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## POLICE CHECKPOINTS: LACK OF GUIDANCE FROM THE SUPREME COURT CONTRIBUTES TO DISREGARD OF CIVIL LIBERTIES IN THE DISTRICT OF COLUMBIA

JASON FIEBIG\*

*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.<sup>1</sup>*

*During the summer of 2008, crime in the Trinidad neighborhood of the District of Columbia was at an all time high and, in the eyes of top law enforcement brass, was only getting worse. In response to the rising crime rate, city leadership authorized a wide variety of law enforcement sweeps in the area, all of which proved ineffective. Reluctantly, the decision was made to set up police checkpoints around the neighborhood.*

*The constitutionality of the police checkpoints was challenged in federal court that summer. Despite a favorable ruling in district court, the United States Court of Appeals for the D.C. Circuit held that the military-style checkpoints set up to combat the city's gun violence problem were unconstitutional. The appellate court found that the city's administrators had ignored Supreme Court guidance that has limited when, where, and how police checkpoints may be used in a manner consistent with the Constitution.*

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<sup>1</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

*This Comment argues that the Supreme Court has failed to provide the type of guidance necessary to ensure that officials in high-crime areas refrain from instituting unconstitutional police checkpoints in the face of increased criminal activity. The Supreme Court's guidance regarding police checkpoints has been sufficiently vague to encourage city administrators to authorize checkpoints of questionable legality in the face of rising crime. Accordingly, the protections of the Fourth Amendment in cities across the United States are at risk.*

## I. INTRODUCTION

Imagine armed police officers surrounding your neighborhood and pulling over every approaching vehicle without any individualized suspicion of guilt. Each driver is questioned regarding his purpose in driving into the neighborhood. Each driver is also forced to disclose the contact information of his friends, family, and associates in the neighborhood—information that is then verified and entered into a police database. Only those drivers who the police deem as having a legitimate purpose for entering the neighborhood are allowed to continue on to their final destination. For those who fail to comply, a local jail cell awaits.

If you live in an area of the United States where the crime rates are high or rapidly rising, such tactics may soon find a place in a neighborhood near you. In the summer of 2008, the leaders of one major American city authorized the enforcement of such tactics—tactics that one more commonly associates with military zones in war-torn cities like Baghdad and Kabul. The American city that instituted these tactics, which were considered essential elements of a police checkpoint program authorized by city officials, serves as the capital of the United States: Washington, D.C. The first U.S. court that considered the constitutionality of these checkpoints found them reasonable and justifiable under the Constitution.<sup>2</sup> More recently, a panel of judges on the United States Court of Appeals for the D.C. Circuit held that the checkpoints are, in fact, unconstitutional.<sup>3</sup>

In their opinions, both the district and appellate courts analyzed the constitutionality of Washington's police checkpoints by applying tests created by the Supreme Court. While this Comment argues that the D.C. Circuit's proper application of the tests resulted in the correct conclusion, it acknowledges that the current tests advocated by the Supreme Court make that conclusion debatable. However, this conclusion should not be up for debate and would not be if the Supreme Court modified or replaced its

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<sup>2</sup> *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47 (D.D.C. 2008).

<sup>3</sup> *Mills v. District of Columbia (Mills II)*, 571 F.3d 1304 (D.C. Cir. 2009).

current, deeply flawed tests for assessing the constitutionality of police checkpoints.

#### A. FACTUAL OVERVIEW OF THE D.C. POLICE CHECKPOINTS

In the summer of 2008, the District of Columbia Metropolitan Police Department (MPD) established Neighborhood Safety Zones (NSZ) to combat the city's growing gun violence problem.<sup>4</sup> The District's top brass had decided that enough was enough, particularly in the Northeast neighborhood known as Trinidad.<sup>5</sup> In the preceding year, the neighborhood had witnessed an inordinate amount of violence involving firearms.<sup>6</sup> Several of these incidents resulted in homicides and as many as six involved the use of automobiles.<sup>7</sup>

On June 7, 2008, in response to the aforementioned events and a triple homicide involving a juvenile victim that took place on May 31, 2008, the MPD, under the authorization of Special Police Order SO-08-06, designated a portion of Trinidad as an NSZ.<sup>8</sup> The MPD installed eleven vehicle checkpoints over the course of five days at locations around the zone's perimeter.<sup>9</sup>

According to an article in the Washington Post, the checkpoints would

stop vehicles approaching the 1400 block of Montello Avenue NE, a section of the Trinidad neighborhood that has been plagued with homicides and other violence. Police [would] search cars if they [suspected] the presence of guns or drugs, and [would] arrest people who [did] not cooperate, under a charge of failure to obey a police officer . . . .<sup>10</sup>

In addition, vehicles were only allowed to enter the Trinidad neighborhood if police officers determined, after questioning the driver, that he had a "legitimate purpose" for entering the NSZ.<sup>11</sup> The checkpoints were to be enforced at random hours for at least five days, though they could be extended to ten days according to the police under Special Order SO-08-06.<sup>12</sup>

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<sup>4</sup> David C. Lipscomb, *Police to ID Drivers in 5th District*, WASH. TIMES, June 5, 2008, at A1.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Mills I*, 584 F. Supp. 2d at 50.

<sup>8</sup> *Id.* at 50-51.

<sup>9</sup> *Id.*

<sup>10</sup> Allison Klein, *D.C. Police to Check Drivers in Violence-Plagued Trinidad*, WASH. POST, June 5, 2008, at A14.

<sup>11</sup> *Mills I*, 584 F. Supp. 2d at 51.

<sup>12</sup> *Id.* at 50.

The Special Order, which governed the conduct of the officers conducting the checkpoints, listed a variety of “legitimate” reasons for entry.<sup>13</sup> MPD officers staffing the checkpoints stopped 951 vehicles and denied entry to 48 on account of either the operator’s failure or refusal to provide a “legitimate reason” for entry.<sup>14</sup> The MPD officers were authorized to request identification and proof of the reason for entry in order to “verify the accuracy of the reason.”<sup>15</sup> Failure to provide a “legitimate reason” was not a criminal offense in itself, and those who were denied entry or that chose not to provide it were allowed to park their cars and enter the NSZ on foot.<sup>16</sup> For vehicles denied entry into Trinidad, officers were instructed to record the “operator information, vehicle description, vehicle tag number, and reason for denial.”<sup>17</sup> Even for vehicles granted entry, officers were instructed to record the tag number and reason for entry.<sup>18</sup> The District has admitted that much of this information was entered into a law enforcement database, for reasons unknown as of this point.<sup>19</sup>

On July 18, 2008, the MPD issued a revised Special Order regarding the NSZ.<sup>20</sup> The core aspects of the program and procedures were not changed.<sup>21</sup> However, the revised Special Order required that no data gathered at NSZ checkpoints from that point on was to be entered into any District of Columbia law enforcement electronic database.<sup>22</sup>

The following day, July 19, 2008, Chief of Police Cathy Lanier authorized a second NSZ in Trinidad.<sup>23</sup> These checkpoints were presumably in response to multiple shootings earlier that day by individuals

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<sup>13</sup> *Id.* at 51. The Special Order lists the following “legitimate” reasons for entry:

- 1) The person resides in the NSZ;
- 2) The person is employed in the NSZ or is on a commercial delivery;
- 3) The person attends school or a day-care facility, or is taking a child to, or picking up a child from, a school or day-care facility in the NSZ;
- 4) The person is a relative of a person who resides in the NSZ;
- 5) The person is seeking medical attention, is elderly, or is disabled; and/or
- 6) The person is attempting to attend a verified organized civic, community or religious event within the NSZ.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 52.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* The MPD has not revealed its motivation for making this change.

<sup>23</sup> *Id.*

allegedly firing from automobiles.<sup>24</sup> More than six people were shot, including a thirteen-year-old boy who later died.<sup>25</sup>

On July 24, 2008, Chief Lanier extended the second NSZ for five days in response to information the police had received indicating that further violence involving automobiles might be imminent.<sup>26</sup> Following the extension, another revised Special Order was issued, but none of the core aspects of the revised Special Order were materially altered.<sup>27</sup>

#### B. THE DISTRICT OF COLUMBIA'S JUSTIFICATION FOR THE USE OF POLICE CHECKPOINTS IN TRINIDAD

As mentioned previously, the checkpoints were instituted by the police in an attempt to combat a spike in the number of homicides in the District, which rose 7% in 2007 after several years of decline.<sup>28</sup> Chief Lanier noted that the checkpoints "served as a fence to keep violent criminals out of Trinidad" rather than as "nets to capture evidence of ordinary criminal wrongdoing."<sup>29</sup> City officials downplayed the significance of the initiative, noting that the MPD had used various checkpoints in the past.<sup>30</sup> In fact, while the use of checkpoints to surround a neighborhood was a new policy, the MPD had maintained a long-standing practice of using police checkpoints (referred to as roadblocks) for the purposes of general crime control and data collection.<sup>31</sup>

Responding to the threat of a potential legal challenge to the checkpoints, Interim D.C. Attorney General Peter Nickles cited a New York case he believed provided legal support for the checkpoints, *Maxwell v. City of New York*.<sup>32</sup> In *Maxwell*, New York City police were authorized to stop motorists in the Bronx at random hours, mostly in the evening, to curtail drive-by shootings, drug trafficking, and robberies.<sup>33</sup> Neighborhood residents and commercial vehicles were allowed to pass while others were

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<sup>24</sup> Michael Birnbaum, Paul Duggan & Valerie Strauss, *Checkpoints Resume After Spate of Violence*, WASH. POST, July 20, 2008, at C1.

<sup>25</sup> *Id.*

<sup>26</sup> Elissa Silverman, *Trinidad Checkpoints: Anti-Violence Effort to Be Extended*, Chief Says, WASH. POST, July 25, 2008, at B4.

<sup>27</sup> *Mills I*, 584 F. Supp. 2d at 52.

<sup>28</sup> Allison Klein, *Killings in D.C. up After Long Dip*, WASH. POST, Jan. 1, 2008, at A1.

<sup>29</sup> *Mills I*, 584 F. Supp. 2d at 51 (citing Declaration. of Cathy L. Lanier ¶ 4, June 27, 2008).

<sup>30</sup> Brian Westley, *Police Plan Car Checkpoints in D.C. Neighborhood*, HOUS. CHRON., June 6, 2008, at A13.

<sup>31</sup> Allan Lengel, *Safety Stops Draw Doubts: D.C. Police Gather Nonviolators' Data*, WASH. POST, May 2, 2005, at B1.

<sup>32</sup> 102 F.3d 664 (2d Cir. 1996).

<sup>33</sup> *Id.* at 666.

turned away.<sup>34</sup> A federal appeals court ruled in 1996 that those police tactics were constitutional, saying that the checkpoints were reasonably viewed as an effective mechanism to reduce drive-by shootings.<sup>35</sup>

Even with the legal support found in *Maxwell*, Nickles believed that the District of Columbia had “gone the extra mile” to make sure that the roadblocks passed constitutional muster.<sup>36</sup> He assured the public that officials had tried all other reasonable means to stop the killings, including flooding the area with police officers.<sup>37</sup> Yet, on June 20, 2008, the Partnership for Civil Justice, a Washington-based public interest law firm, filed a class action lawsuit in the United States District Court for the District of Columbia seeking an injunction against the MPD’s NSZ checkpoint program.<sup>38</sup>

The plaintiffs alleged that the roadblock program instituted by the MPD authorized unconstitutional suspicionless seizures of persons traveling on public roadways in the District of Columbia.<sup>39</sup> All of the plaintiffs in the suit, except for one, were denied entry to Trinidad in their vehicles on account of their refusal to provide certain information.<sup>40</sup> On October 30, 2008, Judge Richard Leon of the U.S. District Court for the District of Columbia denied the preliminary injunction request because the plaintiffs had demonstrated neither a substantial likelihood that the checkpoint program was unconstitutional nor the necessary irreparable harm.<sup>41</sup>

On July 10, 2009, approximately one year after the installation of the first set of NSZ checkpoints, the D.C. Circuit Court of Appeals reversed the district court and granted a preliminary injunction on the basis that the Trinidad checkpoints were likely to be held unconstitutional.<sup>42</sup>

### C. WOULD THE SUPREME COURT AGREE?

It is difficult to determine whether the Supreme Court would agree with the opinions of the district court or the D.C. Circuit regarding the

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 668.

<sup>36</sup> Westley, *supra* note 30, at A13.

<sup>37</sup> *Id.*

<sup>38</sup> Del Quentin Wilber, *Class Action Filed Over Checkpoints: Rights Group Calls Police Activity in Trinidad Neighborhood Unconstitutional*, WASH. POST, June 21, 2008, at B2.

<sup>39</sup> *Id.*

<sup>40</sup> *Mills I*, 584 F. Supp. 2d 47, 51-52 (D.D.C. 2008). The one plaintiff who was not denied entry, William Robinson, resided in the Trinidad neighborhood at the time of the complaint. He, however, alleged that he was told by an officer at a checkpoint that he could not proceed to his house in his vehicle without providing identity information, which he refused to do.

<sup>41</sup> *Id.* at 64.

<sup>42</sup> See *Mills v. District of Columbia (Mills II)*, 571 F.3d 1304, 1310 (D.C. Cir. 2009).

constitutionality of the NSZ checkpoints. Part II of this Comment explores how the Supreme Court has dealt in the past with police checkpoint cases that implicate the Constitution's Fourth Amendment protections. Part III considers Judge Leon's district court opinion refusing to grant a preliminary injunction prohibiting further use of NSZ checkpoints. This section also scrutinizes the D.C. Circuit's opinion, examining how it came to a different conclusion than the district court.

Finally, Part IV argues that the tests used by the Supreme Court to judge the constitutionality of police checkpoints are deeply flawed, that the Court's current lack of effective guidance poses a substantial risk to the protections of the Fourth Amendment, and that a new "strict scrutiny" test should be applied to police checkpoints. Given recent developments in this area of the law, the Supreme Court must clarify or correct its position. The fundamental rights of U.S. citizens are at stake.

## II. BACKGROUND

The Fourth Amendment protects citizens from unreasonable government searches and seizures.<sup>43</sup> Since the beginning of the twentieth century, courts have struggled with the question of how to apply the privacy rights guaranteed by the Fourth Amendment to drivers of automobiles.<sup>44</sup> This Part examines how the Fourth Amendment has been interpreted by the Supreme Court as it applies to automobile searches and seizures, specifically when they occur at police checkpoints.

### A. DISCRETIONARY STOPS BY THE POLICE UNDER THE FOURTH AMENDMENT

The Supreme Court has consistently held that, when a vehicle is stopped at a police checkpoint and the vehicle's passengers are detained, a "seizure" under the Fourth Amendment occurs.<sup>45</sup> The result is the same even when the stop is limited in purpose or brief in duration.<sup>46</sup>

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<sup>43</sup> U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

<sup>44</sup> See David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 565-66 (1998).

<sup>45</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment."); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) ("[C]heckpoint stops are 'seizures' within the meaning of the Fourth Amendment.").

<sup>46</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.").



In *Delaware v. Prouse*, the Supreme Court considered whether discretionary stops by individual patrolmen were constitutional.<sup>47</sup> A patrolman pulled over a driver to check his license and registration without observing a traffic violation or suspecting other illegal activity.<sup>48</sup> The Court held that unless definite suspicion exists that a driver has committed an unlawful act, stopping a vehicle and detaining a driver for the purpose of checking his license and registration violates the Fourth Amendment.<sup>49</sup> The Court concluded that the danger of a patrolman abusing his discretion is greater than any marginal benefit the stops might produce for roadway safety.<sup>50</sup> This conclusion was consistent with the Fourth Amendment bedrock principle that no seizure should occur without individualized suspicion of criminal wrongdoing.

Despite the *Prouse* Court's articulation that the Fourth Amendment demands individualized suspicion to conduct a seizure, over the years the United States Supreme Court has carved out several exceptions to the individualized suspicion requirement.

#### B. THE FIRST EXCEPTION: BORDER PATROL CHECKPOINTS

*United States v. Martinez-Fuerte* is the seminal police checkpoint case that began the carving out of exceptions to the individualized suspicion requirement of the Fourth Amendment in order to facilitate automotive-related crime control.<sup>51</sup> In *Martinez-Fuerte*, the defendants were drivers of automobiles stopped at permanent checkpoints set up along roads that led away from the U.S.-Mexico border.<sup>52</sup> The Supreme Court granted certiorari because the Courts of Appeals for the Fifth and Ninth Circuits were in conflict regarding the constitutionality of the use of checkpoints to police the nation's borders.<sup>53</sup>

The checkpoints were located on thoroughfares frequently traveled by vehicles coming from the border.<sup>54</sup> Each vehicle was inspected, and those drivers that, as determined by the police, required additional inquiry were pulled out of traffic.<sup>55</sup> Each of the original defendants in *Martinez-Fuerte*

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<sup>47</sup> 440 U.S. 648 (1979).

<sup>48</sup> *Id.* at 650.

<sup>49</sup> *Id.* at 663.

<sup>50</sup> *Id.*

<sup>51</sup> 428 U.S. 543 (1976).

<sup>52</sup> *Id.* at 546-47.

<sup>53</sup> *Id.* at 551.

<sup>54</sup> *Id.* at 546.

<sup>55</sup> *Id.*

had been arrested for transporting illegal aliens, which in each instance had been discovered upon further inquiry at the checkpoint.<sup>56</sup>

After reviewing the facts, the Supreme Court held that routine stops at permanent border checkpoints are consistent with the Fourth Amendment.<sup>57</sup> The decision was significant given that the Court had consistently held in the past that checkpoint searches are constitutional only if justified by consent or probable cause.<sup>58</sup> The Court held that the need to make routine checkpoint stops near borders is great, particularly in light of the flow of illegal aliens and drug smuggling across the Mexican border.<sup>59</sup> The Court also noted that the intrusion on Fourth Amendment interests is limited.<sup>60</sup>

The Court's majority recognized the dissent's concern that the decision might erode Fourth Amendment protections as envisioned by the Framers.<sup>61</sup> Accordingly, the holding in *Martinez-Fuerte* is limited to border control checkpoints.<sup>62</sup>

### C. THE *BROWN* REASONABLENESS TEST

Three years after *Martinez-Fuerte*, the Court faced another Fourth Amendment case that would prove highly influential for years to come, particularly in the realm of police checkpoint jurisprudence. In *Brown v. Texas*, two police officers spotted the defendant as he walked away from another man in an alley.<sup>63</sup> The police officers admitted that they did not suspect him of any specific misconduct.<sup>64</sup> Regardless, they stopped the defendant and demanded that he identify himself and explain what he had been doing in the alley.<sup>65</sup> The defendant refused to cooperate and was arrested.<sup>66</sup>

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<sup>56</sup> *Id.* at 546-50.

<sup>57</sup> *Id.* at 566-67.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 555-56.

<sup>60</sup> *Id.* at 558 (noting that the stops involved only a "brief detention of travelers during which 'all that [was] required of the vehicle's occupants [was] a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States'").

<sup>61</sup> *Id.* at 567 (Brennan, J., dissenting) ("Today's decision is the ninth Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures.").

<sup>62</sup> *Id.*

<sup>63</sup> 443 U.S. 47, 48-49 (1979).

<sup>64</sup> *Id.* at 49.

<sup>65</sup> *Id.* at 48-49.

<sup>66</sup> *Id.* at 49.

The defendant claimed that his seizure violated his Fourth Amendment rights.<sup>67</sup> The Court considered whether it was reasonable for police to seize an individual absent individualized suspicion of criminal activity. The Court developed a test that weighed “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.”<sup>68</sup> The Court found that the public interest concerns in preventing crime are great, but the concerns are not great enough to demand that an individual identify himself when he is not suspected of committing a crime.<sup>69</sup> The *Brown* test has since been relied upon by the U.S. Supreme Court in almost every major ruling regarding police checkpoints.<sup>70</sup>

#### D. THE SECOND EXCEPTION: SOBRIETY CHECKPOINTS

The next major Supreme Court police checkpoint case was *Michigan Department of State Police v. Sitz*.<sup>71</sup> In *Sitz*, the Supreme Court considered whether Michigan’s use of sobriety checkpoints violated the Fourth Amendment.<sup>72</sup> The sobriety checkpoints were set up at selected sites along state roads, and officers would briefly stop all vehicles that passed in order to examine the drivers for signs of intoxication.<sup>73</sup> If signs of intoxication were detected, then, as in the checkpoint in *Martinez-Fuerte*, the cars would be taken out of traffic for further inspection.<sup>74</sup> Typically, the police inspected the driver’s license and registration and, if necessary, conducted additional sobriety tests.<sup>75</sup>

The case came to the Supreme Court after motorists filed a complaint in Michigan courts against the state police department alleging that checkpoints conducted with the purpose of combating drunk driving violate the Fourth Amendment.<sup>76</sup> Relying on the *Brown* reasonableness test, which requires courts to weigh the public concern against the severity of the intrusion, the majority in *Sitz* upheld the sobriety checkpoints as constitutional.<sup>77</sup> Chief Justice Rehnquist, writing for a sharply divided

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 51.

<sup>69</sup> *Id.* at 52.

<sup>70</sup> See, e.g., *Illinois v. Lidster (Lidster IV)*, 540 U.S. 419, 426 (2004); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

<sup>71</sup> 496 U.S. at 444.

<sup>72</sup> *Id.* at 447.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 448.

<sup>77</sup> *Id.* at 455.

Court, held that a sobriety checkpoint is justified. The Court reasoned that the state's interest in preventing drunk driving, and the extent to which the checkpoint program could reasonably be found to advance that interest, outweighs the minimal degree of intrusion upon motorists who are briefly stopped.<sup>78</sup>

E. GENERAL CRIME CONTROL POLICE CHECKPOINTS: THE  
INTRODUCTION OF THE PRIMARY PURPOSE TEST

In a somewhat surprising decision, given the Supreme Court's holdings in *Martinez-Fuerte* and *Sitz*, the Court placed a limitation upon police checkpoints in *City of Indianapolis v. Edmond*.<sup>79</sup> In *Edmond*, the Court dealt with a challenge to Indianapolis's use of vehicle checkpoints to search automobiles for drugs.<sup>80</sup> City officials were worried that motorists were bringing narcotics into Indianapolis.<sup>81</sup> They hoped that police checkpoints would prove more effective in curbing narcotics trafficking than the prior techniques relied upon by city officers.<sup>82</sup> The officials figured that they could set up reasonable checkpoints to deal with their drug problem that would pass constitutional muster, much like earlier Court-approved checkpoints that had dealt with the problems of drunk driving and illegal immigration.<sup>83</sup>

The Indianapolis Police Department adopted very specific guidelines that were to be followed by police officers administering the checkpoints.<sup>84</sup> The vehicle checkpoints were manned with approximately thirty police officers.<sup>85</sup> The officers would pull over a group of passing cars for inspection, and the rest of the traffic on the road would proceed as usual.<sup>86</sup> Officers would approach each vehicle, inform the driver that he had been stopped at a drug checkpoint, and ask for his driver's license and registration.<sup>87</sup> The officer would check for impairment and conduct a visual inspection from outside the car.<sup>88</sup> A narcotics dog would also walk around

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<sup>78</sup> *Id.*

<sup>79</sup> 531 U.S. 32 (2000).

<sup>80</sup> *Id.* at 34.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 34-36.

<sup>84</sup> *Id.* at 35.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

the vehicle.<sup>89</sup> Any further inspection before letting the driver go would require consent or particularized suspicion.<sup>90</sup>

In *Edmond*, the Court framed the dispositive issue as being whether highway checkpoints with the “primary purpose” of discovery and interdiction of vehicle passengers possessing illegal narcotics are constitutional.<sup>91</sup> In an opinion delivered by Justice O’Connor, the Court noted that it was unwilling to limit the purposes that might justify a checkpoint program to any “rigid set of categories.”<sup>92</sup> The Court, however, also concluded that it could not approve a program whose “primary purpose” is indistinguishable from the general interest in crime control.<sup>93</sup> The Court noted that, in the previous instances in which the Fourth Amendment particularized-suspicion requirement was suspended, the primary purpose of the checkpoints was closely tailored to the specific problems of patrolling the border or maintaining safe highways.<sup>94</sup> The Court found that in *Edmond*, the purpose of “drug interdiction” was too closely related to Indianapolis’s general interest in crime control and the city’s checkpoints organized under this purpose required individualized suspicion in order to be constitutional.<sup>95</sup>

F. *ILLINOIS V. LIDSTER*: THE LATEST SUPREME COURT CASE TO CONSIDER POLICE CHECKPOINTS

In *Illinois v. Lidster*, the Supreme Court faced another police checkpoint dilemma.<sup>96</sup> In this case, however, the police officers were not stopping cars in order to detect or deter criminal wrongdoing by the drivers themselves; instead, officers were stopping cars for the sole purpose of obtaining information about a hit-and-run driver on the loose.<sup>97</sup> Joseph Pytel was hit and killed by a car while riding his bike in August 1997, and the driver of the vehicle that hit him left the scene without identifying himself.<sup>98</sup> Two days after the accident, the local police had no leads. In an

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 40.

<sup>92</sup> *Id.* at 44.

<sup>93</sup> *Id.* at 44.

<sup>94</sup> *Id.* at 41.

<sup>95</sup> *Id.* at 48.

<sup>96</sup> 540 U.S. 419 (2004).

<sup>97</sup> *Id.* at 421.

<sup>98</sup> William Grady, Obituaries, *Joseph L. Pytel, 70, Postal Worker*, CHI. TRIB., Aug. 25, 1997, at 5.

effort to obtain more information about the driver, police set up the checkpoints in question.<sup>99</sup>

Robert Lidster was the manager of a local pet store who was not involved in and had no material knowledge regarding Pytel's accident.<sup>100</sup> Lidster did, however, encounter the checkpoint while driving under the influence. After being briefly questioned, he nearly hit a police officer while attempting to drive his car away from the checkpoint.<sup>101</sup> Noting Lidster's erratic driving, the police officer who had nearly been hit requested Lidster's license and registration.<sup>102</sup> The officer smelled alcohol on his breath, had Lidster perform sobriety tests, and subsequently arrested Lidster for driving under the influence.<sup>103</sup>

The Court's decision in this case is particularly interesting considering the outcomes reached by the two Illinois appellate courts that heard the case in the wake of the *Edmond* decision. At the trial court level, Robert Lidster was convicted by a jury of his peers.<sup>104</sup> The Illinois Appellate Court reversed the conviction, finding that it was "impossible to escape the conclusion that the roadblock's ostensible purpose was to seek evidence of 'ordinary criminal wrongdoing.'"<sup>105</sup> The appellate court acknowledged the possibility that an emergency situation might justify a roadblock for crime control, but it concluded that this was "the type of routine investigative work that the police must do every day and does not justify the extraordinary means chosen to further the investigation."<sup>106</sup> In using the *Brown* reasonableness test criteria, the appellate court also concluded that the public interest in the acquisition of evidence of a prior crime did not outweigh the intrusion on the rights of innocent motorists.<sup>107</sup>

The Illinois Supreme Court affirmed the appellate court's ruling. The Illinois Supreme Court came to the conclusion that the trial court ignored the U.S. Supreme Court's decision in *Edmond*, which it interpreted as prohibiting the use of police checkpoints to advance the general interest in crime control.<sup>108</sup> The court reasoned that allowing such informational

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<sup>99</sup> *Lidster IV*, 540 U.S. at 422.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 422.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 421.

<sup>105</sup> *People v. Lidster (Lidster II)*, 747 N.E.2d 419, 422 (Ill. App. Ct. 2001).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 421-22.

<sup>108</sup> *People v. Lidster (Lidster III)*, 779 N.E.2d 855, 858-59 (Ill. 2002).

roadblocks could potentially make police checkpoints a “routine part of American life.”<sup>109</sup>

Justice Breyer wrote the opinion for the U.S. Supreme Court, which overturned the rulings of the Illinois courts. The Court held that the Fourth Amendment does not prohibit the use of motorist checkpoints that are authorized for the purpose of requesting information from vehicle occupants about a previously committed crime.<sup>110</sup> Justice Breyer refused to accept the lower courts’ conclusion that the checkpoint in *Lidster* had been used to prevent “ordinary criminal wrongdoing,” like the checkpoint in *Edmond*. The police checkpoint in question in *Lidster* was for informational purposes, not general crime control, which after *Edmond* continues to be per se invalid.<sup>111</sup>

After determining that the “informational” primary purpose of the *Lidster* checkpoints is valid under *Edmond*, the Court moved to the *Brown* reasonableness test.<sup>112</sup> The Court deemed the stops to be constitutional as the public interest in solving the crime is great, the methods used by the police are effective, and these factors outweigh the concern over interference with individual liberties as a result of the stops.<sup>113</sup>

### III. IN THE WAKE OF THESE DECISIONS: DISCUSSION OF THE CONSTITUTIONALITY OF NEIGHBORHOOD ZONES IN THE DISTRICT OF COLUMBIA

It is clear that the Supreme Court has not said that police checkpoints are per se unconstitutional. Various exceptions have been carved out of the individualized suspicion requirement of the Fourth Amendment in order to permit police checkpoints that facilitate automotive-related crime control (such as border checkpoints, sobriety checkpoints, and *Lidster*-type informational checkpoints).<sup>114</sup> Still, Judge Leon’s district court opinion in *Mills v. District of Columbia*, which upheld the D.C. checkpoints, was startling for its outcome. The facts of the case strongly support a conclusion that the primary purpose of the checkpoints was to serve the general interest in crime control. Consequently, like the D.C. Circuit Court of Appeals, this Comment argues that his ultimate decision was not faithful to Supreme Court precedent or the Constitution.

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<sup>109</sup> *Id.* at 860.

<sup>110</sup> *Illinois v. Lidster (Lidster IV)*, 540 U.S. 419, 427-28 (2004).

<sup>111</sup> *Id.* at 426.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See id.*; *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

The district court's decision in *Mills* is to be commended in one sense: Judge Leon attempted to apply faithfully the Supreme Court's tests to the facts in front of him.<sup>115</sup> This is a significant undertaking given that the Justices of the Supreme Court themselves have been inconsistent in the application of the tests. Nevertheless, this Comment argues that, because the primary purpose of the D.C. checkpoints was to serve the "general interest in crime control," the district court's opinion was correctly reversed on appeal.

#### A. THE PRIMARY PURPOSE OF THE D.C. POLICE CHECKPOINTS

A vehicle checkpoint program's "primary purpose" is a question of fact that must be assessed at the programmatic level.<sup>116</sup> Lower courts have been cautioned that "finding the primary or predominant purpose will often prove difficult," and the courts must take into account all available evidence.<sup>117</sup> Furthermore, courts should not "probe the minds of individual officers" acting at the checkpoints, but rather they should look beyond the specific circumstances of any one checkpoint in determining the "programmatic purpose."<sup>118</sup>

In *Mills*, the district court, in determining the "primary purpose" of the checkpoints, looked to the Special Orders issued, the Trinidad NSZ authorizing documents, declarations from Chief Lanier, and the factual circumstances of the Trinidad checkpoints themselves.<sup>119</sup> Judge Leon dispensed with the argument that the programmatic purpose of the police checkpoints was to "detect evidence of ordinary criminal wrongdoing," which is per se unconstitutional after *Edmond*.<sup>120</sup> Instead, according to Judge Leon, the purpose of the checkpoints was not to detect evidence of criminal wrongdoing but to *deter* violent crime facilitated by the use of automobiles.<sup>121</sup> This difference in purpose made the D.C. checkpoints distinguishable from those used in *Edmond*.<sup>122</sup>

Accordingly, the primary purpose test in *Mills* turned on whether a "primary purpose to deter violent crime of a specific type is *sufficiently distinct* from the District's general interest in crime control."<sup>123</sup> Since the

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<sup>115</sup> See *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47 (D.D.C. 2008).

<sup>116</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

<sup>117</sup> *Mills I*, 584 F. Supp. 2d at 55 (citing *United States v. Davis*, 270 F.3d 977, 979 (D.C. Cir. 2001)).

<sup>118</sup> *Id.* (citing *Edmond*, 531 U.S. at 48).

<sup>119</sup> *Id.* at 55-56.

<sup>120</sup> *Id.* at 57.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* (emphasis added).



primary purpose was “sufficiently distinct” from the District’s general interest in crime control, the checkpoints were held to be constitutional.<sup>124</sup> The court reasoned, “Indeed, because the NSZ checkpoint program explicitly does not seek to detect ordinary criminal wrongdoing, or apprehend those committing criminal acts, the program’s primary purpose is clearly distinct from the District’s ‘general interest in crime control,’ as that phrase was employed in *Edmond*.”<sup>125</sup>

The district court’s reasoning is dangerous as far as the Fourth Amendment is concerned. A primary purpose of deterring gun violence (or even drive-by shootings) should still fall under the “general interest in crime control.” If the courts were to sanction all police checkpoints for the simple fact that they were preventative in nature and sought to “deter rather than detect” ordinary criminal wrongdoing, then the primary purpose test would pose little challenge at all. In time, the Fourth Amendment exceptions would inevitably swallow the rule, given that preventative police checkpoints would trump the constitutional protections from police intrusions conducted without suspicion. On appeal, the D.C. Circuit realized the inherent danger in the district court’s application of the primary purpose test. The appellate court repudiated the district court’s reasoning, concluding that if the courts adopted the primary purpose test as envisioned by Judge Leon, then all preventative police checkpoints would be sanctioned as long as they proved reasonable.<sup>126</sup> The D.C. Circuit was unwilling to accept the narrow reading of *Edmond*’s “general interest in crime control” standard urged by the district court. The appellate court shared the fear of other courts that such an application of the primary purpose test could lead to police checkpoints becoming a “routine part of American life.”<sup>127</sup> Accordingly, the D.C. Circuit reversed the case under *Edmond*.<sup>128</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Mills v. District of Columbia (Mills II)*, 571 F.3d 1304, 1311 (D.C. Cir. 2009).

<sup>127</sup> *See People v. Lidster (Lidster III)*, 779 N.E.2d 855, 861 (Ill. 2002) (commenting on the potential for police checkpoints to become routine parts of American life).

<sup>128</sup> It must also be noted that the district court’s reliance on the *Maxwell* case was misplaced, and it is telling that Judge Leon did not mention this in his opinion. *Maxwell* was decided before *Edmond* in a tribunal that is not binding on the District’s courts. *See Maxwell v. City of New York*, 102 F.3d 664 (2d Cir. 1996). In fact, I would argue that *Edmond* effectively overturned *Maxwell*.

The argument can be made that the police checkpoints considered in that case would today be deemed unconstitutional checkpoints whose primary purpose was to serve the general interest in crime control. *Id.* (finding that the checkpoints in *Maxwell* were utilized to curtail drive-by shootings and drug trafficking, which presumably fall under the umbrella of “ordinary criminal wrongdoing” or the “general interest in crime control”).

#### B. REASONABLENESS OF THE D.C. NEIGHBORHOOD SAFETY ZONES

The district court in *Mills* held that the circumstances that led to the implementation of the NSZ were grave, the methods that were used by the MPD were effective, and the intrusion imposed by the checkpoints on the District's drivers was minimal.<sup>129</sup> The D.C. Circuit did not address the reasonableness of the checkpoints after determining that the primary purpose of the checkpoints was unconstitutional.

Although the district court's primary purpose analysis was faulty, it is difficult to argue with the court's reasonableness analysis under the current tests available—particularly with regard to the gravity of the public concern and the effectiveness of the checkpoints. Gun violence is of the highest concern in Washington, as in other American cities, and during the time in which the police checkpoints were in effect, there were no reported incidents of automobile-related gun violence in the area.<sup>130</sup>

As for the level of intrusion, it was held that the plaintiffs in *Mills* had not established a substantial likelihood that the NSZ checkpoints' intrusion on individual liberty was so great that it outweighed the interests the NSZ checkpoints advanced.<sup>131</sup> The district court argued that both the objective and subjective intrusiveness of the checkpoints were minimal and that the level of discretion afforded the officers conducting the checkpoints was limited.<sup>132</sup> This aspect of the district court's analysis deserves more attention and is discussed in the next Part.

#### IV. THE END OF THE ROAD FOR FOURTH AMENDMENT PROTECTIONS: CAUSE FOR CONCERN FOR DRIVERS IN HIGH-CRIME AREAS

Thirty years ago, the Supreme Court came to the conclusion that the expectation of privacy in an automobile and the right to operate an automobile freely differ from the expectation of privacy and freedom in

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Judge Leon did not make this argument. In fact, he cited to the case in persuasive fashion. See *Mills I*, 584 F. Supp. 2d at 59 (noting that checkpoints, like those in *Maxwell*, which were utilized to deter drive-by shootings “served an important public concern,” similar to the D.C. checkpoints). This was an interesting development, because if *Maxwell* continues to be cited as good law, then the legal community must question the continued viability of the *Edmond* case as a binding opinion. *Maxwell* and *Edmond* arguably cannot coexist as reliable precedent.

<sup>129</sup> *Mills I*, 584 F. Supp. 2d at 59-62.

<sup>130</sup> *Id.* at 59-60.

<sup>131</sup> *Id.* at 62.

<sup>132</sup> *Id.* at 60-62.

one's home.<sup>133</sup> As a result, Fourth Amendment analysis of searches and seizures of homes has differed from that of searches and seizures of cars.<sup>134</sup> Unfortunately, the idea that a driver should have a "lower" expectation of privacy while in his car has been exaggerated and exploited. Consequently, city and police administrators today can develop police checkpoint programs that, despite being highly intrusive, easily survive judicial scrutiny. The Fourth Amendment, as it applies to the expectation of privacy in automobiles, has lost its teeth, and the judicial system must restore its relevance before it is too late. The following sections touch on several reasons why the Fourth Amendment's protections are in danger, particularly in high-crime areas like the Trinidad neighborhood of Washington, D.C.

#### A. THE PRIMARY PURPOSE AND *BROWN* REASONABLENESS TESTS ARE DEEPLY FLAWED

The primary purpose and *Brown* reasonableness tests are deeply flawed, though courts currently rely on both to determine the constitutionality of police checkpoints. Moreover, the Supreme Court and the lower courts inconsistently apply the tests.<sup>135</sup> Police checkpoints will and should continue to be challenged until the Supreme Court develops better standards or sufficiently outlines the criteria that it considers most important in judging the constitutionality of police checkpoints. The

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<sup>133</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 556, 561 (1976) ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence.").

<sup>134</sup> *See Carroll v. United States*, 267 U.S. 132, 151-53 (1925). Indeed, it can be argued that this distinction in Fourth Amendment jurisprudence was made far earlier, as the Supreme Court suggested in *Carroll* that

the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or *automobile*, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

*Id.* at 153 (emphasis added).

<sup>135</sup> *See, e.g., Illinois v. Lidster (Lidster IV)*, 540 U.S. 419 (2004); *People v. Lidster (Lidster III)*, 779 N.E.2d 855 (Ill. 2002). In the *Lidster* proceedings, the Illinois Appellate Courts and the U.S. Supreme Court sharply differed on what is considered to be a primary purpose which serves the "general interest in crime control." These differences have yet to be addressed, and the Supreme Court has yet to identify what it considers the "general interest in crime control." Consequently, the constitutionality of checkpoints, like those in D.C., remains difficult to determine.

following subsections examine the major flaws in both tests as they have been applied by the courts.

*1. The Application of the Primary Purpose Test Is Open to Interpretation and Therefore Has Been Applied in an Inconsistent Fashion*

The primary purpose test created in *Edmond* has arguably shifted the focal point in checkpoint litigation. In today's courts, considerable deference is shown to city and police officials with regard to the authorization and operation of police checkpoints. Past Supreme Court precedent has illustrated that it is almost a foregone conclusion that the checkpoints will be deemed reasonable.<sup>136</sup> Authorized checkpoints are assumed to address a grave public concern in an effective manner while only minimally intruding on the civil liberties of the common citizen. As a result, courts are now focusing more heavily on the government's purpose for resorting to checkpoints, as opposed to the manner in which the checkpoints are conducted.<sup>137</sup> This approach is partly the result of the relative weakness of the *Brown* reasonableness test.<sup>138</sup> Considering this shift in emphasis, to ensure the rights protected in the Fourth Amendment, courts must apply a legitimate primary purpose test, and the test's fundamental flaws must be addressed.

*i. First Flaw: The Edmond Language Has Been Misinterpreted, Leading to a Shallow, Insufficient Analysis of the Programmatic Purpose of Challenged Checkpoints*

The first major flaw in the primary purpose test as it is currently applied is a product of the evolution of the test since *Edmond*. In *Edmond*, the Court stated that when a programmatic purpose of the police checkpoints is to detect "ordinary criminal wrongdoing," then the checkpoints are per se unconstitutional.<sup>139</sup> That language was strictly

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<sup>136</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 53-55 (2000); see also *Lidster IV*, 540 U.S. at 427-28. In the two major Supreme Court checkpoint cases that have been decided since the advent of the primary purpose test, the Court has dedicated the majority of its opinions to the discussion of the checkpoint programs' primary purpose. In *Edmond*, where the checkpoint program was struck down, the dissenting Justices of the Supreme Court indicated that the checkpoint program was clearly reasonable and thus constitutional. They saw the primary purpose test as a tool which would be utilized by lower courts to strike down police checkpoints which would clearly be reasonable and thus constitutional under *Brown*.

<sup>137</sup> See generally, e.g., *Mills I*, 584 F. Supp. 2d 47 (D.D.C. 2008).

<sup>138</sup> For further discussion of the *Brown* reasonableness test, see *infra* Part IV.A.2.

<sup>139</sup> *Edmond*, 531 U.S. at 41-42.

construed by Judge Leon.<sup>140</sup> Consequently, minor linguistic manipulation of the documents that authorize a checkpoint program by law enforcement officials create police checkpoints that survive judicial scrutiny.<sup>141</sup> More specifically, if the programmatic documents specify that the checkpoints are to “deter” criminal wrongdoing or to “gather” information regarding a crime rather than to “detect” wrongdoing, then the programmatic purpose is justifiable under Judge Leon’s version of the test.<sup>142</sup>

The key to passing the test, however, should not be whether the primary purpose of a system of police checkpoints is deterrence rather than detection of criminal wrongdoing. Fortunately, the D.C. Circuit recognized this flaw in the district court’s reasoning.<sup>143</sup> The fundamental rights provided by the Fourth Amendment should not be so easily overcome by a play on words by a clever legislator. This is not to say that a police checkpoint that serves as a deterrent should be presumptively unconstitutional. Both border checkpoints and sobriety checkpoints arguably have as major goals the prevention of drunk driving and illegal immigration, respectively.<sup>144</sup> Yet, courts must dig deeper than the legislative language of the authorizing documents when attempting to decipher the programmatic purpose of the checkpoint program.

ii. The Second Flaw: The Supreme Court Has Failed to Articulate Which Police Objectives Fall Under the “General Interest in Crime Control” Umbrella

The second major flaw in the primary purpose test stems from the Supreme Court’s failure to indicate what comes under the umbrella of the “general interest in crime control.” Given the outcome in *Edmond*, we can be assured that the detection of drug trafficking is considered by several

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<sup>140</sup> See *Mills I*, 584 F. Supp. 2d at 57 (holding that the D.C. checkpoints can be distinguished from those prohibited under *Edmond* because their primary purpose is not to make arrests or to *detect* evidence of ordinary criminal wrongdoing, but rather to *deter* persons in motor vehicles from entering the NSZ to commit crime).

<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., *Illinois v. Lidster (Lidster IV)*, 540 U.S. 419, 426 (2004); *Mills I*, 584 F. Supp. 2d at 57-58. Both of these cases illustrate the weakness of the primary purpose test. The courts in each case placed far too much emphasis on the language of the documents which authorized the checkpoints in determining the “primary purpose” of the checkpoints. The danger of relying on this authorizing language is that courts will be easily manipulated in the future, as the authorizing language may state that the purpose is to “gather information” when the underlying purpose is to, in fact, detect ordinary criminal wrongdoing.

<sup>143</sup> *Mills v. District of Columbia (Mills II)*, 571 F.3d 1304, 1311 (D.C. Cir. 2009).

<sup>144</sup> See *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 449 (1990) (noting the importance of deterring drunk driving); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555-56 (1976) (noting the importance of deterring illegal immigration).

Justices to be a “general crime control” objective, but we can be assured of little else.<sup>145</sup> This is a flaw that must be cured in order to ensure that city officials only resort to the authorization of police checkpoints when a special governmental interest is identified.

In *Edmond*, Justice O’Connor argued that, despite the “severe and intractable nature of the drug problem,” the Indianapolis checkpoints were not justifiable.<sup>146</sup> She understood the checkpoints to be simply a tool for police to “pursue their general crime control ends” in a fashion which did not pass constitutional muster.<sup>147</sup> Yet, she did not indicate any other checkpoint objectives that might be classified as impermissible “general crime control” law enforcement techniques.

In *Mills*, the district court made a point of arguing that the phrase “general interest in crime control” does not refer to every law enforcement objective.<sup>148</sup> Consequently, the court concluded that the phrase did not encompass the specific deterrence of automobile-related gun violence encountered in the nation’s capital.<sup>149</sup> Of course, the D.C. Circuit Court of Appeals disagreed with Judge Leon’s district court opinion, holding that the D.C. checkpoint’s primary purpose was to pursue the general interest in crime control.

Given the ambiguity surrounding the phrase “general interest in crime control,” it remains unclear whether the district court or the appellate court properly interpreted the Supreme Court’s views regarding justifiable primary purposes for checkpoint programs.<sup>150</sup> It is clear, however, that if the Supreme Court were to provide categories of impermissible police checkpoint justifications or a list of justifications that would come under the heading of “general interest in crime control,” the Court would go a long way towards resolving this question. The lack of clarity in determining what is considered the “general interest in crime control” will undoubtedly continue to be a problem in checkpoint litigation until the Supreme Court attempts to resolve it.

iii. Third Flaw: The Primary Purpose Can Be Deceiving and Difficult to Decipher

The primary purpose examination has a third flaw: police departments may erect roadblocks under the guise of conducting sobriety checkpoints, or

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<sup>145</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000).

<sup>146</sup> *Id.* at 42.

<sup>147</sup> *Id.* at 43.

<sup>148</sup> *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47, 57 (D.D.C. 2008).

<sup>149</sup> *Id.*

<sup>150</sup> See *Mills II*, 571 F.3d 1304, 1311 (D.C. Cir. 2009).

gathering information regarding past activities, or even simply deterring gun violence, when the true underlying mission of the checkpoints is to detect other criminal activity. While this statement illustrates an undeniably cynical view, how are the courts supposed to be able to decipher the actual purpose of the checkpoints?

Take, for example, the NSZ checkpoints. The appellate court chose to overturn the district court's opinion on the grounds that the programmatic purpose of the checkpoints was too closely related to "general crime control."<sup>151</sup> Under the primary purpose test, as it is currently applied, the issuance of a revised Special Order with several linguistic changes would allow the checkpoints to pass constitutional muster. For instance, the checkpoints could be tied to roadway safety or traffic regulation instead of the deterrence of gun violence. In *Mills*, the D.C. Circuit noted that while deterrence of drug activity and gun violence are forbidden primary purposes under *Edmond*, traffic regulation remains a permissible primary purpose for suspicionless checkpoints.<sup>152</sup>

It is only a matter of time before city officials facing rising crime rates attempt to authorize checkpoint plans under deceptive guises that might persuade the courts to deem the checkpoints constitutional. Indeed, given the level of violent crime involving the use of automobiles in Washington, D.C., it would be difficult to make the argument that the sobriety checkpoints in *Sitz* are more justifiable in eliminating the "immediate, vehicle-bound threat to life and limb" than any D.C. checkpoints aimed at roadway safety.<sup>153</sup> This emphasis on the legislative language of checkpoint plans—language which can easily be manipulated by legislators to "pass" the Supreme Court's test—places Fourth Amendment in danger.

#### iv. What the Supreme Court Can Do to Save the Primary Purpose Test

The Supreme Court must clarify the parameters of the primary purpose test if it is to be relied upon in future checkpoint litigation. If the Court does so, perhaps the test will be applied by lower courts so that only certain special governmental needs, which are distinguishable from the general interest in crime control, justify police checkpoints. Justice O'Connor noted that she was unwilling to identify a bright-line rule or "rigid categories" that would limit the types of crimes that would justify

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<sup>151</sup> *Id.* at 1312.

<sup>152</sup> *Id.*

<sup>153</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 39, 43 (2000) (noting that *Sitz* sobriety checks were "aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue").

reasonable police checkpoints.<sup>154</sup> She noted that the Fourth Amendment would permit an “appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”<sup>155</sup> This Comment does not deny that these considerations are valid. It does argue, however, that the Court should be more transparent with respect to which checkpoint justifications are not sufficient under the test or are too closely linked to the general interest in crime control. Given the way that the doctrine has evolved since *Edmond* and the manner in which lower courts have applied the test, it may be time to rethink Justice O’Connor’s reluctance to specify certain categories of criminal activity that are indistinguishable from the general interest in crime control.

## 2. *The Increasingly Low Threshold to Pass the Brown Reasonableness Test Must Be Addressed*

Although the D.C. Circuit Court of Appeals chose not to address the reasonableness of the NSZ checkpoints after determining that the primary purpose of the program was unconstitutional, courts in most checkpoint cases use the *Brown* reasonableness test after determining that the primary purpose is justified.<sup>156</sup> “The reasonableness of seizures at vehicle checkpoints” under *Brown* is assessed by weighing: “1) the gravity of the public concern served by the checkpoints; 2) the degree to which the checkpoints advance the public interest; and 3) the severity of the checkpoints’ interference with individual liberty.”<sup>157</sup> The test is inherently flawed because it undervalues individual liberty interests when balancing such interests against the public interest goal. The test, as it is currently applied, does not sufficiently protect Fourth Amendment rights.

Courts have maintained that the gravity of the public concern may reduce an individual’s liberty interest, but that “the gravity of the threat alone [is not] dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose.”<sup>158</sup> Despite this proclamation, when government officials have provided a rational reason for instituting police checkpoints and adequately warned drivers about the checkpoints, the checkpoints have survived the *Brown* reasonableness test. The test has a very low threshold—an assertion

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<sup>154</sup> *Id.* at 44.

<sup>155</sup> *Id.*

<sup>156</sup> *See, e.g., Illinois v. Lidster (Lidster IV)*, 540 U.S. 419, 426 (2004); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

<sup>157</sup> *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47, 59 (D.D.C. 2008).

<sup>158</sup> *Edmond*, 531 U.S. at 42.



supported by the government's high success rate in proving the reasonableness of intrusive checkpoints in the thirty years since *Brown*.<sup>159</sup>

The following discussion highlights the flaws in the *Brown* reasonableness test, with a special focus on the problems associated with the “effectiveness” and “intrusiveness” prongs of the test. This discussion also examines how courts assess the reasonableness of police checkpoints used in high-crime areas like Trinidad.

i. Gravity of Public Concern

The first factor considered under the *Brown* test is the gravity of the public concern that has led to the authorization of challenged checkpoints. The manner in which courts have assessed the gravity of public concern is straightforward and uncontroversial. After all, it would be nonsensical to argue that the issues of border control, drunk driving, narcotics trafficking, or gun violence are not grave public concerns. Not surprisingly, the Supreme Court has yet to hold that the gravity of the public concern motivating a challenged checkpoint was insufficient under the *Brown* test.<sup>160</sup> More troubling, the Court has never described in detail what constitutes a “grave public concern.” Consequently, lower courts have nowhere to turn for guidance in judging whether the gravity of public concern is sufficient under the *Brown* test.

In considering how a court might examine a high-crime area checkpoint, it is a near certainty that the criminal activity that is prevalent in most urban areas would be considered a grave public concern (including gun violence, gang violence, drug trafficking, and prostitution). Accordingly, given past Court precedent, the more controversial “effectiveness” and “intrusiveness” aspects of the *Brown* test will be the subject of far more scrutiny.

ii. Effectiveness

The second factor considered under the *Brown* reasonableness test is the effectiveness of the checkpoints. In considering the effectiveness of police checkpoints, courts have concluded that while statistical evidence can often be instructive, it is not required to establish a checkpoint's

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<sup>159</sup> See 443 U.S. 47 (1979). The police checkpoint cases that have come before the Supreme Court since *Brown* have ended with the Court considering the checkpoints reasonable, with the exception being *Edmond*, where the *Brown* test was not applied. *Lidster IV*, 540 U.S. at 426; *Sitz*, 496 U.S. at 455.

<sup>160</sup> See *Edmond*, 531 U.S. at 49 (Rehnquist, C.J., dissenting) (concluding that Indianapolis's determination that checkpoints utilized to stop drug trafficking was a legitimate state interest and satisfied the first part of the *Brown* test).

effectiveness.<sup>161</sup> As Judge Leon wrote in *Mills*, “no single type of evidence is a touchstone for determining whether a checkpoint is ‘effective.’”<sup>162</sup>

When accused of setting up an ineffective checkpoint, the government must simply prove that the method chosen is a reasonable law enforcement technique and that it furthers the public’s interest in a “sufficiently productive” manner.<sup>163</sup> As a result of this low bar, every police checkpoint to which the Court has applied the *Brown* test has been deemed “effective.”<sup>164</sup> The Supreme Court has made clear that judges are not able to decide the best means to advance the public interest identified; instead, considerable deference must be accorded to “the government officials who have a unique understanding of, and a responsibility for, limited public resources.”<sup>165</sup>

Thus, despite a fundamental right being at stake, the courts are not allowed to stop checkpoints solely on the grounds that, statistically, they prove ineffective. As long as the checkpoints are reasonably tailored to advance the program’s purpose, and as long as the checkpoints are “sufficiently” productive (although it is not necessarily up to the presiding judge to determine what is considered “productive”) then the checkpoints pass muster under the “effectiveness” test.

Judges should be given more credit. Although showing deference to government officials is understandable, if the statistical analysis illustrates that a checkpoint has failed to limit illegal border crossings, drunk driving, or violent crime in a high-crime area, then a judge should be able to make the determination that the checkpoint is ineffective. At the moment, the test requires far too much deference, and the Supreme Court should rectify this flaw in the analysis in its next police checkpoint case.

Notably, even within the D.C. police hierarchy, some dispute the effectiveness of high profile police checkpoints in high-crime areas, such as those which surrounded Trinidad.<sup>166</sup> Kris Baumann, head of the D.C. Fraternal Order of Police, argued that the NSZ program would ultimately “make policing more difficult by harming the trust between officers and

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<sup>161</sup> *Mills I*, 584 F. Supp. 2d at 59-60 (citing *United States v. Bowman*, 496 F.3d 685, 693 (D.C. Cir. 2007) (“[T]he effectiveness or expected effectiveness of the checkpoint . . . may be demonstrated in a variety of ways.”)).

<sup>162</sup> *Id.* at 60.

<sup>163</sup> *Id.* at 59 (citing *Sitz*, 496 U.S. at 453-54).

<sup>164</sup> See, e.g., *Lidster IV*, 540 U.S. at 419; *Sitz*, 496 U.S. at 444; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

<sup>165</sup> *Mills I*, 584 F. Supp. 2d at 59 (citing *Sitz*, 496 U.S. at 454).

<sup>166</sup> See David Nakamura, *Police Union Chief: Checkpoints Not Effective*, WASH. POST, June 10, 2008, [http://voices.washingtonpost.com/dc/2008/06/police\\_union\\_chief\\_checkpoints.html](http://voices.washingtonpost.com/dc/2008/06/police_union_chief_checkpoints.html).

city residents.”<sup>167</sup> He noted that, as far as making arrests, the NSZ program had “limited or no effectiveness” and worried that the checkpoints were “destroying the relations with citizens.”<sup>168</sup> In addition, he added that he was “getting a lot of calls from officers who [were] concerned that [the checkpoint program was] not [c]onstitutional.”<sup>169</sup>

This Comment argues that, if this test is to be applied in the future, in-depth statistical analysis of the effectiveness of checkpoints like those used in the D.C. NSZ should be included in the record and noted in future opinions. In addition, the effect that the checkpoints have on police-resident relations should be taken into account. These steps would solidify the justification for authorizing checkpoints. They would also provide judges with reliable benchmarks to compare the effectiveness of police checkpoints in the future. At the moment, there is no comparison, and there is no true scrutiny of the statistical or societal effectiveness of checkpoints. As it stands, the effectiveness element of the *Brown* reasonableness test is itself ineffective.

### iii. Intrusiveness

The final factor in the *Brown* reasonableness test is the analysis of the intrusiveness of the police checkpoints. To determine the severity of the checkpoint program’s intrusiveness, three criteria are generally considered: (1) the “objective” intrusiveness of the checkpoints; (2) the “subjective” intrusiveness of the checkpoints; and (3) the level of discretion afforded the police officers conducting the checkpoints.<sup>170</sup> These three elements of the “intrusiveness” prong of the *Brown* test are examined in detail in the following discussion, which focuses particularly on the flaws in the “intrusiveness” analysis in *Mills*, and how the “intrusiveness” analysis might be conducted in future cases involving checkpoints surrounding high-crime neighborhoods.

#### a. Objective Intrusiveness

A checkpoint’s objective intrusion is “measured by the duration of the seizure and the intensity of the investigation.”<sup>171</sup> The objective intrusion

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *Sitz*, 496 U.S. at 452; *Brown v. Texas*, 443 U.S. 47, 51 (1979).

<sup>171</sup> *Sitz*, 496 U.S. at 452.

analysis has typically only examined the intrusiveness of each individual stop, not the overall length of the checkpoint program.<sup>172</sup>

The district court's opinion in *Mills* illustrates a major flaw in the "objective intrusiveness" test, particularly when the test is applied to checkpoints surrounding a high-crime neighborhood.<sup>173</sup> Checkpoints surrounding one's neighborhood present a different set of issues than those that have been previously validated by the Supreme Court. The checkpoints that the Supreme Court has authorized are generally of the type that one rarely encounters; no one anticipates that drivers are frequently crossing the border or being stopped at sobriety checkpoints.<sup>174</sup> This likely contributes to the Supreme Court's assumption that the checkpoints are minimally intrusive. But checkpoints at the border and on highways can be avoided with knowledge of the checkpoints in a manner that contrasts starkly from those that confine a residential neighborhood.

The D.C. checkpoints were authorized twice in one month.<sup>175</sup> The second time they were authorized, the Chief of Police approved an extension of the checkpoints for up to ten days.<sup>176</sup> This would presumably lead to the seizure of one's vehicle multiple times over a period of days, as one returned home from work, errands, leisure activity, or visits with family and friends outside the neighborhood. The objective intrusiveness is far greater when citizens are being stopped and questioned by the police repeatedly. This is undoubtedly more intrusive police checkpoint behavior than has previously been sanctioned by the Supreme Court, and it should be treated as such in the future.

#### *b. Subjective Intrusiveness*

The second factor considered, the "subjective" intrusiveness of the checkpoints, is easily satisfied. The courts require that those administering police checkpoints make an effort to "minimize anxiety, alarm, and fear."<sup>177</sup> Minimal efforts to ensure that checkpoints are publicized, such as putting

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<sup>172</sup> See *Illinois v. Lidster (Lidster IV)*, 540 U.S. 419 (2004); *Sitz*, 496 U.S. 444; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); see also *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47, 61 (D.D.C. 2008). In the three major Supreme Court police checkpoint cases, the Court examined the intrusiveness of each individual stop in detail, but not the overall length of the checkpoint program. Not surprisingly, Judge Leon followed the same formula in *Mills I*.

<sup>173</sup> *Mills I*, 584 F. Supp. 2d at 61.

<sup>174</sup> See *Sitz*, 496 U.S. 444; *Martinez-Fuerte*, 428 U.S. 543.

<sup>175</sup> *Mills I*, 584 F. Supp. 2d at 53.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 61 (citing *Sitz*, 496 U.S. at 452). In *Sitz*, the Supreme Court noted that the potential for "fear and surprise" is minimal where uniformed police officers stopped every car.

up posters warning motorists approaching the checkpoints that stops are imminent or announcing the checkpoints at a news conference, have led courts to label checkpoints as minimally intrusive.<sup>178</sup> When checkpoints stop all passing motorists for inspection, rather than picking cars at random, courts also tend to see the stops as minimally intrusive in a subjective sense.<sup>179</sup> Again, these requirements constitute an incredibly low bar for the administrators of police checkpoints to overcome.

The “subjective intrusiveness” analysis is particularly flawed as applied to checkpoints in high-crime neighborhoods. The analysis by Judge Leon of the subjective intrusiveness of the D.C. checkpoints, in which he strictly applied tests used by higher courts, illustrates these flaws. Judge Leon concluded that the “subjective intrusiveness” of the D.C. checkpoints was minimal.<sup>180</sup> He noted that the checkpoints in D.C. were publicized, posters were put up that warned motorists approaching the checkpoints that a stop was imminent, and all motorists who chose to proceed to the checkpoint were stopped.<sup>181</sup> He affirmed that these were the kinds of steps that the Supreme Court had held minimized anxiety, alarm, and fear.<sup>182</sup>

In high-crime neighborhoods, however, the relationship between the police and the neighborhood’s residents may be tense.<sup>183</sup> While some are heartened at the sight of the police, others are instilled with a sense of anger and fear, particularly those who have been previously apprehended or who know someone who has been arrested or mistreated by the police.<sup>184</sup> Consequently, it is more likely that in a high-crime neighborhood, the sight of an increased police presence might increase the level of alarm and anxiety one feels as a driver, despite not having committed a crime. As a result, courts should engage in more cogent analysis with regard to which police efforts realistically “minimize anxiety, alarm and fear” when checkpoints are authorized in high-crime areas.

### *c. Police Discretion*

The third consideration of the intrusiveness test is the level of discretion given to the police officers conducting the checkpoints.

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<sup>178</sup> See *United States v. McFayden*, 865 F.2d 1306, 1313 (D.C. Cir. 1989) (holding that there was minimal subjective intrusion where the police checkpoint was announced at a news conference and the checkpoint was sufficiently well-marked).

<sup>179</sup> See *Sitz*, 496 U.S. at 452.

<sup>180</sup> *Mills I*, 584 F. Supp. 2d at 61.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., Ronald Weitzer, *Citizens’ Perceptions of Police Misconduct: Race and Neighborhood Context*, 16 JUST. Q. 819 (1999).

<sup>184</sup> See *id.* at 833.

Reasonableness under the Fourth Amendment requires that the seizure be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.<sup>185</sup> Courts consider whether officers manning checkpoints have been given specific instructions and training. If their instructions are detailed in a reasonable fashion and the officers have been sufficiently trained, then the discretionary standard poses little threat to the constitutionality of a checkpoint.

While the aforementioned limitations on police officers are important and well-stated, the potential for abuse of the discretion afforded police officers remains extremely high at checkpoints, regardless of the level of training and instruction provided. Giving police officers license to stop every driver on the road, without the driver's consent or an articulated reason for suspicion, can lead to friction between driver and officer.

In high-crime areas like Trinidad, police officers manning checkpoints are granted the discretion to arrest when they believe that the drivers are not complying with their requests.<sup>186</sup> Even with careful instructions, there is clearly a danger of abuse of discretion, particularly because the checkpoints are located in an area where residents and police often already coexist in a state of distrust.<sup>187</sup>

In *Mills*, the district court stated that the NSZ checkpoint program was drafted "to minimize the discretion vested with the officers implementing the program."<sup>188</sup> The court noted that the Special Orders provided a "highly-detailed set of rules" that governed the officers staffing the checkpoints.<sup>189</sup> The district court also found it persuasive that all of the officers were required to complete a training session on the checkpoint program before they were allowed to staff a checkpoint.<sup>190</sup>

In passing, the district court added that the one instance in which an officer retained significant discretion was when an operator's stated reason for entry fell "within an ambiguity in the list of 'legitimate reasons' for entry."<sup>191</sup> This, however, is the moment where an abuse of discretion is the most likely to occur. The driver's chances of entry are completely subject

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<sup>185</sup> See *Brown v. Texas*, 443 U.S. 47, 51 (1979); see also *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (finding system of vehicle spot checks unconstitutional on account of "standardless and unconstrained discretion" afforded police officers).

<sup>186</sup> See *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47, 51 (D.D.C. 2008).

<sup>187</sup> See Keith L. Alexander & V. Dion Haynes, *Police Call ID Checks in Trinidad a Success: Stopping Drivers a Violation of Rights, Some Neighbors Say*, WASH. POST, June 8, 2008, at C1.

<sup>188</sup> *Mills I*, 584 F. Supp. 2d at 62.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

to the police officer's discretion. A law-abiding citizen, in a moment of panic, might not provide the answer the police officer is looking for and, as a result, be denied entry into his neighborhood. In fact, he might provide a perfectly suitable answer and still be denied entry. These checkpoint programs place far too much power in the hands of the police at the expense of citizens, in contravention of the Fourth Amendment. The danger of this abuse of discretion should carry more weight in future police checkpoint cases if the *Brown* reasonableness test is to be relied upon.

#### B. A NEW STRICT SCRUTINY TEST IS NEEDED

As the D.C. Circuit Court of Appeals concluded in *Mills*, instituting police checkpoints due to a rise in crime is generally not a concept that can be reconciled with the Fourth Amendment.<sup>192</sup> The Supreme Court has been quite clear that it is willing to carve out exceptions to the rules that uphold the protections of the Fourth Amendment, but it has only done so when it finds a primary purpose that can be identified as a "special governmental need."<sup>193</sup> All governmental needs, however, cannot be treated equally when a fundamental right of citizens under the Constitution is at stake. Therefore, a new test is needed which will ensure that only those police checkpoints that are narrowly tailored to pursue a compelling governmental interest are authorized.

##### 1. *Strict Scrutiny Review*

When police are authorized to conduct "seizures" at checkpoints without individualized suspicion or consent, the checkpoints should be subjected to strict scrutiny. Just as "strict scrutiny" tests are applied to protect the First and Fourteenth Amendment rights of citizens, the Fourth Amendment rights of drivers should be similarly protected by a test which strictly scrutinizes a severe burden on citizens' fundamental rights.<sup>194</sup> The burden imposed by police checkpoints should be considered per se severe. Police officers who operate checkpoints are authorized to stop motorists

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<sup>192</sup> *Mills v. District of Columbia (Mills II)*, 571 F.3d 1304 (D.C. Cir. 2009).

<sup>193</sup> *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000).

<sup>194</sup> *See, e.g., Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (holding that when a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that where fundamental rights and liberties are asserted under Equal Protection Clause, classifications that might invade or restrain them must be closely scrutinized and carefully confined).

without individualized suspicion, and the Fourth Amendment specifically forbids this type of burdensome, intrusive behavior.<sup>195</sup>

Strict scrutiny review makes sense for two major reasons. First, this type of review is commonly used by judges and its application in other contexts has been consistent and reliable.<sup>196</sup> The tests currently in place to determine the constitutionality of checkpoints have been applied in an inconsistent fashion that must not be condoned. Second, courts are currently applying what in reality is a “rational review” analysis, in the form of the two-part primary purpose and *Brown* reasonableness tests. This approach, as the discussion in Part IV has illustrated, does not provide the scrutiny necessary to properly protect the fundamental rights guaranteed by the Fourth Amendment. A strict scrutiny test would have the necessary teeth to protect the fundamental Fourth Amendment rights guaranteed to American citizens (even while driving).

## 2. *Would the D.C. Checkpoints Survive Strict Scrutiny?*

It is unlikely that the NSZ checkpoints would prove constitutional under a strict scrutiny review, although other high-crime area checkpoints might survive. Under a strict scrutiny review, the first step that D.C. officials would have the burden of proving is that the NSZ checkpoints were authorized to pursue a compelling governmental interest. City officials could go with a broad or narrow argument or something in between. Broadly, officials could argue that the compelling governmental interest at stake is keeping the District’s at-risk neighborhoods safe from crime. Yet, if this interest was accepted as compelling, such a decision would force the courts to accept almost all law enforcement objectives as “compelling” governmental interests.

Alternatively, the government could, and likely would, argue that the compelling interest is a far narrower one: reducing the number of gun-related deaths in a high-crime area, for example. The Court could find that this interest is also too general, or too closely tied to the “general interest” in crime control, to be considered a compelling interest. On the other hand, it is conceivable that a court might consider the reduction of gun violence in a high-crime area a compelling governmental interest, and if so, the Court would be forced to move to the second prong of the test.

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<sup>195</sup> See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

<sup>196</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006).



The second element of a strict scrutiny review would require the government to illustrate how the checkpoints were narrowly tailored to pursue the compelling governmental interest. It is here that the NSZ checkpoint program is fatally flawed under a strict scrutiny review. Regardless of the compelling interest put forward by the government, the checkpoints were not narrowly tailored in a manner that should pass constitutional muster under strict scrutiny review.

There are two major reasons for this argument. First, the checkpoints were over-inclusive, authorizing seizures on every citizen who happens to live in the designated high-crime area.<sup>197</sup> Strict scrutiny review would demand that the checkpoints have more focus and likely require a higher level of individualized suspicion. A program which condones random stops of innocent civilians in order to pursue a compelling governmental interest (here, ostensibly to prevent gun violence) is, quite simply, not narrowly tailored.

Second, far less intrusive options are available to law enforcement. There are other ways to pursue “routine investigative work that the police must do every day.”<sup>198</sup> Interim D.C. Attorney General Nickles acknowledged that city officials had attempted to attack the gun violence problem in a variety of less intrusive manners with limited or no success.<sup>199</sup> This acknowledgment, that the city was aware of other available techniques that were less intrusive and consistent with the Constitution, would prove fatal under the strict scrutiny review.

Accordingly, under a responsible strict scrutiny test, the NSZ checkpoints, and other high-crime area checkpoints fashioned after those authorized in the District during the summer of 2008, would not survive judicial review. With that said, one can imagine a checkpoint program that survives this type of review. It would, however, have to operate in a fashion that is less intrusive on innocent civilians and be authorized only after a determination that no other reasonable alternatives are available. Checkpoints *should* be held to such a standard, in order to ensure the Fourth Amendment rights of all citizens, regardless of where they live or drive.

## V. CONCLUSION

The Court’s lack of effective guidance poses a substantial risk to the protections guaranteed by the Fourth Amendment. In *Lidster*, the Court argued that practical considerations would limit just how extensively police

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<sup>197</sup> See *Mills v. District of Columbia (Mills I)*, 584 F. Supp. 2d 47, 51 (D.D.C. 2008).

<sup>198</sup> *People v. Lidster (Lidster I)*, 319 Ill. App. 3d 825, 828 (2d Dist. 2001).

<sup>199</sup> Westley, *supra* note 30, at A13.

checkpoints would be utilized in the future.<sup>200</sup> In the opinion, Justice Breyer noted that there was no real threat that police checkpoints would become a routine part of American life.<sup>201</sup> Yet, in the wake of *Lidster* and Judge Leon's opinion in *Mills*, the District of Columbia had the power to surround every neighborhood in the nation's capital with an intrusive police barricade in a manner that ran completely contrary to the Framers' vision of privacy.<sup>202</sup> The Supreme Court must realize that its past errors in the realm of police checkpoint jurisprudence will proliferate as more cities introduce intrusive checkpoints in the face of rising crime. It is the duty of the Supreme Court to ensure that the Fourth Amendment rights of citizens are not violated. Without a change in direction by the Court, these rights are at risk of disappearing.

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<sup>200</sup> *Illinois v. Lidster (Lidster IV)*, 540 U.S. 419, 426 (2004) (holding that “practical considerations—namely, limited police resources and community hostility to related traffic tieups—seem likely to inhibit” the unreasonable proliferation of police checkpoints).

<sup>201</sup> *Id.*

<sup>202</sup> *See Mills I*, 584 F. Supp. 2d at 47.

