temptation that police are under to conform their conduct to legal requirements after the fact.

67. Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973).

68. People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 369 N.Y.S.2d 67 (1975).

69. State v. Ochoa, 23 Ariz. App. 510, 534 P.2d 441 (1975), *rev'd on other grounds*, 112 Ariz. 582, 544 P.2d 1097 (1976). *See also* United States v. Soto-Soto, 598 F.2d 545 (9th Cir. 1979).

70. United States v. Nicholas, 448 F.2d 622 (8th Cir. 1971).

71. People v. Brand, 71 Ill. App. 3d 698, 390 N.E.2d 68 (1979) (citing Delaware v. Prouse, 440 U.S. 648 (1979)).

ulate hunches" will no longer suffice.[72] Additionally, a court must find that, in light of all the cirumstances,[73] the facts articulated by the officer would warrant a man of reasonable caution to suspect "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 . . . ."[74] Given the previously discussed applications of the *Prouse* standard and the relatively specific findings required in such applications, and granting that subjectivity cannot be entirely eliminated, overly pessimistic criticism of the *Prouse* roving-patrol analysis is unjustified and premature.[75]

2. Roadblock Stops

Roadblocks are an obvious alternative to random stops as a method of effecting license and registration checks. The asserted constitutional virtues of roadblocks were, thus, prominent in *Prouse*'s condemnation of random stops.[76] Consequently, *Prouse* echoes the rationale of the border patrol analysis: while groundless roving-patrol stops are unconstitutional, checkpoint stops are valid because they are less frightening and methodologically less subject to police abuse than are random stops.[77] It seems true that roadblock stops are, at least initially, less frightening than random stops because many motorists are conspicuously stopped at roadblocks. However, it is doubtful that the use of roadblocks in the regulatory stop context will really provide the anticipated rein on police discretion.

At the outset it must be stressed that the qualities of the Court's suggested roadblock alternative were ill-defined in *Prouse*. While the majority suggested the "[q]uestioning of all oncoming traffic at roadblock-type stops" as a possibility,[78] the concurring opinion "assume[d] that . . . other not purely random stops (such as every 10th car to pass a given point) that equate with, but are less intrusive than, a 100% roadblock stop" are permissible.[79] Hence, it could be concluded that a consensus is presently lacking on the Court as to the essential qualities of permissible regulatory roadblocks.

Although the nature of *Prouse*-sanctioned roadblocks is unclear, it is certain that the checkpoint rationale developed in the border patrol context yet relied upon in *Prouse* is not suitable for license and registration enforcement. A glaring analytical dysfunction appears in that while the border patrol con-

72. 440 U.S. at 661 (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)); *see* 3 W. LAFAVE, *supra* note 9, at 62.

73. A court may clearly consider the special training and expertise of police officers. 3 W. LAFAVE, *supra* note 9, at 61.

74. 440 U.S. at 663.

75. *See* 3 W. LAFAVE, *supra* note 9, at 59.

76. *See* 440 U.S. at 657 (1979).

77. The dissent was particularly flamboyant regarding this distinction, suggesting that the Court "elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." *Id.* at 664 (Rehnquist, J., dissenting). While Mr. Justice Rehnquist proceeded to complain that "a random license check . . . is quite different from a random stop designed to uncover violations of [unrelated] laws," *id.*, he did not effectively argue that policemen either can or do make this constitutional distinction in the field. The irony of Justice Rehnquist's statement is as rich as his rhetoric.

78. 440 U.S. at 663.

79. *Id.* at 663-64 (Blackmun, J., concurring).

text supports "fixed" checkpoint operations,[80] it is persuasively arguable that *fixed* license and registration check roadblocks are inherently doomed to fail their regulatory purpose because of their easy avoidability.[81] As a consequence, temporary roadblocks will evidently be needed in order to achieve regulatory goals. Moreover, while fixed border patrol checkpoints are constitutionally virtuous, in part, because their locations are determined by officials charged with and interested in overall enforcement planning,[82] this desirable administrative detachment will not necessarily inhere in temporary regulatory roadblocks. The use of such temporary roadblocks must result in a movement on the constitutional continuum away from the minimal officer discretion of fixed border patrol checkpoints toward the danger of unbridled discretion. The degree of this movement will be gauged by subsequent litigation; however, the fact of the innate shift toward greater individual discretion shows that the extension of the border patrol analysis to license and registration stops is dubious at best.

Both the location and operation of license and registration check roadblocks are subject to official abuse.[83] The apparent need for temporary roadblocks and the possibility of the application of *Martinez-Fuerte* selective referrals enhance this abusive potential. It is arguable that *Prouse* requires a showing of the systematic operation of a roadblock; however, the judicial view of what is "systematic" is unlikely to be extremely rigid.[84] The totality of these considerations indicates that individuals may find themselves in the untenable position of having to rebut the alleged systematic operation of a roadblock. It will be recalled that the inherent failure of proof in the analogous random stop situation is a particular evil of that procedure. It is presently unclear, then, to what extent abuse of official discretion will abate by application of the roadblock procedure to license and registration stops.

IV. CONCLUSION

Since its endorsement in *Terry* of a less-than-probable cause justification for seizures of persons, the Supreme Court has been committed to a balancing approach to fourth amendment "reasonableness" problems. Balancing provides great judicial flexibility since it focuses the resolution of fourth amendment confrontations on the relative weightiness of state and individual interests in particular circumstances. Flexibility, however, precludes the recognition of definite parameters to the reasonableness inquiry. The Court's use of balancing in *Prouse* produces a laudable result in light of con-

80. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

81. *See* Brief for Petitioner, at 10; *cf.* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) ("Motorists . . . are not taken by surprise as they know, or may obtain knowledge of, the location of checkpoints and will not be stopped elsewhere.").

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

83. *E.g.*, Swift v. State, 131 Ga. App. 231, 206 S.E.2d 51, *rev'd*, 232 Ga. 534, 207 S.E.2d 459 (1974) (license check roadblock operated on a road leading to a rock festival and manned by a drug abuse squad and marijuana-detecting dog).

84. *See, e.g.*, People v. Estrada, 68 Ill. App. 3d 272, 386 N.E.2d 128 (1978): "It is not necessary for a checkpoint to stop every car in order to be systematic but only for officers to be following some pattern that will minimize their discretion . . . ." *Id.* at 274, 386 N.E.2d at 130.

tinued commitment to *Terry*: roving-patrol automobile stops for license and registration checks are unconstitutional absent "articulable reasonable suspicion" to believe that violations of the pertinent laws exist. Despite this arguably favorable outcome in *Prouse*, the Court's reliance on balancing is subject to criticism.

Initially, the extension of *Terry*'s analysis to seizures of automobiles and their occupants by roving patrols necessitates an almost case-by-case exploration of the scope of the fourth amendment protections implicated in such seizures. Implicit in *Prouse*'s balancing rationale is the conclusion that statistical proof of the benefits of intrusive procedures may overwhelm fourth amendment interests of the motoring public. When the focus of analysis can shift so subtly from the permissibility of the means of police procedure to the desirability of the ends, the constitutional justification of a police procedure becomes possible on the basis that the procedure is minimally intrusive on individual interests while being significantly productive of permissible law enforcement goals. While courts would not knowingly sanction police-state tactics, the means/ends dichotomy enhances the possibility of unwitting judicial condonation of police procedures which clearly achieve legitimate state goals but also surreptitiously facilitate impermissible police practices. The danger of arbitrary, discriminatory, pretextual use of roving-patrol stops, therefore, remains substantial in the wake of *Prouse*.

The second factor which impugns *Prouse*'s rationale is the Court's gratuitous validation of ill-defined roadblock stops as the alternative to random stops. This dictum constitutes a wholesale retreat from any idea of ever requiring that a standard, reasonable suspicion or otherwise, justify roadblock seizures of automobiles for license and registration checks. Such a retreat is difficult to reconcile with the Court's veiled castigation of the lack of documentation supporting the effectiveness of existing random stop procedures. Since the state clearly did not undertake to prove the effectiveness of roadblock procedures, the Court has apparently foregone its opportunity to review roadblock stops on their merits.

The Court's roadblock alternative is also assailable on the basis of its erroneous incorporation, by implication, of the border patrol analysis of roadblocks. It is clear that vastly different governmental interests inhere in license and registration stops and border stops. The license and registration roadblock procedures may, therefore, be subject to a balancing which differs radically from that involved in analysis of border patrol roadblocks; specifically, the great public interest in preserving the integrity of national borders is undoubtedly deserving of being accorded greater constitutional weight than the states' interest in verifying compliance with license and registration laws. Nevertheless, application of the roadblock procedure to license and registration enforcement entails a dilution of constitutional protections, the magnitude of which is presently in doubt.

The Court's infatuation with the balancing analysis has proven to be both jurisprudentially stimulating and constitutionally challenging. In the abstract, balancing is perfectly suited to an analysis of reasonableness; thus, abandonment of balancing is unlikely as well as undesirable from the

Court's perspective. Analysis of the nature of balancing, however, suggests that this analytical tool is subject to abuse and must be carefully monitored by the courts that employ it. Only by maintaining the proper perspective on what is being balanced and why balancing is being utilized can courts engage in principled application of standards such as "articulable reasonable suspicion" in a balancing framework. The burden is heavy on both the courts and litigants to cultivate an enlightened appreciation of balancing's limitations and dangers.

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