RUSE DRUG CHECKPOINTS: HOW THE GOVERNMENT'S FALSE ADVERTISING MAY DIMINISH YOUR FOURTH AMENDMENT RIGHTS

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.
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> —*Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

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I. INTRODUCTION

General search warrants issued by England in the mid-1700s accounted for "the first serious friction between the British customhouse officers and the colonists,"[1] and were ultimately "'the first in [a] chain of events which led directly and irresistibly to revolution and independence.'"[2] Mindful of the rampant abuse that resulted from such practices, "the founding fathers sought to bestow upon private individuals on American soil a guarantee against unreasonable governmental intrusion into their lives."[3] It is therefore not surprising that every state constitution since the creation of the Virginia Bill of Rights on June 12, 1776, has had some provision protecting state citizens from unreasonable searches and seizures.[4] The historical context in which the Fourth Amendment was written supports Justice Thomas's statement in *City of Indianapolis v. Edmond*:[5] "I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of

1. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (Da Capo Press 1970) (1937).

2. *See id.* (quoting *Introduction* to AMERICAN HISTORY LEAFLETS, NO. 33, at 1 (Albert Bushnell Hart & Edward Channing eds., Parker P. Simmons Co. 1915) (1895)).

3. J. DAVID HIRSCHEL, FOURTH AMENDMENT RIGHTS 1 (1979).

4. *See* LASSON, *supra* note 1, at 80-82 (chronicling the adoption of such provisions in the constitutions of seven states); BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE app. A, at 193-95 (1991) (listing all fifty states and their corresponding constitutional provisions that provide protection to citizens from unreasonable or unwarranted searches and seizures).

5. City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

individuals not suspected of wrongdoing."[6]

The "program of indiscriminate stops" Justice Thomas was referring to is the use of roadside checkpoints which the Court previously declared constitutional in *United States v. Martinez-Fuerte*[7] and *Michigan Department of State Police v. Sitz*.[8] These roadside checkpoints were upheld despite the fact that they subjected innocent motorists on America's highways to suspicionless seizures.[9] Bearing in mind that "[t]he needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power,"[10] it should come as no surprise that the government will be tempted to expand the use of such checkpoints into areas of crime control unrelated to either drunk driving or controlling the United States-Mexico border.[11]

It is precisely this law enforcement principle that fostered the government's attempt to use suspicionless roadside checkpoints in order to interdict drugs.[12] These drug checkpoints were firmly shut down by the Supreme Court in *City of Indianapolis v. Edmond*,[13] but law enforcement

6. *Id.* at 56 (Thomas, J., dissenting). Though he dissented in *Edmond*, and was thus in favor of declaring the drug checkpoints constitutional, Justice Thomas cited the fact that precedent demanded the result. *Id.* (Thomas, J., dissenting). He did, however, imply that *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), could be overruled, but stated he would not "consider such a step without the benefit of briefing and argument." City of Indianapolis v. Edmond, 531 U.S. at 56 (Thomas, J., dissenting); *see also* Dunaway v. New York, 442 U.S. 200, 213 (1979) ("Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment . . . .").

7. *See* United States v. Martinez-Fuerte, 428 U.S. at 545 (upholding the use of border checkpoints to combat the influx of illegal immigrants into the United States).

8. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. at 447 (upholding the use of sobriety checkpoints to combat drunk driving).

9. *See id*. ("All vehicles passing through a checkpoint would be stopped and their drivers briefly examined for signs of intoxication."); United States v. Martinez-Fuerte, 428 U.S. at 545, 566-67 (upholding the constitutionality of fixed checkpoints to question automobile occupants about the transportation of illegal aliens).

10. Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

11. *See* Illinois v. Lidster, 540 U.S. 419, 422 (2004) (upholding the use of a roadside checkpoint to obtain information related to a hit and run accident that occurred on the same highway a week before the checkpoint was set up).

12. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 42-47 (2000) (analyzing numerous arguments proffered by the City of Indianapolis to analogize its narcotics checkpoints to the checkpoints upheld by the Court in *Sitz* and *Matinez-Fuerte*).

13. *Id*. at 48.

officials have remained vigilant in their attempts to circumvent the Court's line drawing.[14] This vigilance has culminated in the present controversy constituting the focus of this Note—ruse drug checkpoints.

A. *The Theory Behind Ruse Drug Checkpoints*

The Court in *Edmond* stated that "[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . [these] stops can only be justified by some *quantum of individualized suspicion*."[15] Law enforcement officials have focused on this concept of "individualized suspicion" in formulating a new species of drug checkpoints, commonly referred to as ruse drug checkpoints.[16] These checkpoints are set up in an attempt to manufacture the individualized suspicion necessary to distinguish such checkpoints from those declared unconstitutional in *Edmond*.[17] For the reasons set forth in this Note, the attempt to shield these checkpoints from the precedent established in *Edmond* is unavailing. The smoke and mirrors employed by the police in such cases will do little to divert the Court from concluding that these checkpoints are, for all practical purposes, indistinguishable from the drug checkpoints in *Edmond*, and must therefore be declared unconstitutional.

B. *The Basic Setup of Ruse Drug Checkpoints*

Briefly stated, in ruse checkpoints law enforcement officials set up signs on U.S. highways deceptively informing motorists that there is a "Drug Enforcement Checkpoint" some distance ahead.[18] These signs are placed a short distance from rarely used exits, chosen to minimize the interference with law-abiding motorists.[19] Law enforcement officials then

14. *See* United States v. Yousif, 308 F.3d 820, 827-29 (8th Cir. 2002) (deciding the constitutionality of the government's use of ruse drug checkpoints); United States v. Green, 275 F.3d 694, 698-700 (8th Cir. 2001) (same); United States v. Brugal, 209 F.3d 353, 354 (4th Cir. 2000) (same); People v. Roth, 85 P.3d 571, 572-74 (Colo. Ct. App. 2003) (same); State v. Mack, 66 S.W.3d 706, 706-07 (Mo. 2002) (same); State v. McNeal, 6 P.3d 1055, 1056-57 (Okla. Crim. App. 2000) (same).

15. City of Indianapolis v. Edmond, 531 U.S. at 47 (emphasis added).

16. *See* Roth v. Green, Nos. 04-1006, 04-1256, 04-1272, 2005 WL 256580, at *1 (10th Cir. Feb. 3, 2005) (labeling the checkpoints "ruse" drug checkpoints).

17. *See* State v. Mack, 66 S.W.3d at 709 (stating that "the entire purpose of the [ruse drug] checkpoint was to generate the suspicious conduct necessary to constitute 'individualized suspicion'").

18. *See, e.g.*, United States v. Green, 275 F.3d at 697.

19. *Id*. These exits are generally void of any gas stations, lodgings, or restaurants. *Id*.

set up drug checkpoints on these exits under the belief that they have obtained the necessary quantum of individualized suspicion to appease the Court's ruling in *Edmond*.[20] The rationale supporting this belief is that all drivers transporting drugs would be inclined to use this exit after seeing the drug checkpoint sign in order to avoid detection by the police.[21] The flaw in this reasoning is that the majority of individuals taking these exits are still innocent motorists[22] whose Fourth Amendment rights have been sacrificed in an attempt to move "one step closer to winning the war on drugs."[23]

Part II of this Note will begin with an analysis of the current status of roadside checkpoints and the precedential impact that cases like *Edmond* and *Sitz* will have on ruse drug checkpoints. Analysis of these cases will show that the exceptions carved out by the Court, to the Fourth Amendment's general requirement that searches and seizures be justified by at least reasonable suspicion, were crafted with a measure of reluctance and are meant to be limited in their application.[24] Applying these precedents and the balancing test used to test the constitutionality of ruse drug checkpoints will show they are virtually indistinguishable from the unconstitutional drug checkpoints in *Edmond*, and would fail under the Court's analysis.

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20. *See* State v. Mack, 66 S.W.3d at 709 (agreeing with the state's contention that "the [ruse drug] checkpoint in this case is fundamentally different than that in *Edmond* because the required 'quantum of individualized suspicion' is present").

21. *See* United States v. Green, 275 F.3d at 697 (referencing a Franklin County Sheriff Department "Drug Enforcement Checkpoint Plan of Action" which stated that the checkpoints were designed "to enhance the likelihood of contacting drug couriers"); State v. Mack, 66 S.W.3d at 709 (stating that drivers engaged in criminal activity would "exit[] the highway so as to avoid the checkpoint they expected to encounter at the next exit").

22. *See* United States v. Yousif, 308 F.3d 820, 828 n.3 (8th Cir. 2002) (395 drug arrests out of 2537 seizures at ruse drug checkpoint); United States v. Huguenin, 154 F.3d 547, 555-56 (6th Cir. 1998) (128 drug arrests out of 2342 seizures at ruse drug checkpoint); State v. Mack, 66 S.W.3d at 715 n.3 (only 5 drug arrests out of 60 to 150 seizures at ruse drug checkpoint); State v. Damask, 936 S.W.2d 565, 568 (Mo. 1996) (only 1 drug arrest out of 66 seizures at ruse drug checkpoint).

23. Luke R. Spellmeier, Comment, *Bypassing the Fourth Amendment: The Missouri Supreme Court's Use of "Ruse" Reasonable Suspicion to Justify De Facto Drug Interdiction Checkpoints [*State v. Mack*, 66 S.W.3d 706 (Mo. 2002)]*, 42 WASHBURN L.J. 209, 209 (2002).

24. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (stating that while suspicion is generally required to consider a search or seizure reasonable under the Fourth Amendment, the Court has "recognized only *limited* circumstances in which the usual rule does not apply") (emphasis added).

Parts III and IV will analyze the two different approaches that have been taken by courts to assess the constitutionality of ruse drug checkpoints. Part III will focus on the balancing test that the Court developed in *Brown v. Texas*,[25] and Part IV will focus on the application of the *Terry v. Ohio*[26] analysis[27] to the supposed development of reasonable suspicion within the context of ruse checkpoints. These sections will help provide the reader with the proper background and foundational understanding necessary to weigh and analyze the cases addressed in Part V of this Note.

Part V will focus on the case law that has developed surrounding this recent phenomenon. Currently, the Sixth[28] and Eighth[29] Circuits are the only circuits to have distinctively weighed in on the issue. In each of these cases, the courts held that the ruse drug checkpoints were unconstitutional, but the Missouri Supreme Court recently reached the opposite conclusion in *State v. Mack*.[30] The arguments addressed in these cases and others will be scrutinized in order to address the potential weaknesses and strengths in each.

II. EVOLUTION OF SUSPICIONLESS SEIZURES

The United States Supreme Court carved out three narrow exceptions to the general rule that seizures must be justified by reasonable suspicion: permanent border checkpoints designed to intercept illegal aliens,[31] sobriety checkpoints aimed at removing drunk drivers from the

25. Brown v. Texas, 443 U.S. 47, 50-51 (1979) (devising a test that "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and severity of the interference with individual liberty"). This test has been used extensively by the Court in addressing the constitutionality of suspicionless seizures. *See, e.g.*, Illinois v. Lidster, 540 U.S. 419, 426-27 (2004); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990).

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

27. *Id*. at 30-31 (holding that a police officer may conduct a limited search and seizure when he reasonably concludes "that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous").

28. United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998). This case is important because it was decided before *Edmond* and thus did not rely on that case as precedent. The Sixth Circuit applied the balancing test developed in *Brown v. Texas* and determined the ruse drug checkpoint was unconstitutional. *Id*. at 563.

29. *See* United States v. Yousif, 308 F.3d 820, 827-28 (8th Cir. 2002) (holding a ruse checkpoint unconstitutional).

30. State v. Mack, 66 S.W.3d 706, 710 (Mo. 2002) (holding a ruse checkpoint constitutional).

31. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (holding

road,[32] and roadblocks set up for the purpose of verifying drivers' licenses and vehicle registrations.[33] The Court drew a line in the sand in 2000 when it declared that drug checkpoints, with the primary purpose being the detection of "ordinary criminal wrongdoing," contravened the Fourth Amendment.[34] "Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."[35] The Court clearly and unambiguously refused to put drug checkpoints in the limited category of acceptable exceptions to the Fourth Amendment's requirement that searches and seizures are reasonable only when there is a certain level of individualized suspicion of wrongdoing.[36]

A. *Immigration Checkpoints*

In *Martinez-Fuerte*, the Supreme Court upheld for the first time a program that subjected the general public on U.S. highways to suspicionless seizures.[37] The checkpoints in question were permanent border checkpoints located less than one hundred miles from the Mexican-

that border checkpoint stops and questioning "may be made in the absence of any individualized suspicion").

32. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding the initial stop and questioning of motorists at drunk driving checkpoints).

33. *See* Delaware v. Prouse, 440 U.S. 648, 656-57 (1979) (indicating, but not deciding, that license and registration checkpoints, as opposed to individualized stops, would be constitutional because the seizures would involve less discretion on the part of the acting governmental official and would be less intrusive to the motorists than the roving patrols the Court declared unconstitutional in that case). The Court has recently opened the door to a potential fourth class of checkpoints, "information-seeking checkpoints." Illinois v. Lidster, 540 U.S. 419, 428 (2004). In upholding the checkpoint, the Court cited to the grave public concern at issue (the investigation of a fatal hit and run), the objective of the checkpoint being to "help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort," and the fact that officers were seeking voluntary cooperation from the public to obtain information related to the crime. *Id.* at 425, 427. This holding appears to be fact-specific and the potential replication of the information-seeking checkpoint in later cases will be minimal at most. *See id.* at 426 (stating that a proliferation of such checkpoints is not likely).

34. City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000).

35. *Id*. at 42.

36. *Id*. at 41-42.

37. United States v. Martinez-Fuerte, 428 U.S. 543, 566 (1976) (upholding "stops for brief questioning routinely conducted at permanent checkpoints").

American border[38] designed to curb the influx of illegal immigration.[39] These checkpoints were challenged by motorists on the ground that the government lacked reasonable suspicion to justify stopping them in their vehicles.[40] The Court noted that the act of stopping a vehicle, and thus detaining its occupants, constitutes a "'seizure[]' within the meaning of the Fourth Amendment."[41] The Fourth Amendment requirement that the seizure cannot be unreasonable must therefore apply.[42] In determining "whether reasonable suspicion is a prerequisite to a valid stop," the Court balanced the various interests at stake,[43] weighing the government's interest in administering the checkpoints against the level of resulting intrusion on the motorists' Fourth Amendment rights.[44] The Court ultimately upheld the suspicionless seizures near the Mexican-American border, noting that "the need to make routine checkpoint stops is great [and] the consequent intrusion on Fourth Amendment interests is quite limited."[45]

B. *Sobriety Checkpoints*

The Court's ruling in *Martinez-Fuerte* allowed police to invade the privacy of innocent motorists near the Mexican-American border without any degree of individualized suspicion of wrongdoing.[46] This ruling paved the way for *Sitz*, in which the Court declared sobriety checkpoints constitutional even though these seizures, like those in *Martinez-Fuerte*, lacked any degree of individualized suspicion.[47] The low level of intrusion on law-abiding motorists at these checkpoints,[48] coupled with the

38. *See id.* at 545 (stating that "the San Clemente checkpoint is 66 road miles north of the Mexican border"); *id.* at 549-50 (stating that the Sarita checkpoint is "65-90 miles from the nearest points of the Mexican border").

39. *Id*. at 552.

40. *Id*. at 556.

41. *Id*.

42. *See* U.S. CONST. amend. IV (providing citizens the right to be free from unreasonable searches and seizures).

43. United States v. Martinez-Fuerte, 428 U.S. at 556.

44. *Id*. at 556-58.

45. *Id*. at 557.

46. *Id*. at 545.

47. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990). In *Sitz*, the Court addressed "only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers," and indicated that "[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Id.* at 450-51.

48. *Id*. at 451-52.

substantial state interest in eradicating drunk drivers from America's highways,[49] played a substantial role in the Court's determination that these checkpoints should be placed into the limited category of exceptions to the Fourth Amendment's probable cause requirement.

C. *License and Registration Checkpoints*

The Court alluded to the constitutional validity of the use of checkpoints for the purpose of verifying the validity of drivers' licenses and vehicle registrations in *Delaware v. Prouse*.[50] In *Prouse*, the Supreme Court confronted the random seizure of a car made by a patrolling officer in order to verify the license and registration of the driver.[51] The Court made reference to the substantial state interests in verifying the validity of drivers' licenses and registrations,[52] but ultimately declared the spot checks unconstitutional due to the inherently intrusive nature of the stops.[53] The Court suggested that using checkpoints, as opposed to roving patrol stops, would lower both the level of intrusion subjected upon motorists and the amount of discretion allowed the officers, to a degree sufficient to satisfy constitutional scrutiny.[54] "'At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.'"[55]

D. *Drug Checkpoints*

In 2000, the Supreme Court declared in *Edmond* that checkpoints set

49. *See id*. at 456 (Blackmun, J., concurring) ("for the period from 1900 through 1969 motor-vehicle deaths in the United States exceeded the death toll of all our wars").

50. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (stating that such checkpoints would be an acceptable alternative to random stops for the same purpose).

51. *Id*. at 650.

52. *See id*. at 658 ("We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.").

53. *See id*. at 657 (stating that such stops "generally entail law enforcement officers signaling a moving automobile to pull over to the side of the roadway, by means of a possibly unsettling show of authority . . . [and] interfere with freedom of movement, are inconvenient, and consume time [and] may create substantial anxiety").

54. *See id*. (comparing the intrusive nature inherent in roving patrol stops to the less intrusive nature of standardized checkpoints).

55. *Id*. (quoting United States v. Oritz, 422 U.S. 891, 894-95 (1974)).

up for the primary purpose of interdicting the transportation of illegal drugs contravened the Fourth Amendment.[56] In *Edmond*, the Court made reference to the substantial state interests at stake[57] and acknowledged that the checkpoints were being used to further these interests.[58] However, the Court ultimately determined that drug checkpoints were unconstitutional "[b]ecause the primary purpose of the Indianapolis narcotics checkpoint program [was] to uncover evidence of ordinary criminal wrongdoing."[59] This determination was due in large part to the principle acknowledged by Justice Stewart in *Almeida-Sanchez v. United States*:[60] "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."[61] Accordingly, the Court distinguished the precedents set by *Martinez-Fuerte*, *Sitz*, and *Prouse* from drug checkpoints, stating that "each of the checkpoint programs that we have approved [up to *Edmond*] was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety."[62] The Court went on to state that it was "particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."[63]

It is important to note, as *Edmond* should make abundantly clear, that the use of checkpoints is the exception and not the rule.[64] In order to fully grasp the logic of the checkpoint decisions handed down to date, an understanding of the analysis applied by the Court in such cases is necessary. In addressing whether roadside checkpoints comport with the Fourth Amendment's requirement that all seizures be reasonable, the

56. City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000).

57. *See id.* at 42 ("There is no doubt that traffic in illegal narcotics creates social harms of the first magnitude.").

58. *Id.* at 40-41.

59. *Id.* at 41-42.

60. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

61. *Id.* at 273; *see* City of Indianapolis v. Edmond, 531 U.S. at 42 ("If we were to rest the case at this high level of generality [ordinary criminal wrongdoing], there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.").

62. City of Indianapolis v. Edmond, 531 U.S. at 41.

63. *Id.* at 43.

64. *See id.* at 41 (stating "our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by *some measure of individualized suspicion*") (emphasis added).

Court applies the balancing test it established in *Brown*.[65] Setting out the factors of this test in detail will help provide a framework upon which to build a predictive analysis of the test's implications on the constitutionality of ruse drug checkpoints.

III. *BROWN* TEST ANALYSIS

In *Brown*, the Court established that an analysis of "[t]he reasonableness of seizures that are less intrusive than a traditional arrest," requires the Court to weigh "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[66] The dissent in *Sitz* rightfully pointed out that "[o]nly when a seizure is '*substantially* less intrusive' than a typical arrest is the general rule [requiring probable cause] replaced by a balancing test."[67] This distinction is significant for two reasons: it emphasizes the Court's reluctance to stray from the Fourth Amendment's requirement that all searches be supported by at least reasonable suspicion,[68] and it makes reference to the importance placed on the intrusive nature of the stop in determining its validity.[69]

A. *Ruse Drug Checkpoints Are Inherently More Intrusive Than Other Checkpoints*

By their very nature, deceptive drug checkpoints are more intrusive than the other checkpoints that have been considered by courts in the

65. *See, e.g.*, Illinois v. Lidster, 540 U.S. 419, 426-27 (2004) (applying the *Brown* analysis to an information-seeking checkpoint); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990) (applying the *Brown* analysis to a sobriety checkpoint).

66. Brown v. Texas, 443 U.S. 47, 50-51 (citations omitted).

67. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. at 45 (Brennan, J., dissenting) (quoting Dunaway v. New York, 442 U.S. 200, 210 (1979)) (alteration in original).

68. *See* Dunaway v. New York, 442 U.S. at 210 (stating that "[b]ecause *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope.").

69. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. at 452-53 (stating that the fear and surprise placed upon innocent drivers is lessened because of the nature of the stop; i.e., drivers can see other cars stopped, there are visible signs of police authority, and the fear and surprise related to the stop are thus minimized) (citing United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976)); United States v. Ortiz, 422 U.S. 891, 893-95 (1975) (recognizing the characteristics that make the border checkpoints subjectively less intrusive than roving patrol stops; i.e., signs placed a mile before the stop warning drivers of the checkpoint, the use of flashing lights to allow drivers advanced warning of the stop, and the fact that it is placed on a major highway).

past.[70] Not only are drivers taken by complete surprise at such stops because they are hidden away on exits, these drivers are also deliberately deceived into thinking that the checkpoint is set up at a different location.[71] These facts do little to ease the surprise and annoyance felt by innocent motorists taking these exits. Thus far, in every case in which the constitutionality of checkpoints has been considered by the Supreme Court, reference has been made to the fact that the fear and annoyance at such checkpoints are minimized.[72] Increasing the fear, surprise, and annoyance felt by motorists passing through such checkpoints increases the chances that such unwarranted interaction between the motorists and the police will become adversarial or unpleasant.[73] "To be law abiding is not necessarily to be spotless, and even the most virtuous can be unlucky. Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions."[74] Thus, the innocent as well as the guilty have much to lose from the implementation of such checkpoints.

The fact that deceptive drug checkpoints are more subjectively intrusive to the motorists involved makes these checkpoints even more offensive to the Fourth Amendment than the drug checkpoints declared unconstitutional by the Supreme Court in *Edmond*. In *Edmond*, the checkpoints were clearly identified with lighted signs stating exactly where the checkpoint would be found and these checkpoints were generally

70. *See* United States v. Huguenin, 154 F.3d 547, 561 (1998) (stating that ruse drug checkpoints did not "minimize the fear and surprise potentially experienced by motorists, but specifically attempted to increase the surprise").

71. *Id*.

72. *See* Illinois v. Lidster, 540 U.S. 419, 428 (2004) (stating that "the contact [at the checkpoints] provided little reason for anxiety or alarm"); City of Indianapolis v. Edmond, 531 U.S. 32, 52 (2000) (Rehnquist, C.J., dissenting) ("The subjective intrusion [of drug checkpoints] is likewise limited as the checkpoints are clearly marked . . . ."); Mich. Dep't of State Police v. Sitz, 496 U.S. at 452 (noting that the fear and surprise felt by law-abiding citizens at sobriety checkpoints is minimal); United States v. Martinez-Fuerte, 428 U.S. at 558 (noting that drivers are much less likely to be frightened or annoyed at checkpoint stops) (citing United States v. Ortiz, 422 U.S. at 894-95).

73. Mich. Dep't of State Police v. Sitz, 496 U.S. at 465 (Stevens, J., dissenting).

74. *Id*. (Stevens, J., dissenting); *see also* State v. Mack, 66 S.W.3d 706, 716-17 (Mo. 2002) (Stith, J., dissenting) (stating that innocent motorists may take the exit in order to get to their destination, to avoid dealing with delay, out of fear of the police related to prior unpleasant encounters, fear of being treated differently because one is a member of an ethnic or racial minority, or because one fears being treated differently because they are from out of state).

operated during daylight hours.[75] The signs displayed in ruse drug checkpoints deliberately lead the motorists to believe the checkpoints are in different locations and the timing of many of these checkpoints is deliberately set late in the evening in order to "eliminate the likelihood that innocent drivers would be stopped at the checkpoint."[76]

B. *Individualized Suspicion, Not Group Suspicion*

In order for ruse drug checkpoints to survive constitutional scrutiny, states must distinguish them from the drug checkpoints declared unconstitutional in *Edmond.* The pivotal issue in an attempt to accomplish this distinction will center on the concept of reasonable suspicion.[77] "Some level of individualized suspicion is a core component of the protection the Fourth Amendment provides against arbitrary government action."[78] The level of suspicion involved in deceptive drug checkpoints amounts to, at best, a group suspicion, and therefore lacks the specificity required by the Supreme Court.[79] The sole basis for developing this "group suspicion" is the fact that all of the motorists stopped at these checkpoints chose to take a highway exit that happened to follow a deceptive sign placed on the highway by the police.[80] "There is something fundamentally unsettling and counter-intuitive about labeling as suspicious a person's conduct in

75. City of Indianapolis v. Edmond, 531 U.S. at 35-36.

76. Daniel R. Dinger & John S. Dinger, *Deceptive Drug Checkpoints and Individualized Suspicion: Can Law Enforcement Really Deceive Its Way into a Drug Trafficking Conviction?*, 39 IDAHO L. REV. 1, 4, 52 (2002).

77. *See id*. at 31-32 (arguing that ruse drug checkpoints are distinguishable because they are suspicion-based as opposed to the suspicionless seizures at issue in *Edmond*).

78. Mich. Dep't of State Police v. Sitz, 496 U.S. at 457 (Brennan, J., dissenting).

79. *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. at 47 ("When law enforcement authorities pursue primarily general crime control purposes . . . some quantum of individualized suspicion [is required.]"); Mich. Dep't of State Police v. Sitz, 496 U.S. at 457 (Brennan, J., dissenting) (stating that "[s]ome level of *individualized* suspicion is a core component of" the Fourth Amendment) (emphasis added); Reid v. Georgia, 448 U.S. 438, 441 (1980) (stating that because the characteristics displayed by defendant "describe a very large category of presumably innocent travelers," the facts were not sufficient to supply reasonable suspicion); Brown v. Texas, 443 U.S. at 51 ("[W]e have required the officers to have a reasonable suspicion, based on objective facts, that the *individual* is involved in criminal activity.") (emphasis added).

80. *See* Reid v. Georgia, 448 U.S. at 441 (stating that because the characteristics displayed by defendant "describe a very large category of presumably innocent travelers," the facts were not sufficient to supply reasonable suspicion).

avoiding the state's own unconstitutional conduct."[81]

In determining whether there is sufficient cause to seize an individual, the Court has focused on the amount of individualized suspicion attributable to the particular person, not to any group he may be associated with[82]—*Brown* is a prime example. *Brown* involved the suspicionless seizure of a pedestrian for questioning by officers on patrol.[83] The officers in this case pulled up near an alleyway in time to see Brown and another individual parting ways.[84] The officers stated that Brown looked suspicious and claimed "that he was in a 'high drug problem area.'"[85] However, the Court determined that this was an insufficient basis for justifying the officer's seizure of Brown.[86] The Court stated that officers must "have a reasonable suspicion, based on objective facts, that the *individual* is involved in criminal activity."[87] The Court ultimately decided that "the balance between the public interest and [Brown's] right to personal security and privacy tilts in favor of freedom from police interference," and his detention was thus unconstitutional.[88]

Several points alluded to in *Brown*, coupled with the precedent set forth in *Edmond*, provide a firm basis for supporting the prediction that ruse drug checkpoints will not survive the Court's scrutiny, should it ever decide to take up the issue. The first of these points is the Court's reliance on the need for an individualized suspicion in order to justify the detention of the individual.[89] In *Brown*, the Court pointed out that there was nothing

81. State v. Mack, 66 S.W.3d 706, 717 (Mo. 2002) (Stith, J., dissenting).
82. *See supra* note 79 and accompanying text.
83. Brown v. Texas, 443 U.S. 47, 48-49 (1979).
84. *Id*. at 48.
85. *Id*. at 49.
86. *Id*. at 52.
87. *Id*. (emphasis added).
88. *Id*.
89. *See id.* at 51 (stating that "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the *particular individual*, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers") (emphasis added). Though the Court in *Brown* did allude to "a plan embodying explicit, neutral limitations" like those involved in roadside checkpoints, the Court's decision in *Edmond* firmly establishes that such explicit and neutral plans limiting officer discretion are unconstitutional when their primary purpose is drug interdiction. *Id.* (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979)); *see also* City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000) ("Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.").

unusual about an individual standing in an alley, even one located in an area frequented by drug users, and that this conduct alone would not amount to a reasonable suspicion to believe that the individual was engaged in criminal conduct.[90] This is analogous to the situation presented by ruse drug checkpoints. Under such checkpoints, states argue that the conduct portrayed by the individuals in choosing the exit immediately following the ruse sign amounts to a reasonable suspicion to believe that criminal activity is afoot;[91] although this exit may be frequented by drug couriers attempting to avoid detection by the police, this does not amount to a reasonable suspicion that every individual taking this exit is involved in criminal conduct. Thus, applying the precedent set forth in *Brown*, the act of legally exiting a highway, by itself, does not amount to unusual behavior justifying a reasonable suspicion that the individual is involved in criminal activity.[92] There is nothing inherently suspect about an individual taking a paved exit off a highway, just as there is nothing inherently suspect about a person standing in a high-crime alleyway.[93]

In *Brown*, the Court stated that the fact that the defendant was in a high-crime area did not provide "a basis for concluding that [the defendant] *himself* was engaged in criminal conduct."[94] Thus, the fact that individuals standing in a particular alleyway may be involved in some form of criminal activity as a group does not by itself amount to a reasonable suspicion sufficient to justify the seizure of any particular individual in this area.[95] Ruse checkpoints seek justification on just such a principle. The fact that the government's purpose in interdicting drugs may be served to

90. Brown v. Texas, 443 U.S. at 52.

91. *See* United States v. Yousif, 308 F.3d 820, 828 (8th Cir. 2002) (addressing the government's arguments for why it had obtained the necessary individualized suspicion, including that the appellant exited the highway immediately after seeing the drug checkpoint signs); United States v. Brugal, 209 F.3d 353, 358 & n.5 (4th Cir. 2000) (stating the fact that defendant exited highway after the drug checkpoint sign was a factor used by the officer to establish reasonable suspicion to believe that defendant was involved in criminal activity); People v. Ray, 764 N.E.2d 173, 177-78 (Ill. App. Ct. 2002) ("The State contends that the act of exiting on the particular exit ramp, just prior to the supposed drug checkpoint on the interstate, raised the suspicion that defendant was trafficking in illegal drugs.").

92. *Cf.* Brown v. Texas, 443 U.S. at 52 (stating that the act of standing in an alley, by itself is not suspicious behavior).

93. *Cf. id.* (same).

94. *Id*. (emphasis added).

95. *See id*. (stating that "even assuming that [the] purpose [of drug interdiction] is served to some degree by stopping and demanding identification from an individual without any *specific* basis for believing *he* is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it") (emphases added).

some degree through the use of ruse checkpoints will not justify a seizure without a "*specific* basis for believing [the individual] is involved in criminal activity."[96] "[T]he mere fact that some vehicles took the exit [to avoid the ruse checkpoint] does not . . . create individualized reasonable suspicion of illegal activity as to every one of them."[97] "General profiles that fit large numbers of innocent people do not establish reasonable suspicion."[98] Such "generalized and ever-present possibilit[ies] that interrogation and inspection may reveal that any given motorist has committed some crime"[99] must fall short of meeting the reasonableness requirement of the Fourth Amendment, unless the Fourth Amendment is to be diminished to the point of mere symbolism.

IV. *TERRY V. OHIO* AND THE CREATION OF REASONABLE SUSPICION

In *Brown*, the Court relied heavily on the precedent set by *Terry*.[100] An analysis of *Terry* will lend credence to the argument that its use as precedent was meant to be narrow[101] and that its application to support the use of ruse drug checkpoints is unavailing.

Terry was the first case in which the Court held that "something less than probable cause"[102] could justify the seizure of an individual.[103] In

96. *Id*. (emphasis added).

97. United States v. Yousif, 308 F.3d 820, 827 (8th Cir. 2002).

98. *Id*. at 828; *see also* United States v. Eustaquio, 198 F.3d 1068, 1071 (8th Cir. 1999) (stating that probable cause to believe that an individual was involved in the transportation of illegal narcotics through the airport did not exist, despite the fact that she bought a one-way ticket with cash, had no family or friends meeting her at the airport, had no checked luggage, appeared slightly nervous, and took the most direct route to the exit terminal. The court held that individualized suspicion was required and that it did not exist in the circumstances presented by that case because "[t]oo many people fit this description for it to justify a reasonable suspicion of criminal activity.") (citing United States v. Crawford, 891 F.2d 680, 682-83 (8th Cir. 1989)).

99. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

100. *See* Brown v. Texas, 443 U.S. at 50, 51, 53 n.3 (citing *Terry* four times in reversing Brown's conviction on the ground that police officers did not have the necessary reasonable suspicion to detain him, as required by *Terry*).

101. *See* Dunaway v. New York, 442 U.S. 200, 210 (1979) ("Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope."); *see also* Terry v. Ohio, 392 U.S. 1, 16 (1968) ("Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.").

102. Spellmeier, *supra* note 23, at 215.

103. Terry v. Ohio, 392 U.S. at 30.

Terry, an officer with over thirty-nine years of experience observed two men acting suspiciously in front of a store in downtown Cleveland.[104] The officer eventually approached the men and identified himself as a police officer.[105] Likely based on his thirty-nine years of experience and his belief that the men were in the process of planning an armed robbery, he feared that the men had weapons[106] and therefore proceeded to pat them down.[107] Guns were subsequently found on the two men and both were arrested.[108] In upholding their convictions, the Court cited a concern for officer safety,[109] the experience of the officer involved in the encounter,[110] and the limited nature of the search conducted by the officer in the encounter[111] as relevant factors to its determination that the search and seizure were constitutional.[112] This decision is credited with creating what has come to be known as "reasonable suspicion."[113]

In explaining its result, the Court stated that "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion."[114] The Court stressed that specificity in the information relied upon to create the reasonable suspicion was "the central teaching of this Court's Fourth Amendment jurisprudence."[115] The same degree of "specific and articulable facts" is plainly lacking in the context of ruse drug checkpoints. With or without a "ruse drug sign" on the highway, the legal act of exiting a highway at any particular exit does not by itself rise to the level of reasonably suspicious behavior necessary to justify the seizure of any individual unlucky enough to have taken that exit.[116]

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104. *See id*. at 5-6. The two men took turns walking by a storefront and peering in as they walked by. *Id*. at 6. Each man went through these actions five or six times, stopping to converse with one another after each trip. *Id*. The officer stated that he watched them for several minutes and that he believed that the "oft-repeated reconnaissance of the store window" was done in anticipation of "'a stick-up.'" *Id.*

105. *Id*. at 6-7.

106. *Id*. at 6.

107. *Id*. at 7.

108. *Id*.

109. *Id*. at 23 n.21.

110. *Id*. at 30.

111. *Id*. at 29-30.

112. *Id*. at 30-31.

113. Spellmeier, *supra* note 23, at 216.

114. Terry v. Ohio, 392 U.S. at 21.

115. *Id*. n.18.

116. *See* United States v. Yousif, 308 F.3d 820, 827-28 (8th Cir. 2002) (stating that even though some of the vehicles may have taken the exit to escape detection

Some legal scholars have argued that a *Terry* analysis should be used in assessing the constitutionality of ruse drug checkpoints.[117] Some of the courts that have addressed the constitutionality of ruse drug checkpoints have also applied the *Terry* analysis in reaching their conclusions.[118] A common thread running through each of these decisions is whether or not the act of exiting the highway after the deceptive drug checkpoint sign amounts to evasion on the part of the motorists, thereby giving rise to a reasonable suspicion sufficient to justify the stops in question.[119] Applying the precedents established in *Illinois v. Wardlow*[120] and *United States v. Arvizu*[121] to ruse drug checkpoints will support the Illinois Appellate Court's conclusion in *People v. Ray*[122] that the act of exiting a highway at one of these checkpoints fails to amount to the articulable suspicion required to justify a *Terry* stop analysis.[123]

A. *Evasion?: Exiting the Highway After a Ruse Drug Sign Is Insufficient to Establish Reasonable Suspicion*

1. *Distinguished from* Illinois v. Wardlow

In *Wardlow*, the defendant was standing in a high-crime area with an opaque bag in his hand when the officers began observing him.[124] Upon seeing the uniformed officers drive by, Wardlow fled.[125] The officers then

"many more took the exit for wholly innocent reasons—such as wanting to avoid the inconvenience and delay of being stopped or because it was part of their intended route").

117. *See, e.g.*, Dinger & Dinger, *supra* note 76, at 32-36 (arguing that the *Terry* analysis should be applied to ruse drug checkpoints due to the fact that they are not completely suspicionless stops).

118. *See, e.g.*, State v. Mack, 66 S.W.3d 706, 709-10 (Mo. 2002) (applying the *Terry* analysis to determine that the ruse drug checkpoint was constitutional); People v. Ray, 764 N.E.2d 173, 177-81 (Ill. App. Ct. 2002) (applying the *Terry* analysis to declare the ruse drug checkpoint unconstitutional).

119. *See, e.g.*, People v. Ray, 764 N.E.2d at 177-78 (addressing the state's argument that the act of exiting on the ramp just before the supposed drug checkpoint provided officers with "specific and articulable facts to conduct a *Terry* stop of defendant's vehicle").

120. Illinois v. Wardlow, 528 U.S. 119 (2000).

121. United States v. Arvizu, 534 U.S. 266 (2002).

122. People v. Ray, 764 N.E.2d 173.

123. *See id*. at 179 (stating that the defendant "had done nothing but exit the interstate, an act that is not particularly incriminating in and of itself"); *see* discussion *infra* Parts IV.A.1-3.

124. Illinois v. Wardlow, 528 U.S. at 121-22.

125. *Id*. at 122.

chased him through an alleyway and eventually cornered him in the street.[126] After conducting a protective search for weapons, the officers found a gun in the bag that Wardlow was holding.[127] The Court reversed the Illinois Supreme Court, upholding the conviction of Wardlow through the application of the analysis it established in *Terry*.[128] The Court stated that "it was not merely respondent's presence in an area of heavy narcotics trafficking that aroused the officers' suspicion, but his unprovoked flight upon noticing the police."[129] The Court stated "that nervous, evasive behavior is *a pertinent factor* in determining reasonable suspicion."[130] The preceding statement is profound in the determination of *Wardlow's* applicability to the issue of ruse drug checkpoints for two reasons. First, it states that evasive conduct is *a* factor, as opposed to *the* factor in determining whether there is reasonable suspicion.[131] Second, it characterizes the evasion in *Wardlow* as being both headlong and nervous in appearance, thus more likely to draw suspicion upon him.[132] It is for these reasons that *Wardlow* is plainly distinguishable from the conduct portrayed by motorists exiting a highway after seeing a ruse drug checkpoint sign.[133] Every motorist exiting the highway at one of these paved and clearly marked exits is stopped at the checkpoint, whether their driving appeared nervous, impulsive, or even completely normal.[134]

2. *Distinguished from* United States v. Sokolow[135]

In assessing whether or not a stop is supported by a reasonable suspicion, the Supreme Court considers "the totality of the circumstances—the whole picture."[136] The Court applied this analysis in *Sokolow* when it

126. *Id*.
127. *Id*.
128. *Id*. at 123.
129. *Id*. at 124.
130. *Id*. (emphasis added).
131. *See id.*
132. *See id.*
133. In the case of ruse drug checkpoints, the act of exiting the highway at a legal exit falls far short of drawing the kind of attention that Wardlow did in this case. Seeing police officers and *running* in the opposite direction is sure to appear more suspicious than simply exiting a highway after seeing the decoy drug checkpoint signs.
134. *See, e.g.*, People v. Ray, 764 N.E.2d 173, 176 (Ill. App. Ct. 2002) (noting testimony from an officer "that the policy for the drug checkpoint required that all drivers be interviewed at the checkpoint," excluding those who had already been through the checkpoint, local residents, and law enforcement vehicles).
135. United States v. Sokolow, 490 U.S. 1 (1989).
136. United States v. Cortez, 449 U.S. 411, 417 (1981).

upheld the seizure of Sokolow at an airport by DEA agents.[137] DEA agents asserted that Sokolow exhibited a host of suspicious behaviors that aroused their suspicions.[138] The Court did, however, take issue with the Ninth Circuit's determination that Sokolow's "evasive or erratic path" through the airport amounted to a showing of "'ongoing criminal activity,'"[139] stating that "[a]ny one of these factors [including evasive conduct] is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion."[140] Therefore, the precedent set in *Sokolow* appears to require more than mere passive evasion on the part of individuals in order to determine the seizure reasonable in light of *Terry*.

3. *Clarifying Suspicious Conduct in Light of* United States v. Arvizu

Daniel and John Dinger gave *Arvizu* great weight in their well-written article arguing for the constitutionality of ruse drug checkpoints.[141] This reliance on *Arvizu*, however, lacks what the Supreme Court has stated is required in determining whether reasonable suspicion exists: an appreciation of "the totality of the circumstances—the whole picture."[142] In *Arvizu*, the Court listed a host of suspicious characteristics displayed by the defendant that justified the determination that there was sufficient suspicion to stop his vehicle.[143] The manufactured suspicion offered to

137. United States v. Sokolow, 490 U.S. at 8-9.

138. *See id.* at 3 ("When respondent was stopped, the agents knew . . . that (1) he paid $2,100 for two airplane tickets from a roll of $20 bills; (2) he traveled under a name that did not match the name under which his telephone number was listed; (3) his original destination was Miami, a source city for illicit drugs; (4) he stayed in Miami for only 48 hours, even though a round-trip flight from Honolulu to Miami takes 20 hours; (5) he appeared nervous during his trip; and (6) he checked none of his luggage.").

139. *See id.* at 8 (stating that evasive movement through the airport may be highly probative of criminal conduct, "but [it does] not have the sort of ironclad significance attributed to [it] by the [Ninth Circuit] Court of Appeals").

140. *Id.* at 9.

141. *See* Dinger & Dinger, *supra* note 76, at 38 (concluding that "[l]eaving the highway after passing signs that indicate the presence of a narcotics checkpoint ahead is behavior consistent with an attempt to avoid a law enforcement checkpoint, and is therefore behavior similar to that given a good deal of weight by the *Arvizu* court in determining the existence of reasonable suspicion").

142. United States v. Cortez, 449 U.S. 411, 417 (1981).

143. United States v. Arvizu, 534 U.S. 266, 269-71 (2002) (noting that the road was commonly used by smugglers seeking to avoid the border checkpoint—this road was even monitored by a magnetic sensor used to facilitate agents' efforts in patrolling these areas; the sensors alerted to a vehicle on the road during a shift change at the

justify the use of ruse drug checkpoints pales in comparison to the quantity of suspicion developed in the *Arvizu* case.[144]

In *Arvizu*, the road that the defendant took was "a primitive dirt road" that was "very rarely traveled except for use by local ranchers and forest service personnel."[145] This fact alone is sufficient enough to distinguish this case from ruse drug checkpoints. In the case of ruse drug checkpoints, the exits used are marked, paved, and are unarguably used by more than just ranchers and forest service personnel. The Court in *Arvizu* pointed out a number of suspicious characteristics displayed by Arvizu that culminated in the development of sufficient *individualized* suspicion to seize his vehicle.[146] When the agent began to follow him, Arvizu slowed from 50 to 55 down to 25 to 30 miles per hour, he appeared stiff and rigid to the agent (and acted as though he didn't even see the officer), three children in the back of his vehicle began waiving their arms in "an abnormal pattern," and Arvizu enacted his turn signal, turned it off, then abruptly turned in front of the agent.[147] Thus, in light of the whole picture, the Court determined that sufficient individualized suspicion was developed before Arvizu was stopped by the agent.[148] Just as in *Sokolow*, the Court relied on substantially more evidence than mere passive evasion to determine that reasonable suspicion was developed.[149] If the supposed evasion displayed by every vehicle taking a ruse exit is taken out of the equation, what suspicious behavior is left to analyze? To answer this question is to realize the utter frailty of any attempt to use cases like

checkpoint—this fact further aroused the suspicions of the checkpoint agents, as smugglers often attempted to bypass the checkpoint during shift changes; the road taken by Arvizu was "a primitive dirt road" that was "rarely traveled except for use by local ranchers and forest service personnel;" when the agent drove up on Arvizu his speed dropped from fifty to fifty-five to twenty-five to thirty miles per hour; Arvizu "appeared stiff and his posture very rigid;" he pretended not to notice the agent; the children in the back of the vehicle began waving their hands at the agent "in an abnormal pattern;" and Arvizu turned his signals on and off and hesitated before abruptly turning in front of the agent following him).

144. Compare the list of suspicious behaviors exhibited by the *individual* in the *Arvizu* case to those attributable to the group of individuals unlucky enough to exit at a ruse drug checkpoint, for example, exiting after seeing a ruse sign on the highway, and possibly driving late in the evening or on highways connecting possible "source drug cities." *Cf.* United States v. Sokolow, 490 U.S. 1, 3 (1989) (considering as a factor that the defendant's "original destination was Miami, a source city for illicit drugs").

145. United States v. Arvizu, 534 U.S. at 269.

146. *Id.* at 269-71.

147. *Id*. at 270-71.

148. *Id*. at 277.

149. *Id*. at 277-78.

Sokolow or *Arvizu* to justify the use of ruse drug checkpoints.

4. *The Utter Lack of Efficiency*

Despite the government's best efforts to shield innocent motorists from the humiliation of being treated like criminals at these checkpoints, the overwhelming majority of vehicles stopped are still innocent motorists.[150] For example, the ruse checkpoint upheld in *Mack* resulted in only 5 drug-related arrests out of the 60 to 150 cars that took the exit.[151] This amounts to a hit rate of only 8.3% using numbers most favorable to the state.[152] The ruse checkpoint in *United States v. Huguenin*[153] yielded a hit rate of only 5.5%,[154] and the hit rate in *State v. Damask*[155] was only 1.5%.[156] One of the most efficient ruse drug checkpoints to date was the subject of *United States v. Yousif*,[157] which resulted in a hit rate of 15.6%.[158] These percentages may even be slightly inflated because the figure used in calculating them is the number of individuals arrested, not the number of cars in which drugs were found. One may assume that at least some of the arrests were related to multiple individuals within the same car; therefore, the percentages would likely be even lower than those listed above.[159]

Though the Supreme Court has not placed great weight on the efficiency of the checkpoints it considered in the past,[160] the lack of

150. *See* cases cited *supra* note 22.

151. State v. Mack, 66 S.W.3d 706, 715 n.3 (Mo. 2002) (Stith, J., dissenting).

152. The hit rate is calculated by dividing the number of drug-related arrests by the total number of seizures. Edmond v. Goldsmith, 183 F.3d 659, 661 (1999), *aff'd sub nom*, City of Indianapolis v. Edmond, 531 U.S. 32 (2000). Applying the calculation using the 150 seizures as opposed to 60 results in only a 3% hit rate.

153. United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998).

154. *See id*. at 555-56 (stating that during the 64 days that the ruse checkpoint was running, 2342 cars were stopped and "128 arrests were made for drug-related offenses").

155. State v. Damask, 936 S.W.2d 565 (Mo. 1996).

156. *Id*. at 568 (noting one drug-related arrest out of sixty-six seizures).

157. United States v. Yousif, 308 F.3d 820 (8th Cir. 2002).

158. *Id*. at 828 n.3 (indicating 395 drug-related arrests out of 2537 seizures).

159. *See, e.g.*, *id.* (illustrating that no evidence regarding convictions, much less how the arrest occurred, was presented to the court).

160. For example, the Court upheld the use of sobriety checkpoints even though it resulted in only 2 drunk-driving arrests out of 126 seizures, equaling a hit rate of less than 2%. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 454-55 (1990). The Court also upheld the use of border checkpoints despite the fact that the overall hit rate of that checkpoint was less than 1%—171 vehicles were found to contain illegal aliens out of the 146,000 vehicles which passed through the permanent border

efficiency displayed by ruse checkpoints tends to undercut the argument that they manufacture sufficient individualized suspicion to distinguish them from the suspicionless drug checkpoints declared unconstitutional in *Edmond*. In *Edmond*, the drug checkpoints were set up on the highway and subjected the general public to seizures that were not based on any suspicion of wrong-doing whatsoever.[161] In spite of this fact, the hit rate of the *Edmond* checkpoint was 9%.[162] Therefore, a drug checkpoint set up without any ruse at all—subjecting every vehicle on a given highway to the seizure—was more efficient than nearly all of the ruse drug checkpoints discussed above. This fact substantially undercuts the Missouri Supreme Court's assertion in *Mack* that "deceptive drug checkpoints are effective—that drivers with drugs do indeed 'take the bait.'"[163] In light of this assertion, an analogy seems to be in order: in *Edmond*, it appears that the officers caught just as many fish, if not more, with empty hooks than the officers using the baited hooks in *Mack*, *Damask*, and *Huguenin*. Common sense would thus dictate the conclusion that the bait had little to do with the bounty.

V. THE CASES ADDRESSING RUSE CHECKPOINTS

Since 1998, a handful of cases have addressed the constitutionality of ruse drug checkpoints. The Sixth Circuit was the first to address this issue in *Huguenin*.[164] The court ultimately concluded that the use of such checkpoints violated the Fourth Amendment.[165] In 2000, before the Supreme Court decided *Edmond*, the Fourth Circuit upheld the use of license verification checkpoints in *United States v. Brugal*.[166] The two primary cases addressing this issue since *Edmond* have also come to differing conclusions. In February 2002, the Missouri Supreme Court declared such checkpoints constitutional in *Mack*.[167] Less than eight months later, the Eighth Circuit declared that deceptive drug checkpoints

checkpoint. United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

161. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000) (stating that at the roadblock checkpoints, "police stop a predetermined number of vehicles" and "officers have no discretion to stop any vehicle out of sequence").

162. *See id*. at 34-35 (noting 55 drug-related arrests out of 1161 stopped vehicles).

163. State v. Mack, 66 S.W.3d 706, 709 (Mo. 2002).

164. United States v. Huguenin, 154 F.3d 547, 558-59 (6th Cir. 1998).

165. *Id.*

166. United States v. Brugal, 209 F.3d 353, 357 (4th Cir. 2000).

167. State v. Mack, 66 S.W.3d at 710.

violated the Fourth Amendment in *Yousif*.[168] The primary points of contention related to the analyses used in these cases has been laid out previously in this Note[169] and should provide a firm foundation for understanding the weaknesses and strengths highlighted in the following cases.

A. *Pre*-Edmond *Cases*

1. United States v. Huguenin

The first of the circuit courts to address the issue of ruse checkpoints was the Sixth Circuit in *Huguenin*.[170] On March 14, 1996, Huguenin and Martin were traveling on Interstate 40 when they passed two large signs stating "DRUG-DUI ENFORCEMENT CHECK POINT ½ MILE AHEAD."[171] Martin turned onto the next available exit located one-quarter mile past the signs.[172] The actual checkpoint was located at the end of this exit and was not noticeable from the highway.[173] After stopping the vehicle at the checkpoint, an officer approached Martin and asked him why he had taken that particular exit.[174] Martin replied that he was looking for gas, although his gas gauge indicated he had a full tank.[175] This aroused the suspicions of the officer and a drug dog was walked around the vehicle, eventually alerting the officer to the presence of drugs.[176] Both Martin and Huguenin were arrested after police discovered over 200 pounds of marijuana in the vehicle.[177]

Judge Leroy J. Contie wrote for the majority and applied the *Brown* test to the facts of the case.[178] In assessing the subjective intrusion inherent in the checkpoint, Judge Contie stated:

> [M]otorists exiting off the Airport Road exit are taken by surprise;

168. United States v. Yousif, 308 F.3d 820, 828-29 (8th Cir. 2002).
169. *See supra* Parts II-III.
170. United States v. Huguenin, 154 F.3d at 547.
171. *Id*. at 549.
172. *Id*.
173. *Id*.
174. *Id*. at 550.
175. *Id*.
176. *Id*. at 551.
177. *Id*.
178. *Id*. at 551-52. This case was decided before the Supreme Court declared drug checkpoints unconstitutional in *Edmond*, thus, no reference was made to that decision in the Sixth Circuit's analysis.

> they are stopped "elsewhere," not at the designated location for the checkpoint; . . . the checkpoint operates as a trap and bears arbitrarily and oppressively on those who take the Airport Road exit; and there is room for abusive and harassing questioning, which is left to the discretion of the individual officer in the field.[179]

The court ultimately concluded that "the need to curtail drug trafficking [did not] outweigh[] the intrusion on individual liberty that occurred."[180] "[W]ithout a traffic violation or reasonable suspicion of drug trafficking," the ruse checkpoint violated the Fourth Amendment.[181] The intrusive nature of the checkpoints and the court's opinion that the checkpoint failed to establish a reasonable suspicion that motorists taking the Airport Road exit were trafficking drugs led the Sixth Circuit to the correct decision; the use of ruse drug checkpoints is unconstitutional.

2. United States v. Brugal

At 3:30 a.m. on October 31, 1997, Brugal and a couple of his friends approached a similar checkpoint on Interstate 95.[182] Brugal took the exit after seeing the decoy signs and was stopped at a license verification checkpoint.[183] After questioning Brugal about the rental car he was driving and requesting information about where he was headed, the trooper asked why he chose that particular exit[184]—as the trooper did in the previous case.[185] Brugal responded that he needed gas, even though his tank was shown to be one-quarter full.[186]

The primary issue in this case was not the constitutionality of the license verification checkpoint—the Supreme Court had already stated in dicta that such checkpoints would be constitutional[187]—but was instead the

179. *Id*. at 556.

180. *Id*. at 558. The court was also persuaded by the fact that the checkpoint was set up under the guise of being a DUI checkpoint even though the officers appeared to be concerned only with drug trafficking. *Id*. at 556-59. Another factor emphasized by the court was the fact that no appropriate operating procedures were in place to limit the discretion of the officers. *Id*.

181. *Id*. at 558.

182. United States v. Brugal, 209 F.3d 353, 354-55 (4th Cir. 2000).

183. *Id*. at 355.

184. *Id*.

185. United States v. Huguenin, 154 F.3d 547, 550 (1998).

186. United States v. Brugal, 209 F.3d at 355.

187. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (indicating that checkpoints at which all vehicles are stopped would be acceptable).

constitutional validity of Brugal's extended detention after displaying proper identification and vehicle registration.[188] The court upheld the checkpoint and the subsequent search of Brugal's car partly due to the fact that the checkpoint was a license and registration checkpoint, not a drug checkpoint.[189] The court did, however, urge that Brugal's decision to exit Interstate 95 after passing the decoy signs "militate[d] strongly in favor of finding reasonable suspicion."[190] The court alluded to the time at which the stop was made, 3:30 a.m., and to the fact that the exit "showed no signs of activity"[191] at the time, as being relevant factors to its determination that reasonable suspicion may have been developed.[192] The court primarily focused on the issue of reasonable suspicion as it related to the extended detention of Brugal after the initial stop, and thus, the majority of its analysis centered on the suspicions developed by officers after the initial stop.[193] Though this case is obviously distinguishable from ruse drug checkpoints because it concerns the use of a ruse in connection with a license and registration checkpoint, it is important because it suggests that the Fourth Circuit may view ruse drug checkpoints in a favorable light, thus furthering a split between the courts.

B. *Post*-Edmond *Cases*

1. State v. Mack

At 11:00 p.m. on June 24, 1999, Mack and a friend drove past signs stating "DRUG ENFORCEMENT CHECKPOINT ONE MILE AHEAD" and "POLICE DRUG DOGS WORKING."[194] As one would

188. *See* United States v. Brugal, 209 F.3d at 358 ("[T]he district court should have analyzed whether the defendant's continued seizure was justified by reasonable suspicion.").

189. *Id*. at 357.

190. *Id*. at 360.

191. *Id.*

192. *See id*. (citing the analysis of evasive conduct in *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000) as support).

193. *See id*. at 359-60 (listing eleven suspicious characteristics justifying the extended seizure of Brugal, including the fact that Brugal and his passengers had only three small bags which appeared to be "insufficient luggage for three persons, two males and one female, traveling from Miami to Virginia Beach"). The vast majority of the factors listed in the court's analysis related to characteristics found *after* the initial seizure—which is appropriate given that the initial seizure, at a license and registration checkpoint, was one that the Supreme Court previously stated in dicta to be constitutional. *Id*. at 357 (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979)).

194. State v. Mack, 66 S.W.3d 706, 707 (Mo. 2002).

undoubtedly guess, Mack took one of the next exits and discovered the real drug checkpoint.[195] Drugs were subsequently discovered in his vehicle and he was arrested.[196] In upholding the constitutionality of the deceptive drug checkpoint, the Missouri Supreme Court distinguished *Edmond* by agreeing with the State's argument "that the checkpoint in this case is fundamentally different than that in *Edmond* because the required 'quantum of individualized suspicion' is present."[197] The court avoided the *Brown* analysis applied by the Supreme Court in decisions related to other checkpoint programs and instead applied the *Terry* analysis.[198] Under this analysis, the focus is solely on whether or not the ruse checkpoint generated the necessary "'quantum of individualized suspicion'" to justify a *Terry* stop.[199] The court found "that deceptive drug checkpoints are effective—that drivers with drugs do indeed 'take the bait.'"[200] As stated previously, the checkpoint at issue resulted in only 5 drug-related arrests out of 60 to 150 vehicle seizures, amounting to a mere 3% to 8.3% hit rate![201] The drug checkpoint at issue in *Edmond*, the very one that the court declared to be fundamentally distinguishable from *Mack*[202] because there was no individualized suspicion, yielded a hit rate of approximately 9%.[203] If there is credence to the argument that ruse drug checkpoints do establish individualized suspicion as to every vehicle taking the bait, then one would rightfully expect a much higher hit rate stemming from ruse drug checkpoints than from the drug checkpoints set up without such a ruse. The fact that this is not the case should make one question the assertion that these ruse checkpoints generate the necessary quantum of individualized suspicion to distinguish them from *Edmond*.

Judge Laura Stith's powerful dissent in *Mack* correctly applied the precedent set in *Edmond* to the use of ruse checkpoints.[204] She determined that the ruse failed to establish the requisite level of individualized

195. *Id*.

196. *Id*. at 708. Mack's passenger was also arrested pursuant to an outstanding warrant. *Id*.

197. *Id*. at 709 (quoting City of Indianapolis v. Edmund, 531 U.S. 32, 47 (2000)).

198. *Id*. at 709-10.

199. *Id*. at 710.

200. *Id*. at 709.

201. *See id*. at 715 n.3 (Stith, J., dissenting) (noting that although the officers were unable to determine the exact number of vehicles stopped at this checkpoint, they estimated the total number to be somewhere between 60 and 150).

202. *Id*. at 710.

203. City of Indianapolis v. Edmond, 531 U.S. 32, 35 (2000).

204. State v. Mack, 66 S.W.3d at 710-20 (Stith, J., dissenting).

suspicion to distinguish deceptive drug checkpoints from the drug checkpoints in *Edmond*.[205] In addressing the lack of efficiency shown by such ruse checkpoints, Judge Stith pointed out that "[i]t is not only criminals who may wish to avoid unwanted contact with the police. A motorist encountering a sign warning of a drug checkpoint ahead may have any number of legitimate reasons not to travel through that checkpoint."[206] These legitimate "explanations for exiting the highway take on even added weight, for this is a drug checkpoint, not a sobriety checkpoint, and the general rule requiring proof of individualized suspicion is fully in force."[207] Judge Stith ultimately concluded that *Edmond* commanded the determination that such checkpoints be held unconstitutional.[208]

2. United States v. Yousif

On April 13, 2000, Yousif approached signs on Interstate 44 stating "Drug Enforcement Checkpoint 1/4 Mile Ahead" and "Drug Dogs in Use Ahead."[209] Yousif drove his vehicle halfway up the exit and slowed to a near stop before finally making it to the checkpoint.[210] After the police obtained Yousif's registration, driver's license, and proof of insurance, the officers asked him why he took that particular exit—to which his wife responded that they pulled over to allow their dog to relieve itself.[211] The officers then asked for permission to search the vehicle and Yousif made the mistake of granting this request.[212] The search resulted in the confiscation of six large suitcases containing marijuana.[213] Yousif and his wife were arrested and later sought to exclude the marijuana at trial,

205. *Id*. at 710 (Stith, J., dissenting).

206. *Id*. at 716 (Stith, J., dissenting); *see also id*. at 716-17 (Stith, J., dissenting) (stating that innocent motorists may wish to avoid the checkpoint out of a desire to avoid a delay in travel plans, out of fear of police associated with prior experiences, the driver may be a member of a minority group and may thus be concerned about being treated differently as a result, or "an ordinary law-abiding citizen might take the exit simply to avoid the unusual process of being stopped on the Interstate highway").

207. *Id*. at 718 (Stith, J., dissenting).

208. *Id*. at 720 (Stith, J., dissenting). For an in depth analysis of this case, see generally Spellmeier, *supra* note 23, at 209.

209. United States v. Yousif, No. 4:00 CR 208 JCH, 2000 WL 1514755, at *2-3 (E.D. Mo. Sept. 15, 2000), *amended by* United States v. Yousif, No. 4:00 CR 208 JCH, 2000 WL 1916534 (E.D. Mo. Dec. 12, 2000), *vacated by* United States v. Yousif, 308 F.3d 820 (8th Cir. 2002).

210. *Id*. at *3.

211. *Id*.

212. *Id*.

213. *Id*.

arguing that it was the result of an illegal seizure.[214]

The magistrate judge to first hear the case distinguished it from *Edmond* on the basis that the police had an individualized reasonable suspicion of illegal activity considering a totality of the circumstances.[215] The magistrate based his assessment that reasonable suspicion existed primarily based on three facts: Yousif took the exit after seeing the signs on the highway, the vehicle he was driving had out-of-state license plates, and Yousif slowed his vehicle to a near stop halfway up the exit after seeing the checkpoint.[216] The magistrate believed these factors indicated to the officers that the "defendant was attempting to evade the announced police drug checkpoint."[217] Yousif's attempt to suppress the marijuana was subsequently denied and he eventually appealed to the Eighth Circuit.[218]

The Eighth Circuit found that the checkpoint violated the Fourth Amendment.[219] While admitting that the ruse checkpoint at issue was different in some respects from the drug checkpoints in *Edmond*, the court stated that "the mere fact that some vehicles took the exit under such circumstances does not . . . create individualized reasonable suspicion of illegal activity as to every one of them."[220] He alluded to the fact that most of the individuals taking the exit in question did so for wholly innocent reasons and pointed out how this fact undercut the government's argument related to the creation of reasonable suspicion: "[g]eneral profiles that fit large numbers of innocent people do not establish reasonable suspicion."[221] In support of the conclusion that reasonable suspicion was lacking in this case, the Eighth Circuit stated:

> [B]ecause there is nothing inherently unlawful or suspicious about a vehicle (even one with out-of-state license plates) exiting the highway, it should not be the case that the placement of signs by the police in front of the exit ramp transforms that facially innocent behavior into grounds for suspecting criminal activity. Reasonable suspicion cannot

214. *Id*. at *4-5.
215. *Id.* at *6-7.
216. *Id*. at *7.
217. *Id*.
218. United States v. Yousif, 308 F.3d 820, 822 (8th Cir. 2002).
219. *Id*. at 827.
220. *Id*.
221. *Id*. at 827-28 (citing United States v. Eustaquio, 198 F.3d 1068, 1071 (8th Cir. 1999)); *see also* United States v. Gray, 213 F.3d 998, 1001 (8th Cir. 2000) ("Too many people fit this description for it to justify a reasonable suspicion of criminal activity.") (quoting United States v. Eustaquio, 198 F.3d at 1071).

be manufactured by the police themselves.[222]

VI. CONCLUSION

The Supreme Court made it clear in *Edmond* that the Fourth Amendment is violated when the police use checkpoints to uncover evidence of ordinary criminal wrongdoing without some quantum of individualized suspicion.[223] The argument that decoy signs manufacture the suspicion required to appease the *Edmond* ruling is unpersuasive for a number of reasons: (1) the suspicion created by the police amounts to a group suspicion as opposed to an individualized suspicion; (2) the suspicion supposedly developed relies primarily on passive evasion, as opposed to the outright flight, of the motorists; and (3) the lack of efficiency displayed by such checkpoints undercuts the assertion that only those with drugs "take the bait." In sum, the ruse has failed to set these checkpoints apart from those declared unconstitutional in *Edmond*.

"If [the] war [on drugs] is to be fought, those who fight it must respect the rights of individuals . . . ."[224] This Note does not advocate that the courts tie the hands of law enforcement agents in their ever-vigilant effort to gain the upper hand in the war on drugs—what it does advocate is respect for our rights as set out in the Constitution and interpreted by the United States Supreme Court. For the staunch advocates of the war on drugs[225] that may fear the effect that the correct decision here would have on law enforcement, fear not, because declaring the use of ruse drug checkpoints unconstitutional will not burden our police force to any appreciable extent. The efficiency of this practice has been dismal at best, and as stated by the Court in *Edmond*, declaring the use of drug checkpoints unconstitutional would not affect "whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics."[226] Justice Brennan warned that "[m]oved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches [or seizures] that sacrifice the liberty of each citizen to assuage the perceived evil."[227]

222. United States v. Yousif, 308 F.3d at 829.

223. City of Indianapolis v. Edmond, 531 U.S. 32, 47 (2000).

224. Florida v. Bostik, 501 U.S. 429, 439 (1991).

225. I am not a party to this line of thinking—though espousing my views on the war on drugs is not the intention of this Note.

226. City of Indianapolis v. Edmond, 531 U.S at 47 n.2.

227. New Jersey v. T.L.O., 469 U.S. 325, 361 (1985) (Brennan, J., concurring in

The war on drugs claims many victims each year; let us not allow another piece of our liberty to be added to the list.

Travis Johnson[*]

part and dissenting in part).

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