

# Thank You All the Same, but I'd Rather Not Be Seized Today: The Constitutionality of Ruse Checkpoints under the Fourth Amendment

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## INTRODUCTION

American roadways have increasingly become a major point of interaction between citizens and police. A Department of Justice study conducted in 2008 revealed that almost sixty percent of all contact between United States residents and police arose in the context of traffic incidents.<sup>1</sup> Moreover, approximately five percent of all traffic stops resulted in a search of the driver, vehicle, or both.<sup>2</sup> As is the case with any citizen-police contact, these encounters create the opportunity for police to investigate a variety of criminal activity unrelated to the ostensible reason for the contact.

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1. CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEPT OF JUSTICE, NCJ 234599, CONTACTS BETWEEN POLICE AND THE PUBLIC 3 tbl.2 (2011), <http://www.bjs.gov/content/pub/pdf/ccp08.pdf>. Interestingly, while the overall percentage of residents having contact with police (for any reason) has declined from 21% in 2002 to 16.9% in 2008, the percentage of residents having traffic-related contact with police has remained relatively steady—decreasing from 11.1% in 2002 to 10% in 2008. *Id.* at 3 tbl.3. In fact, during this time period, the percentage of all resident-police contact arising from traffic-related incidents has increased, from 52.8% in 2002 to 59.2% in 2008. *Id.* at 3 tbl.2.

2. *Id.* at 10 tbl.14.

Although the primary focus of this Article is on the use of one particular investigative tool—the ruse narcotics checkpoint—the importance of carefully and critically evaluating the ways in which police officers are permitted to confront and interact with citizens on the roads cannot be overstated. Numerous studies have demonstrated that minority drivers are stopped disproportionately in comparison to their white counterparts.<sup>3</sup> And, as all too many news stories have recently reminded us, these traffic stops can lead to tragic consequences and loss of life. As only one of many examples of the danger—particularly to young African American men—inherent in a routine traffic stop, the reader may remember that, on a summer evening in Minnesota, Philando Castile was shot to death in the presence of his girlfriend and her young daughter after being pulled over for a broken taillight.<sup>4</sup> Routine traffic stops put officers at risk as well; one report indicates that of sixty-four officer fatalities involving a firearm in 2016, three such fatalities occurred during traffic stops.<sup>5</sup> Thus, it is imperative to reassess policing on the roadways, and, in particular, the ways in which the Supreme Court has adopted an overly permissive and deferential stance on the investigative approaches that can be utilized by police under the Fourth

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3. See, e.g., AMY FARRELL ET AL., NORTHEASTERN U. INST. ON RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS ACT FINAL REPORT: EXECUTIVE SUMMARY 1 (2003), [http://www.dot.ri.gov/community/CCPRA/docs/2003\\_Rhode\\_Island\\_Traffic\\_Stop\\_Statistics\\_Final\\_Report\\_NU.pdf](http://www.dot.ri.gov/community/CCPRA/docs/2003_Rhode_Island_Traffic_Stop_Statistics_Final_Report_NU.pdf) (“In most communities in Rhode Island non-white drivers are stopped disproportionately to their presence in the driving population.”); STEPHEN M. HAAS ET AL., DIV. OF CRIMINAL JUSTICE SERVS., CRIMINAL JUSTICE STATISTICAL ANALYSIS CTR., WEST VIRGINIA TRAFFIC STOP STUDY FINAL REPORT (2009), [http://www.djcs.wv.gov/ORSP/SAC/Documents/WV\\_AC\\_Traffic\\_NEWOverviewofStatewideFindings.2009.pdf](http://www.djcs.wv.gov/ORSP/SAC/Documents/WV_AC_Traffic_NEWOverviewofStatewideFindings.2009.pdf) (“State-level results indicate that black drivers are 1.64 times more likely . . . [and] Hispanics were 1.48 times more likely to be stopped compared to white drivers.”).

4. Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <http://www.nytimes.com/2017/06/16/us/police-shooting;trial-philando-castile.html?mcubz=0>.

5. NAT’L LAW ENF’T OFFICERS MEM’L FUND, PRELIMINARY 2016 LAW ENFORCEMENT OFFICER FATALITIES REPORT 1–2 (2016), <http://www.nleomf.org/assets/pdfs/reports/Preliminary-2016-EOY-Officer-Fatalities-Report.pdf>.

Amendment.<sup>6</sup>

The Court has, through numerous decisions, facilitated police investigation of criminal activity in the guise of traffic enforcement, rendering the roadways a significant front in fighting the so-called “War on Drugs.” For example, the Court has held that “mere[] passengers” cannot claim a “legitimate expectation of privacy” in the cars they occupy, and thus, cannot seek to suppress evidence found in the unlawful searches of those vehicles.<sup>7</sup> Thus, even unlawful searches, at least of those vehicles containing multiple occupants, can be fruitful ground for law enforcement seeking evidence of criminal wrongdoing.<sup>8</sup> Of course, perhaps no decision has been more helpful to law enforcement seeking to investigate criminal activity than *Whren v. United States*, which held that, as long as an officer has probable cause to stop a vehicle, for example, if the driver committed even a minor traffic offense, the ensuing seizure is reasonable regardless of the officer’s true motivations in executing the stop.<sup>9</sup> Although *Whren’s* holding specifies

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6. The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

7. *Rakas v. Illinois*, 439 U.S. 128, 148–49 (1978). The Court in *Rakas* merged the “standing” inquiry, governing who may properly invoke the exclusionary rule, with the substantive definition of a search, holding that the defendant, as a mere passenger in the automobile that had been searched, lacked the requisite expectation of privacy to permit him to challenge the search. *Id.* See *infra* note 175 for a discussion of *Katz v. United States*, 389 U.S. 347 (1967). For a description and critique of the Court’s treatment of Fourth Amendment standing, see Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L. J. 570 (2008).

8. As stated by Justice White in his dissent, “the Court’s opinion today declares an ‘open season’ on automobiles.” *Rakas*, 439 U.S. at 157 (White, J., dissenting).

9. 517 U.S. 806, 813, 819 (1996). As stated by one scholar, “with the traffic code in hand, any officer can stop any driver any time. The most the officer will have to do is ‘tail [a driver] for a while,’ and probable cause will materialize like magic.” David A. Harris, “Driving While Black” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM L. & CRIMINOLOGY

probable cause as the standard justifying the stop, the Court's reasoning supports the conclusion that a traffic stop based on an officer's objective reasonable suspicion would also be justified, regardless of the officer's subjective intentions regarding the stop.

Adding to *Whren's* potency as a law enforcement tool, the Court, in *Navarette v. California*, recently upheld a traffic stop as supported by "reasonable suspicion that the driver was intoxicated" based only on an anonymous 9-1-1 caller's assertion that the vehicle in question had "run her off the road," although the officer, after tailing the truck for five minutes, did not personally observe any reckless or improper driving.<sup>10</sup> When combined with *Whren*, the exceedingly low standard of reasonable suspicion articulated by the Court in *Navarette* truly provides officers with the means to "single out almost whomever they wish for a stop."<sup>11</sup>

The Court has also sanctioned suspicionless seizures of drivers and passengers in their vehicles pursuant to vehicle checkpoints conducted for purposes of enforcing immigration laws,<sup>12</sup> highway sobriety,<sup>13</sup> and licensing and registration requirements.<sup>14</sup> As is the case with any lawful stop, whether based on suspicion or not, police do not need to ignore other

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544, 559 (1997). When the officer's true motivations for conducting the stop are unexamined and irrelevant, as long as a stop is based on probable cause, derived from the traffic violation, it does not matter, for Fourth Amendment purposes, if the officer was acting from racial animus. As the Court stated, "We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the *Equal Protection Clause*, not the *Fourth Amendment*." *Whren*, 517 U.S. at 813 (emphasis added). For a more thorough discussion of *Whren*, see *infra* Part III. See also Nadia B. Soree, *The Hitchhiker's Guide to the Fourth Amendment: The Plight of Unreasonably Seized Passengers Under the Heightened Factual Nexus Approach to Exclusion*, 51 AM. CRIM L. REV. 601, 639–41 (2014).

10. *Navarette v. California*, 134 S. Ct. 1683, 1686–87 (2014).

11. *Whren*, 517 U.S. at 818.

12. *United States v. Martinez-Fuerte*, 428 U.S. 543, 576 (1976).

13. *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444, 455 (1990).

14. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

indicators of criminal activity that may arise during the stop. Indeed, officers may ask questions unrelated to the reason for the stop,<sup>15</sup> and are permitted to employ the use of a narcotics-detection dog,<sup>16</sup> as long as these additional investigative activities are conducted within the lawful temporal limits of the stop.

Although police may essentially conduct a collateral narcotics investigation pursuant to and within the confines of a sobriety or license and registration checkpoint, the Court drew a line in *City of Indianapolis v. Edmond*, prohibiting the suspicionless seizures of drivers through checkpoints conducted for the primary purpose of advancing “the general interest in crime control.”<sup>17</sup> In doing so, the Court expressed its fear that “[w]ithout 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>18</sup> Thus, despite having found suspicionless checkpoints for certain purposes, unrelated to general law enforcement needs, to be reasonable under the Fourth Amendment,<sup>19</sup> the Court, in *Edmond*, reiterated its “reluctan[ce] to recognize exceptions to the general rule of individualized suspicion,”<sup>20</sup>

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15. *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (holding that questioning regarding defendant’s immigration status during a lawful detention, while police executed a search warrant, did not extend the detention and therefore did not require further Fourth Amendment justification).

16. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (“A dog sniff conducted during a concededly lawful traffic stop . . . does not violate the Fourth Amendment.”). The Court noted, however, that the outcome would be different if the dog sniff occurred when the defendant was unlawfully detained, such as if the traffic stop was “prolonged beyond the time reasonably required to complete that mission.” *Id.* at 407–08.

17. 531 U.S. 32, 41–42 (2000) (quoting *Prouse*, 440 U.S. at 659 n.18).

18. *Id.* at 42.

19. See, e.g., *Mich. Dep’t. of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 576 (1976). See also text accompanying notes 12–14.

20. *Edmond*, 531 U.S. at 43.

stating that, “[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoints such as here, however, stops can only be justified by some quantum of individualized suspicion.”<sup>21</sup>

In the wake of *Edmond*, police departments developed a new breed of checkpoint, designed to either, depending on one’s view, comply with or circumvent the rule and spirit of *Edmond*: the ruse checkpoint. Ruse checkpoint programs all operate in essentially the same fashion.<sup>22</sup> Police set up signs on a highway advising motorists of a drug interdiction checkpoint ahead. Of course, there is no such checkpoint ahead on the highway, as such a checkpoint would clearly be unlawful under *Edmond*. Nevertheless, the driver “take[s] the bait,”<sup>23</sup> and decides to take the first available exit—generally one in a remote area that does not immediately provide access to any services, such as a gas station or

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21. *Id.* at 47. *Edmond* does not specify, however, what quantum of suspicion would be necessary, though it would seem that reasonable suspicion would be the correct standard.

22. Numerous authors have described the basic structure of the ruse narcotics checkpoint, and have offered their evaluations of these checkpoints. *See, e.g.*, Dustin P. Deschamp, Note, *The Missouri Supreme Court Approves a Controversial Police Drug Enforcement Tactic Used on Missouri Highways Code Name: “Gotcha!” A Case Note on State v. Mack*, 48 ST. LOUIS U. L. J. 669 (2004); 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 (2002); Kathryn L. Howard, Note, *Stop in the Name of that Checkpoint: Sacrificing Our Fourth Amendment Right in Order to Prevent Criminal Activity*, 68 MO. L. REV. 485 (2003); Travis Johnson, Note, *Ruse Drug Checkpoints: How the Government’s False Advertising May Diminish Your Fourth Amendment Rights*, 53 DRAKE L. REV. 781 (2005); Allison M. Low, Comment, *Designing a Constitutional Ruse Drug Checkpoint: What Does the Fourth Amendment Really Protect?*, 44 U. S.F. L. REV. 955 (2010); Theresa A. O’Loughlin, Note, *Guerillas in the Midst: The Dangers of Unchecked Police Powers Through the Use of Law Enforcement Checkpoints*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 59 (2001); 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*, 42 WASHBURN L. J. 209 (2002).

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

restaurant.<sup>24</sup> This leads to the inference that the driver has chosen to exit the freeway because he seeks to avoid the advertised (but nonexistent) checkpoint. Of course, even *if* the driver is motivated by the desire to avoid the checkpoint, this alone does not lead to the inevitable conclusion that the driver is hoping to avoid detection of unlawful drug possession, as the driver may wish to avoid the hassle and delay involved in a checkpoint. Or, perhaps the driver simply does not wish to be seized that day.

At this point, the structures of the checkpoints begin to vary as they have evolved in response to constitutional concerns. In what one author has termed “first generation ruse drug checkpoints,”<sup>25</sup> actual checkpoints are located at the bottom of the exit, and all vehicles exiting the highway are stopped subject to those checkpoints.<sup>26</sup> Proponents of these checkpoints would argue that this complies with *Edmond* because each exiting driver, by seeking to avoid the checkpoint, has provided the requisite “quantum of individualized suspicion.”<sup>27</sup> At least one state supreme court has upheld such ruse checkpoints, essentially finding that the avoidance of the advertised checkpoint alone is sufficient to raise the reasonable suspicion that justifies the stop.<sup>28</sup>

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24. See, e.g., *Webb v. Arbuckle*, 456 Fed. Appx. 374, 375 (5th Cir. 2011) (“The sign was placed a short distance before . . . the exit for . . . a gravel road with no services such as gas stations, restaurants, or hotels.”); *United States v. Wright*, 512 F.3d 466, 467 (8th Cir. 2008) (“Other than at the campground there are no services or signs for services . . . .”); *United States v. Valimont*, No. 8:12-CR-430, 2013 WL 1975850, at \*1 (D. Neb. May 13, 2013) (“The signs were placed such that the only exit available before the supposed checkpoint was a rural exit with no advertised services or rest areas.”); *Mack*, 66 S.W.3d at 709 (“[T]he checkpoint was set up in an isolated and sparsely populated area offering no services to motorists and was conducted on an evening that would otherwise have little traffic.”).

25. Low, *supra* note 22, at 959.

26. *Id.*

27. See *Edmond*, 531 U.S. at 47.

28. See *Mack*, 66 S.W.3d at 709. The majority pointed to officer testimony describing the individual defendant’s driving, which included “suddenly veer[ing] off onto the off ramp.” *Id.* at 710. However, the dissent noted the

However, other courts considering these checkpoints have reached the opposite result, finding that the Fourth Amendment's individualized suspicion requirement is not truly satisfied when each vehicle exiting the freeway is stopped.<sup>29</sup>

In response to certain challenges, perhaps most notably the argument that avoidance of the checkpoint alone is not sufficient to raise a reasonable suspicion of drug possession,<sup>30</sup> two variations to the original ruse narcotics checkpoint have come into use and have been upheld by a number of state and federal courts. In the first of these variations, officers do not stop each car that exits, but instead apply a totality of the circumstances approach to determine, on an individual basis, which of the exiting cars to detain.<sup>31</sup> Although the decision to leave the highway weighs heavily in that totality, some additional factors are also considered to buttress a finding of reasonable suspicion.<sup>32</sup> Finally, and perhaps most commonly, the officers are stationed in a location from which they can observe the exiting vehicles, and pull over the vehicles after observing the driver commit a traffic violation.<sup>33</sup> While it is abundantly clear that the

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contradiction of invoking a finding of individualized suspicion at a checkpoint stopping "all those who exited the highway at a certain point." *Id.* at 714 (Denvir Stith, J., dissenting) (emphasis in original).

29. See, e.g., *United States v. Yousif*, 308 F.3d 820, 828 (8th Cir. 2002) ("General profiles that fit large numbers of innocent people do not establish reasonable suspicion. . . . Finding a quantum of individualized suspicion only after a stop occurs cannot justify the stop itself."). See also *infra* text accompanying notes 70–71.

30. See, e.g., *United States v. Prokupek*, 632 F.3d 460, 462 (8th Cir. 2011) ("We previously have held that reasonable suspicion for a traffic stop cannot be based solely on the fact that a driver exits an interstate after seeing a sign that a drug checkpoint lies ahead.").

31. See *infra* text accompanying notes 81–103.

32. See, e.g., *United States v. Carpenter*, 462 F.3d 981, 987 (8th Cir. 2006) (citing to various factors, in addition to exiting the highway, that support a finding of reasonable suspicion). See also *infra* text accompanying notes 81–98 (discussing factors the officer in *Carpenter* observed to support a finding of reasonable suspicion).

33. See, e.g., *Webb v. Arbuckle*, 456 Fed. Appx. 374, 375 (5th Cir. 2011);

traffic violation is a pretext for stopping the driver and vehicle in this scenario, courts have upheld these seizures under *Whren*.<sup>34</sup>

The critical question, with respect to all three variations of the ruse drug checkpoint, and most particularly with respect to the first two mentioned above, is whether the government should be able to establish reasonable suspicion exclusively, or in large part, from a threat to violate a citizen's Fourth Amendment rights and the citizen's decision to assert those rights by seeking to avoid an illegal seizure.<sup>35</sup> As stated by Judge Denvir Stith in her dissent from the court's decision in *State v. Mack*,

There is something fundamentally unsettling and counter-intuitive about labeling as suspicious a person's conduct in avoiding the state's own unconstitutional conduct. The driver would be put in a "Catch-22" of either proceeding down the highway and being stopped at an unconstitutional checkpoint, or exiting to avoid it and risk being stopped at a ruse checkpoint set up to catch those who had exited. The public should not be put to such a choice.<sup>36</sup>

Additionally, in the context of the third variety of ruse checkpoint, where the officer observes—or claims to have observed<sup>37</sup>—a traffic violation, this Article argues that the government should not be permitted to benefit from *Whren's*

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United States v. Taylor, No. 8:13CR223, 2013 WL 6283819, at \*1 (D. Neb. 2013).

34. See, e.g., *Webb*, 456 Fed. Appx. at 380 ("Thus, because a traffic violation provides an objective basis for the initial stop . . . the subjective motivations of the police in making a stop do not affect the constitutional analysis." (citing *Whren v. United States*, 517 U.S. 806, 812 (1996))).

35. Of course, unless a particular driver is well versed in the Court's checkpoint jurisprudence, he very well may not know that the threatened checkpoint, had it actually existed, would have been unlawful.

36. 66 S.W.2d 706, 717 (2002) (Denvir Stith, J., dissenting).

37. See *United States v. Prokupek*, 632 F.3d 460, 461–62 (8th Cir. 2011) for testimony of officer regarding the driver's failure to signal as inconsistent with his statements at the time of stop. Overwhelmingly, the traffic offenses used to justify the stops in the ruse checkpoint cases are ones for which there is no evidence other than the officer's word, such as failure to come to a complete stop at a stop sign, failure to signal, or improper lane change. See *infra* notes 105–08 and accompanying text.

shielding of official motives when the opportunity to target and observe the driver only presents itself because of official misconduct.<sup>38</sup>

While the Supreme Court has not been called on to determine the constitutionality of ruse drug checkpoints, in any of their iterations, the Court has recently ruled on the question of whether and under what circumstances police may avail themselves of the exigent circumstances exception to the warrant requirement,<sup>39</sup> when their own conduct prompts the exigency.<sup>40</sup> The Court, in *Kentucky v. King*, held that a warrantless search of an apartment was reasonable where officers, having smelled the odor of marijuana escaping the apartment, “banged on . . . the door ‘as loud as [they] could,’” announced their identity, and heard sounds that led them to believe that the destruction of evidence was imminent.<sup>41</sup> In considering the scope of “the so-called ‘police-created exigency’ doctrine” as an exception to the rule permitting warrantless searches under exigent circumstances, the Court rejected an inquiry into the subjective bad faith of the officers in creating the exigency.<sup>42</sup> The Court endorsed, instead, an objective inquiry, holding that “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual *or threatened* violation of the Fourth Amendment.”<sup>43</sup> This

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38. See *infra* Part III. This does not require, as the Court often seeks to avoid, an examination of individual subjective motivations, as the signs warning motorists of the upcoming drug interdiction checkpoint themselves provide objective evidence of the threat to violate Fourth Amendment rights. Further, it requires very little imagination to conclude that when officers specifically target and stop motorists who have exited the highway to avoid the checkpoint, the traffic offenses cited are merely a pretext for the true reason for the stop: a drug investigation.

39. The exigent circumstances exception to the warrant requirement was firmly recognized by the Court in *Warden v. Hayden*, 387 U.S. 294, 298 (1967).

40. See *Kentucky v. King*, 563 U.S. 452, 455 (2011).

41. *Id.* at 456.

42. *Id.* at 461, 464.

43. *Id.* at 469 (emphasis added).

Article argues that *King* is directly analogous to the use of ruse drug checkpoints, and that courts considering the constitutionality of these checkpoints should be guided by the Court's ruling in *King*.

Part I of this Article provides a brief background on vehicle checkpoints generally, and ruse drug checkpoints in particular. It also surveys the existing case law regarding ruse drug checkpoints, and categorizes the various levels of individualized suspicion offered to justify these stops: (1) avoidance of the threatened checkpoint alone; (2) avoidance of the threatened checkpoint as a major factor in a totality analysis; and (3) commission of a traffic offense by a driver who has avoided the threatened checkpoint. Part II discusses the standard of reasonable suspicion as it pertains to these checkpoints, and to seizures in general, focusing on avoidance of the checkpoint as evidence of suspicious or criminal activity. Further, it explores a dichotomy in Fourth Amendment protection: where an individual seeks to limit exposure to the government in the context of a search, he gains or strengthens his constitutional protection. However, in the context of a seizure, when an individual seeks to limit physical exposure and contact with the government, this becomes a basis for diminishing his protection. Part III discusses *Kentucky v. King* in greater detail, further developing the analogy between unlawfully created exigent circumstances and the use of ruse drug checkpoints. That Part concludes that the Court's ruling in *King* should govern the checkpoint context as well, arguing that even in the third category of cases, where a driver has committed a traffic offense, *Whren* should not apply, and the officer should bear a heightened burden of demonstrating that the traffic stop is not pretextual.

I. THE HISTORY AND EVOLUTION OF THE VEHICLE  
CHECKPOINT

A. *Calling All Cars, Checkpoint Ahead: Suspicionless  
Seizures on American Roadways*

While the history and evolution of vehicle checkpoints have been fully developed elsewhere in the scholarly literature,<sup>44</sup> a brief exposition of the case law and doctrine regarding these checkpoints is helpful to understand the ruse narcotics checkpoint in its proper context. The Supreme Court has permitted the suspicionless seizures of drivers through both permanent and temporary checkpoints for a variety of purposes. In 1976, the Court in *United States v. Martinez-Fuerte* eschewed the usual Fourth Amendment norm requiring some level of individualized suspicion to justify the seizure of an individual, upholding the constitutionality of brief questioning at a permanent checkpoint conducted for purposes of immigration enforcement.<sup>45</sup> The Court's rationale for upholding the checkpoint foreshadows the balancing test formally adopted in subsequent checkpoint cases, which requires consideration of the governmental purpose and the checkpoint's effectiveness in advancing that purpose, weighed against the level of intrusion suffered by the individual.<sup>46</sup>

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44. See, e.g., Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 419 (2007); Deschamps, *supra* note 22; Eustace T. Francis, *Combating the Drunk Driving Menace: Conditioning the Use of Public Highways on Consent to Sobriety Checkpoint Seizure*, 59 ALB. L. REV. 599, 603–04 (1995); Johnson, *supra* note 22, at 782.

45. 428 U.S. 543, 556–64 (1976).

46. See *id.* at 562 n.15 (finding the location of the checkpoint reasonable in light of the high number of apprehensions and the relatively light flow of legitimate traffic between San Diego and Los Angeles). The Court set out the factors used to assess the constitutionality of a seizure in *Brown v. Texas*, requiring courts to weigh “the gravity of the public concerns served by the seizure,

Thus, the Court began its analysis by noting the large numbers of illegal immigrants within the country and the difficulties of detecting unlawful entries, ultimately concluding that “[i]nterdicting the flow of illegal entrants . . . poses formidable law enforcement problems.”<sup>47</sup> The Court continued by examining the particular characteristics of permanent checkpoints, designed by the Border Patrol to ensure effectiveness, and by stating that the particular checkpoint at issue had exposed deportable individuals within 0.12% of stopped vehicles, which would have resulted in over 33,000 such apprehensions over an annual period at a similar rate.<sup>48</sup>

In concluding that seizures at such checkpoints are permitted in the absence of reasonable suspicion, the Court emphasized that these types of programs are “necessary” and “most important,” and that a requirement of individualized suspicion would be “impractical.”<sup>49</sup> On balance, the Court viewed the intrusion upon the individual as being “quite limited.”<sup>50</sup> The Court supported this conclusion with a number of assertions. First, the intrusion itself generally involved only “a brief question or two and possibly the production of a document . . . .”<sup>51</sup> Second, the Court reasoned that the permanent nature of the checkpoint, as well as the lack of individual official discretion in operating the checkpoint, lessened the gravity of the intrusion because motorists would not be taken by surprise, nor would they be

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the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.” 443 U.S. 47, 50–51 (1979).

47. *Martinez-Fuerte*, 428 U.S. at 551–52.

48. *See id.* at 554.

49. *Id.* at 556–57.

50. *Id.* at 557.

51. *Id.* at 558 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975)). The Court based its assessment of intrusiveness on the initial checkpoint seizure, rather than on any subsequent questioning, finding that referral to a secondary area for further inspection did not require the same level of cause as a roving stop, and could constitutionally be “made largely on the basis of apparent Mexican ancestry . . . .” *Id.* at 563.

subjected to “abusive or harassing stops.”<sup>52</sup>

In *Michigan Department of State Police v. Sitz*, the Court turned its attention from illegal immigration to highway sobriety.<sup>53</sup> Again, balancing the importance of the governmental interest served by the checkpoint and its effectiveness in furthering that interest against the “objective” and “subjective” intrusion on drivers, the Court upheld the program.<sup>54</sup> In conducting its balancing, the Court found the “magnitude of the drunk driving problem” to be beyond dispute, and this particular checkpoint, as well as other similar ones, to have a hit rate at or above one percent—making these checkpoints considerably more effective than the one upheld in *Martinez-Fuerte*.<sup>55</sup>

As for the objective intrusiveness of the checkpoint, the Court found the intrusion of a brief stop for a sobriety check to be “slight.”<sup>56</sup> Subjectively speaking, the Court found this checkpoint, although a temporary one, “indistinguishable” from the permanent checkpoint approved in *Martinez-Fuerte*, contrasting it with roving-patrol stops.<sup>57</sup> The Court

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52. *Id.* at 559. The Court has noted the far more intrusive nature of the roving patrol stop, stating, “[r]oving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, . . . and he is much less likely to be frightened or annoyed by the intrusion.” *United States v. Ortiz*, 422 U.S. 891, 894–95 (1975). Of course, the Court’s description of the roving patrol and its effect on the surprised motorist sounds precisely like the stops conducted on remote roadways pursuant to the ruse checkpoints.

53. *See* 496 U.S. 444, 444 (1990).

54. *See id.* at 455. As in *Martinez-Fuerte*, the Court here focused on the initial stop of the vehicle at the checkpoint, only noting that “[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard.” *Id.* at 451.

55. *Id.* at 451–55.

56. *Id.* at 451–52.

57. *Id.* at 452–53. This characterization was vigorously contested by Justice Stevens in dissent: “In my opinion, unannounced investigatory seizures are, particularly when they take place at night, the hallmark of regimes far different from ours; the surprise intrusion upon individual liberty is not minimal.” *Id.* at 468–69 (Stevens, J., dissenting).

again emphasized the limit on unfettered officer discretion with respect to the operation of the checkpoint, provided by the guidelines.<sup>58</sup>

Previously, in *Delaware v. Prouse*, the Court also considered the validity of a checkpoint program, and, although that particular program was invalidated because of the lack of guidelines to curb individual discretion, the Court had suggested approval of another purpose for vehicle checkpoints: the license and registration check.<sup>59</sup> Thus, by the time the Court was faced with deciding the constitutionality of a checkpoint designed and operating primarily for the purpose of interdicting illegal drugs, it had already approved of checkpoints serving the interests of immigration enforcement and highway safety. And, while the Court in *City of Indianapolis v. Edmond* made clear “that traffic in illegal narcotics creates social harms of the first magnitude,”<sup>60</sup> and the challenged checkpoint also resulted in similarly brief detentions when compared to those experienced by motorists in its previous checkpoint cases,<sup>61</sup> the Court took a different course.

The Court distinguished the checkpoint at issue in *Edmond* from the earlier approved checkpoints, reasoning that while the immigration checkpoint had an obvious connection to the country’s interest in maintaining the integrity of its borders, and the highway safety checkpoint had a more direct connection to the roadways and sought to address a more immediate threat to life and limb, the drug

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58. *Id.* at 452–53 (“Here, checkpoints are selected pursuant to guidelines, and uniformed officers stop every vehicle.”).

59. 440 U.S. 648, 658, (1979) (“[T]he State[] [has] 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.”).

60. 531 U.S. 32, 42 (2000).

61. *Id.* at 35 (“The city agreed . . . to operate the checkpoints in such a way as to ensure that the total duration of each stop, absent reasonable suspicion or probable cause, would be five minutes or less.”).

interdiction checkpoint was primarily aimed at “pursu[ing] . . . general crime control ends.”<sup>62</sup> For such a purpose, the Court was loath to suspend the usual Fourth Amendment requirement of individualized suspicion, noting that its failure to do so “would do little to prevent such intrusions from becoming a routine part of American life.”<sup>63</sup> Nonetheless, the Court did not, by its language, forbid all checkpoints with the primary purpose of discovering illegal narcotics, but held that stops aimed at uncovering such activity required individualized suspicion.<sup>64</sup> Just how much individualized suspicion would be required to justify a drug interdiction checkpoint, however, was not specified by the Court,<sup>65</sup> and this lack of specificity paved the way for police departments to develop a new type of checkpoint: the ruse narcotics checkpoint.

B. *Calling All Cars, Checkpoint Ahead: Ruse Narcotics Checkpoints*

As previously described,<sup>66</sup> the ruse checkpoints operate by deceiving motorists traveling along a highway into believing that a drug interdiction checkpoint is being conducted some ways ahead, although, of course, not before an opportunity to exit the highway. It is not unreasonable to assume that some or even many of the motorists would avail themselves of the exit in order to avoid the advertised checkpoint, whether or not they have anything to hide.<sup>67</sup> In

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62. *Id.* at 43.

63. *Id.* at 42. The Court also rejected the checkpoint despite its lawful secondary purposes of checking license and registration, and looking for signs of impairment. *Id.* at 46–47.

64. *Id.* at 47.

65. The Court simply held that “[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoint such as here, however, stops can only be justified by *some quantum* of individualized suspicion.” *Id.* (emphasis added).

66. *See supra* notes 22–24 and accompanying text.

67. In fact, the court in *State v. Mack*, 66 S.W.3d 706, 709 (Mo. 2002), found

the first-generation model of the ruse checkpoint,<sup>68</sup> however, the assumption seems to be that most drivers who choose to exit the highway *are* seeking to avoid detection of wrongdoing, and thus, when they are stopped at the actual checkpoint, at the bottom of the exit ramp, their act of exiting has provided the “quantum of individualized suspicion” needed to satisfy *Edmond*.<sup>69</sup>

Courts generally have not approved this model of the ruse checkpoint,<sup>70</sup> primarily because stopping each car that exits, even assuming that a significant portion of those drivers are seeking to avoid the checkpoint, simply does not comport with a requirement of suspicion individually tailored to each car and driver. As stated by the Eighth Circuit in *United States v. Yousif*,

General profiles that fit large numbers of innocent people do not establish reasonable suspicion. Without first stopping the vehicles and questioning the drivers, the police had no way to determine why any particular vehicles were exiting at the Sugar Tree Road ramp. Finding a quantum of individualized suspicion only *after* a stop occurs cannot justify the stop itself.<sup>71</sup>

That argument notwithstanding, the Supreme Court of Missouri upheld such a checkpoint, and reversed the

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this assumption to be reasonable due to the “significant efforts to reduce the legitimate reasons for taking the exit.”

68. See *Low*, *supra* note 22, at 959.

69. Even, assuming *arguendo*, that *Edmond* might be satisfied, there is a strong argument that the ruse checkpoint would not satisfy the *Brown v. Texas* test. See *supra* note 46. As one commentator argues, these “checkpoints are more intrusive than the other checkpoints that have been considered by courts in the past. Not only are drivers taken by complete surprise at such stops . . . these drivers are also deliberately deceived into thinking that the checkpoint is set up at a different location.” Johnson, *supra* note 22, at 791–92.

70. See *supra* note 29 and accompanying text.

71. 308 F.3d 820, 828 (8th Cir. 2002) (citation omitted). The Sugar Tree Road exit (off of Interstate 44 in Phelps County, Missouri) at issue in *Yousif* was also the exit used in the ruse checkpoint schemes in at least three other cases: *United States v. Carpenter*, 462 F.3d 981, 983 (8th Cir. 2006); *United States v. Williams*, 359 F.3d 1019, 1020 (8th Cir. 2004); and *United States v. Martinez*, 358 F.3d 1005, 1006 (8th Cir. 2004).

Defendant's motion to suppress, finding it "reasonable to conclude that drivers with drugs would 'take the bait' and exit . . . to avoid being questioned at the next exit."<sup>72</sup> The court continued by noting that the checkpoint was set up at a time and location to minimize "legitimate reasons for taking the exit" and also noted that such deceptive tactics are effective, all of which bolstered a finding of reasonableness.<sup>73</sup>

To avoid the objection raised in *Yousif*, the ruse checkpoint evolved in its operation. If stopping each car would run afoul of *Edmond's* requirement of individualized suspicion, then stopping only those cars whose drivers did in fact exhibit distinctively suspicious behavior would, in theory, pass constitutional muster, as long as such behavior attained the level of reasonable suspicion required for a temporary investigative stop. Thus, rather than having an actual checkpoint at the bottom of the exit ramp, officers place themselves where they can observe the cars that take the exit after having seen the ruse sign, and execute a stop only after observing additional suspicious behavior.<sup>74</sup>

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72. *Mack*, 66 S.W.3d at 709.

73. *Id.* The court did allow for the possibility that the evasive behavior alone might not be enough to justify the stop, stating, however, that "even if the deceptive drug checkpoint scheme did not alone constitute 'individualized suspicion,' defendant's particular conduct in exiting at the checkpoint must also be considered." *Id.* Thus, the court was willing to consider the defendant's sudden veering onto the ramp as further evidence of suspicion. *Id.* at 710. As noted by the dissent, however, because *all* motorists were being stopped, this "after-the-fact" justification was not in fact the basis for the defendant's being stopped. *Id.* at 720 (Denvir Stith, J., dissenting). The majority also relied on *United States v. Brugal*, 209 F.3d 353 (4th Cir. 2000), for the proposition that avoidance of a ruse checkpoint furnishes reasonable suspicion. *Mack*, 66 S.W.3d at 709. The majority did note, however, that *Brugal* involved a challenge to the continued detention of the motorist, but did not directly address the initial roadblock stopping the exiting drivers. *Id.* at 709 n.1.

74. One author describes these "modified ruse drug checkpoints" as differing from the first-generation checkpoint in two ways: first, not all drivers are stopped at the exit; and second, officers are also located on the interstate (as opposed to only at the bottom of the exit ramp) in order to observe suspicious behavior, or a traffic violation, in the act of exiting the interstate itself. Low, *supra* note 22, at 965.

The standard of reasonable suspicion that justifies a temporary stop in the ruse checkpoint context will be more thoroughly explored below,<sup>75</sup> but for purposes of this Part, it suffices to say that reasonable suspicion is established when “a police officer observes unusual conduct which leads him reasonably to conclude . . . that criminal activity may be afoot.”<sup>76</sup> This conclusion, however, cannot be based merely on an “inchoate and unparticularized suspicion or ‘hunch,’ but [on] specific reasonable inferences” drawn from the officer’s experience.<sup>77</sup> Similarly to the more demanding standard of probable cause,<sup>78</sup> a determination of sufficiency of the information is based on an analysis of the “totality of the circumstances.”<sup>79</sup> Thus, if exiting the highway upon seeing the ruse narcotics checkpoint sign is not enough to establish reasonable suspicion of drug possession or trafficking<sup>80</sup>—if it

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75. See *infra* Section II.A.

76. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

77. *Id.* at 27.

78. The Court, in *Illinois v. Gates*, 462 U.S. 213, 238 (1983), defined probable cause as a “fair probability” of criminal activity, and reaffirmed the “totality-of-the-circumstances analysis” as the proper approach to determinations of probable cause. The Court has compared reasonable suspicion to probable cause by describing the “level of suspicion required for a *Terry* stop [as] obviously less demanding than that for probable cause . . . .” *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

79. *Alabama v. White*, 496 U.S. 325, 328–29 (1990) (holding that the same totality approach as proscribed by the Court in *Gates* is applicable to the context of reasonable suspicion as well, taking into account “the lesser showing required to meet that standard.”).

80. *But see* *State v. Rose*, No. 29,388, 2011 WL 193537, at \*5 (N.M. Ct. App. 2011). In *Rose*, the New Mexico Court of Appeals did not address the legality of the ruse checkpoint as an investigatory method, stating that the issue was not properly preserved below. *Id.* at \*3–4. The Defendant was stopped after executing an illegal u-turn to avoid the advertised checkpoint, and tried, on appeal, to raise the argument that such a checkpoint (had it existed) would have been unlawful under *Edmond*, and that the placement of the ruse essentially forced drivers seeking to avoid the unlawful checkpoint to make an illegal u-turn. *Id.* at \*1–4. While not ruling on the use of the ruse, the court nonetheless upheld the seizure, stating “where a driver engages in conduct that indicates he is attempting to evade a narcotics checkpoint, an officer may form a reasonable suspicion that the driver is in possession of narcotics.” *Id.* at \*4 (citing *State v. Anaya*, 2009-NMSC-043, 147 N.M. 100, 217 P.3d 586 (2009) (holding that

were, then all exiting drivers could be lawfully detained—the critical question becomes just how much more is needed to provide the required level of suspicion.

The next generation of ruse checkpoint, briefly discussed here, differs from the scenario described directly above only in that other factors are considered, in addition to the driver's choice to exit the highway, to justify the detention of some, but not all, exiting drivers, based on the totality of circumstances. The Eighth Circuit case of *United States v. Carpenter* once again involved the ruse checkpoint at the Sugar Tree Road exit on Highway 44 in Phelps County, Missouri.<sup>81</sup> The officer, Deputy Rightnowar, in a marked car, was placed where he could observe “nonlocal traffic” and “get reason to stop them.”<sup>82</sup> According to Carpenter, he had exited in search of a gas station because he was low on fuel, but in doing so, he piqued the interest of the waiting officer who decided to follow the Chevrolet Blazer because it “just didn't look right for the area.”<sup>83</sup> According to Carpenter, once he realized there was no service station at this exit, he observed the patrol car through his rear-view mirror, and, fearing a trap, executed a U-turn and pulled over to the side of the road.<sup>84</sup> Meanwhile, Rightnowar observed Carpenter's vehicle parked on the side of the road and pulled in behind him, activating his lights.<sup>85</sup>

In the ensuing conversation between the two, Carpenter explained that he was traveling in a rental vehicle between Austin, Texas, and New York, and offered his reason for

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avoidance of a sobriety checkpoint supports a reasonable suspicion that the driver is intoxicated)).

81. 462 F.3d 981, 983 (8th Cir. 2006).

82. *Id.* The officer specified that he was focused on cars that were not familiar to him, or those with license plates from other states. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

leaving the highway.<sup>86</sup> However, this did not quell Rightnowar's suspicion, as he observed the gas tank to be one-quarter full.<sup>87</sup> Further, although the sign at the Sugar Tree Road exit indicated a motel and campground, it did not indicate other services, as were available at other exits.<sup>88</sup> Adding to his suspicion, Rightnowar found Carpenter to appear nervous, observing "an artery in his neck pulsing."<sup>89</sup>

At this point, Rightnowar took possession of Carpenter's license and rental documents for approximately five minutes, observing that the Blazer had been rented not in Austin, but in El Paso.<sup>90</sup> When the officer returned from his patrol car, he requested consent to search some boxes in the car, which Carpenter claimed contained tile.<sup>91</sup> When Carpenter refused, Rightnowar ordered Carpenter out of the vehicle, patted him down for weapons, told him that he believed Carpenter had drugs in his vehicle, and called a nearby officer with a narcotics detection dog.<sup>92</sup> The dog subsequently alerted the officers to drugs, and the ensuing search revealed cocaine in the boxes.<sup>93</sup>

Interestingly, the district court found Carpenter had been seized in the absence of reasonable suspicion, relying primarily on the argument that Carpenter's act of exiting the highway was not enough, alone, to support the seizure.<sup>94</sup> The district court did not definitively ascertain the point of seizure, finding instead that Carpenter had been seized *either* when the officer took his documents to his patrol car,

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86. *Id.* at 983–84.

87. *Id.*

88. *Id.*

89. *Id.* at 984.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 984–85.

or once the officer asked him to exit his vehicle.<sup>95</sup> The Eighth Circuit, however, found that Carpenter was not seized until the latter event.<sup>96</sup> By pushing forward the point of seizure, the court could now include the information gained by Rightnowar *after* he took Carpenter's license and rental papers to justify the subsequent seizure, which occurred, according to the Eighth Circuit, once Rightnowar informed Carpenter of his suspicion, asked him to exit his car, and conducted a weapons frisk.

The court summarized the circumstances supporting a finding of reasonable suspicion, relying heavily on the following facts: (1) Carpenter exited the highway immediately after the checkpoint sign, and parked on the side of the road "for no apparent reason"; (2) he claimed to have exited—at an exit with no services—in search of a gas station, even though his gas tank was one-quarter full; (3) when questioned, he appeared nervous; and (4) although he claimed to be driving from Austin, his vehicle was in fact rented in El Paso, "a known source city for drugs."<sup>97</sup> Although the court noted that some innocent drivers may do the very things Carpenter did, it ultimately found the circumstances were "sufficiently unusual and suspicious that they eliminate a substantial portion of innocent travelers, and provide reasonable suspicion to justify the brief detention of Carpenter . . . ."<sup>98</sup> Of course, had the court found Carpenter was seized when Rightnowar took his license and paperwork, the discrepancy between the stated origin of travel and the location of the rental would not have played any role in establishing suspicion, and it is highly questionable whether,

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95. *Id.* at 985

96. *Id.*

97. *Id.* at 987. The fourth factor seemed to play a major role in the court's analysis: "[t]his sort of discrepancy between documents and a driver's explanation is a legitimate basis for suspicion, particularly where a reasonable officer could infer that Carpenter's explanation was an effort to distance himself from a known source city for drugs." *Id.* (citations omitted).

98. *Id.*

without that fact, the seizure would have withstood constitutional scrutiny.

As a comparison, the Tenth Circuit, in *United States v. Neff*, although agreeing with the Eighth Circuit's reasoning that the driver's choice to exit after the decoy sign is a highly relevant fact in assessing reasonable suspicion, emphasized the importance of "additional suspicious circumstances or independently evasive behavior to justify" an investigative stop.<sup>99</sup> In this particular case, the court concluded that such additional circumstances did not support a finding of reasonable suspicion.<sup>100</sup> The additional factors considered by the court in its analysis included the following facts: (1) Neff (the driver) exited the highway onto a gravel road after the checkpoint sign; (2) he pulled into and stopped on a driveway; (3) when he observed the officer who had been tailing him, he appeared "startled," then "backed out of the driveway as if to turn around"; and (4) his vehicle plates were registered to a neighboring county.<sup>101</sup> In its analysis, the court noted that there was no evidence that Neff engaged in any erratic driving that would add to the suspicion,<sup>102</sup> and, critically, that Neff had not committed any traffic violations observed by the officer.<sup>103</sup>

This leads us to the next, and most common, variant of the ruse checkpoint case: where drivers who exit after the checkpoint sign are not stopped based on reasonable suspicion of drug trafficking, but are stopped because of an

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99. *United States v. Neff*, 681 F.3d 1134, 1142–43 (10th Cir. 2012).

100. *Id.* at 1143.

101. *Id.*

102. *Id.* at 1142. The court discussed the Supreme Court decision of *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), and its holding that "an individual's 'unprovoked flight upon noticing the police' and 'nervous, evasive behavior' are relevant factors in determining reasonable suspicion for a brief investigatory stop. *Neff*, 681 F.3d at 1141 (quoting *Wardlow*, 528 U.S. at 124). For a more thorough discussion of *Wardlow* and its role in the reasonable suspicion analysis in the ruse checkpoint context, see *infra* Part II.

103. *Neff*, 681 F.3d at 1143.

observed traffic violation.<sup>104</sup> As the previously discussed cases illustrate, officers who conduct investigative stops relying on observed factors to support a finding of reasonable suspicion may later have those stops deemed unlawful, if a court decides those factors to be insufficient. This determination may, in turn, depend on when a court decides the seizure actually occurred. With so much uncertainty, it is not surprising that this variant of the ruse narcotics checkpoint is frequently encountered, and often (but not always) proves successful. It is much easier to avoid a Fourth Amendment violation, and the outcome is more predictable, when the officer supports the stop with testimony that he observed the driver commit a traffic violation, rather than having to establish a number of suspicious circumstances that must survive a court's totality analysis.

Moreover, many of the cases surveyed by this author involve traffic offenses without independently verifiable proof, such as a reading on a radar gun to establish a speeding violation.<sup>105</sup> Instead, the violations at issue in these cases are often proved only through an officer's observation and later, his testimony, that the driver failed to comply with the traffic code. For example, the drivers in these cases were pulled over due to the officer's observation of a stop-sign

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104. Although targeted because they have exited the highway, and thus, they are in fact suspected of drug trafficking, the stops of these drivers are justified on the basis of their having committed a traffic violation. In one case included in this category of checkpoint cases, the passenger of the exiting vehicle discarded an object from the vehicle window, and therefore, the stop was based on a littering, rather than traffic, violation. *Roth v. Green*, 466 F.3d 1179, 1183 (10th Cir. 2006). The object turned out to be a marijuana pipe. *Id.*

105. It is possible that a traffic violation could be recorded by the patrol car's video, which is what occurred in *United States v. Valimont*, No. 8:12-CR-430, 2013 WL 1975850, at \*3 (D. Neb. May 13, 2013). Although the camera recorded the defendant's failure to use his signal, the officer failed to turn on the microphone. *Id.* at \*3. However, most of the cases surveyed by the author did not mention video evidence of the purported traffic violations, or, if there was available video footage, as in *United States v. Wright*, 512 F.3d 466, 472 (8th Cir. 2008), the camera was not activated until *after* the officer witnessed the violation and decided to execute a stop. *See also* *United States v. Prokupek*, 632 F.3d 460, 461 (8th Cir. 2011).

violation,<sup>106</sup> a signal violation,<sup>107</sup> or a lane violation.<sup>108</sup> One such case exemplifies how these traps are set up, and how courts typically uphold the seizures that occur. In *United States v. Johnson*, various police departments in a Texas county operated a typical ruse checkpoint—setting up a cautionary sign warning of an upcoming narcotics checkpoint less than a mile away from an exit located in, as is typical, a “remote area where there are no services or facilities . . . and [which] does not lead to any other major highway.”<sup>109</sup> In addition, the exit used to bait the unsuspecting drivers was located approximately two miles past a well-lit exit with an abundance of services, restaurants, and places of lodging.<sup>110</sup> Only those drivers who committed a traffic violation were stopped by officers, but the chosen location was not only typical in its remoteness, but also ideal for creating ample opportunities for traffic violations to occur.<sup>111</sup> As described by the court:

It is somewhat difficult for an individual unfamiliar with the exit to avoid committing a traffic violation. The speed limit quickly drops from 65 miles per hour to 25 miles per hour and there are no lights at the exit. [The road] is a two-lane road divided by a yellow centerline. It is easy to cross the centerline when entering [the road] from the . . . exit ramp, since there is only a short break in the centerline to allow entry into the lane of travel. Crossing the yellow centerline is a traffic offense under Texas law.<sup>112</sup>

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106. *United States v. Chavez Loya*, 528 F.3d 546, 549 (8th Cir. 2008); *Wright*, 512 F.3d at 467; *United States v. Williams*, 359 F.3d 1019, 1020 (8th Cir. 2004); *United States v. Martinez*, 358 F.3d 1005, 1007 (8th Cir. 2004).

107. *Webb v. Arbuckle*, 456 F. App'x. 374, 375 (5th Cir. 2011); *Prokupek*, 632 F.3d at 461; *United States v. Wendt*, 465 F.3d 814, 815 (7th Cir. 2006); *Valimont*, 2013 WL 1975850, at \*1.

108. *United States v. Grier*, 127 F. App'x. 712, 713 (5th Cir. 2005); *United States v. Johnson*, 59 M.J. 666, 669 (A.F. Ct. Crim. App. 2003).

109. *Johnson*, 59 M.J. at 668.

110. *Id.*

111. *Id.*

112. *Id.*

The court continued by finding it “undisputed” that the officers established probable cause to stop drivers by observing the violations, and also that it was “undisputed that the real purpose of the stops was not to cite motorists for minor traffic violations, but to interdict illicit drugs on a known drug-trafficking route.”<sup>113</sup> In fact, while close to one-third of the exiting drivers were stopped for minor violations, not one citation was issued during the checkpoint’s operation.<sup>114</sup> Johnson was pulled over, rather predictably, for crossing the center while entering the road, after having exited the interstate.<sup>115</sup> He then consented to the search of his vehicle, resulting in the discovery of marijuana.<sup>116</sup>

The court engaged in a fairly thorough exposition of the relevant case law, finding these facts “clearly distinguishable” from both *Edmond*<sup>117</sup> and the Eighth Circuit case of *United States v. Yousif*,<sup>118</sup> which the defendant relied on for the very simple reason that, unlike both *Edmond* and *Yousif*, there was no actual checkpoint or roadblock stopping all passing motorists, and only those who committed a violation were detained.<sup>119</sup> While the purpose, as in *Edmond*, may have been drug interdiction, and the use of deception may have been identical to that used in *Yousif*,<sup>120</sup> the court concluded that “[t]he stop of a motor vehicle based on an observed violation of a traffic law is a stop based upon probable cause and is, therefore, reasonable

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113. *Id.*

114. *Id.* at 668–69.

115. *See id.* at 669.

116. *Id.*

117. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). *See supra* notes 60–64 and accompanying text.

118. 308 F.3d 820 (8th Cir. 2003). *See supra* notes 70–71 and accompanying text.

119. *Johnson*, 59 M.J. at 671–73.

120. *Id.* at 672.

under the Fourth Amendment.”<sup>121</sup> And so, even as the court found that the “traffic offenses were simply a pretext for [officers’] real motivation of intercepting illicit narcotics in the vehicles of those who might be attempting to evade the nonexistent drug checkpoint,”<sup>122</sup> the court cited to *Whren v. United States*,<sup>123</sup> for its holding that as long as the seizure is objectively justified, the officer’s state of mind or true motivation has no real relevance.<sup>124</sup> Further, while the traffic stop would not have justified the subsequent search of the vehicle, Johnson’s consent was all the justification needed.<sup>125</sup>

While the exit used to snare suspected drug traffickers in *Johnson* created a strong likelihood that an unwitting driver would commit a traffic violation, such as the lane violation committed in that case, the types of violations frequently seen in these ruse checkpoint cases raise the possibility of police fabrication—or, at the very least, a contested version of the facts leading to conflicting testimonies of officers and defendants at suppression

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121. *Id.* at 673 (citing *Whren v. United States*, 517 U.S. 806 (1996)).

122. *Id.*

123. 517 U.S. 806, 813 (1996).

124. *Johnson*, 59 M.J. at 673. *See also* *United States v. Williams*, 359 F.3d 1019, 1021 (8th Cir. 2004) (relying on *Whren* to uphold objectively justified seizures, regardless of “a law enforcement officer’s ulterior motives.”).

125. *Johnson*, 59 M.J. at 673. Of course, once the officer conducts the initial stop of a driver, he will likely seek to obtain consent to search the vehicle. In many of the cases surveyed here, the subsequent searches were indeed based on consent. *See, e.g.*, *United States v. Wright*, 512 F.3d 466, 468 (8th Cir. 2008); *United States v. Wendt*, 465 F.3d 814, 816 (7th Cir. 2006); *United States v. Grier*, 127 F. App’x. 712, 713 (5th Cir. 2005); *United States v. Valimont*, No. 8:12-CR-430, 2013 WL 1975850, at \*2 (D. Neb. May 13, 2013). Alternatively, the detained motorist may exhibit additional indicia of suspicion, or make incriminating statements that can provide an officer with probable cause to search. *See, e.g.*, *Webb v. Arbuckle*, 456 F. App’x. 374, 384 (5th Cir. 2011) (finding that officers did not act unreasonably in searching the entire car of a doctor who informed the officers that she “might be in possession of controlled substances and was uncertain what substances she had in the car.”). Or, a drug detection canine available at the scene may alert to the presence of contraband, providing the necessary probable cause to search. *See United States v. Prokupek*, 632 F.3d 460, 461 (8th Cir. 2011).

hearings. When there is no proof of the violation other than the officer's observation, judges and magistrates must base their factual conclusions on their assessments of credibility.

For example, in *United States v. Wendt*, two officers—one (Officer Parkinson) stationed on an interstate overpass and using binoculars, and the other (Officer Boerm) stationed at the top of the exit ramp—separately observed the defendant make two distinct sets of traffic offenses: crossing two lanes in order to take the ruse exit without signaling, and straddling the roadway's center line after having exited.<sup>126</sup> The court stated, “[a]s expected, Wendt's version of the facts differ [sic].”<sup>127</sup> The defendant claimed he had only crossed through one lane in order to exit the interstate, used his signal, and upon exiting, remained in the proper lane.<sup>128</sup> Based on his own observations and the information he received from Parkinson, Boerm stopped Wendt, obtained consent to search the vehicle, and discovered 19.6 kilograms of cocaine.<sup>129</sup>

However, it was not until Wendt was in custody that Boerm prepared a written warning, and although he had originally indicated the time on the warning as 13:40, he later corrected it to state 15:40.<sup>130</sup> In addition, Wendt pointed to several other facts in order to call the officers' credibility into question: in his testimony, Officer Parkinson “refus[ed] to acknowledge that he worked as part of a drug interdiction detain' [sic] and instead characterized his assignment as ‘conducting traffic stops.’”<sup>131</sup> However, Parkinson, if he was indeed searching for traffic violations, was doing so without a radar gun, seemed to target vehicles from out-of-state, and

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126. *Wendt*, 465 F.3d at 815.

127. *Id.* at 816 (emphasis added).

128. *Id.*

129. *Id.*

130. *Id.* Officer Boerm indicated that he often confused the two numbers in military time. *Id.*

131. *Id.* at 817.

testified that, although he observed the failure to signal, he could not see the vehicle's license plate.<sup>132</sup> On appeal, the court found these inconsistencies "minor and unpersuasive" and exhibited the usual deference to the trial judge in assessing credibility.<sup>133</sup>

Although in most of the surveyed cases the court found the police version of events more credible, *United States v. Prokupk* illustrates an instance where the appellate court concluded that the inconsistencies in the officer's testimony were too great to overlook, and thus overturned the district court's finding as clearly erroneous.<sup>134</sup> After Ronald Prokupek exited the interstate following the ruse checkpoint sign and turned onto a local road, Trooper Estwick stopped Prokupek's vehicle.<sup>135</sup> As indicated by the officer's dashboard camera, which had been activated immediately after the traffic stop, Estwick explained that Prokupek failed to signal his exit from the interstate, but that he properly used his signal upon turning onto the county road at the bottom of the exit ramp.<sup>136</sup> However, at the suppression hearing, Estwick testified that stop was based on probable cause that Prokupek failed to signal his turn onto the county road.<sup>137</sup> When pressed by defense counsel with respect to the inconsistency between his initial statement to Prokupek at the time of the stop and his testimony, Estwick repeated several times simply that Prokupek "failed to signal" and admitted that he did not (and, in fact, could not) actually see him exit the interstate.<sup>138</sup>

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132. *Id.*

133. *Id.* The trial judge's credibility determination would need to be clearly erroneous in order to be overturned on appeal. *Id.*

134. 632 F.3d 460, 463 (8th Cir. 2011).

135. *Id.* at 461.

136. *Id.* During the traffic stop, a narcotics dog indicated the presence of what turned out to be 151 grams of methamphetamine. *Id.*

137. *Id.*

138. *Id.*

The magistrate judge presiding over the suppression hearing found Estwick's testimony at that hearing to be credible, despite the inconsistency.<sup>139</sup> However, upon *de novo* review, the district court adopted a broader finding that effectively rendered the inconsistency of little import, finding that, "Prokupek failed to [signal] *at one of the two* described places."<sup>140</sup> On appeal, in light of the fact that Estwick had not been located in a position to view Prokupek's exit from the interstate, the Eighth Circuit remanded the case to the district court for clarification of its finding.<sup>141</sup> The district court supplemented its earlier finding, acknowledging the inconsistency between Estwick's testimony and his contemporaneous statement at the traffic stop, while ultimately concluding that the traffic stop statement was "an unintentional misstatement" and that Prokupek had, in fact, failed to signal his turn onto the county road.<sup>142</sup>

The Eighth Circuit characterized the district court's finding as an "attempt[] to dismiss the contradiction" and found "no evidence in the record that supports this finding," noting that Estwick himself offered no explanation for the inconsistency in his statements when cross-examined by defense counsel.<sup>143</sup> The Eighth Circuit vacated the convictions, stating:

Because Trooper Eswtick's testimony at the hearing is so clearly and affirmatively contradicted by his own statement at the time of the events, in the absence of any explanation for this contradiction that is supported by the record, we conclude that Trooper Eswtick's after-the-fact testimony at the suppression hearing is "implausible on its face," and we are left with the "firm and definite conviction

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139. *Id.*

140. *Id.* (emphasis added). The district court denied the suppression motions of Prokupek and his passenger, and entered their conditional guilty pleas, after which Prokupek and his passenger appealed the court's denial of their suppression motions. *Id.* at 461-62.

141. *Id.* at 462.

142. *Id.*

143. *Id.* at 463.

that a mistake has been made . . . .”<sup>144</sup>

Thus, because the Eighth Circuit found that the district court’s crediting of Estwick’s suppression hearing testimony was clearly erroneous, and because the government had no other basis for justifying the traffic stop, the Eighth Circuit concluded that the traffic stop constituted an illegal seizure, and that the drugs that had been found pursuant to that stop were inadmissible as fruit of that illegality.<sup>145</sup>

While *Prokupek* provides an example where ultimately, the officer’s proffered justification for the traffic stop leading to the discovery of narcotics was disbelieved, it is important to note that, before the Eighth Circuit rendered its decision, two levels of judicial review, by the magistrate and district court judges, all but ignored the very real possibility that Trooper Estwick fabricated the probable cause to conduct the traffic stop. *Prokupek* also highlights why the third generation of ruse checkpoint stops—those based on traffic offenses allegedly committed by drivers upon exiting after seeing the checkpoint sign—is the most common and also potentially the most problematic because of the ease with which officers can conduct traffic stops, either based on actual or fabricated violations of the traffic code. The next Part of this Article, however, turns once more to the issue at the heart of the ruse checkpoint: the suspicion generated by the driver who “take[s] the bait”<sup>146</sup> and chooses to exit the highway, only to drive right into that which he sought to avoid.

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144. *Id.* (internal citations omitted).

145. *Id.*

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

## II. TAKING THE ROAD LESS TRAVELED: ADVERTISING YOUR GUILT OR ASSERTING YOUR RIGHTS?

### A. *Avoiding a Checkpoint as an Assertion of the Right to Be Free of Unreasonable Seizures*

As briefly mentioned above,<sup>147</sup> *Terry v. Ohio* authorized police to conduct temporary investigative stops based on reasonable suspicion—a lesser standard than the probable cause required for an arrest.<sup>148</sup> While *Terry* laid the groundwork for the use of the ruse checkpoint as a tool in fighting drug trafficking, *Illinois v. Wardlow* provided the cornerstone supporting the rationale used to justify this particular method of ensnaring unwitting drivers.<sup>149</sup> In *Wardlow*, the Court eschewed a *per se* rule respecting flight and its role in generating the suspicion necessary to support an investigative stop, but nevertheless upheld a stop as properly based on reasonable suspicion considering two factors alone: the defendant’s “presence in an area of heavy narcotics trafficking” and the defendant’s “unprovoked flight” from police.<sup>150</sup> Extrapolating *Wardlow*’s holding to the ruse checkpoint scenario, one can at first glance understand the logic underpinning even the first-generation ruse checkpoint.<sup>151</sup> The drivers are originally located on an interstate (an area with a high potential for drug trafficking) and, upon being notified of a police presence ahead (the ruse), exit the highway in order to avoid contact with law enforcement.<sup>152</sup>

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147. See *supra* note 76.

148. 392 U.S. 1, 33, 37 (1968).

149. See 528 U.S. 119 (2000).

150. *Id.* at 124. In *Wardlow*, two officers driving as a part of a four-car caravan through an area known for drug trafficking spotted the defendant standing near a building holding an opaque bag. *Id.* at 121–22. As the caravan passed the building, the defendant “looked in the direction of the officers and fled.” *Id.*

151. See *supra* text accompanying notes 25–26.

152. While it is a stretch to classify an entire interstate as a high-crime area,

However, on closer inspection, one can also see why most courts rejected the first-generation ruse checkpoint, requiring more factors to be added to the mix before declaring the standard of reasonable suspicion to be met. First, it is problematic to classify an interstate as an area known for drug trafficking. Any product that is being transported from one location to another over large distances will likely traverse our nation's interstates, whether that product is an illegal substance or produce being delivered to a supermarket chain. Further, while drug traffickers may, of necessity, use the interstate system, so too do those commuting to work on a daily basis and those heading to recreational activities or a long overdue family vacation. In other words, the interstates are used too heavily and for too many purposes to be properly classified as high-crime areas.

More critical, however, is an examination of what constitutes “unprovoked flight.” The Court, in *Wardlow*, noted the relevance of “nervous, evasive behavior [as] a pertinent factor in determining reasonable suspicion.”<sup>153</sup> The Court continued by describing “[h]eadlong flight—wherever it occurs—[as] the consummate act of evasion . . . .”<sup>154</sup>

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as contemplated in *Wardlow*, the court in *United States v. Yousif* noted that the Sugar Tree Road exit was selected as the ruse checkpoint exit partly “because law enforcement officers believed that I-44 was a commonly used route for transporting drugs . . . .” 308 F.3d 820, 823 (8th Cir. 2002). Exiting the highway could conceivably serve as evidence of the second factor relied on by the *Wardlow* court: unprovoked flight. See *Wardlow*, 528 U.S. at 124. One article has classified a driver’s choice to exit the highway as follows: “When a drug courier chooses to exit the interstate in order to avoid what appears to be an upcoming narcotics checkpoint, he or she is engaging in evasive behavior.” Dinger & Dinger, *supra* note 22, at 37. Because the exiting driver is “evading imminent contact with law enforcement,” his conduct “gives rise to reasonable suspicion under *Wardlow*.” *Id.* The authors also turn to the Supreme Court’s ruling in *United States v. Arvizu* for additional support. *Id.* at 37–39. In *United States v. Arvizu*, the Court upheld the stop of the defendant who was traveling on an unpaved and “little-traveled route used by smugglers to avoid the [Border Patrol] checkpoint.” 534 U.S. at 277. However, the choice of road, although it added significantly to the calculation of reasonable suspicion, was just one of numerous factors relied on by law enforcement in a totality analysis. *Id.*

153. 528 U.S. at 124.

154. *Id.*

However, the Court also emphasized that “when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.”<sup>155</sup> The Court was quick to point out, however, that although “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure,”<sup>156</sup> when an individual engages in unprovoked flight, he does more than refuse to cooperate: “[f]light, by its very nature, is not ‘going about one’s business’; in fact, it is just the opposite.”<sup>157</sup>

Putting aside, for now, that the nonexistent checkpoint being advertised on the interstate would be (if it existed) unlawful under *Edmond*,<sup>158</sup> the driver who exits the road is merely seeking to avoid a seizure that is based neither on reasonable suspicion nor probable cause. While he may have altered his route, his apparent “business” is to drive from one location to another, and by exiting, he seeks to continue going about that business without having to stop. As previously mentioned,<sup>159</sup> the choice to exit may have as much to do with seeking to avoid traffic congestion or the hassle of having to stop, wait in a line, and search for and produce vehicle documentation as it has to do with avoiding contact with the police. But even if the driver’s exit is motivated by the desire to steer clear of the police, this does not necessarily establish

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155. *Id.* at 125 (referring to the Court’s prior holding in *Florida v. Royer*, 460 U.S. 491, 498 (1983)).

156. *Id.* (quoting *Florida v. Bostick*, 501 U.S. 429, 437 (1991)).

157. *Id.*

158. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 32 (2000); *supra* text accompanying notes 60–63.

159. See *supra* text immediately following note 24. Of course, there could also be a myriad of reasons to use a particular exit off an interstate that have nothing to do with the advertised checkpoint. As stated by the court in *Yousif*: “Moreover, because 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.” *United States v. Yousif*, 308 F.3d 820, 829 (8th Cir. 2002).

criminal wrongdoing, as noted by Justice Stevens in his *Michigan Department of State Police v. Sitz* dissent:

Unwanted attention from the local police need not be less discomfoting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior.<sup>160</sup>

Returning to the idea that the exiting driver is declining the invitation to be seized without individualized suspicion, it is important to recall what *Edmond* instructs regarding such seizures:

The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing. While such suspicion is not an “irreducible” component of reasonableness, we have recognized only limited circumstances in which the usual rule does not apply. . . . We have . . . upheld brief, suspicionless seizures of motorists at a fixed Border Patrol Checkpoint designed to intercept illegal aliens, and at a sobriety checkpoint aimed at removing drunk drivers from the road. In addition, . . . we suggested that a similar type of roadblock with the purpose of verifying drivers' licenses and vehicle registrations would be permissible. In none of these cases, however, did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.<sup>161</sup>

In other words, suspicionless mass seizures arising from checkpoints conducted for purposes of highway safety or immigration enforcement would be unreasonable, were it not for the fact that they served important societal interests apart from ordinary crime control and law enforcement. Now if one considers the fact that the ruse checkpoint is advertised as a drug interdiction checkpoint, which, if it existed, would clearly violate the Fourth Amendment, using

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160. 496 U.S. 444, 465 (1990) (Stevens, J., dissenting).

161. 531 U.S. at 37–38 (internal citations omitted).

the fact that the driver has exited the highway in order to avoid being *unreasonably* seized to generate reasonable suspicion is especially problematic. Judge Denvir Stith's words bear repeating: "[t]here is something fundamentally unsettling and counterintuitive about labeling as suspicious a person's conduct in avoiding the state's own unconstitutional conduct."<sup>162</sup>

This raises the question not only of whether exiting the interstate constitutes flight, but more importantly, even if so, whether it is "unprovoked." There seems to be a vast difference from the facts of *Wardlow*, where the defendant took off running at the mere sight of police officers, even though there was no indication that he was personally subject to their attention,<sup>163</sup> and the driver who exits the interstate in order to prevent himself, personally, from being unlawfully seized. When the police threaten to unlawfully seize an individual, and that individual chooses not to be seized, is his decision to remove himself from the situation truly "unprovoked?" This author believes there is a strong argument for not ascribing any, let alone significant, weight in a totality analysis to a citizen's decision to exit the highway prior to an announced unreasonable seizure.

Of course, if the police rely instead on the occurrence of a traffic violation to conduct the stop, rather than on reasonable suspicion of drug trafficking, it is not necessary to engage in any totality analysis at all, as all that is required to justify the stop is the officer's observation of the traffic

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162. *State v. Mack*, 66 S.W.3d 706, 717 (Denver Stith, J., dissenting).

163. *Illinois v. Wardlow*, 528 U.S. 119, 122 (2000) ("Respondent looked in the direction of the officers and fled."). This is not to say that fleeing from the scene of anticipated police activity in an area known for drug trafficking necessarily implicates one in individual wrongdoing. As Justice Stevens noted, "[I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses." *Id.* at 131 (Stevens, J., dissenting) (quoting *Alberty v. United States*, 162 U.S. 499, 511 (1896)). However, I wish to contrast the facts of *Wardlow* with the usual ruse checkpoint facts, where the exiting motorist wants to avoid his own threatened seizure.

offense. Part III will address the traffic stop (the third variation of the ruse checkpoint), arguing that, *Whren* notwithstanding,<sup>164</sup> the police should not be permitted to use pretextual traffic stops to conduct a narcotics investigation in the ruse checkpoint scenario. Before turning to Part III, however, the next Section of this Part further addresses avoidance and suspicion and explores a fascinating dichotomy between seizures and searches with respect the assertion of one's Fourth Amendment rights.

B. *The Fork in the Road to Fourth Amendment Protection:  
Asserting the Right to Liberty versus the Right to Privacy*

Turning back to *Wardlow*, how could the defendant have avoided being seized without furnishing the reasonable suspicion used to justify his eventual seizure when he *was* apprehended? Perhaps he could have continued standing near that building, ignoring the police, and “going about his business.” Perhaps he could have walked away casually, being careful not to walk so quickly as to cross the line between avoidance and flight (or to catch the eye of the passing officers). But how does the driver, once notified of the upcoming checkpoint, implement his decision to not cooperate with the police interaction he believes to be ahead?

Vehicle checkpoints are clearly considered seizures for purposes of the Fourth Amendment,<sup>165</sup> but it is instructive here to examine the definition of a seizure. In *Terry v. Ohio*, the Court defined a seizure in terms of an officer's use of “physical force or show of authority” to “in some way restrain[] the liberty of a citizen.”<sup>166</sup> In *U.S. v. Mendenhall*, the Court further refined the definition of a seizure as follows: “[a] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the

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164. See *Whren v. United States*, 517 U.S. 806 (1996); *supra* text accompanying note 9.

165. *Sitz*, 496 U.S. at 450.

166. 392 U.S. 1, 19 n.16 (1968).

circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”<sup>167</sup> The Court added the final piece to the definition of a seizure in *California v. Hodari D.*, holding that one is not seized for Fourth Amendment purposes until such time as one comes under the control of the police, either by submission to authority or through the use of physical force.<sup>168</sup>

Seizures, then, are all about compulsion. An individual is seized once his interaction with police has reached the point where a reasonable person in those circumstances would feel compelled to remain under police control, even if only temporarily. Of course, seizures must by nature be compulsive—chances are that most people who are stopped or arrested would rather not be. So, whereas compulsion is permitted and likely necessary in the context of the Fourth Amendment seizure, in at least two other key areas of criminal procedure, compulsion by the police is not permitted. First, in the context of Fourth Amendment searches, a suspect cannot be coerced into granting consent to search and any consent given must be voluntary in order to be valid.<sup>169</sup> Secondly, in the context of police interrogation, the Fifth Amendment states, in the relevant part, that no person “shall be compelled in any criminal case to be a witness against himself.”<sup>170</sup> In order to protect the right against compelled self-incrimination, police must provide suspects in custody with their *Miranda* warnings, advising

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167. 446 U.S. 544, 554 (1980). Note that this is an objective test, based on the perception of the reasonable detainee, rather than on the subjective intent of the officer, although ultimately, it is the latter that determines whether or not one will be free to leave.

168. 499 U.S. 621, 629 (1991).

169. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

170. U.S. CONST. amend. V. Suspects also have protection under the due process clauses of the Fifth and Fourteenth Amendments, which have been held to prohibit the introduction of confessions that are deemed to be involuntary. *See id.* amend V, XIV. *See also, e.g.*, *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (holding that the use of confessions obtained through torture and brutality constitutes “a clear denial of due process.”).

them, among other things, of their right to remain silent.<sup>171</sup> Further, if a suspect being subjected to custodial interrogation asserts the right to remain silent, or the right to have an attorney present, the police must cease the interrogation, thereby preventing the compelled statement from being made.<sup>172</sup> Thus, there is a mechanism for the suspect to assert his right to be free of compulsion, and safeguards in place to ensure that he can enjoy that right.

In contrast, however, while a suspect can assert his right to be free of a potential Fifth Amendment violation by way of a compelled statement, there is no clear mechanism for an individual to assert the right to be free of a Fourth Amendment violation by way of an unreasonable seizure.<sup>173</sup> In fact, the driver approaching a ruse checkpoint faces quite the dilemma: until he reaches the checkpoint, he is not seized, and therefore, has, at least in theory, freedom of movement. However, if he exercises that freedom to avoid being compelled to stop and submit to the police, his assertion, by changing his course, of the right to be free of a suspicionless seizure supplies the suspicion that can, in large part, justify his being compelled to stop after all. Or, alternatively, his choice to freely change his route will subject him to particularly vigilant traffic code enforcement as waiting officers try “to get reason to stop [him].”<sup>174</sup>

An even starker contrast can be found within Fourth Amendment law, particularly with respect to how citizens seek to protect themselves from unlawful searches versus

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171. *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

172. *Id.* at 473–74.

173. Of course, if a defendant has been unreasonably seized, he can assert his Fourth Amendment rights post hoc by seeking to suppress any evidence gained as a result of a Fourth Amendment violation. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to state prosecutions by holding that “all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”). Of course, this is not the same as avoiding the seizure in the first place.

174. *United States v. Carpenter*, 462 F.3d 981, 983 (8th Cir. 2006).

seizures. In order for government surveillance to be deemed a search for Fourth Amendment purposes, the government must “obtain information by physically intruding on a constitutionally protected area,” or in the absence of such an intrusion, obtain information by violating one’s reasonable expectation of privacy.<sup>175</sup> Of particular interest here is the fact that, in order to claim the protection of the Fourth Amendment with respect to searches by establishing a reasonable expectation of privacy, one must vigorously assert and safeguard that privacy. If one fails to exercise sufficient diligence to hide from view what one “seeks to preserve as private,”<sup>176</sup> one loses Fourth Amendment protection over what is in fact seen.<sup>177</sup> Thus, even though one may ultimately be unsuccessful at keeping the object targeted by police surveillance hidden, the fact that significant precautions were taken to preserve privacy ensures that, at the very least, the police will need to abide by the requirements of the Fourth Amendment (generally, a warrant and probable

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175. The “reasonable expectation privacy” test used to define a search in the absence of a physical intrusion is derived from *Katz v. United States*, 389 U.S. 347 (1967), and in particular from Justice Harlan’s formulation, found in his concurrence, which recognized a Fourth Amendment search as occurring when the government violates “an actual (subjective) expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

176. *Id.* at 351.

177. Perhaps one of the most stringent applications of this principle can be found in *California v. Ciraolo*, where the Court upheld surveillance by two police officers from a private plane flying at 1,000 feet of the defendant’s back yard. 476 U.S. 207, 209, 215 (1986). Despite the fact that the defendant had enclosed his yard with two tall fences, the Court found that he did not have a reasonable expectation of privacy in his yard, at least not from aerial observation. *Id.* at 209, 214. The defendant had, of course, asserted that “he ha[d] done all that can reasonably be expected to tell the world he wishes to maintain the privacy of his garden . . . without covering his yard.” *Id.* at 211. I have elsewhere argued that the Court’s search doctrine, particular in how it defines when a Fourth Amendment search has occurred, requires citizens to take extreme or “utmost” precautions to maintain privacy. See Nadia B. Soree, *Show and Tell, Seek and Find: A Balanced Approach to Defining a Fourth Amendment Search and the Lessons of Rape Reform*, 43 SETON HALL L. REV. 127, 210 (2013) (analogizing the utmost resistance requirement in traditional rape law to the Court’s narrow definition of a Fourth Amendment search).

cause) when conducting that surveillance.

On the other hand, when a citizen vigorously seeks to maintain the integrity of his person and his freedom of movement by choosing to not drive into a checkpoint (an unlawful one, at that), his Fourth Amendment protection is actually diminished through his assertion of the right to be free from unreasonable seizures, and he is more vulnerable to being stopped. In fact, his own actions in seeking to avoid the advertised narcotics checkpoint help transform what would have been an unlawful stop at a highway checkpoint into a lawful one on the side of a rural road. While this dichotomy of approaches to Fourth Amendment protection may seem logical—after all, searches and seizures are different in nature—it also seems counterintuitive that an individual can do very little to avoid being unconstitutionally seized, even if the feared seizure is miles ahead.

Further, although initially it seems that searches and seizures threaten different interests, if one adopts the eloquent and powerful description of Fourth Amendment privacy as “the right to be let alone” provided by Justices Warren and Brandeis in their groundbreaking article, *The Right to Privacy*,<sup>178</sup> then one sees that the individual who draws his blinds against the prying eyes of the government is essentially protecting the same interest as the driver who takes the exit in order to keep driving without interference from that same government. One cannot escape noting the irony that, had our driver simply continued down the interstate, he would never have encountered a checkpoint at all because such a checkpoint would be, of course, unlawful under *Edmond*. The next Part explores the significance of this very important fact: that the success of the ruse checkpoint as a law enforcement technique is predicated on the government’s threat to violate the Fourth Amendment.

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178. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

III. CALLING ALL CARS, FOURTH AMENDMENT VIOLATION  
AHEAD: AN ARGUMENT FOR THE INADMISSIBILITY OF  
EVIDENCE OBTAINED THROUGH A THREATENED  
CONSTITUTIONAL VIOLATION

This Part turns once more to *Kentucky v. King*,<sup>179</sup> which was briefly detailed in the Introduction.<sup>180</sup> To refresh the reader's memory, in *King*, the Court addressed the extent to which police may rely on the presence of exigent circumstances to justify a warrantless entry into a home when the police had a role in creating the exigency.<sup>181</sup> The Court upheld the search as reasonable, stating that “[w]here, as here, the police did not create the exigency *by engaging or threatening to engage in conduct that violates the Fourth Amendment*, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”<sup>182</sup> Therefore, when officers, smelling the odor of marijuana emanating from an apartment, banged loudly on the door, apparently leading the occupants of the apartment to begin destroying the evidence, the officers were permitted to forcibly enter in order to preserve that evidence.<sup>183</sup> The Court admonished: “[o]ccupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”<sup>184</sup>

Arguably, the result in *King* would have been different had the police, rather than simply banging and identifying themselves, threatened to immediately break down the door. Notice, under these alternative facts, the occupants no longer have the choice to “stand on their constitutional rights.” If

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179. *See* 563 U.S. 452 (2011).

180. *See supra* text accompanying notes 40–43.

181. 563 U.S. at 461.

182. *Id.* at 462 (emphasis added).

183. *Id.* at 456.

184. *Id.* at 470.

they ignore the knock on the door, or indeed demand that the police return with a warrant, the police will nevertheless enter illegally if they follow through on the threat. As the *King* Court repeatedly emphasized the fact that the officers did not violate or threaten to violate the Fourth Amendment,<sup>185</sup> it is safe to assume that under our alternative scenario, the police would no longer be permitted to effectuate a warrantless entry based on exigent circumstances, despite the fact that the occupants may very well be destroying evidence (something that they have no constitutional right to do), and therefore, the exigency is real. What matters more than the existence of the exigency under these circumstances is the manner in which it arose.

Analogizing the holding of *King* to the ruse checkpoint, just as the police may not create an exigency, which ordinarily would permit a warrantless entry, by violating or threatening to violate the Fourth Amendment—real as that exigency may be, assuming that evidence is actually being destroyed as a result of the officers' actions—police may not create suspicion or create the opportunity to establish objective justification by violating or threatening to violate the Fourth Amendment. The ruse checkpoint is just that: a clear and manifest threat to violate the right to be free of unreasonable seizures. When the threat has the desired effect, causing drivers to exit the highway, police are ready and waiting to observe additional suspicious activity leading to reasonable suspicion of drug trafficking or the commission of a traffic offense—real or fabricated.

While the Court has not directly addressed ruse narcotics checkpoints, this author believes that its decision in *King* should inform the inquiry in the present context as well. If the *King* decision is to be taken to its logical conclusion and applied to the ruse checkpoint, the driver's choice to exit the highway should play no role in establishing reasonable suspicion. Further, regardless of *Whren v. United*

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185. *Id.* at 455, 462, 472.

*States*, police should not be permitted to use the traffic stop as a pretext to conduct a narcotics investigation, even when (or if) the driver has committed a traffic violation.<sup>186</sup>

*Edmond* addressed *Whren's* holding when formulating its primary purpose test for narcotics checkpoints, noting that “*Whren* therefore reinforces the principle that, while [s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis, programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion.”<sup>187</sup> Arguably, the ruse checkpoint is, in fact, a scheme conducted without individualized suspicion, as all motorists are in some way subjected to the ruse, even though the stop of an individual motorist may be based, at least technically, on probable cause of a traffic violation. While it may be difficult in ordinary circumstances to discern the exact motivation of an officer when he stops a motorist, it is abundantly and objectively clear that during the ruse checkpoint operation, that motivation is to investigate narcotics trafficking. Thus, this author argues that *Edmond* could be read to support an inquiry into the programmatic purposes of the ruse checkpoint, creating a presumption that when the officer acting pursuant to the ruse checkpoint program stops a motorist—even one who has committed a traffic violation—he is truly conducting a narcotics investigation.

One solution to rehabilitate a post-ruse checkpoint traffic stop would be to require police to shoulder a heightened burden of demonstrating that the traffic stop was indeed motivated by the desire to enforce the traffic laws in order to overcome that presumption.<sup>188</sup> However, a more

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186. See 517 U.S. 806, 819 (1996).

187. 531 U.S. 32, 45–46 (2000) (internal citations omitted).

188. While determining whether an officer was truly acting from a traffic-enforcement motivation may again prove challenging, objective factors, such as the severity of the alleged traffic violation, could help inform such a determination.

definitive and easily administered solution would be simply to create a rule that evidence obtained as a direct result of a ruse checkpoint operation is inadmissible. In other words, the police should not benefit from a threatened violation of the Fourth Amendment.<sup>189</sup>

Of course, the exclusionary rule serves to remedy an actual constitutional violation, so a question arises as to whether the ruse, as a threat to violate the Fourth Amendment constitutes a violation in itself, or whether the actual constitutional violation occurs only when the driver is seized. Again, *King* is instructive, although not a perfect fit. If one assumes that the outcome of *King* would have been different had the officers violated or threatened to violate the Fourth Amendment, and through that misconduct, created the exigency, the actual constitutional violation would have been the warrantless entry into the apartment. If the baseline for reasonableness under the Fourth Amendment is the warrant requirement,<sup>190</sup> the officers' ability to enter without a warrant must be based on an exception to that requirement, such as the existence of an exigency.<sup>191</sup> Because the officers are seeking to justify what otherwise would be an unreasonable search by asserting an exception to the warrant requirement, it is reasonable to insist, as the Court

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189. This approach is consistent with what the Court has stated to be the primary justification for exclusion: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

190. See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent").

191. The Court in *King* noted the existence of various exceptions to the warrant requirement, stating that "[o]ne well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). See also *Payton v. New York*, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

did in *King*, that the police misconduct did not create the circumstances—the exigency—that the officers then wish to exploit. Thus, in effect, if the police violate the Fourth Amendment or threaten to do so, the exception to the warrant requirement is unavailable, rendering their warrantless entry indeed unreasonable. It is critical for purposes of the analogy to the ruse checkpoint to highlight that, for the *King* Court, in reaching its holding, the threat to violate the Fourth Amendment is as egregious as conduct that actually constitutes a violation of that Amendment.

In the ruse narcotics checkpoint context, one cannot say that the threat to violate the Fourth Amendment—the sign advertising an unlawful narcotics checkpoint ahead—is itself a violation, because until a driver is actually stopped, there has been no seizure, nor search, under the Fourth Amendment. Addressing the first and second-generation ruse checkpoint stops, where the driver's decision to exit the highway either generates entirely,<sup>192</sup> or significantly contributes to,<sup>193</sup> the reasonable suspicion used to justify the stop, it is fairly straightforward to argue that a citizen's choice to prevent an unreasonable seizure of his person should not be used as an indication of wrongdoing.<sup>194</sup> When the citizen's choice to exit the highway is no longer taken into account, it will be much more difficult to establish the reasonable suspicion necessary to render the subsequent seizure reasonable.

The third-generation ruse checkpoint stop, based on a traffic violation committed by the driver after having exited

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192. As previously mentioned, most courts require more than simply exiting the highway to establish reasonable suspicion. *See supra* text accompanying note 29.

193. For discussion of cases in which the driver's decision to exit the highway plays a significant role in establishing reasonable suspicion, see *supra* Section I.B.

194. Further, although the avoidance of the checkpoint is only one factor in a totality, it is highly likely that if a court were precluded from considering that fact in its analysis, the remaining factors would not be sufficient to rise to the level of reasonable suspicion.

the interstate, presents a bit more of a challenge in the exclusionary rule analysis. The officers in *King* actually entered the apartment without benefit of a warrant, which would have constituted a *per se* violation of the Fourth Amendment, had it not been for a valid exception to the warrant requirement. On the other hand, under *Whren*, the warrantless traffic stop is reasonable, as long as it is based on probable cause that the driver committed a traffic offense. To call the pretextual traffic stop unreasonable (despite the existence of probable cause) requires a new understanding of *Whren*. Many commentators, including this author, have been critical of *Whren* as a decision that permits officers broad discretion to investigate criminal activity unrelated to the traffic offense for which a driver is actually detained.<sup>195</sup> If *Whren*, however, is reframed as an *exception* to the requirement of probable cause or reasonable suspicion, the Court's ruling in *King* has great significance.

Imagine an officer who believes, but has neither probable cause nor reasonable suspicion, that a driver of a particular vehicle is engaged in criminal activity, such as drug trafficking or possession. Of course, under *Whren*, the basis of the officer's belief does not matter, whether it arises from the location, the type of vehicle being driven, or the age, gender, or even race of the driver.<sup>196</sup> Knowing that he cannot stop the driver and vehicle to investigate the criminal activity he believes is occurring, he patiently waits for the driver to commit a traffic violation—a failure to signal, perhaps. Now the officer has the probable cause needed to stop the vehicle for the traffic violation, and the opportunity to conduct the narcotics investigation he would otherwise not have been permitted to conduct.

This calls for an understanding of the pretextual traffic stop as, in fact, a suspicionless investigatory stop, rendered reasonable only by the existence of an independent,

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195. *See supra* note 9.

196. *Id.*

unrelated (to the narcotics investigation) source of objective probable cause. Just as the objective existence of an exigency creates an exception allowing the warrantless entry into a home, the objective existence of a traffic violation creates, in effect, an exception to the requirement that a stop conducted for purposes of investigating criminal activity be based on probable cause or reasonable suspicion of such activity, which this author will refer to, for purposes of the analogy to *King*, as the *Whren* exception.<sup>197</sup>

Under the hypothetical *King* facts, officers who create the exigency by a violation or threatened violation of the Fourth Amendment could not then benefit from the exigent circumstances exception to render their warrantless search reasonable. Similarly, officers who threaten to violate the Fourth Amendment through the ruse checkpoint operation should not benefit from the *Whren* exception to render their subsequent narcotics stops reasonable. One could argue that the advertised checkpoint threat does not actually cause the driver to commit a traffic violation in the same way that the threat to violate the Fourth Amendment may cause the occupants of an apartment to destroy evidence. Nonetheless, the causal connection between the ruse and the traffic offense is undeniably strong. Not only does the ruse provide officers with the opportunity to target specific drivers (who find themselves on an unfamiliar road, often late at night) with a heightened purpose of observing a traffic offense, but as was seen in *United States v. Johnson*, the very location of the ruse may create a virtual certainty that a traffic offense will be committed.<sup>198</sup> Thus, when the government's threat to violate the Fourth Amendment creates the strong likelihood that a traffic violation will be committed or observed, government officers should not be permitted to use *Whren* to insulate what is, in fact, a narcotics investigation from constitutional scrutiny and the requirements of

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197. This "exception" in effect provides a substitute source of probable cause.

198. See 59 M.J. 666, 668 (A.F. Ct. Crim. App. 2003).

individualized suspicion of narcotics-related wrongdoing.

Finally, what of Justice Alito's call, in *King*, to an informed and self-assured citizenry to assert their constitutional rights?<sup>199</sup> The drivers who exit the interstate after being warned of an upcoming narcotics checkpoint are, albeit perhaps unknowingly, seeking to do just that. However, in the ruse checkpoint cases, rather than successfully avoiding an unconstitutional seizure, these drivers find themselves directly confronted by the police, stopped either because their desire not to be seized becomes a sign of wrongdoing or because they commit a traffic violation, no matter how minor—or simply because they are in the wrong place at the wrong time.

#### CONCLUSION

Simply put, the use of ruse checkpoints to target drivers violates the Fourth Amendment, or more precisely, the seizures resulting from the ruse are unreasonable. When the government threatens to violate the Fourth Amendment, it behaves unreasonably for purposes of that Amendment, and the advantages gained from such behavior should not be permitted. The questions arising from use of the ruse checkpoint, such as through what mechanisms a citizen can assert his right to be free from unreasonable seizures, or to what extent a citizen's avoidance of police interaction should be factored into an analysis of suspicion, or even to what extent officers should be permitted to conduct pretextual traffic stops, are not easily answered. Further, this Article does not suggest that police should abandon their efforts to interdict drugs, but argues that the methods used to do so matter.

Thus, while difficulties arise in attempting to answer the above questions, the solution to this particular issue is startlingly simple: police should not be permitted to conduct

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199. See *Kentucky v. King*, 563 U.S. 452, 468–70 (2011).

ruse checkpoints, and if a ruse checkpoint produces evidence, it should be inadmissible under the exclusionary rule. While the government is diligently seeking to enforce the laws, it must do so in a way that demonstrates respect for constitutional rights, rather than through the use of threats to abrogate those rights in order to achieve its ends.<sup>200</sup> Courts should be cautious of an overly permissive approach to such deceptive tactics as exemplified by the ruse checkpoint, and draw the line suggested by *King*. As it stands now, the drivers who “choose [] to stand on their constitutional rights” by driving away from the advertised—but nonexistent—unlawful checkpoint may very well find themselves instead standing on the side of the road, watching as their cars are searched. As Judge Denvir Stith pointedly stated, “[t]he public should not be put to such a choice.”<sup>201</sup>

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200. As stated by Justice Brandeis in his famous *Olmstead* dissent, “[i]f the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

201. *State v. Mack*, 66 S.W.3d 706, 717 (Mo. 2002) (Denvir Stith, J., dissenting).