

1975

## "Random" Spot Checks and the Fourth Amendment: *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975)

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### Recommended Citation

Stewart Walker, "Random" Spot Checks and the Fourth Amendment: *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975), 55 Neb. L. Rev. 316 (1976)

Available at: <https://digitalcommons.unl.edu/nlr/vol55/iss2/7>

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## “Random” Spot Checks And the Fourth Amendment

*State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975).

### I. INTRODUCTION

*State v. Holmberg*<sup>1</sup> raised the question of whether “spot checks” of motor vehicles, when based upon neither the “probable cause” required for arrest,<sup>2</sup> nor the “reasonable suspicion” sufficient for an investigative seizure,<sup>3</sup> are constitutional under the fourth amendment.<sup>4</sup> The case is the first to consider the constitutionality of such stops in light of *United States v. Brignoni-Ponce*,<sup>5</sup> in which the Supreme Court condemned similar stops by United States Border Patrol officers.<sup>6</sup>

The defendant, Gary Holmberg, was driving a pickup truck-camper during the early morning hours on Interstate 80 in western Nebraska. Trooper Hollis Compton<sup>7</sup> of the Nebraska Safety Patrol

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1. 194 Neb. 337, 231 N.W.2d 672 (1975).

2. See *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959).

3. See *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Carroll v. United States*, 267 U.S. 132, 162 (1924).

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

U.S. CONST. amend. IV.

5. 422 U.S. 873 (1975). See notes 26-47 *infra* and accompanying text.

6. The *Holmberg* opinion states:

[T]his opinion was written prior to the release of *United States v. Brignoni-Ponce* . . . . It has been reaffirmed subsequent to that decision upon the ground that footnote 8 limits that case to Border Patrol agents, and specifically excepts the situation present herein.

194 Neb. at 347, 231 N.W.2d at 678. See note 14 *infra* and accompanying text.

7. Officer Compton was the arresting officer in several similar Nebraska cases, including *United States v. Harris*, Crim. No. 74-0-116 (D. Neb. Jan. 31, 1975); *United States v. Pitchford*, Crim. No. 74-0-47 (D. Neb.

stopped the defendant's vehicle "for the purpose of checking his operator's license, the vehicle registration and vehicle identification number. There was no other reason for the stop."<sup>8</sup> While doing this, the officer smelled the odor of marijuana and observed marijuana seeds on the floor of the vehicle. With the defendant's consent,<sup>9</sup> Trooper Compton searched the vehicle and found a substantial amount of marijuana. He arrested the defendant and took him to jail, where a "strip search" disclosed more drugs. Holmberg was convicted for possession of marijuana with the intent to distribute, deliver or dispense and for the possession of amphetamines and cocaine. On appeal to the Supreme Court of Nebraska, he argued that the stop was an unreasonable seizure under the fourth amendment since it was unsupported by a reasonable suspicion of a violation of the law.<sup>10</sup>

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Nov. 27, 1974); *United States v. Bell*, 383 F. Supp. 1298 (D. Neb. 1974); *State v. Shepardson*, 194 Neb. 673, 235 N.W.2d 218 (1975); *State v. Romonto*, 190 Neb. 825, 212 N.W.2d 641 (1973).

8. The officer acted under the authority of Nebraska law, providing in part that:

[A]ll members of the Nebraska State Patrol and all other peace officers shall have the power . . . (4) when in uniform, to require the driver [of any vehicle] to stop and exhibit his operator's license and registration card issued for the vehicle, and the registration plates and the registration card thereon

NEB. REV. STAT. § 60-435 (Reissue 1974).

The vehicle identification number on Holmberg's camper was located on the front door jamb of the vehicle. Brief for Appellant at 6. When such vehicles are checked, it is necessary for the investigating officer to open the door of the vehicle. Cf. *Cotton v. United States*, 371 F.2d 385, 393-94 (9th Cir. 1967).

9. The consent issue was argued in both briefs. The court, however, apparently concluding that consent was given, did not discuss the issue in its opinion.
10. The *Holmberg* opinion indicates the defendant argued that the momentary stopping of a motorist for an inspection constitutes an arrest, requiring "probable cause." A reading of the briefs, however, indicates the defendant did not contend that more than a "reasonable suspicion" of wrongdoing should be required. See Brief for Appellant on Motion for Rehearing at 10. The court gave the issue short shrift:

Defendant is laboring under the misapprehension that the same rule on probable cause applies when a person is merely stopped and questioned as when he is arrested. Defendant's approach presents a clash of interest between the protection of the public and right of an individual. His premise is false and would cripple law enforcement.

194 Neb. at 340, 231 N.W.2d at 675, quoting from *State v. Carpenter*, 181 Neb. 639, 644-45, 150 N.W.2d 129, 133 (1967).

Though *Henry v. United States*, 361 U.S. 98 (1959), had indicated that stopping a motor vehicle constituted an arrest, *Terry v. Ohio*, 392 U.S. 1 (1968), foreclosed the possibility of a literal reading of *Henry*. See Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA.

Citing the state's interest in highway safety, the momentary nature of the stop, the lack of alternatives for enforcing the state's motor vehicle licensing laws,<sup>11</sup> and the difficulty of enforcing such laws when a reasonable suspicion is required, the Supreme Court of Nebraska upheld the constitutionality of the statute authorizing the stop, and affirmed the defendant's conviction.<sup>12</sup> The court added that if the facts were to disclose that a stop was used as a pretext for reasons unrelated to the enforcement of state licensing laws, the stop would be held arbitrary, unreasonable, and violative of the fourth amendment.<sup>13</sup>

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L. REV. 287 (1971). *Terry* approved a limited, brief stop of a suspicious individual in order to determine his identity or to obtain information. In *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Supreme Court extended the suspicion test of *Terry* to the stopping of a moving automobile. See 422 U.S. at 888 (Douglas, J., concurring); notes 26-47 and accompanying text *infra*.

Under the "exclusionary rule" evidence obtained in an illegal search or seizure may not be admitted into evidence against those whose rights have been violated. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). See also *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360-61 (1974).

11. The court stated: "Stopping the vehicles for inspection is the only practical method of enforcement of section 60-435 R.R.S. 1943." 194 Neb. at 340, 231 N.W.2d at 675. The section, however, is merely an enforcement provision for Nebraska's licensing and registration statutes.

NEB. REV. STAT. § 60-403 (Reissue 1974), provides:

Except as herein otherwise provided, no person, resident of the state of Nebraska, shall operate a motor vehicle upon the streets, alleys or public highways of the State of Nebraska until such person shall have obtained a license for that purpose.

NEB. REV. STAT. § 60-302 (Reissue 1974), provides:

No motor vehicle . . . shall be operated on the highways of this state unless such vehicle is registered in accordance with the provisions of this act. . . .

12. See 194 Neb. at 347, 231 N.W.2d at 678.

13. *Id.* at 346, 231 N.W.2d at 678.

Three months after the *Holmberg* decision, the Nebraska Supreme Court again considered the constitutionality of random spot checks. In *State v. Shepardson*, 194 Neb. 673, 235 N.W.2d 218 (1975), the defendant was driving a red van with a U-Haul trailer eastward on Interstate 80 in western Nebraska. Trooper Hollis Compton, see note 7 *supra*, noticing the defendant's vehicle, turned his patrol car around, intending to stop the defendant to check his driver's license and vehicle registration papers. When Officer Compton caught up to the defendant, the defendant had already stopped at a service station. After examining the defendant's driver's license and trailer rental agreement, and while checking the vehicle number against the vehicle registration, the officer noticed what he believed to be marijuana seeds on the threshold of the van's door and in front of the driver's seat. In re-

The *Holmberg* court asserted that a footnote to the *Brignoni-Ponce* opinion<sup>14</sup> limited that holding to stops by Border Patrol agents, and, therefore, dismissed *Brignoni-Ponce* as being inapplicable. That case, however, represents the United States Supreme Court's most recent discussion of the fourth amendment's applicability to the stopping of automobiles, and as such, its reasoning is valu-

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sponse to an inquiry by Officer Compton, the defendant produced a bag containing a substance believed by the officer to be marijuana. The defendant was arrested. A search of the van disclosed a substance believed by the officer to be marijuana, and the defendant was charged with possession of a controlled substance. Prior to his trial, he moved to have suppressed the evidence obtained during the search of his vehicle. After a hearing overruling the motion, the defendant was convicted. On appeal to the Nebraska Supreme Court, the defendant argued that, in being confronted by the officer without cause, he had been subjected to an unreasonable seizure in violation of the fourth amendment. Though substantially reiterating the reasoning it had followed in *Holmberg*, the court added:

Officer Compton testified that the defendant "didn't seem to fit his vehicle." The thought occurred to Officer Compton that the vehicle might be stolen. This, together with the authority given Officer Compton under section 60-435(4), R.R.S. 1943, to make "random" and "spot" checks for proper vehicle registration papers, was sufficient justification for Officer Compton to approach the defendant's vehicle, which was already stopped at a service station, and to make the initial inquiries that he did. This court has recognized that the rule for probable cause when a person is merely stopped and questioned is not the same as when a person is arrested.

194 Neb. 676, 235 N.W.2d 221.

What the court meant by this statement is unclear. The only interpretation consistent with *Holmberg* is that, since a function of registration is to certify ownership, see Note, *Automobile License Checks and the Fourth Amendment*, 60 VA. L. REV. 666, 687 n.103 (1974) [hereinafter cited as *Automobile Checks and the Fourth Amendment*]; *State v. Hatfield*, 112 W. Va. 424, 164 S.E. 518 (1932) (license-registration checks justified, in part, as protection for automobile owners against unauthorized use of their vehicles), the detection of auto theft is related to the purposes of section 60-435 and officers will be able to rely on that section to justify stops made to investigate car thefts.

14. Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.

422 U.S. at 883 n.8.

able in considering whether automobile stops, in whatever context, violate the fourth amendment. The court's failure to consider the reasoning of *Brignoni-Ponce* leaves the *Holmberg* opinion extremely unsatisfying.

## II. FOURTH AMENDMENT SEIZURES

The basic purpose of the fourth amendment,<sup>15</sup> as the Supreme Court has consistently affirmed, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.<sup>16</sup> The amendment applies to all seizures of the person, including those that involve only a brief detention short of traditional arrest.<sup>17</sup> By its language, it prohibits only those seizures that are "unreasonable,"<sup>18</sup> with the reasonableness of a particular search or seizure determined by balancing the governmental and individual interests at stake.<sup>19</sup> A seizure of the person occurs "whenever a police officer accosts an individual and restrains his freedom to walk away."<sup>20</sup>

A police officer may arrest a suspect only when he has "probable cause" to do so—only when "the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."<sup>21</sup> But in *Terry v. Ohio*,<sup>22</sup> the Supreme Court approved an investigative seizure—a pat-down for weapons—based upon facts not amounting to probable cause.<sup>23</sup>

15. See note 4 *supra*.

16. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The fourth amendment is applicable to the states through the fourteenth. *Mapp v. Ohio*, 367 U.S. 643 (1961).

17. See 422 U.S. at 878; *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1, 16-19 (1968).

18. 422 U.S. 873, 878 (1975).

19. *Id.* See also *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Cook*, *supra* note 10.

20. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). See also LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters*, and *Beyond*, 67 MICH. L. REV. 39 (1968).

21. See note 3 *supra*.

22. 392 U.S. 1 (1968).

23. In *Adams v. Williams*, 407 U.S. 143 (1972), the Court, extending *Terry*, held that an investigative seizure, absent a frisk, was justified when based upon a reasonable suspicion:

The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an immediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more in-

only a "reasonable suspicion" was required. However, under *Terry*, 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."<sup>24</sup> "Anything less," wrote Chief Justice Warren, "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."<sup>25</sup>

In *United States v. Brignoni-Ponce*, the Supreme Court extended the *Terry* "suspicion" test to the stopping of a moving automobile.<sup>26</sup> Two officers of the United States Border Patrol, as part of the Patrol's regular traffic checking operations in southern California,<sup>27</sup> were observing northbound traffic from a patrol car parked at the side of the highway, the car's headlights being used to illuminate passing cars. The officers pursued and stopped the defendant's car solely because its three occupants appeared to be of Mexican descent. When it was determined that the driver's two passengers were aliens who had entered the country illegally, all three were arrested. The defendant was charged with two counts of knowingly transporting illegal immigrants, in violation of 8 U.S.C. § 1324 (a) (2).<sup>28</sup> At trial, he moved to suppress the testi-

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formation, may be most reasonable in light of the facts known to the officer at the time.

*Id.* at 145-46.

24. 392 U.S. at 21.

25. *Id.* at 22.

26. See 422 U.S. 873, 888 (1975) (Douglas, J., concurring).

27. See notes 48-53 *infra* and accompanying text.

28. 8 U.S.C. § 1324 (1970), provides:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

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(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law;

....  
any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs....

mony of his two passengers. After denial of the motion, he was convicted on both counts. The Court of Appeals for the Ninth Circuit, applying the principles of *Almeida-Sanchez v. United States*,<sup>29</sup> held that the fourth amendment forbids stopping a vehicle, even for the limited purpose of questioning its occupants, unless the officers have a "founded suspicion" that the vehicle contains aliens illegally in the country. The court said that Mexican ancestry alone could not support such a "founded suspicion," and held that the motion to suppress should have been granted.<sup>30</sup> An appeal was subsequently made to the United States Supreme Court.

The Court sustained the decision of the court of appeals. Referring to *Terry and Adams v. Williams*,<sup>31</sup> it declared:

These cases together establish that in appropriate circumstances the Fourth Amendment allows a properly limited "search" or "seizure" on facts that do not constitute probable cause to arrest or to search for contraband or evidence of crime. . . . The limited searches and seizures in [*Terry and Adams*] were a valid method of protecting the public and preventing crime. In this case as well, because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border, we hold that when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion.<sup>32</sup>

But the Court refused to allow Border Patrol officers to stop vehicles upon less than a reasonable suspicion:

We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. . . . To approve roving-patrol stops of all vehicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with

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29. 413 U.S. 266 (1973). In *Almeida-Sanchez*, the Court held that the Border Patrol's warrantless search of the defendant's automobile, at a point twenty-five miles north of the Mexican border, was violative of the fourth amendment. Evidence seized in the search was not admissible against the defendant, because the search was without probable cause or consent. The Court refused to equate the search with administrative inspections (see text accompanying notes 87-90), because the officers had neither a warrant nor any reason to believe that the defendant had been engaged in illegal activity.

30. *United States v. Brignoni-Ponce*, 499 F.2d 1109 (9th Cir. 1974).

31. 407 U.S. 143 (1972). See note 23 *supra*.

32. 422 U.S. at 881.



their use of the highways, solely at the discretion of Border Patrol officers.<sup>33</sup>

Prior to *Brignoni-Ponce*, Border Patrol officers had exercised broad powers in stopping vehicles, with their jurisdiction limited only to within a "reasonable distance"<sup>34</sup> from the border.<sup>35</sup> In reaching its decision to limit the Patrol's authority, the Court considered three central factors: (1) the importance of the governmental interest at stake, (2) the minimal intrusion of a brief stop, and (3) the absence of practical alternatives for policing the border.<sup>36</sup>

33. *Id.* at 882. See *United States v. Byrd*, 520 F.2d 1101 (5th Cir. 1975).

Similarly, in *Carroll v. United States*, 267 U.S. 132, 153-54 (1925), the Court said:

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . . [T]hose lawfully within the country entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

34. 8 U.S.C. § 1357 (1970) provides:

(a) Any officer or employee of the service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle . . . .

35. See 8 C.F.R. § 287.1(a) (1975), which defines "reasonable distance" as 100 miles from the border.

36. Similarly, in *Camara v. Municipal Court*, 387 U.S. 523 (1967), where the Court held that the state's interest in enforcing a municipal housing code justified an invasion of an individual's privacy, the Court considered the following elements as being persuasive:

First, such programs have a long history of judicial and public acceptance. . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. Many such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

*Id.* at 537. See *Automobile Checks and the Fourth Amendment*, *supra* note 13, at 683-88.

In regard to the first point, the importance of the Border Patrol's function, the Court observed that as many as twelve million aliens were illegally in the country, an estimated eighty-five per cent of whom were from Mexico.<sup>37</sup> Obviously impressed with the magnitude of the problem, the Court noted the economic and social problems created by illegal immigrants, the competition for jobs between them and the rest of the population, the increased demand for social services, and the fact that "aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation."<sup>38</sup>

As the second factor, the Court wrote that since a stop by a roving patrol "usually consumes no more than a minute,"<sup>39</sup> such a stop could be justified on facts that do not amount to the probable cause required for arrest. The brevity of the stop was not, however, persuasive that less than a reasonable suspicion would suffice as justification for such stops.<sup>40</sup>

Lastly, the Court discussed the existence of alternatives to stops unsupported by reasonable suspicion. It stated that "the nature of illegal alien traffic and the characteristics of smuggling operations tend to generate articulable grounds for identifying violators,"<sup>41</sup> and enumerated, but did not express an opinion on the merits of<sup>42</sup> several factors Border Patrol officers might take into account in deciding whether or not to stop a car in the border area. They include the characteristics of the area in which the officers encounter a vehicle, the area's proximity to the border, the usual patterns of traffic on the particular road, and previous experience with alien traffic.<sup>43</sup> Information about illegal border crossings in

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37. See *United States v. Baca*, 368 F. Supp. 398, 402 (S.D. Cal. 1973).

38. 422 U.S. at 878-79.

39. *Id.* at 880.

40. Although not expressly discussed in the opinion, the question of whether roving-patrol stops are personal in nature or aimed at the discovery of evidence of crime was implicitly considered by the Court. In *Camara*, the nonpersonal nature of building inspections was in part persuasive of the constitutionality of a search made with a warrant granted on less than probable cause. Roving-patrol stops by the Border Patrol are both personal in nature and aimed at the discovery of evidence of crime. See note 13 *supra*.

41. 422 U.S. at 883.

42. *Id.* at 890 (Douglas, J., concurring). Justice Douglas noted that: [B]y specifying factors to be considered without attempting to explain what combination is necessary to satisfy the test, the Court may actually induce the police to push its language beyond intended limits and to advance as a justification any of the enumerated factors even where its probative significance is negligible.

43. *Id.* at 884-85. See *Carroll v. United States*, 267 U.S. 132, 159-61 (1925);

the area, the driver's behavior,<sup>44</sup> the appearance of the vehicle itself,<sup>45</sup> or even whether the mode of dress or haircut of the occupants of the vehicle is characteristic of persons who live in Mexico<sup>46</sup> may also be factors to consider. Clearly, even when a "reasonable suspicion" is required, Border Patrol officers retain a fair amount of discretion.<sup>47</sup>

As an alternative to roving-patrol stops based upon a reasonable suspicion, the Border Patrol's procedures include maintaining established checkpoints on highways leading from the border.<sup>48</sup> Since *Brignoni-Ponce* was limited to roving-patrol stops, the Court did not indicate what standards would apply for the stopping of motorists at established checkpoints. However, in *United States v. Ortiz*,<sup>49</sup> a companion case to *Brignoni-Ponce*, the Court, though holding that the "probable cause" standard applied no less to a search at a fixed checkpoint than to a search made by a roving patrol, did intimate that different standards might apply at fixed checkpoints if official discretion could be significantly reduced. In *Ortiz*, two Border Patrol officers stopped the defendant's car for a "routine immigration search" at an established traffic checkpoint, sixty-six road miles north of the Mexican border in southern California.<sup>50</sup> A

*United States v. Jaime-Barrios*, 494 F.2d 455 (9th Cir.), *cert. denied*, 417 U.S. 972 (1974).

44. See *United States v. Larios Montes*, 500 F.2d 941 (9th Cir. 1974); *Duprez v. United States*, 435 F.2d 1276 (9th Cir. 1970).

45. Border Patrol "officers say that certain station wagons, with large compartments for fold-down seats or spare tires, are frequently used for transporting concealed aliens." 422 U.S. at 885. See also *United States v. Bugarin-Casas*, 484 F.2d 853 (9th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *United States v. Wright*, 476 F.2d 1027 (5th Cir. 1973).

46. 422 U.S. at 885.

47. But see *United States v. Ortiz*, 422 U.S. 891, 899 (1975) (Burger, C.J., concurring).

48. See note 50 *infra*.

49. 422 U.S. 891 (1975).

50. The Court described the checkpoint as follows:

Approximately one mile south of the checkpoint is a large black on yellow sign with flashing yellow lights over the highway stating 'ALL VEHICLES, STOP AHEAD, 1 MILE.' Three-quarters of a mile further north are two black on yellow signs suspended over the highway with flashing lights stating 'WATCH FOR BRAKE LIGHTS.' At the checkpoint, which is also the location of a State of California weighing station, are two large signs with flashing red lights suspended over the highway. These signs each state 'STOP HERE—U.S. OFFICERS.' Placed on the highway are a number of orange traffic cones funneling traffic into two lanes where a Border Patrol agent in full dress uniform, standing behind a white on red 'STOP' sign checks traffic. Blocking traffic in the unused lanes are official U.S. Border Patrol vehicles with flashing red

search of the trunk of the car disclosed three aliens illegally in the country. Later, the defendant was convicted of transporting illegal aliens. The Court of Appeals for the Ninth Circuit held that *Almeida-Sanchez*, which required probable cause for searches conducted by roving patrols, applied as well to searches conducted at established traffic checkpoints. The court reversed the conviction on the ground that the search of defendant's vehicle was made without probable cause. The Supreme Court affirmed, holding that "[w]hile the differences between a roving patrol and a checkpoint would be significant in determining the propriety of the stop, which is considerably less intrusive than a search, . . . they do not appear to make any difference in the search itself."<sup>51</sup> Further, since the Border Patrol agent's discretion as to whether to search was not significantly limited at the established checkpoint, the probable cause standard was a necessary check on official discretion. But the Court withheld judgment on whether a Border Patrol officer might lawfully stop a motorist for questioning at an established checkpoint without reason to believe that the particular vehicle was carrying aliens.<sup>52</sup> Clearly, if Border Patrol officers were given such latitude, a significant alternative to the roving-patrol stop would be at their disposal. That issue is particularly relevant in considering the validity of spot checks, where the only practical alternative to stops unsupported by a reasonable suspicion may well be the more systematic, indiscriminatory roadblock.<sup>53</sup>

Since the Supreme Court in *Brignoni-Ponce* refused to allow Border Patrol officers to exercise the broad discretionary powers granted them without a reasonable suspicion of a violation of the immigration laws, the major issue to be considered in examining *Holmberg* is whether the special problems inherent in the enforcement of licensing and registration laws justify dispensing with the "suspicion" requirement deemed necessary in *Brignoni-Ponce*.

### III. AUTOMOBILE STOPS

The motor vehicle laws of every state contain provisions requiring persons operating motor vehicles to be licensed,<sup>54</sup> and the

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lights. In addition, there is a permanent building which houses the Border Patrol office and temporary detention facilities. There are also floodlights for nighttime operation.

*Id.* at 893, quoting from *United States v. Baca*, 368 F. Supp. 398, 410-11 (S.D. Cal. 1973).

51. 422 U.S. at 895 (emphasis added).

52. See *id.* at 897, n.3.

53. See notes 86-91 *supra* and accompanying text.

54. See, e.g., CAL. VEHICLE CODE, § 12500 (West 1971); N.Y. VEHICLE & TRAFFIC LAW § 509 (McKinney Supp. 1975),

motor vehicles to be properly registered.<sup>55</sup> These laws generally require that the driver's license and registration papers be shown upon demand to law enforcement officers, who have, in some states, been granted express statutory authority to stop motor vehicles and make such examinations.<sup>56</sup> Where express authority has not been granted, courts have often found the implied authority in licensing and registration statutes to compel a stop.<sup>57</sup>

Where inspection stops have been challenged as unlawful seizures, the courts, in balancing the governmental and individual interests, have reached differing conclusions. One line of cases, including *State v. Holmberg*, strikes the balance in favor of the state and adopts the position that if an inspection stop is a pretext for other motives the stop will be held invalid.<sup>58</sup> Illustrative of this view is *Palmore v. United States*.<sup>59</sup> In that case, two District of Columbia police officers, recognizing from the Virginia license tags on it that the defendant's car had been rented, decided to run a "spot check" to determine if the defendant had a proper license and rental agreement (the equivalent of proper registration). The defendant had committed no moving traffic violation, and his vehicle had no apparent equipment defect. During the stop, one of the officers, positioned at the right front window of the car, saw the trigger mechanism of a pistol protruding out from beneath the arm rest on the front door of the defendant's car. He seized the weapon and, after learning that it was unregistered, placed the defendant under arrest. Responding to the defendant's contention that the stop constituted an unreasonable seizure, the court said:

At the outset, we reject the rigid rule which appellant urges us to adopt: That a police officer may stop an automobile for a spot check of the driver's license and the car's registration *only* when he has articulable suspicion, as defined in *Terry*, that either of such documents is invalid. The touchstone of the fourth amendment is reasonableness. It seems to us in this age of the motor car that when the community's interest in limiting use of its highways to licensed drivers in registered autos is balanced against the momentary interruption of the motorist which is

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55. *Automobile License Checks and the Fourth Amendment*, *supra* note 13, at 670; see, e.g., CAL. VEHICLE CODE § 4000 (West 1971); N.Y. VEHICLE & TRAFFIC LAW § 401 (McKinney Supp. 1975).

56. See, e.g., FLA. STAT. ANN. § 321.05(1) (Supp. 1973-74); NEB. REV. STAT. § 60-435 (Reissue 1974).

57. See, e.g., *United States v. Lepinski*, 460 F.2d 234 (10th Cir. 1972).

58. See, e.g., *United States v. Davis*, 459 F.2d 458 (9th Cir. 1972); *Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967); *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965); *Bowling v. United States*, 450 F.2d 1002 (D.C. Cir. 1965); *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964).

59. 290 A.2d 573 (D.C. App. 1972), *aff'd on other grounds*, 411 U.S. 389 (1973).

necessary to ascertain whether he is complying with these licensing requirements such intrusion is *not* so unreasonable as to be violative of the fourth amendment.<sup>60</sup>

The court further held that requiring an articulable suspicion "might render virtually unenforceable the congressional prohibition against *all* unlicensed drivers and unregistered cars driving on District of Columbia streets,"<sup>61</sup> and added that "a 'spot check' is *not* to be used as a substitute for a search for evidence of some crime unrelated to possession of a driver's permit."<sup>62</sup> Although many cases have expressed a similar willingness to hold invalid spot checks used as a pretext for other reasons,<sup>63</sup> few have actually done so<sup>64</sup> and those only when the stop in question was clearly a sham.<sup>65</sup> Several other cases have stated or implied that a stop to investigate *other* activity may be justified as a "routine license check" even where the officers do not have either probable cause or a reasonable suspicion sufficient to support an investigation of such other activity.<sup>66</sup>

A second, shorter line of cases that began essentially with *Commonwealth v. Swanger*,<sup>67</sup> has struck the balance in favor of the individual.<sup>68</sup> In *Swanger*, two police officers stopped the car

60. *Id.* at 582 (footnotes omitted).

61. *Id.*

62. *Id.*, quoting from *Mincy v. District of Columbia*, 218 A.2d 507, 508 (D.C. App. 1966).

63. See cases cited in note 58 *supra*.

64. See *Montana v. Tomich*, 332 F.2d 987 (9th Cir. 1964); *State v. Rosenberg*, 24 Ariz. App. 341, 538 P.2d 770 (1975). In *Rosenberg*, the court noted that:

[W]hile we are not prepared to say the trial court incorrectly determined that the registration check was not merely a pretense to execute an illegal search, the circumstances of the officer checking only this "hippy" type vehicle, his failure to await the results of his radio check for stolen vehicle and his snatching articles from the car without probable cause, lends credence to the suspicion that the registration check was merely a subterfuge.

65. See *Amsterdam*, *supra* note 10, at 445 n.110.

66. See *United States v. Geelan*, 509 F.2d 737 (8th Cir. 1974), *cert. denied*, 421 U.S. 999 (1975); *United States v. Kelley*, 462 F.2d 372 (4th Cir. 1972); *United States v. Turner*, 442 F.2d 1146 (8th Cir. 1971); *Rodgers v. United States*, 362 F.2d 358 (8th Cir. 1966); *D'argento v. United States*, 353 F.2d 327 (1965); *State v. Ream*, 19 Ariz. App. 131, 505 P.2d 569 (1973); *State ex rel. Berger v. Cantor*, 13 Ariz. App. 555, 479 P.2d 432 (1970); *State v. Cobbuzzi*, 161 Conn. 371, 288 A.2d 439 (1971), *cert. denied*, 404 U.S. 1017 (1972); *State v. Grabowski*, 206 Kan. 532, 479 P.2d 830, *cert. denied*, 403 U.S. 918 (1971); *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973). But see *United States v. Harris*, 404 F. Supp. 1116, 1123 (E.D. Pa. 1975).

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

68. See *State v. Puig*, 23 Ariz. App. 516, 534 P.2d 447 (1975); *State v.*

in which the defendant was riding for a "routine check." Authority to make the stop was based upon a Pennsylvania statute<sup>69</sup> similar to the Nebraska law.<sup>70</sup> Burglar's tools observed inside the car during the stop were used to convict the defendant of burglary after the defendant's motion to suppress the evidence as the product of an illegal seizure was denied. The Supreme Court of Pennsylvania reversed the lower court's decision, articulating its reasoning as follows:

Focusing on the government interest, the Commonwealth asserts the automobile is a dangerous instrumentality, one of the nation's highest ranking causes of death. It is argued that in order to insure the safety of the highways and for the protection of the public, the police should be given the right to stop automobiles at random, without cause, to ascertain if the operator and the vehicle meet the comprehensive standards set forth in the Motor Vehicle Code. On the other side, we must consider the personal liberty and the right of the individual to be free from government intrusions without apparent reason. On balance, we conclude that the interest of the individual outweighs that of the Commonwealth.<sup>71</sup>

The *Swanger* court found most objectionable the fact that there could be no judicial review of stops made without apparent justification, and held that, before officers can single out a particular vehicle for a stop, they must be able to point to specific and articulable facts that justify a reasonable suspicion of some violation of the law.

Although the Nebraska Supreme Court chose to follow the *Palmore* line of cases, *Holmberg* is unique, as it represents the first case to consider the validity of random spot checks in light of *Brignoni-Ponce* and *Ortiz*.

#### IV. BALANCING THE INTERESTS

The first element considered in *Brignoni-Ponce* was the importance of the governmental interest at stake. There, despite the acknowledged importance of diminishing the flow of illegal aliens, the Court refused to allow Border Patrol officers to stop vehicles

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Ochoa, 23 Ariz. App. 510, 534 P.2d 441 (1975); *People v. Grace*, 32 Cal. App. 3d 447, 108 Cal. Rptr. 66 (1973); *People v. Ingle*, 36 N.Y.2d 413, 330 N.E.2d 39, — N.Y.S.2d — (1975).

69. PA. STAT. ANN. tit. 75, § 1221(b) (1971) provides:

Any peace officer, who shall be in uniform, and shall exhibit his badge or other sign of authority, shall have the right to stop any vehicle, upon request or signals for the purpose of inspecting the said vehicle, as to its equipment and operation, and securing of such other information as may be necessary.

70. See note 8 *supra*.

71. 453 Pa. at 111-12, 307 A.2d at 878 (footnotes omitted).

without a "reasonable suspicion." *Brignoni-Ponce* clearly stands for the proposition that the importance of a governmental interest standing alone will not justify dispensing with the "suspicion" test.

The interests at stake in the licensing check are, perhaps, not as great as those present in the context of Border Patrols.<sup>72</sup> Highway safety has been the primary justification whether the procedure has included vehicle inspection or merely a check of the operator's license and the vehicle's registration. One court expressed its concern about highway safety in the following way:

The State has a legitimate interest in the roadworthiness of automobiles which transport, but which can maim and kill. This comprehends both technical fitness of the driver and the mechanical fitness of the machine. After the event it is always too late. The State can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it because the inspection may produce the irrefutable proof that the law has just been violated. The purpose of the check is to determine the present, not the past: is the car, is the driver now fit for further driving? In the accommodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers stopping cars in the hopes of uncovering the evidence of nontraffic crimes, . . . the stopping for road checks is reasonable and therefore acceptable.<sup>73</sup>

Few courts have challenged the assumption, implicit above, that state licensing and registration laws contribute to highway safety.<sup>74</sup> In addition, none of the cases researched discussed the significance of there being more properly licensed drivers on the road driving cars that are, apparently, mechanically sound, than there are licensing statute violators. In *Brignoni-Ponce*, however, the Supreme Court expressed concern that substantial numbers of law abiding citizens could be subjected to governmental intrusion.<sup>75</sup> The danger is equally great in the context of inspection stops.

The second consideration in *Brignoni-Ponce* was the nature and scope of the intrusion. Rather than confronting the potential for

72. See *State v. Holmberg*, 194 Neb. 337, 347, 231 N.W.2d 672, 679 (1975) (dissenting opinion).

73. *Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967).

74. *State v. Ochoa*, 23 Ariz. App. 510, 534 P.2d 441 (1975); cf. *People v. Superior Court*, 7 Cal. 3d 186, 193-94, 101 Cal. Rptr. 837, 842, 496 P.2d 1205, 1210 (1972), where the Supreme Court of California, referring to a California statute requiring that a registration card be kept in each motor vehicle, said "it bears remembering that section 4454 is essentially a regulatory measure and does not protect the public from either dangerous driving or unsafe equipment."

75. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975).



arbitrary governmental interference with the *individual*, the *Holmberg* court focused on the inconvenience to the *motoring public* that would ensue if roadblocks, rather than spot checks, were used, and held that spot checks were, therefore, preferable. As the central concern of the fourth amendment has always been the shielding of the individual from arbitrary governmental intrusions,<sup>76</sup> the court's aim seems somewhat wide of the mark. In *Brignoni-Ponce*, interference with the motoring public as a class was significant only insofar as individual members of that class could be discriminatorily intruded upon.

Moreover, in *Brignoni-Ponce*, the brevity of the stop did not convince the Court of the stop's constitutionality. In the spot check, as in the roving-patrol stop, the detention is momentary, usually consuming no more than one or two minutes. Indeed, if there is any distinction to be made as to the scope of the two intrusions, the spot check, where the officer may often open the door of the vehicle to check the vehicle identification number located on the door jamb, seems the more intrusive of the two.<sup>77</sup>

The Supreme Court has, irregularly, in search and seizure cases, weighed in the balance the degree to which the search or seizure was personal or impersonal. Though the factor was not expressly discussed in *Brignoni-Ponce*—perhaps because the case involved only the stopping, and not the searching of a vehicle—the Supreme Court has, in other cases, given the factor considerable weight. For example, in *Camara v. Municipal Court*,<sup>78</sup> the Court approved municipal housing inspections made with warrants issued without probable cause in part because the inspections were “neither personal in nature nor aimed at the discovery of evidence of crime.”<sup>79</sup> The highway inspection stop, like the roving-patrol stop, is, however, both personal in nature (*i.e.*, directed at selected motorists) and aimed at the detection of crime.<sup>80</sup> The police officer, because his discretion is virtually uncurbed is guided only by the quirks of his own personality and can selectively detain any individual driver. Labeling such stops as “random,” with the implication that they can be made impartially, would seem to be a weak argument when there is no judicial review of the officer's initial decision.

Neither in the importance of the governmental interest, nor in the nature and scope of the intrusion, can random spot checks be

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76. See *United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Shmerber v. California*, 384 U.S. 757, 767 (1966).

77. Cf. *Cotton v. United States*, 371 F.2d 395 (1967).

78. 387 U.S. 523 (1967).

79. *Id.* at 537.

80. See note 13 *supra*.

significantly distinguished from roving-patrol stops at the border. The central difference lies in the third factor considered in *Brignoni-Ponce*: the availability of alternatives to random stops unsupported by reasonable suspicion. In *Brignoni-Ponce*, the Court emphasized the point that smuggling operations tend to generate articulable grounds for suspicion. The same cannot be said for licensing violations, at least under current systems of licensing and registration.<sup>81</sup> Alternatives, less susceptible to official abuse than the random check, are, however, available.

First, there may be instances, albeit limited in number, when violations of state licensing laws are observable. Nonpossession of a driver's license reasonably might be inferred where the driver of a vehicle appears too young to be licensed to drive.<sup>82</sup> A violation of the state registration laws might be evidenced by an apparent lack of license plates or registration sticker,<sup>83</sup> or by damage to or obstruction of the license plates.<sup>84</sup> Another possibility is that law enforcement officers might reasonably check a driver's license and registration as part of a detention based initially upon an apparent violation of the state's laws regarding the operation and maintenance of motor vehicles, or pursuant to an investigation initiated because a vehicle met the description of a stolen

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81. The Report of the President's Task Force on Highway Safety recommends the following reforms:

Enforcement of the suspended or revoked driver license is virtually nonexistent for all practical purposes because of difficulties of identification. Specially coded license plates should be employed in demonstration programs to determine their effectiveness in controlling driving without a valid license. Such tags should enable police to identify the person convicted, while not interfering with use of the car by other family members. It is recommended that consideration be given to impounding the car or revoking the license plates of a car driven by a person without a valid license when involved in an accident.

MOBILITY WITHOUT MAYHEM, THE REPORT OF THE PRESIDENT'S TASK FORCE ON HIGHWAY SAFETY 39 (1970).

82. *State v. Puig*, 23 Ariz. App. 516, 534 P.2d 449 (1975).
83. *See United States v. Harris*, Crim. No. 74-0-116 (D. Neb. January 31, 1975); *United States v. Bell*, 383 F. Supp. 1298 (D. Neb. 1974). In *Harris*, the United States District Court for the District of Nebraska determined that the presence of both a license plate and an "in transit" sticker on a vehicle was sufficient to justify the suspicion that a licensing violation was being committed. On that basis, the court found NEB. REV. STAT. § 60-435 (Reissue 1974) to be constitutional. Earlier, in *Bell*, the same court had invalidated a similar stop as unsupported by a reasonable suspicion. Both *Harris* and *Bell* were decided before *Holmberg*. However, neither was cited in the majority opinion.
84. *State v. Wood*, 195 Neb. 353, — N.W.2d — (1976); *see State v. Romento*, 190 Neb. 825, 827, 212 N.W.2d 641, 643 (1973).

car.<sup>85</sup> And third, Supreme Court cases strongly suggest that more systematic, less discriminatory methods of enforcing state licensing laws might well be sustained as analogous to administrative inspections.<sup>86</sup> In *Camara v. Municipal Court*<sup>87</sup> and *See v. City of Seattle*,<sup>88</sup> the Court approved municipal housing and fire code inspections authorized by warrants issued without probable cause, because such inspections were conducted under routine, periodic, city-wide procedures. As no individual dwelling or business was singled out, the "searches" were, essentially, impersonal.<sup>89</sup> The Court has also held that where statutory procedures are sufficiently prescriptive to reduce the chance of official abuse, specific justification for the initial intrusion may not be required.<sup>90</sup>

In the context of automobile stops, official discretion can be significantly curbed through the use of roadblocks, where all passing motorists are routinely stopped for a momentary check, and where stopping procedures are extensively regulated by statute. When all travelers are stopped, the likelihood of embarrassment to the individual is less than where only a few are singled out. Moreover, a properly designed checkpoint that gives the motorist advance notice of the reason for the stop is less frightening to the individual than being stopped by a patrol car with its lights flashing. Even where, as a matter of course, every fifth vehicle is stopped, official discretion is significantly reduced. For these reasons, systematic stops stand as preferable and practical alternatives to spot checks.<sup>91</sup> It is difficult to justify spot checks by arguing that no

85. See *State v. Puig*, 23 Ariz. App. 516, 534 P.2d 449 (1975); *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968); *Commonwealth v. Mitchell*, 355 S.W.2d 686 (Ky. Ct. App. 1962); Note, *Automobile Spot Checks and the Fourth Amendment*, 6 RUTGERS CAMDEN L.J. 85, 100 (1974).

86. See *Cook*, *supra* note 10, at 313.

87. 387 U.S. 523 (1967).

88. 387 U.S. 541 (1967).

89. See Comment, *Camara and See: Accommodation Between the Right of Privacy and the Public Need*, 47 NEB. L. REV. 613 (1968).

90. Cf. *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970).

In *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973), the court distinguished the administrative inspection cases from random inspection stops:

In *See* the "search" was part of a routine, periodic city-wide canvass of commercial buildings, and in *Camara* the "search" was part of an annual inspection of dwelling houses. These situations lack the arbitrariness inherent in the present case. The "searches" in *See* and *Camara* were part of a systematic plan, whereas, the seizure here lacked any semblance of being part of a systematic plan. The factual situations are very much different.

*Id.* at 114, 307 A.2d at 879.

91. See cases cited in note 85 *supra*.

practical alternatives are available for enforcing licensing and registration laws.<sup>92</sup>

## V. CONCLUSION

The danger of arbitrary governmental interference, inherent in the random spot check, far outweighs the interest of the state in enforcing its licensing laws through "random" stops. Roadblocks, less susceptible to official abuse, are preferable alternatives to a virtually unreviewable procedure. In the future, courts should heed the reasoning of the *Brignoni-Ponce* decision, and require at least a reasonable suspicion of wrongdoing as a condition precedent to the selective stopping of motor vehicles.

*Stewart Walker '77*

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92. A number of cases have upheld the validity of roadblocks used to check driver's licenses and vehicle registrations. See, e.g., *Miami v. Aronovitz*, 114 So. 2d 784 (Fla. 1959); *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968); *Morgan v. Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963).