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Casenotes: Constitutional Law — Roadside Sobriety Tests May Not Be Administered by Law Enforcement Officials without Probable Cause to Believe the Defendant Was Driving While Intoxicated. People v. Carlson, 677 P.2d 310 (Colo. 1984)

Elena A. Rodney
University of Baltimore School of Law

NOTES

CONSTITUTIONAL LAW — ROADSIDE SOBRIETY TESTS MAY NOT BE ADMINISTERED BY LAW ENFORCEMENT OFFICIALS WITHOUT PROBABLE CAUSE TO BELIEVE THE DEFENDANT WAS DRIVING WHILE INTOXICATED. *People v. Carlson*, 677 P.2d 310 (Colo. 1984).

A Colorado police officer stopped a motorist who was driving erratically. After smelling alcohol on the motorist's breath and observing him stumble,[1] the officer requested that the motorist perform a roadside sobriety test.[2] The motorist failed the test and was arrested.[3] At trial, he moved to suppress all the evidence obtained on the grounds that it was the product of an unreasonable search and seizure in violation of the fourth amendment.[4] Without deciding whether probable cause[5] was needed to subject the motorist to the roadside sobriety test, the trial court suppressed the evidence on other grounds, reasoning that the officer was not constitutionally justified to order the motorist out of the car; the district court affirmed.[6] The Supreme Court of Colorado reversed, finding the officer justified in ordering the motorist out of the car;[7] in addition,

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1. People v. Carlson, 677 P.2d 310, 313 (Colo. 1984). The police officer detected the smell of alcohol and observed that the motorist's eyes were red and that he was having difficulty maintaining his balance. *Id.*
2. *Id.* The roadside sobriety test consisted of four maneuvers: (1) standing erect, with hands at sides, closing the eyes and tilting the head backwards; (2) reciting the alphabet or counting to ten both backward and forward; (3) walking heel to toe along a straight line; and (4) touching the finger to the nose or earlobe. *Id.* at 316 n.6.
3. *Id.* at 313. A chemical test was given to the motorist at the police station and, after he was advised of his *Miranda* rights, the motorist gave a statement in which he admitted that he had consumed five beers. *Id.*
4. *Id.* at 312. The fourth amendment to the United States Constitution provides, in pertinent part: "The right of 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. In general, probable cause means that a reasonable person would conclude from the facts and circumstances that a crime occurred or that evidence of a crime is located at the place to be searched. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963); Brinegar v. United States, 338 U.S. 160 (1949); Dumbra v. United States, 268 U.S. 435 (1925); Carroll v. United States, 267 U.S. 132 (1925). *See generally* J.W. HALL, JR., SEARCH AND SEIZURE §§ 5:7-:8 (1982) (probable cause cannot be defined by a simple formula but must be determined objectively from the facts and circumstances).
6. *Carlson*, 677 P.2d at 313. The lower courts looked to the initial stages of the encounter and found constitutional violations. The trial court ruled that the police officer's order requiring the motorist to walk to the rear of the car was unconstitutional. On appeal, the district court noted two instances that justify an order to step out of a vehicle and walk to the rear of the car: (1) an officer, having probable cause to believe the driver is intoxicated, intends to administer a roadside sobriety test; and (2) a threat to the officer's safety is posed by either the driver or a traffic hazard. Neither situation was applicable to this case. *Id.*
7. *Id.* at 318. The Supreme Court of Colorado found that under Pennsylvania v. Mimms, 434 U.S. 106 (1977), the police officer was justified in ordering the driver to get out of his car and walk to the rear. In *Mimms*, the Court held that the interest

the court held that roadside sobriety tests constitute full searches under the fourth amendment and thus can be ordered only when there is probable cause to arrest the driver for driving while intoxicated or when the driver voluntarily consents to the test.[8]

Whether probable cause is required to conduct a search is determined by weighing the search's intrusiveness upon the defendant's personal liberty[9] against the importance of the government's interest in enforcing the law.[10] Searches conducted without probable cause were considered unreasonable and thus unconstitutional under the fourth amendment[11] until the landmark decision of *Terry v. Ohio*.[12] In *Terry*, the Supreme Court for the first time upheld certain searches and seizures on a lesser standard than probable cause. The *Terry* Court determined that a limited pat-down search for weapons could be conducted by a police officer if the officer had a reasonable and articulable suspicion that the defendant was armed and posed a threat to the officer's safety and the safety of others.[13] Highlighting the government's compelling interest in public safety, the Court determined that these limited stop and frisk searches were substantially less intrusive than arrests and therefore were reasonable even without probable cause to arrest.[14]

As a result of *Terry*, prosecutors attempted to justify certain searches and seizures on the basis of the less stringent reasonable and articulable suspicion standard.[15] The Supreme Court, however, has re-

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in the officer's safety far outweighed the minimal intrusion on the driver who is ordered to walk to the rear of the vehicle. *Carlson*, 677 P.2d at 314.

8. *Carlson*, 677 P.2d at 317. The supreme court remanded the case to the trial court to determine whether the motorist had consented to the test. *Id.* at 318. The prosecution never claimed that the officer had probable cause to arrest the motorist. *Id.*
9. *See* Terry v. Ohio, 392 U.S. 1, 16 (1968) (a fourth amendment seizure occurs whenever a police officer accosts an individual and restrains his freedom to walk away); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (a search is an intrusion by a governmental official upon an area in which a person has a reasonable expectation of privacy).
10. *See* United States v. Mendenhall, 446 U.S. 544 (1980) (Powell, J., concurring) (factors used to determine reasonableness include: (1) the public interest served by the seizure; (2) the nature and scope of the intrusion; and (3) the objective facts relied upon by the officer in light of his knowledge and expertise); Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (a determination of reasonableness requires a balancing of the need to search against the invasion the search entails).
11. *See* Brinegar v. United States, 338 U.S. 160, 164 (1949) (probable cause requirement treated as absolute); Carroll v. United States, 267 U.S. 132, 147, 149 (1925) (a search conducted without probable cause is unreasonable); *see also* Dunaway v. New York, 442 U.S. 200, 208 n.10 (1979) (before *Terry*, probable cause requirement *was* absolute).
12. 392 U.S. 1 (1968).
13. *Id.* at 26.
14. The *Terry* Court determined that the need to search must be balanced against the invasion the search entails. The officer must be able "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21.
15. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 211-12 (1979) (Court refused to use *Terry* to justify a custodial interrogation that was "in important respects" indistin-

fused to expand the narrowly defined *Terry* exception beyond a pat-down search for weapons[16] and has emphasized that evidence gathering is not a justification for a *Terry* search.[17] Consequently, when an attempt was made to apply the reasonable and articulable suspicion standard to custodial interrogations, the Court refused to expand *Terry*'s scope.[18] Custodial interrogations involve questioning by law enforcement officials after a person is in custody or otherwise deprived of freedom of movement in a significant way.[19] As evidence gathering is an inherent element of such detention, the reasonable and articulable suspicion standard is inappropriate as a justification.

While the *Terry* doctrine has been applied only in very limited situations, its standard has served as the basis for validating investigatory detentions at or near the border in order to curb the influx of illegal aliens and contraband.[20] In *United States v. Brignoni-Ponce*,[21] the Supreme Court upheld the constitutionality of random vehicle stops at or near the border when the police officer has a reasonable suspicion that the vehicle contains illegal aliens.[22] Holding the governmental interest in controlling illegal alien traffic and smuggling operations to be great,[23] the *Brignoni-Ponce* Court determined that an officer could stop a car briefly

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guishable from traditional arrest); Cupp v. Murphy, 412 U.S. 291 *passim* (1973) (brief detention for fingernail scraping is not within the scope of a *Terry* search); Adams v. Williams, 407 U.S. 143 (1972) (*Terry* rationale successfully used to validate search in spite of the lack of any personal observations by the officer, and the lack of reliability of the informant); Davis v. Mississippi, 394 U.S. 721, 727 (1969) (*Terry* rejects the notion that something short of a "full blown search" is not subject to fourth amendment protections; therefore, detention for fingerprinting requires probable cause).

16. *See supra* note 15.
17. *See* Terry v. Ohio, 392 U.S. 1, 29 (1968); Sibron v. New York, 392 U.S. 40, 63-65 (1968). *But cf.* Adams v. Williams, 407 U.S. 143 (1972). In *Adams*, the Supreme Court upheld a search predicated upon an informant's tip rather than the officer's personal observations, despite the questionable validity of the tip. *Id.* The Court dismissed expressions of concern that the *Terry* stop was being used to disguise evidence gathering motives. *Id.* at 151 (Brennen, J., dissenting). Justice Marshall, dissenting, opined that *Adams* represented a weighing of the delicate balance between a citizen's right to be free from governmental intrusions and the government's need for a limited exception to the warrant and probable cause requirements heavily in favor of the government. *See id.* at 161-62 (Marshall, J., dissenting).
18. Dunaway v. New York, 442 U.S. 200, 216 (1979) ("Detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger traditional safeguards against illegal arrest.").
19. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); State v. Franklin, 281 Md. 51, 375 A.2d 1116 (1976); Byrd v. State, 13 Md. App. 288, 283 A.2d 9 (1971).
20. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975) (aliens); United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984) (contraband).
21. 422 U.S. 873 (1975).
22. *Id.* at 881.
23. *Id.* at 883. The Court noted that the entry of illegal aliens creates significant economic and social problems such as competition with citizens for social services. *Id.* at 879.

and investigate.[24] The investigation could consist of questions concerning citizenship, immigration status, and suspicious circumstances, but any further intrusion required probable cause or consent.[25] One year later, in *United States v. Martinez-Fuerte*,[26] the Court considered the constitutionality of similar intrusions at border checkpoint stops. Pointing to an individual's 'somewhat diminished expectation of privacy in automobiles, the minimal nature of the intrusion, and the important governmental interest in controlling illegal alien traffic, the *Martinez-Fuerte* Court upheld the border checkpoint stop and the subsequent detention[27] regardless of the officer's lack of reasonable and articulable suspicion or individualized suspicion.[28] Thus, in the border checkpoint situation even greater deference is afforded to an officer's judgment.

The reasonable and articulable suspicion standard has also been used to justify border searches by customs officials.[29] Although the Supreme Court has held that border searches by customs officials are not subject to the probable cause and warrant requirements of the fourth amendment,[30] the authority of customs inspectors to search and seize is not unlimited. Despite the importance of the governmental interest in controlling the flow of contraband, customs inspectors must still comply with the reasonableness requirement of the fourth amendment when conducting a search.[31] Although the Court has recognized blanket authority to search and seize in at least one instance,[32] there is no absolute deference to congressionally granted authority for governmental officials to search and seize when body searches are involved.[33] Speaking specifically on this issue, the Eleventh Circuit in *United States v. Vega-Barvo*[34] determined that a particularized reasonable suspicion is necessary before

24. *Id.* at 881.
25. *Id.* at 881-82. In this manner, the Court struck the proper balance between allowing the government an adequate means of guarding the public interest in controlling illegal alien traffic and protecting the residents of border areas from indiscriminate official interference. *Id.* at 883.
26. 428 U.S. 543 (1976).
27. *Id.* In addition to the stop, the Supreme Court upheld the subsequent detention, which consisted of initial questioning and referral to a secondary inspection area for further inquiry. *Id.* at 563.
28. *Id.* at 561-64.
29. *See* United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984).
30. United States v. Ramsey, 431 U.S. 606 (1977).
31. United States v. Villamonte-Marquez, 103 S. Ct. 2573 (1983). The Court agreed that no act of Congress may violate the Constitution. The precursor to the vessel search statute in this case, however, was enacted by the same Congress that promulgated the Bill of Rights containing the fourth amendment. The Court, therefore, determined that because the statute was associated with a Congress that designed the protections of the fourth amendment, it must have been considered reasonable by the Framers of the amendment. *Id.* at 2578.
32. *See Id.* (blanket authority to board vessels and inspect documents is reasonable).
33. United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984) (reasonableness requirement of the fourth amendment mandates that as the intrusiveness of the search increases, so does the amount of suspicion necessary to justify the search).
34. 729 F.2d 1341 (11th Cir. 1984).

a person can be compelled to undergo an x-ray search for contraband at the border.[35] The court developed a sliding scale that correlated the level of intrusiveness with the degree of suspicion necessary to justify the intrusion.[36] This scale is used to determine whether the intrusion was a reasonable means of balancing "the privacy interests of the international traveler and the Government's interest in controlling the flow of contraband."[37]

In non-border cases, body searches are subject to even stricter scrutiny. As with customs searches, a sliding scale correlating the level of intrusiveness with the degree of suspicion needed to justify the intrusion has developed.[38] The Supreme Court in *Schmerber v. California*[39] held that when there is a "clear indication" that evidence will be found[40] the warrantless taking of blood from a drunk-driving suspect is reasonable, especially because alcohol in blood will dissipate quickly due to natural processes.[41] The term "clear indication" was not defined, but some authorities suggest that it is a higher standard than probable cause.[42] Several years later, the Court considered another type of body search.[43] *Cupp v. Murphy*[44] involved the taking of fingernail scrapings from a murder suspect, a less substantial intrusion than a blood test. Finding the probable cause standard applicable, the *Cupp* Court upheld the search.[45] *Schmerber* and *Cupp* thus demonstrate the willingness of the Court to adjust the degree of suspicion required to justify the search according to the level of intrusiveness that the search entails.

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35. *Id.* at 1349. The court found the x-ray search more intrusive than a frisk but on par with a strip search and therefore required that there be articulable facts that are particularized as to the person and the place to be searched. *Id.*
36. *Id.* at 1344.
37. *Id.*
38. *See* Cupp v. Murphy, 412 U.S. 291 (1973) (probable cause is sufficient for taking fingernail scrapings); Schmerber v. California, 384 U.S. 757 (1966) (clear indication that evidence will be found is required for blood test justification).
39. 384 U.S. 757 (1966).
40. *Id.* at 769-70. The Court stated:

> The interests in human dignity and privacy which the fourth amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a *clear indication* that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Id. (emphasis added).
41. *Id.* at 771-72.
42. *See, e.g.*, People v. Bracamonte, 15 Cal. 3d 394, 403-04, 540 P.2d 624, 630-31, 124 Cal. Rptr. 528, 534-35 (1975); J.W. HALL, JR., *supra* note 5, § 17.5; Note, *Constitutional Law: Supreme Court Delineates the Relationship Between the Fourth and Fifth Amendments*, 1967 DUKE L.J. 366, 385-86; Note, *Constitutional Law: Compulsory Blood Tests Do Not Violate Fifth Amendment Privilege Against Self-Incrimination or Fourth Amendment Prohibition Against Unreasonable Search and Seizure.* Schmerber v. California, *384 U.S. 757 (1966)*, 44 TEX. L. REV. 1616, 1620 (1966).
43. *See* Cupp v. Murphy, 412 U.S. 291 (1973).
44. *Id.*
45. *Id.* at 296.

Drunk driving law has drawn on *Terry* and its progeny as well as on border checkpoint cases to develop law enforcement guidelines. The increased use of sobriety checkpoint procedures has created litigation in many states concerning the constitutionality of those procedures, and the results have varied.[46] The validity of Maryland's sobriety checkpoints has been sustained.[47] In *Little v. State*,[48] the Court of Appeals of Maryland, analogizing to border checkpoint stops, reasoned that sobriety checkpoints do not violate the fourth amendment because of the limited nature of the intrusion[49] and the compelling state interest in detecting and deterring drunk driving.[50]

In addition to sobriety checkpoints, the constitutionality of various sobriety tests also has been challenged. As indicated in *Schmerber*, blood tests, because of their highly intrusive nature, cannot be justified absent a clear indication that evidence will be found.[51] Since *Schmerber*, however, many legislatures, including that of Maryland, have changed their laws authorizing blood tests for alcohol by enacting implied consent laws.[52] Implied consent laws provide that anyone licensed to drive a motor vehicle is deemed to have consented to take a blood test to determine the alcohol content of his blood. Maryland's implied consent statute requires that an officer have reasonable grounds to believe that an individual is driving while intoxicated before a blood test may be administered.[53] Although an individual has the right to refuse a blood test, except in the case of a fatal accident, the alternative is revocation of his driver's license.[54] It therefore appears that by enacting implied consent laws, Maryland and other states have authorized a significant intrusion, in the form of a blood test, on a lesser standard. Although under *Schmerber* blood tests were justified only by satisfying the "clear indica-

46. *Compare* State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983) (sobriety checkpoint held constitutional) *and* Little v. State, 300 Md. 485, 479 A.2d 903 (1984) (same) *and* State v. Schroeder, 66 Or. App. 754, 675 P.2d 1111 (same), *petition for review denied*, 296 Or. 648, 678 P.2d 1227 (1984) *with* State *ex rel.* Ekstrom v. Justice Court, 136 Ariz. 1, 663 P.2d 992 (1983) (sobriety checkpoint held unconstitutional) *and* Commonwealth v. McGeoghegan, 389 Mass. 137, 449 N.E.2d 349 (1983) (same) *and* State v. Olgaard, 248 N.W.2d 392 (S.D. 1976) (same). *See generally* Grossman, *Sobriety Checkpoints: Roadblocks to Fourth Amendment Protections*, 12 AM. J. CRIM. L. 123 (1984).

47. Little v. State, 300 Md. 485, 479 A.2d 903 (1984).

48. *Id.*

49. *Id.* at 504-06, 479 A.2d 912-14.

50. *Id.*

51. Schmerber v. California, 384 U.S. 757, 769-70 (1966). *See supra* notes 39-41 and accompanying text.

52. *See, e.g.*, COLO. REV. STAT. § 42-4-1202(3)(a)(I) (Supp. 1983); MD. TRANSP. CODE ANN. § 16-205.1(a) (1984); 75 PA. CONS. STAT. ANN. § 1547 (Purdon 1977 & Supp. 1984); VA. CODE § 18.2-268 (1982 & Supp. 1984).

53. MD. TRANSP. CODE ANN. § 16-205.1(c) (1984).

54. *Id.* § 16-205.1(b). In the case of a fatal accident, however, the individual can be required to undergo a blood alcohol test. *Id.* § 16-205.1(c).

tion" test,[55] in Maryland, reasonable grounds are sufficient. The Maryland statute does not define reasonable grounds. Case law in Maryland, however, has equated reasonable grounds with probable cause.[56] Thus the clear indication standard established in *Schmerber* has been somewhat diminished by implied consent laws that authorize a blood alcohol test on reasonable grounds to believe the individual is driving while intoxicated.

Because blood and breath tests require administration by specialized personnel and equipment,[57] roadside sobriety tests are often used by police officers to determine if the individual is driving while intoxicated and if the individual should be requested to undergo chemical blood or breath testing. The roadside coordinative test consists of having the driver perform one or several of the following maneuvers: standing erect, closing the eyes, and tilting the head back; reciting the alphabet; walking heel to toe along a straight line; and touching the finger to the nose or the earlobe.[58] When there are no statutory guidelines for these tests,[59] courts are confronted with the problem that faced the *Carlson* court of determining how best to protect the privacy interests of individuals who are subjected to this type of intrusion.[60]

Although it recognized the compelling governmental interest in preventing drunk driving, the *Carlson* court nevertheless held that the roadside sobriety test constitutes a full search and that a police officer must therefore have probable cause to believe the person is driving while intoxicated before conducting the test.[61] The majority reasoned that an individual normally seeks to preserve these coordinative characteristics as private and thus exposure to the police and to the public is a sufficient invasion of privacy to constitute a full search.[62] Although the test involves no physical contact between the officer and the suspect and takes only a few minutes to conduct, the court determined that the roadside sobriety test was not analogous to a limited *Terry*-type frisk.[63] The evidence gathering nature of the test and its perceived substantial intrusiveness led the *Carlson* court to conclude that to allow such a search on less

55. Schmerber v. California, 384 U.S. 757 (1966). "Clear indication" is arguably a higher standard than probable cause. *See supra* note 42 and accompanying text.
56. *See* Murray v. State, 236 Md. 375, 203 A.2d 908, *cert. denied*, 381 U.S. 940 (1964); Edwardsen v. State, 231 Md. 332, 190 A.2d 84 (1962); Crumb v. State, 1 Md. App. 98, 227 A.2d 869 (1967).
57. *See* MD. CTS. & JUD. PROC. CODE ANN. § 10-304(a)-(c) (1984).
58. *See* People v. Carlson, 677 P.2d 310, 316 n.6 (Colo. 1984).
59. Neither Maryland nor Colorado has statutory provisions governing coordinative sobriety tests. Both states, however, recognize that chemical tests are not required to prove intoxication; other evidence may be sufficient. Garcia v. District Court, 197 Colo. 38, 589 P.2d 924 (1979); Major v. State, 31 Md. App. 590, 358 A.2d 609 (1976).
60. People v. Carlson, 677 P.2d 310, 316 (Colo. 1984).
61. *Id.* at 317.
62. *Id.*
63. *See id.*

than probable cause would make the exception created by *Terry* and its progeny swallow the general rule prohibiting searches and seizures without probable cause.[64]

A strong dissent argued that the roadside sobriety test did not constitute a search for fourth amendment purposes because the test did not involve "the probing into an individual's private life and thoughts that marks an interrogation or search for concealed evidence of criminal activity."[65] The dissent further argued that the detention and testing were therefore analogous to a *Terry* stop and frisk and thus should be allowed on a reasonable and articulable suspicion standard.[66]

Recent Supreme Court decisions affording government officials increased leniency in the area of fourth amendment criminal justice[67] reflect societal pressures to curb serious crime problems through efficient law enforcement.[68] Similarly, the alarming statistics concerning the fatalities and destruction caused by drunk drivers[69] have caused a substantial judicial response to the public's concern with the criminal justice system's need to cope with the drunk driving issue.[70] Yet the *Carlson* court's response was blindly to apply established principles of law pertaining to search and seizure without considering how these principles will affect the problem. The *Carlson* court's characterization of the coordinative sobriety test as a full search requiring probable cause not only fails to consider the seriousness of the drunk driving problem, but also is inconsistent with recent Supreme Court decisions concerning the drunk driving issue. One indication of the trend toward allowing police officials

64. *Id.*
65. *Id.* at 319 (Rovira, J., dissenting) (citations omitted).
66. *See id.* at 319 (Rovira, J., dissenting).
67. *See* United States v. Leon, 104 S. Ct. 3405 (1984) (Court adopts a "good faith" exception to the exclusionary rule and refuses to bar the use of evidence obtained by an officer acting in good faith reliance upon a search warrant that was ultimately found to be unsupported by probable cause); *see also* Massachusetts v. Sheppard, 104 S. Ct. 3424 (1984) (murder evidence admissible despite the defect in the warrant because police acted in good faith).
68. *See* United States v. Leon, 104 S. Ct. 3405, 3413 (1984). The Supreme Court noted the substantial social costs of unbending application of the fourth amendment's exclusionary rule and the objectionable consequence that guilty defendants would go free or receive reduced sentences. *Id.*
69. The death toll caused by drunk drivers in 1980 was 28,000. In 1982, it was 25,600. The decrease has been attributed to stricter laws and an increased public perception of the risk of arrest. *See* Serrill, *Drunk Drivers Turn to the Bar*, TIME, Jan. 16, 1984, at 62. *See generally Driving Drunks Off the Road*, CHANGING TIMES, July, 1982, at 50; Lauter, *The Drunk Driving Blitz*, NAT'L L.J., Mar. 22, 1982, at 23; Starr, *The War Against Drunk Drivers*, NEWSWEEK, Sept. 13, 1982, at 34.
70. *See* California v. Trombetta, 104 S. Ct. 2528 (1984) (due process not violated when breath samples are not preserved but breath analysis tests are introduced as evidence); Berkemer v. McCarthy, 104 S. Ct. 3138 (1984) (*Miranda* warnings not required before giving a roadside sobriety test); South Dakota v. Neville, 459 U.S. 553 (1983) (no violation of due process right when defendant's refusal to take blood alcohol test is used as evidence even though police failed to warn); Schmerber v. California, 384 U.S. 757 (1966) (introduction of evidence of blood test does not violate the privilege against self-incrimination).

increased discretion in the area of drunk driving is the Supreme Court decision in *Berkemer v. McCarthy*,[71] holding that *Miranda* warnings need not be given prior to a roadside sobriety test.[72] The *Berkemer* Court ruled that a roadside sobriety test given pursuant to a traffic stop is not a custodial interrogation.[73] The Court reasoned that the detention was brief, public, and limited in scope and thus did not render the defendant "in custody" for *Miranda* purposes.[74] This characterization of the roadside sobriety test as too limited to implicate the fifth amendment right to be free from compelled self-incrimination implies an unwillingness by the judiciary to impede the enforcement of drunk driving laws by suppressing evidence because of an apparent *Miranda* violation when the situation does not require the protections afforded by *Miranda* warnings.[75]

The *Carlson* court concluded that the roadside sobriety test constituted a full search and was therefore subject to the fourth amendment's probable cause requirement.[76] By referring to the roadside test as an invasion of an individual's expectation of privacy in the coordinative characteristics of his body,[77] the *Carlson* court erroneously placed the search in the same category as other types of body searches. In cases involving body searches at the border and in non-border situations, a hierarchy has evolved based on an assessment of the search's intrusion upon personal dignity.[78] The degree of physical contact and embarrassment caused by the search and the use of force are particularly relevant factors.[79] The roadside sobriety test, when compared to other body searches, is not a substantial intrusion because it consists of only a short series of coordinative exercises. Although it is performed in public, any embarrassment from the roadside sobriety test is minimized by the lack of physical contact involved and the brevity and simplicity of the manuevers required. In addition, the public nature of the encounter protects the individual from the use of unnecessary force by the police officer because the public is present to witness the encounter. Consideration of these factors indicates that the intrusiveness of the sobriety test is not as substantial as the *Carlson* court believed it to be.[80]

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71. 104 S. Ct. 3138 (1984).
72. *Id.* at 3152.
73. *See id.* at 3151-52.
74. *Id.* at 3150-51.
75. *See id.* at 3147. The purpose of *Miranda* is to ensure that confessions are voluntary and are not the product of coercion and trickery. *Id.* The circumstances surrounding a traffic stop are less dominated by police than the circumstances surrounding the kinds of interrogations at issue in *Miranda* itself. *Id.* at 3150-51.
76. *Carlson*, 677 P.2d at 317.
77. *Id.*
78. *See supra* notes 33-45 and accompanying text.
79. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1346-47 (11th Cir. 1984).
80. *Carlson*, 677 P.2d at 317. In determining the intrusiveness of the coordinative test, the *Carlson* court simply noted that the test is performed in public, overlooking the test's lack of physical contact and its brevity as compared to a blood alcohol test. *See id.*

The roadside sobriety test can be characterized as a very limited intrusion because of the specificity of the manuevers of the test and the narrow circumstances in which it is applicable. Moreover, the test is less intrusive than the *Terry* frisk, which necessitates physical contact and carries with it the more serious implication that the individual is armed and dangerous. Because the roadside sobriety test is less intrusive than a *Terry* frisk, the test should be justifiable on a reasonable and articulable suspicion standard. Yet the *Terry* reasoning does not apply to the sobriety test, because it does not fit within the narrow judicial interpretation of *Terry*, as a protective search for weapons is not involved.[81]

If the *Terry* doctrine alone is considered in analyzing the validity of roadside sobriety tests, the *Carlson* court's decision is plainly correct in requiring probable cause to justify a roadside sobriety test. There are, however, limited intrusions that have been justified by the reasonable and articulable suspicion standard regardless of their evidence gathering motives and their inconsistency with the *Terry* rationale.[82] In fact, one state has upheld roadside sobriety tests based upon a reasonable and articulable suspicion.[83] The reasonable and articulable suspicion standard has been used by courts to uphold searches and seizures at the border to determine citizenship[84] and to gather evidence with respect to the illegal importation of narcotics.[85] These searches have been distinguished from *Terry* searches on the basis of the important governmental interests in controlling the influx of illegal aliens[86] and controlling the flow of contraband.[87] In these instances, therefore, determining whether intrusions are reasonable is a matter of judicial perception of which governmental interests are important enough to allow infringement upon fourth amendment rights.[88] The need to stop the drunk driver from destroying lives and property has reached at least the same level of importance as controlling the influx of illegal aliens and contraband.[89] Courts faced with the issue

81. *See* Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968).
82. *See* United States v. Martinez-Feurte, 428 U.S. 543 (1976) (border checkpoint searches for illegal aliens); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (random vehicle stops at or near border to find illegal aliens); United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984) (x-ray search for contraband). *See also supra* notes 20-37 and accompanying text.
83. State v. Wyatt, 687 P.2d 544 (Hawaii 1984).
84. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).
85. United States v. Vega-Barvo, 729 F.2d 1341 (11th Cir. 1984).
86. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 551-53 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878-80 (1975).
87. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984).
88. "[N]o act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973). Regardless of this proclamation, however, the Supreme Court has validated searches on less than probable cause because of the importance of the governmental interest. *See* Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968).
89. In an effort to curb the devastating results of drunk driving, Congress has enacted legislation that will cause any state that does not raise its drinking age to twenty-one to lose part of its federal highway construction funding. Act of July 17, 1984, Pub.

presented in *Carlson* are therefore justified in ruling in favor of applying the reasonable and articulable suspicion standard to roadside sobriety tests.

The validity, for fourth amendment purposes, of sobriety testing hinges upon the action of the judiciary. The court must either extend *Terry* to searches for evidence when the evidence may quickly disappear or decide that the need to curtail the epidemic of drunk driving casualties is of such governmental import that the testing should be subject to a different reasonableness analysis for fourth amendment purposes than other searches pursuant to criminal investigations. Because of their very nature, x-ray searches and strip searches are more intrusive than roadside sobriety tests. Nevertheless, these more intrusive searches are tolerated on less than probable cause because of the significant governmental interest in controlling the influx of contraband.[90] A comparison of drunk driving roadblocks to border checkpoint procedures indicates a possible trend in courts' treatment of the drunk driving issue. In spite of the special nature of the government's interest in the border checkpoint cases, the Court of Appeals of Maryland has used the criteria established to validate border checkpoints to sustain the validity of sobriety checkpoints.[91] In a similar vein, the flexible approach[92] applied to searches performed in the border and customs contexts should be applied to searches incident to stops upon a suspicion that the driver is intoxicated. This flexible approach, which adjusts the strength of the suspicion required for a particular search to the intrusiveness of that search,[93] would also be consistent with the treatment of body searches in general.[94] Because a "clear indication" that evidence will be found justifies a blood alcohol test[95] and probable cause justifies the taking of fingernail scrapings, a less intrusive search than a blood alcohol test,[96] it follows that a reasonable and articulable suspicion is sufficient to justify an intrusion involving no physical contact and a much briefer detention, such as a coordinative sobriety test.

Applying the reasonable and articulable suspicion standard at the

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L. No. 98-363, § 158, 98 Stat. 435, 437. *See also* Doerner, *Rewriting a Rite of Passage*, TIME, July 2, 1984, at 24; *Drinking Limit - State Impact*, U.S. NEWS & WORLD REPORT, July 9, 1984, at 14; *Making It Tough to Drink and Drive*, NEWSWEEK, July 9, 1984, at 23.

90. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984).

91. Little v. State, 300 Md. 485, 504-06, 479 A.2d 903, 912-14 (1984). In upholding the validity of sobriety checkpoints, the Court of Appeals of Maryland found that the governmental interest in controlling drunk driving outweighed the individual's fourth amendment privacy interests. *Id.*

92. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984); *see also supra* notes 20-37 and accompanying text.

93. *See* United States v. Vega-Barvo, 729 F.2d 1341, 1344 (11th Cir. 1984); *see also supra* notes 34-37 and accompanying text.

94. *See supra* notes 38-45 and accompanying text.

95. *See* Schmerber v. California, 384 U.S. 757 (1966).

96. *See* Cupp v. Murphy, 412 U.S. 291 (1973).

roadside sobriety test stage of investigations furthers law enforcement goals and protects citizens' fourth amendment rights. Under this approach, police officers would have a well-defined procedure to follow. They would be allowed to administer a roadside sobriety test when their observations create a reasonable and articulable suspicion that the driver is intoxicated. If their suspicions were enhanced by the test to the point of probable cause, the suspect could be arrested and subjected to the more substantial and serious intrusions of detention, blood alcohol tests, or breath tests. In contrast, the probable cause requirement in *Carlson* would frustrate enforcement efforts by rendering the roadside sobriety test self-defeating.[97] If an officer believes he has probable cause to arrest, he can simply arrest the offender and bypass the test. Conversely, if he is uncertain whether probable cause exists, he will either let the suspect go or proceed under the less stringent reasonable grounds test provided for in the implied consent statute.[98] Faced with the increased likelihood that the evidence obtained will be admissible to prove intoxication, the officer will choose to forego the coordinative test and proceed under the implied consent laws, subjecting the individual to the more substantial intrusion of a detention for blood alcohol analysis. When the officer can more readily make use of the coordinative test upon a lesser degree of suspicion, an arrest will be based on more solid evidentiary grounds, and the individual will be protected from intrusions for blood tests when the coordinative test does not corroborate the officer's suspicions.

Another potential result of a probable cause requirement could be judicial leniency with respect to what constitutes probable cause.[99] This would decrease the efficiency and integrity of the enforcement of drunk driving laws and could result in hostility among citizens by increasing the number of unwarranted detentions.

Although the Court of Appeals of Maryland has not decided whether probable cause is required to administer roadside sobriety tests, it has recognized the potential of this issue in *Little v. State*,[100] a recent case validating Maryland's sobriety checkpoints.[101] The court analo-

97. *See* People v. Carlson, 677 P.2d 310, 319-20 (Colo. 1984) (Rovira, J., dissenting).

98. *Id.* This type of analysis depends on the jurisdiction's interpretation of reasonable grounds. If reasonable grounds means something less than probable cause then this analysis is appropriate. In some jurisdictions, however, reasonable grounds is equated with probable cause; in that case, this analysis is not appropriate. *See supra* note 56 and accompanying text.

99. No uniform standards exist to determine when to subject a drunk driving suspect to further detention. Although the courts have enumerated some specific criteria, such as the smell of alcohol, slurred speech, and blood-shot eyes, too much discretion is often granted by the vagueness of the court's guidelines. *See generally* Schmerber v. California, 384 U.S. 757, 768-69 (1966) (guidelines included the phrase "similar symptoms of drunkenness"); Little v. State, 300 Md. 485, 491, 479 A.2d 903, 906 (1984) (current guidelines include the phrase "general appearance of drunkenness and/or behavior associated with intoxication").

100. 300 Md. 485, 479 A.2d 903 (1984).

101. *Id.*

gized to the border checkpoint cases in upholding the constitutionality of Maryland's sobriety checkpoints.[102] Of particular significance is the *Little* court's recognition of the state's compelling interest in detecting and deterring drunk driving.[103] That interest is evidenced by the court's approval of the checkpoints in spite of strong evidence that they were not highly effective in deterring drunk driving.[104] *Little* indicates that Maryland courts consider the drunk driving issue to be of paramount importance and that they may therefore treat roadside sobriety testing less stringently than did the court in *Carlson*.[105]

Maryland courts, however, have not been blind to the need to protect the rights of those suspected of driving while intoxicated. The court of appeals recently ruled that a drunk driving suspect has a right to communicate with an attorney before undergoing a chemical sobriety test if the communication does not interfere with the timely and efficient administration of sobriety testing procedures.[106] Rather than applying the sixth amendment's right to counsel, the court based its decision on the right to due process,[107] because the roadside sobriety test did not occur at a critical point in the proceeding.[108] Furthermore, Maryland has not expanded the scope of *Terry*-type searches beyond a pat-down search for weapons upon a reasonable and articulable suspicion that the suspect is armed and dangerous.[109] Thus, the roadside sobriety test, if considered a full search, would not be justified in Maryland as an extension of *Terry*.

Further support for the proposition that Maryland courts will adopt a reasonable and articulable suspicion standard for roadside sobriety tests can be inferred from the greater authority granted to police officers under Maryland's implied consent laws in comparison with the authority granted by Colorado's laws.[110] Maryland's implied consent law allows an officer to compel a suspect to take a blood alcohol test when a death has resulted from an accident and the officer has reasonable grounds to suspect that the driver involved is intoxicated.[111] Colorado, in comparison, does not recognize similar police authority when fatal accidents oc-

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102. *Id. passim*.

103. *See id. passim*.

104. *Id.* at 513, 479 A.2d at 917 (Davidson, J., dissenting).

105. *See id.* The Court of Appeals of Maryland cited Berkemer v. McCarthy, 104 S. Ct. 3138 (1984) with apparent approval and noted that the Supreme Court ruled that a brief detention for the purpose of performing a roadside sobriety test is not a custodial interrogation requiring *Miranda* warnings. Little v. State, 300 Md. 485, 510, 479 A.2d 903, 916 (1984).

106. Sites v. State, 300 Md. 702, 481 A.2d 192 (1984).

107. *Id.* at 717-18, 481 A.2d at 200.

108. *Id.*

109. *See, e.g.*, Anderson v. State, 282 Md. 701, 387 A.2d 281 (1978); State v. Wilson, 279 Md. 189, 367 A.2d 1223 (1977); DiPasquale v. State, 43 Md. App. 574, 406 A.2d 665 (1979); Dawson v. State, 40 Md. App. 640, 395 A.2d 160 (1978).

110. *See* COLO. REV. STAT. § 42-4-1202(3)(a)(I) (1973 & Supp. 1983); MD. TRANSP. CODE ANN. § 16-205.1 (1984 & Supp. 1984).

111. MD. TRANSP. CODE ANN. § 16-205.1(c) (Supp. 1984).

cur.[112] Furthermore, Colorado's implied consent law requires that the suspect be arrested prior to the administration of the blood or breath tests,[113] while Maryland has given police officers the specific authority to request a preliminary breath test without making an arrest.[114] This legislative grant of authority, together with the court's willingness to validate procedures such as sobriety checkpoints,[115] increases the likelihood that the Maryland judiciary would find the government's interest in curbing drunk driving sufficiently compelling to allow an officer to conduct a roadside sobriety test on less than probable cause.

Elena A. Rodney

112. COLO. REV. STAT. § 42-4-1202 (1973 & Supp. 1983).
113. COLO. REV. STAT. § 42-4-1202(3)(a) (Supp. 1983).
114. MD. TRANSP. CODE ANN. § 16-205.2(a) (1984).
115. *See* Little v. State, 300 Md. 485, 479 A.2d 903 (1984); *see also supra* notes 99-104 and accompanying text.