Making Sense of Random Vehicle Stops and the Fourth Amendment: A Halting Enigma

Bruce V. Schewe
Under *Agurs*, the prosecutor should either disclose the requested material or submit it to the trial court whenever there is a "substantial basis for claiming the suppression of the evidence might affect the outcome of the trial."\(^{41}\) The trial judge should order disclosure of the specifically requested material, before or during trial, under the same circumstances. After trial the proper standard to evaluate whether a defendant's due process right to a fair trial has been violated by the failure of the prosecutor to disclose specifically requested exculpatory evidence is also whether there was a substantial basis for claiming that the suppressed material might have affected the outcome of the trial.\(^{42}\) If the reviewing court finds that there was a substantial basis for claiming the suppressed material might have affected the outcome of the trial, the defendant's due process right to a fair trial has been violated and a new trial should be ordered. It is urged that the Louisiana Supreme Court reject any further application of the *Agurs* standard of materiality in a general or no request situation to instances where the prosecutor is faced with the specific request. Otherwise, it must risk the possibility of reversal on collateral attack.

*James P. Ryan*

**MAKING SENSE OF RANDOM VEHICLE STOPS AND THE FOURTH AMENDMENT: A HALTING ENIGMA**

Defendant's automobile was subjected to a random driver's license and vehicle registration check, following a stop that was neither based on a traffic or equipment violation nor based on any criminal activity by the defendant or the other occupants of the vehicle. The patrolman effecting the stop arrested the defendant after having observed marijuana on the floor of the automobile. The Delaware state courts suppressed the marijuana as evidence on the ground that it had been obtained during an illegal detention. The United States Supreme Court affirmed and held that, absent artic-

\(^{41}\) See note 21, *supra*, and accompanying text.

\(^{42}\) See note 21, *supra*, and accompanying text.

1. An additional issue raised was the Court's lack of jurisdiction over the case, as the Delaware Supreme Court had based its decision on independent and adequate state grounds. The Court disposed of this issue by concluding that "the Delaware Supreme Court did not intend to rest its decision independently on the state constitution and that we have jurisdiction of this case." Delaware v. Prouse, 99 S. Ct. 1391, 1395 (1979). Compare *Del. Const.* art. I, § 6, with *La. Const.* art. I, § 5 (the right to privacy guarantee).
utable facts that a motorist is unlicensed, that a vehicle is not lawfully registered, or that either the vehicle or an occupant is otherwise subject to seizure, the stop of an automobile and the detention of its occupants are unreasonable under the fourth amendment.\textsuperscript{2} \textit{Delaware v. Prouse}, 99 S. Ct. 1391 (1979).

The contemporary United States Supreme Court has created several constitutional guarantees which, though related to the text, are not enumerated in the Constitution.\textsuperscript{3} One such guarantee embraces the right to privacy.\textsuperscript{4} For purposes of the fourth amendment, the right to privacy has been found to provide protection from unwarranted governmental searches and seizures.\textsuperscript{5} This right is em-
bodied in the concept of "reasonable expectation of privacy." The Court, in giving meaning to the phrase "reasonable expectation," has noted that a weighing of the government's interest against the individual's interest is required. If as a result of this balancing process, the Court concludes that an individual is justified in expecting that he will remain free from unreasonable searches and seizures, then an individual's privacy claim is one that must be considered constitutionally protected.

The stopping of an automobile and its occupants raises a fourth amendment issue only recently confronted by the Court in constitu-

6. The phrase "reasonable expectation of privacy" is essentially a term of art signifying that which is protected by the restrictions of the fourth amendment. See Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The recent decision of Rakas v. Illinois, 99 S. Ct. 421 (1978), adopts the analytical guide proposed by Mr. Justice Harlan's Katz concurrence to determine the scope of the fourth amendment's protection. Rakas imposes a twofold requirement. First, the individual urging a privacy interest must exhibit an actual (subjective) privacy expectation. Second, the expectation must be one that accords with societal notions of reasonableness. 99 S. Ct. at 430-31 n.12. While Rakas places the burden upon the individual claiming a violation of the privacy expectation to demonstrate its reasonableness, both criteria should be satisfied in the case of the seizure of a person. Certainly one may be said to possess a legitimate expectation of privacy over his person. See Reich, Police Questioning of Law Abiding Citizens, 75 YALE L.J. 1161 (1966). See notes 9-10, infra, and accompanying text.

7. The governmental interest sought to be preserved is the authority of a state to act to protect "[p]ublic safety, public health, morality, peace and quiet, law and order . . . [a]s some of the more conspicuous examples . . . of the police power." Berman v. Parker, 348 U.S. 26, 32 (1954). However, the guarantees of the Bill of Rights, through the fourteenth amendment, provide specific limitations on the permissible scope of the police power. See, e.g., Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).


10. The text of the fourth amendment guarantees the right of the "people to be secure in their persons . . . against unreasonable . . . seizures." U.S. CONST. amend. IV. See note 6, supra.
Much of the judicial thinking on this issue prior to Prouse involved reasoning by analogy to the pedestrian stop situation in Terry v. Ohio. The fourth amendment's privacy protections were found applicable in Terry as the Court held that the stop of an individual, though a brief privacy intrusion, is a seizure. Similarly, in determining whether a law enforcement stop of an automobile and its occupants is a seizure, the Court found in United States v. Brignoni-Ponce that "[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." In making the step from Terry to Brignoni-Ponce, the Court apparently discerned no constitutionally significant distinction between the random stop of an automobile and that of a pedestrian. Identifying the stop of an automobile's occupants as a seizure within the scope of the fourth amendment, however, does not respond to the issue of the stop's reasonableness. The problem still remains to comprehend the standard applied by the Court to validate such a limited seizure.

11. The majority in Prouse noted that "[w]e have only recently considered the legality of investigative stops of automobiles where the officers making the stop have neither probable cause to believe nor reasonable suspicion that either the automobile or its occupants are subject to seizure under the applicable criminal laws." 99 S. Ct. at 1397.


13. Rejecting the argument that only a full-dress arrest constitutes a seizure under the fourth amendment, Mr. Chief Justice Warren opined "that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id. at 16. See Adams v. Williams, 407 U.S. 143 (1972); Davis v. Mississippi, 394 U.S. 721 (1969).


15. Id. at 878. See also Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Adams v. Williams, 407 U.S. 143 (1972). Cf. United States v. Martinez-Fuerte, 428 U.S. 543 (1976); United States v. Ortiz, 422 U.S. 891 (1975) (agreeing that roadblock-type stops of automobiles and their occupants are seizures within the province of the fourth amendment).

16. The term random stop is used to distinguish the individualized stop of an automobile and its occupants from a roadblock stop.

17. However, before Prouse some federal and state courts had found the two situations distinctively different. See, e.g., United States v. Turner, 442 F.2d 1146 (8th Cir. 1971); State v. Cobuzzi, 161 Conn. 371, 288 A.2d 439 (1971). One author has noted that "the most common view is that the Constitution permits absolute power in the police to initiate stops of motorists to check licenses and registrations, a power which the policy may use to serve general crime detection techniques." Comment, supra note 2, at 673.


The Supreme Court has established reasonableness as the bedrock standard in evaluating fourth amendment questions. Analyzing the incident of law enforcement observation of suspicious activity, the Terry Court permitted an individual officer to conclude, in light of his experience, that criminality might be afoot. The Court determined that the officer's conclusion, although premised upon his ability to state fewer objective facts than required to establish probable cause, justified a lawful stop, limited both in scope and duration, of


21. See, e.g., Terry v. Ohio, 392 U.S. 1, 19 (1968). Mr. Chief Justice Warren wrote in Terry that "the central inquiry under the Fourth Amendment ... [is] the reasonableness in all circumstances of the particular governmental invasion of a citizen's personal security." See also Pennsylvania v. Mimms, 444 U.S. 106 (1977) (balancing the safety interest of the police against the privacy intrusion of the individual required to get out of his automobile, when lawfully stopped).

The fourth amendment is composed of two separate clauses, each prohibiting a type of governmental activity. Marshall v. Barlow's, Inc., 436 U.S. 307, 325-26 (1978) (Stevens, J., dissenting). See Note, Airport Security Systems and the Fourth Amendment, 34 LA. L. REV. 860, 862 (1974). U.S. CONST. amend. IV, cl. 1 provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." (Emphasis added.) The second clause sets the traditional standard for the issuance of warrants, but as the Court has found that "[i]t is well settled ... that a stop ... of a moving automobile can be made without a warrant," Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973), the second clause is not at issue.

22. 392 U.S. at 21. In Terry, the Court held that the stop of an individual on the street is not offensive to the fourth amendment if the law enforcement officer can "point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant the intrusion." Id. Furthermore, the Court noted that the facts must "be judged against an objective standard: would the facts available to the officer at the moment of the seizure ... 'warrant a man of reasonable caution in the belief' that the action was appropriate?" Id. at 21-22. See also Adams v. Williams, 407 U.S. 143 (1972).

23. Probable cause arises when sufficient facts exist at the moment of arrest to warrant a reasonable belief that an offense has been committed. See Beck v. Ohio, 379 U.S. 89, 96 (1964); Carroll v. United States, 267 U.S. 132, 162 (1925).
the suspicious persons.\footnote{24} Finding the stop of a pedestrian and the stop of automobile occupants analogous situations, the Court in \textit{Brignoni-Ponce} held that, despite the de minimis privacy intrusion incident to a roving stop, the seizure was unreasonable absent articulable facts of criminality.\footnote{25} Following \textit{Terry}'s guide, the \textit{Brignoni-Ponce} Court deduced that patrolling law enforcement officers may stop and detain automobile occupants only upon reasonable suspicion based upon articulable facts.\footnote{26} One rationale for finding the "articulable facts stop" reasonable is that the unconstrained discretion of the officer is removed when he is required to state the facts justifying the privacy intrusion.\footnote{27}

While the Court has found that articulable facts of criminality justify a stop, its conclusion has not pretermitted all other possible rationales rendering stops reasonable. In \textit{United States v. Martinez-Fuerte},\footnote{28} the Court questioned the constitutionality of automobile stops at \textit{fixed}, roadblock-type checkpoints. Although recognizing that roadblock-type stops do intrude upon the motorists' right to free passage without interruption,\footnote{29} the Court held the \textit{fixed} checkpoint seizure to be reasonable\footnote{30} on two grounds. First, the interference with the privacy expectations of motorists is arguably minimal.\footnote{31} Secondly, as fixed checkpoints limit the discretion of the

\textit{NOTES}

\footnote{24} 392 U.S. at 28. By contrast, a seizure lacking at least articulable facts of criminality offends the fourth amendment, as the law enforcement officer's discretion is unchecked. \textit{See}, \textit{e.g.}, \textit{Sibron v. New York}, 392 U.S. 40 (1968). \textit{See also} Note, supra note 21, at 862.

\footnote{25} The Court phrased its ruling by stating that "officers on roving patrol may stop vehicles only if they are aware of specific articulable facts . . . that reasonably warrant suspicion." 422 U.S. at 884. One author, noting the significance of the \textit{Brignoni-Ponce} distinction between the "limited stop" of an investigative nature and the more intrusive, full scale search of the vehicle, stated that in the former type of situation, "the investigating officer may, if he has reasonable suspicion, question the occupants . . . and also have them explain any suspicious circumstances." Comment, \textit{Roving Border Searches for Illegal Aliens}, 59 MARQ. L. REV. 856, 870 (1976).

\footnote{26} 422 U.S. at 884. Note as well Mr. Justice Douglas' concurring opinion stating that "[t]he Court extends the 'suspicion' test of \textit{Terry v. Ohio} to the stop of a moving automobile." 422 U.S. at 888 (Douglas, J., concurring) (citation omitted).


\footnote{28} 428 U.S. 543 (1976).


\footnote{30} 428 U.S. at 566.

\footnote{31} \textit{Id.} at 559. Mr. Justice Powell, writing for the majority, contended that checkpoint stops are viewed "in a different light because the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." \textit{Id.} at 558. Unfortunately, the Court offered no further support for its conclusion.
individual police officer, there is less opportunity for abuse of governmental authority. As a result of the balancing by the Court of the state interest in the practical aspects of controlling criminal activity against the individual privacy interests at issue, the fixed roadblock in *Martinez-Fuerte* was found not to run afoul of the fourth amendment.

"Prouse serves to reaffirm the fundamental choices of reasonableness made in *Terry*, *Brignoni-Ponce*, and *Martinez-Fuerte*. The Court, in *Prouse*, identified the legitimate expectation of privacy that occupants of automobiles may possess: that an automobile and its operation are the subjects of numerous governmental regulations does not mean the individuals operating or travelling in

32. *Id.* at 559. Both points are significant. As an automobile driver or passenger can see that other vehicles are being stopped, the subjective intrusion into the privacy interests of the individual is arguably lessened. Such a stop is probably far less frightening and annoying than the situation where a patrolman pulls a lone automobile over for a routine check. In the latter case, the detention likely does not seem routine to the occupants of the stopped vehicle; and the subjective privacy intrusions are probably more severe.

The other constitutional vice of the random stop has been identified as the unconstrained discretion of the law enforcement officer. *See*, e.g., United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Court in *Martinez-Fuerte* suggested that if such discretion is removed, then the limited intrusion incident to the checkpoint stop is reasonable. The fixed roadblock-type stop is one method of removing the constitutionally offensive law enforcement discretion. One commentator has criticized the *Martinez-Fuerte* Court for sacrificing "the principles of the fourth amendment for the expediency of an operation which unjustifiably burdens . . . law-abiding motorists." *Comment, Alien Checkpoints and the Troublesome Tetralogy*, 14 San Diego L. Rev. 257, 281 (1976).

33. Significantly, *Martinez-Fuerte* further held that "stops for brief questioning routinely conducted at permanent checkpoints . . . need not be authorized by a warrant." 428 U.S. at 566.

34. The Court was careful to find that the regulations incident to the operation of a motor vehicle, imposed both on the vehicle and the operator, do not befit categorizing the automobile or its operation as a subject that is pervasively regulated by the government. Reminded that the "'grave danger' of abuse of discretion does not disappear simply because the automobile is subject to state regulation," 99 S. Ct. at 1400 (citation omitted), the Court distinguished the regulations presently at issue from the "'relatively unique circumstances,'" *id.*, quoting *Marshall v. Barlow's*, Inc., 436 U.S. 307, 313 (1978), that permit implied consent searches, and presumably seizures, as a consequence of engaging in an activity that traditionally has been heavily regulated. The implied consent doctrine has been narrowly limited in application. *See*, e.g., United States v. Biswell, 406 U.S. 311 (1972) (federal regulation of firearms); *Colonnade Catering Corp.* v. United States, 397 U.S. 72 (1970) (federal regulation of liquor). For an excellent discussion of the extraordinary exceptions to the neutral standard of search authorization, *see* *Note, A Modern Approach to the Fourth Amendment: The Reconciliation of Individual Rights with Governmental Interests*, 39 La. L. Rev. 623, 628-29 (1979). One commentator has argued that "[T]o the extent that driving is heavily regulated, a motorist may have a more limited expectation of privacy than a pedestrian . . . . [T]o the extent that routine stops to check licenses are an accepted mode of regulation,
automobiles lose all reasonable privacy expectations. Additionally, the Court recognized the fourth amendment implications of a seizure raised by the stop of an automobile and the detention of its occupants. Deciding that the Brignoni-Ponce rationale applied to any roving patrol stop on grounds less than a reasonable suspicion, the Court refused to construct a distinction between the intrusions occasioned by the random driver's license check stop and those occasioned by the roving border patrol stop. The Court agreed that the proper test to determine reasonableness is a "balancing [of] the public interest against the individual's Fourth Amendment interests implicated by the practice of spot checks such as occurred in this case." It was determined that the random check was not sufficiently productive of evidence of highway safety violations to qualify as a reasonable law enforcement technique under the fourth amendment. 

35. As the Court in Terry noted that people are not shorn of all fourth amendment protection when they step from their homes onto the public walks, the Prouse Court appreciated that individuals are not "shorn of those interests when they step from the sidewalks into their automobiles." 99 S. Ct. at 1401.

36. Since Prouse dealt with the actions of a state law enforcement officer, and not a federal agent, the fourth amendment prohibitions were applied through the fourteenth amendment. Cf. Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the federal exclusionary policy regarding evidence seized in contravention of the fourth amendment applied to the states through the fourteenth amendment).

37. 99 S. Ct. at 1396. The Court framed the constitutional issue by noting that "[t]he Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief." Id.

38. Id. at 1398.

39. Id. at 1397-98. Articulating the necessity of the balancing approach, the majority reasoned that "the permissibility of a particular law-enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Id. at 1396. The proper balance considers both. See notes 7-8, supra. This normative balancing approach has been criticized; see, e.g., Note, Area Search Warrants in Border Zones: Almeida-Sanchez and Camara, 84 YALE L.J. 355 (1974), but, as a general rule, the jurisprudence has favored the individual. See note 8, supra.

For example, in an effort to promote both the individual and governmental interests, the Court has developed several standards of reasonableness based upon the degree of law enforcement discretion and the extent of the individual privacy invasion. While an "articulable facts" stop is certainly less accurate in identifying wrongdoers than is a probable cause test, the permissible privacy intrusion is lesser as well. A stop upon reasonable suspicion is only authorized for a limited duration and purpose; only a self-protective "frisk" is reasonable. See Brown v. Texas, 99 S. Ct. 2637 (1979); Adams v. Williams, 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968). Probable cause permits a custodial arrest, see, e.g., United States v. Santana, 427 U.S. 38 (1976); United States v. Watson, 423 U.S. 411 (1976); Beck v. Ohio, 379 U.S. 89 (1964), and a full search of the person incident to arrest. See, e.g., United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. 218 (1973). Apparently, some dis-
ment; thus, the crucial factor in the balancing seems to have been the inefficacy of the random stop in accomplishing its purported goals.

The Court held that only where articulable facts evidence that a motorist is unlicensed, that the vehicle is not registered, or that either the automobile or an occupant is otherwise subject to seizure for a violation of the law may an automobile and its occupants be stopped by a roving patrolman. Prouse aligns the random automobile stop standard of reasonableness with the Terry/Brignoni-Ponce standard. However, Mr. Justice White, writing for the majority, noted that the Court’s holding “does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or do not involve the unconstrained exercise of discretion” by the law enforcement officer. Specifically, the roadblock-type stop was suggested as one alternative.

40. Mr. Justice White wrote:

The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law-enforcement officials. . . . This kind of standardless and unconstrained discretion is the evil the Court has discerned when . . . it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

99 S. Ct. at 1400.

41. Combining their disdain for permitting law enforcement officers to exercise complete discretion in effecting fourth amendment intrusions with the realization of the inefficiency of the random check in the promotion of highway safety, the majority opined that “[i]n terms of actually discovering unlicensed drivers . . . the spot check does not appear sufficiently productive to qualify as a reasonable law-enforcement practice under the Fourth Amendment.” Id. at 1399.

42. Id. at 1401.

43. Id. (Emphasis added.) By utilizing the conjunction or, separating the analysis of spot checks and of roadblock-type stops on the grounds of lesser privacy intrusion or lessened discretion of the law enforcement officer in effecting the stops, the inference may be drawn that a roadblock-type stop is reasonable for either reason. It is submitted that a fixed (i.e., Martinez-Fuerte-type) roadblock stop is justifiable as such a stop entails lesser privacy intrusions and because the discretion of the law enforcement officer is removed. Merely identifying the constitutional vice of the random stop as either a greater privacy intrusion or a discretionary stop left in the hands of the law enforcement officer appears improper. See Brown v. Texas, 99 S. Ct. 2637, 2641 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 558-59 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

44. Although Mr. Justice Rehnquist, as the Court’s lone dissenter, wrote that [t]he Court holds, in successive sentences, that absent an articulable, reasonable suspicion of unlawful conduct, a motorist may not be subjected to a random
As the Court framed the disposition in the \textit{Prouse} case in terms of an application of the reasonable suspicion test for roving stops, its precise holding is quite unremarkable. Yet, by suggesting that roadblock-type stops may be a reasonable means for conducting future documentation checks, a veritable "Pandora's Box" has been opened regarding a resolution of the reasonableness requirements of a roadblock. Surely the Court is not implying that automobile stops, unreasonable if randomly conducted without justifying facts, are permissible if a law enforcement officer, acting upon his own initiative, makes the stops while standing in the center of the road. Unfortunately, a clear definition of a constitutional roadblock, applicable in the context of the instant case, has yet to be articulated by the Court.

Although the Court in \textit{Martinez-Fuerte} noted that its holding is confined to permanent, fixed checkpoints,\textsuperscript{45} its rationale may be helpful in predicting a course for determination of the present roadblock

\begin{quote}
license check, but that the States are free to develop "methods for spot checks that . . . do not involve the unconstrained exercise of discretion," such as "/questioning . . . all oncoming traffic at roadblock-type stops . . . ." \\
99 S. Ct. at 1401 (Rehnquist, J., dissenting), the Court in \textit{Prouse}, in fact, does not so hold. The majority clarifies its holding by concluding that "/[w]e hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." 99 S. Ct. at 1401. \textit{See also} Brown v. Texas, 99 S. Ct. 2637, 2641 (1979). Mr. Chief Justice Burger, writing in \textit{Brown} for a unanimous Court, stated that \textit{Prouse} required officers making automobile stops "to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity."

45. 428 U.S. at 566 n.19. The \textit{Martinez-Fuerte} majority opinion stated that "/[o]ur holding today, approving routine stops for brief questioning . . . is confined to permanent checkpoints." Id. (Emphasis added.) Yet, the Court did recognize "three kinds of inland traffic-checking operations," id. at 552, conducted by the Border Patrol and presumably any law enforcement agency concerned with the roadway police function. Roving patrols and permanent checkpoints were addressed by \textit{Brignoni-Ponce} and \textit{Martinez-Fuerte}, respectively. The third identification was that of "/[t]emporary checkpoints, which operate like permanent ones." Id. (Emphasis added.)

Additionally, Mr. Justice Powell, writing for the \textit{Martinez-Fuerte} majority, appeared cognizant of the temporary drivers' license-type roadblocks. He wrote:

\begin{quote}
Steps for questioning, not dissimilar to those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements . . . and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendants' position, if realistically pursued might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use.
\end{quote}

Id. at 560-61 n.14. Significantly, "defendants' position" was not accepted or pursued.
issue. The Marínez-Fuerte Court reasoned that fixed checkpoint seizures are reasonable as the incident privacy intrusions are lesser than those produced at random stops and because “[t]he location of a fixed checkpoint is not chosen by the officers in the field, but by officials responsible for making . . . effective allocation of limited enforcement resources.” Repeated in Prouse without further explanation, the first proposition of the Marínez-Fuerte Court raises several questions. Is the inquiry merely one of examining the degree of psychological privacy intrusion experienced by automobile occupants stopped at roadblocks vis-a-vis automobile occupants subjected to random stops? If so, then, arguably, should not the Court have analyzed empirical data regarding the subjective fear experienced by drivers in the two situations before reaching such a significant conclusion? Or is the majority’s reasoning based not upon factual grounds but upon the reasonableness of a privacy expectation? Perhaps the individual automobile occupant may not legitimately possess an expectation that he will not be subjected to the brief detention and accompanying privacy intrusion occasioned by a fixed roadblock-type stop. Certainly, the characterization of the individual’s privacy expectation as unreasonable is within the Court’s province. However, a more succinct approach to fixed roadblock analysis finds the automobile stop not a “seizure” in the fourth amendment sense, as no legitimate privacy interest is pierced.

46. See notes 31-32, supra.
47. 428 U.S. at 559. The Court further “assume[d] that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively . . . [and] a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to a post-stop judicial review.” Id.
48. 99 S. Ct. at 1397. But not all of the justices summarily accepted this notion. Mr. Justice Rehnquist put forth the caustic remark that “motorists, apparently like sheep, are much less likely to be ‘frightened’ or ‘annoyed’ when stopped en masse.” 99 S. Ct. at 1401-02 (Rehnquist, J., dissenting). He also frowned upon the Court’s conclusion, that the possibility of a random check would not deter unlicensed drivers from venturing onto the road, as made “without the benefit of a shred of empirical data . . . suggesting that a system of random spot checks would fail to deter violators.” Id. at 1402-03. See notes 40-41, supra, and accompanying text.
49. See note 48, supra.
50. See Rakas v. Illinois, 99 S. Ct. 421 (1978). Rakas finds that the duty of a court in determining the reasonableness of a claimed fourth amendment interest is to weigh the claim against a societal standard of reasonableness. Unreasonable positions are to be rejected. See note 6, supra, and accompanying text.
51. From a functional standpoint, it appears that some form of a temporary roadblock-type stop is necessary in light of the great public concern for highway safety. If law enforcement officers are not allowed to examine vehicle registration certificates and driver’s licenses until either a traffic violation has occurred, when the public safety has already been endangered, or at the scene of an accident, where the damage has already been inflicted, the Court would not seem to be properly balancing the interests involved.

Indeed, Mr. Justice Rehnquist dissented, believing that the public safety interests
Although this approach may be suggested as an analytical framework for fixed roadblocks, it is not an appropriate guide in analyzing the more common documentation checkpoint—the *temporary* roadblock.

The Court has expressed its awareness of the temporary roadblock for documentation purposes, but, as yet, has reserved judgment as to its legality. However, a constitutional approach similar to that applied by the Court in the fixed roadblock case seems appropriate, using both prongs of the *Martinez-Fuerte* rationale as a guide. Presumably, the same lesser-psychological-privacy-intrusion reasoning, extant in fixed roadblock analysis, may be used in the temporary checkpoint examination. Drivers stopped at either fixed points or temporary roadblocks can observe others in the same circumstance, thereby lessening their subjective fear.

Assuming that the lessened intrusion premise of the Court is valid, another difficult question is presented in determining a reasonable method for establishing the temporary roadblock. It is probable that the temporary roadblock may not be set up solely at the whim of the officer in the field. Some neutral procedure appears to be a necessity, but is a necessity outweighed the individual privacy expectations and that the respondent failed to demonstrate that random stops, for this purpose, are inconsistent with the fourth amendment. 99 S. Ct. at 1403 (Rehnquist, J., dissenting). Rather, Mr. Justice Rehnquist reminds one that "[t]he whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver *before* he demonstrates why he is unlicensed." *Id.* at 1402 (emphasis added). *See Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967). The fifth circuit in *Myricks*, reflecting that "[a]fter the event it is always too late," contended that "[a] State can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness." 370 F.2d at 904.

In light of the extensive state regulations regarding motor vehicle registration and operation, the public safety interest appears certain. In Louisiana, *see*, e.g., *La. R.S. 32:51-53 (Supp. 1962); La. R.S. 32:402 (Supp. 1954); La. R.S. 32:861 (Supp. 1977); La. R.S. 32:900 (Supp. 1952).* The assumption, of course, must be made that registered vehicles and licensed drivers are safer than unregistered vehicles and unlicensed drivers. The majority in *Prouse* did accept this fundamental premise. 99 S. Ct. at 1398-99.

---

52. See note 45, *supra*.

53. In *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975), the Court, in considering fixed checkpoints, opined that "[a]t traffic checkpoints . . . motorists[s] can see visible signs of the officers' authority, and [they are] much less likely to be frightened or annoyed by the intrusion."

54. The Court in *Prouse* specifically held that "persons in automobiles . . . may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers." 99 S. Ct. at 1401. The Court in *Brown v. Texas*, 99 S. Ct. 2637, 2640 (1979), also found that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."
warrant required? If so, what kind of warrant? With respect to fixed checkpoints, the Court has held that establishing warrants are not required. The rationale for such a conclusion further suggests that warrants are not necessary for the establishment of a temporary checkpoint. Possibly, if the law enforcement officials responsible for making the "effective allocation of limited enforce-

55. Again, the dual-headed hydra of the administrative-criminal warrant distinction raises its ominous spectre. Although warrants have been approved in the administrative context upon a standard less exacting than traditional probable cause in the administrative context, see, e.g., Michigan v. Tyler, 436 U.S. 499 (1978); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967), such warrants have not been issued when the investigation is focused upon finding specific criminal evidence.


ment resources” develop a reasonable scheme for the conduct of temporary roadblock stops, then the requirements of the fourth amendment would be satisfied.

*Brown v. Texas,* 59 decided after *Prouse,* lends additional support to the notion that temporary roadblocks are legitimate if “carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.” 60 Fundamentally, the resolution of the issue appears reducible to a determination of an authority constitutionally competent to approve a neutral plan establishing temporary roadblocks. A reasonable policy establishing temporary checkpoints could conceivably be set within a law enforcement department, thus guaranteeing that “no significant discretion is placed in the hands of the . . . officer [in the field]” 61 since the location, date, and duration of the detentions are all predetermined.

Presumably using a dual-sliding scale approach 62 to fourth amendment analysis, the Court, in both *Prouse* and *Brown,* has implied that a limited seizure—a roadblock-type stop—survives constitutional scrutiny, without any justifying facts, when the intrusion is slight and when the law enforcement officer’s discretion is either minimized or removed. 63 Additionally, particularized automobile stops are considered reasonable when the nature of the intrusion is brief and when objective facts of criminality exist to justify the stop. 64

---

60. Id. at 2640.
62. The dual-sliding scale type of analysis identifies the degree of individual privacy intrusion in comparison to the extent of discretion left in the hands of the law enforcement officer effecting the intrusion. Both points must be concurrently analyzed in reaching a proper determination of reasonableness. For example, when the intensity of the privacy invasion is relatively slight, as in the case of a stop instead of a full-blown arrest, the discretion left to the individual officer may reasonably be greater than when the intrusion is more severe. Consequently, the articulable facts of criminality standard, less than probable cause, is reasonably sufficient to justify a stop, but not an arrest. Similarly, when the discretion of the officer in the field is completely denied, limited privacy intrusions, such as occasioned by detention at a fixed roadblock, have been held to be reasonable, without justifying facts. One must be mindful that the issues of privacy expectation, degree of privacy intrusion, and range of law enforcement discretion must be thought of simultaneously.
63. See Comment, supra note 2, at 696. The author states that

[the limitation of reasonable supervision operates as a check on abuses of official power to intrude upon personal security. Where the potential for abuse is high, as in the discretionary spot check, the need for the limitation is great; where it is negligible, as in the roadblock which stops every car, the same limitation can serve no useful purpose and should not be imposed. . . . The result is a minor intrusion for a public health or safety purpose which can easily be declared reasonable.
64. See notes 26 & 42, supra, and accompanying text.
Some troubling questions have been resolved by Prouse while others have only now surfaced. Further exploration into the reasonableness of temporary roadblocks is necessary to develop the full implications of the neutral plan test of validity alluded to in Prouse and Brown. As a result-announcing device, Prouse undeniably reaches the proper disposition; however, until its analytical method and its disturbing implications are better judicially articulated, the future of fourth amendment analysis, remains, as usual, unsettled.

Bruce V. Schewe

65. Apparently, the Court in Prouse has extended the Terry articulable facts standard to test the reasonableness of all random seizures of a limited nature.

66. In his concurring opinion to Prouse, Mr. Justice Blackmun, joined by Mr. Justice Powell, seems to assume that, when the Court suggests roadblock stops as one reasonable alternative to random stops in making license checks, "other not purely random stops (such as every 10th car to pass a given point)," 99 S. Ct. at 1401 (Blackmun, J., concurring), are also permitted. Presumably, Mr. Justice Blackmun identifies the constitutional vice of the random stop solely as the degree of unconstrained discretion left to the law enforcement officer in making the stop. His unusual statement would permit detention of automobile occupants, not at roadblocks of any sort and absent a factual basis, provided the stop was not made at the discretion of the officer in the field. As this analytic perspective necessarily equates the constitutional vice of the random stop only with the latitude of discretion, examination is not made regarding the privacy intrusion of the persons stopped. When a motorist is halted because his automobile is the tenth vehicle to pass a given point, the officer in the field is undoubtedly not permitted any discretion. However, the occupants of the detained automobile suffer privacy intrusions more like that experienced at a random stop than at a roadblock; the subjective knowledge of the persons stopped—as to the reason for the seizure—is no greater than at a random stop.

Moreover, Mr. Justice Blackmun's proposition that the stop of every tenth vehicle passing a given point equates with, and is even less intrusive than, a "100% roadblock stop," id., confounds the majority's reasoning. Both the physical and psychological privacy invasions incident to the every tenth vehicle stop ostensibly are greater than the intrusions produced at a roadblock, permanent or temporary. Unfortunately, Mr. Justice Blackmun offers no account for his proposition. Some rationale for his statement would be helpful in answering many of the disturbing questions it raises. When a law enforcement patrol car is stationed at a point where every tenth vehicle may be stopped, must every tenth automobile be stopped? What procedures are to be adopted to ensure good faith on the part of the officers stopping "every 10th car to pass a given point"? These questions pose difficult and confusing problems. Until serious reflection upon the complexities of the "10th car" scheme is undertaken, the questions will remain perplexing at best.