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City of Indianapolis v. Edmond: An Unprecedented Use of "Primary" Purpose Leaves Wide Open the Door for "Secondary" Problems

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CITY OF INDIANAPOLIS v. EDMOND: AN UNPRECEDENTED USE OF "PRIMARY" PURPOSE LEAVES WIDE OPEN THE DOOR FOR "SECONDARY" PROBLEMS

INTRODUCTION

> 8. EVERY VEHICLE BEING STOPPED MUST BE EXAMINED IN THE SAME MANNER UNTIL PARTICULARIZED SUSPICION OR PROBABLE CAUSE DEVELOPS. THERE WILL BE NO EXCEPTIONS! A DRUG DETECTION DOG WILL WALK AROUND AND EXAMINE EVERY VEHICLE STOPPED AT THE CHECKPOINT.
> 9. THERE WILL BE NO DISCRETION GIVEN TO ANY OFFICER TO STOP ANY VEHICLE OUT OF SEQUENCE. WHEN THE SEQUENCE OF VEHICLES HAVE (sic) BEEN TOTALLY DEALT WITH AND EITHER RELEASED OR SEIZED, THE VERY NEXT SEQUENCE OF VEHICLES WILL BE STOPPED. NO VEHICLES WILL BE PERMITTED TO PASS THE CHECKPOINT BEFORE ANOTHER SEQUENCE IS STOPPED AFTER ALL VEHICLES IN THE CURRENT SEQUENCE HAVE BEEN RELEASED OR SEIZED.[1]

Six times between August and November of 1998, the Indianapolis Police Department set up checkpoints or drug interdiction roadblocks for the sole purpose of catching drug offenders and "[interrupting] the flow of illegal narcotics throughout Indianapolis."[2] Approximately thirty officers were located at each checkpoint, along with patrol cars that contained mobile data terminals.[3] During each stop, which exceeded no more than five minutes, a predetermined number of drivers were asked to present their driver's licenses and vehicle registration, while an officer peered into the car.[4] At some point during the stop, the police led a drug-sniffing dog around the exterior of the

1. Edmond v. Goldsmith, 38 F. Supp. 2d 1016, 1019 (S.D. Ind. 1998) [hereinafter *Goldsmith I*] (quoting selected portions of the Indianapolis Police Department's (IPD's) written guidelines for drug interdiction checkpoints).

2. *Id*. at 1018; Edmond v. Goldsmith, 183 F.3d 659, 661 (7th Cir. 1999) [hereinafter *Goldsmith II*].

3. *Goldsmith I*, 38 F. Supp. 2d at 1019. The purpose of the mobile terminals is to run a search on invalid licenses and registrations at the checkpoint location. *Id*.

4. *Id*.; *Goldsmith II*, 183 F.3d at 661.

car, and upon an "alert" or indication from the trained dog, probable cause was established.[5] This program led to the stopping of 1,161 vehicles, which resulted in fifty-five drug-related arrests, "meaning that five percent of the total number of stops resulted in successful drug 'hits,' and 49 arrests for conduct unrelated to drugs, such as driving with an expired driver's license, for an overall hit rate of 9 percent."[6] Respondents James Edmond and Joell Palmer, who were each stopped at a narcotics checkpoint, filed a class action suit against the City of Indianapolis and its Mayor, as well as unknown members of the Indianapolis Police Department (hereinafter "State"). They represented "any and all persons driving vehicles who have been stopped or [are] subject to being stopped in the future at the drug interdiction roadblocks maintained by the City of Indianapolis in an attempt to interdict and curtail unlawful drugs and unlawful drug use."[7] The United States District Court for the Southern District of Indiana denied Respondents' motion for preliminary injunction, but the United States Court of Appeals for the Seventh Circuit reversed, holding that the checkpoints "contravened the Fourth Amendment."[8] The Supreme Court granted certiorari and affirmed the judgment of the Seventh Circuit.[9]

The fundamental principle of the Fourth Amendment requires that searches and seizures be reasonable;[10] however the Supreme Court has recognized limited circumstances where the usual requirement of reasonable suspicion and probable cause have been waived.[11] To determine whether individualized suspicion is required, the Court balances "the nature of the interests threatened and their connection to the particular law enforcement practices at issue."[12] Suspicionless searches have been upheld where the program was designed to serve special needs,[13] administrative purposes,[14] a fixed border patrol

5. *Goldsmith II*, 183 F.3d at 661; *Goldsmith I*, 38 F. Supp. 2d at 1019.

6. *Goldsmith II*, 183 F.3d at 661.

7. *Goldsmith I*, 38 F. Supp. 2d at 1020.

8. City of Indianapolis v. Edmond, 531 U.S. 32, 36 (2000).

9. *Goldsmith II*, 183 F.3d 659 (7th Cir. 1999), *cert. granted*, 69 U.S.L.W. 4009 (U.S. Feb. 22, 2000) (No. 99-1030).

10. *See infra* notes 27-35 and accompanying text.

11. *See infra* notes 36-39 and accompanying text.

12. *Edmond*, 531 U.S. at 42-43.

13. *Id*. at 37. *See, e.g*., Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995). The increased use of drugs, particularly among student athletes, led the school district in Vernonia, Oregon, to impose random drug testing of its student-athletes. *Id.* at 649. The Court took into account several factors, including "the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search" and upheld Vernonia's school policy as "reasonable and hence constitutional." *Id*. at 664-65. The Court added:

> We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant factor in this case is . . . that the policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care. Just as when

> the government conducts a search in its capacity as employer . . . the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in; so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. [W]e conclude in the present case it is.

Id. at 665 (citation omitted).

In *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), the United States Customs Service, largely responsible for seizing contraband, required its own employees seeking transfer or promotion to certain positions involving the interdiction of illegal drugs to undergo a drug test. *Id.* at 659-60, 679. The Court upheld the suspicionless drug testing of the Service after balancing "the public interest in the Service's testing program against the privacy concerns implicated by the test." The Court also stated that "the Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interest of those who seek promotion in these positions . . . ." *Id.* at 679.

In *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), the Federal Railroad Administration (FRA) set forth certain regulations mandating blood and urine tests of employees involved in certain train accidents or found to be in violation of particular safety regulations. *Id.* at 606; *Edmond*, 531 U.S. at 37. The Court held that the

> compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. The necessity to perform that regulatory function with respect to railroad employees engaged in safety-sensitive tasks, and the reasonableness of the system for doing so, have been established in this case.

Skinner, 489 U.S. at 633.

14. *Edmond*, 531 U.S. at 35-37. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702-04 (1987). New York City Police Department, Auto Crimes Division, conducted a warrantless inspection of a junkyard owner's premises, in accordance with N.Y. VEH. & TRAF. LAW § 415-a5 (McKinney 1986), and determined he was in possession of stolen vehicles and parts. *Burger*, 482 U.S. at 693-95. The Court upheld the inspection, finding that it fell within the "established exception to the warrant requirement for administrative inspection in 'closely regulated' businesses." *Id.* at 703. The regulatory scheme satisfied the three criteria to make reasonable warrantless inspections pursuant to the statute. *Id.* at 708. First, the State had a "substantial interest in regulating the vehicle-dismantling and automobile-junkyard industry" due to increased motor vehicle theft in the State, and this theft is associated with the above industry. *Id.* Second, the regulation of this industry "reasonably [served] the State's substantial interest in eradicating the automobile theft." *Id.* at 709. Finally, the statute provided a "constitutionally adequate substitute for a warrant." *Id.* at 711 (quoting Donovan v. Dewey, 452 U.S. 594, 603 (1981)).

In *Michigan v. Tyler*, 436 U.S. 499 (1978), after the fire department stopped a fire in Tyler's Auction furniture store, other members of the department proceeded into the fire-damaged premises "to determine the cause and make out all reports." *Id.* at 502. Two plastic containers of flammable liquid had been found in the building, and upon concluding that arson may have been the cause of the fire, pictures of the containers and scene were taken, and the actual containers were eventually seized by the fire department. The respondents challenged the introduction of the containers at trial, as there was neither consent nor a warrant for any post-fire entry into the building nor for the removal of the containers. *Id.* at 501. The Court found that a warrant was not necessary for the re-entries because the initial investigation was severely hindered by darkness, steam and smoke. *Id.* at 511. The morning re-entries were just a continuation of the first, and the "lack of a warrant thus did not invalidate the resulting seizure of evidence." *Id.*

checkpoint designed to intercept illegal aliens[15] or check driver sobriety,[16] and the Court even suggested that a similar checkpoint whose purpose was to verify drivers' licenses and vehicle registration might also be permissible.[17] Yet the Court has made it clear that it had never upheld, nor even indicated that it might uphold, a checkpoint whose "primary purpose" was to detect general criminal wrongdoing.[18]

While the Court pointed out another well-established principle—that vehicle stops on the highway constitute a seizure within the meaning of the Fourth Amendment—the thrust of its opinion centered around the *primary* purpose of checkpoint programs.[19] Rejecting the State's assertion that precedent precluded an inquiry into the purpose of a checkpoint program where a legitimate interest is pursued,[20] the Court stated that such cases reinforce the principle that "programmatic purposes may be relevant to the validity of the Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion."[21] In response to the State's argument that its program ought to be justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying drivers' licenses and registrations, the Court noted that the importance of examining the *primary* purpose was to prevent the police from establishing checkpoints for nearly any purpose "so long as they also included a license or sobriety check."[22]

"[A]n entry to fight a fire requires no warrant, and . . . once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches." *Id*. (citations omitted).

And in *Camara v. Municipal Court*, 387 U.S. 523 (1967), contrary to the above-cited cases, the Court held that the routine annual inspection of an apartment building by an inspector of the Division of Housing Inspection did not suggest compelling urgency, thus a warrant should be sought if entry is refused. *Id.* at 539. "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." *Id*. (citations omitted).

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

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

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

18. *Edmond*, 531 U.S. at 38.

19. *Id*. at 40.

20. Petitioners rely on *Whren v. United States*, 517 U.S. 806 (1986), and *Bond v. United States*, 529 U.S. 334 (2000), to support the proposition that "where the government articulates and pursues a legitimate interest for a suspicionless stop, courts should not look behind that interest to determine whether the government's 'primary purpose' is valid." *Edmond*, 531 U.S. at 45.

21. *Edmond*, 531 U.S. at 45-46 (citing *Whren*, 517 U.S. at 813).

22. *Id*. at 46. The Court noted that because the State concedes its primary purpose was to intercept narcotics, it need not be decided whether a state may establish a checkpoint whose

The Court concluded that its holding did not affect valid border searches or those searches conducted at airports and government buildings, where the need for such measures to ensure public safety was heightened.[23] In addition, the ability of police officers to respond to information properly acquired during a checkpoint stop, justified by a lawful primary purpose, was not debilitated.[24] Finally, the purpose inquiry was to be conducted only at the programmatic level and was not an invitation to "probe the minds of individual officers acting at the scene."[25] Because the primary purpose of the Indianapolis checkpoint was concededly one of general crime control, it violated the Fourth Amendment, and the judgment of the Seventh Circuit was affirmed.[26]

This Note will analyze the current state of the law surrounding vehicle roadblocks and checkpoints due to the recent Supreme Court case, *City of Indianapolis v. Edmond*. Part I will provide a summary of the relevant principles behind the Fourth Amendment where the courts have upheld seizures at roadblock checkpoints without a warrant or probable cause. Part II will provide a brief discussion of the circuit split regarding the legality of vehicle roadblocks and *Brown v. Texas*, which set forth the three-prong test governing the reasonableness of seizures. Part III will critically evaluate *City of Indianapolis v. Edmond*, the recent Supreme Court decision discussing vehicle roadblocks and checkpoints, and suggest its departure from *Brown v. Texas* and unprecedented use of a "primary" purpose. Finally, Part IV will conclude with the overall significance and future impact this case will have on the current state of law.

I. VEHICLE CHECKPOINTS: A UNIQUE EXCEPTION TO THE FOURTH AMENDMENT

A. Introduction

The Fourth Amendment provides, in part, that people have a right to be secure against unreasonable searches and seizures, and no warrants permitting such searches or seizures will be granted absent a showing of probable cause.[27]

primary purpose is to check for vehicle registration, while its secondary purpose is for general criminal law enforcement purposes. *Id*. at 47 n.2.

23. *Id*. at 47-48.

24. *Id*. at 48.

25. *Id*.

26. *Edmond*, 531 U.S. at 48.

27. U.S. CONST. amend. IV. Because the Fourth Amendment prohibits only unreasonable searches and seizures, it follows that government activity must first rise to the level of a "search" or "seizure" to be subject to the Fourth Amendment and the reasonable criterion. Reasonable searches and seizures are not subject to the Fourth Amendment. *See generally* STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 33 (5th ed. 1986).

While judicial developments have determined what constitutes a reasonable search and seizure,[28] they have also determined what types of government activity rise to the level of a search or seizure.[29]

28. "Search" is commonly defined by the "reasonable expectation" test fashioned in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the District Court for the Southern District of California convicted petitioner on an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. *Id*. at 348. While the *Katz* majority held that the government's activities constituted a "search and seizure" within the meaning of the Fourth Amendment, it was Justice Harlan's concurrence that established the modern test to determine reasonable expectation of privacy. *Id*. at 360-61. Courts use this two-pronged test to determine whether government conduct constitutes a search. First, it must be shown that a person exhibits an actual, subjective expectation of privacy, and second, that the expectation is one that society is prepared to recognize as reasonable. *Id*. at 361 (Harlan, J., concurring). Government conduct does not rise to the level of a search if either prong is lacking. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 88 (2d ed. 1997). Because Harlan's subjective prong was severely criticized, Harlan ultimately concluded that the objective expectation prong should surpass the subjective expectation, as "[o]ur expectations, and the risks we assume, are in large part reflections of laws that translate into [the] rules[,] customs and values of the past and present." *Id.* at 89.

In the landmark case, *Terry v. Ohio*, 392 U.S. 1 (1959), the Court first defined "seizure" of a person. Terry was convicted of carrying a concealed weapon that was discovered after Officer McFadden patted down the outside of his clothing, fearing that he might have a gun. *Id*. at 6-7. Commonly known as a *Terry* stop, the Court stated, "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Id*. at 16. Moreover, the Court established a two-pronged test for determining the reasonableness of a seizure: (1) whether the officer's actions were justified at the time of the event, and (2) whether it was reasonably related in scope to the circumstances, which justified the interference in the first place. *Id*. at 19-20. The first prong, which later becomes a relevant focus in roadblock cases, focuses on governmental interest that justifies such an intrusion upon the private citizen's constitutionally protected interests, for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.* at 20-21 (citing Camara v. Mun. Court, 387 U.S. 523, 534-35, 536-37 (1967)). In justifying, the officer must be able to point to "specific and articulable" facts which, combined with rational inferences, reasonably warrant that intrusion—simple good faith is not enough. *Id.* at 21-22 (footnote omitted).

In *United States v. Place*, 462 U.S. 696 (1983), the Court further developed the status of seizures of personal property, considering them unreasonable under the Fourth Amendment without a judicial warrant issued upon probable cause. *Id*. at 701. Here, Place was approached by law enforcement officers at Miami International Airport, as well as authorities in New York LaGuardia Airport, after they were aroused by his suspicious behavior. The New York federal narcotics agents asked to search his luggage, to which he refused, and they notified him they would take the luggage to a federal judge to obtain a search warrant. Place's bags were eventually taken to Kennedy Airport where they were subjected to a "sniff test" by a trained narcotics detention dog. The dog alerted to the smaller of the two bags where the agents discovered 1,125 grams of cocaine. Place was eventually indicted for possession of cocaine with the intent to distribute, to which he replied that his Fourth Amendment rights were violated by the warrantless seizure of his luggage. Applying *Terry*, the Eastern District of New York stated that seizure of the luggage could only be justified if it was based on reasonable suspicion to believe

The actual text of the Fourth Amendment can be divided into two general parts: the reasonableness clause and the warrant clause, respectively. The first depicts what the amendment seeks to prohibit, or what rights citizens hold against the government, and the second states what is required before a warrant may be properly issued.[30] Probable cause, found within the warrant clause, is defined as the "minimum showing necessary to support a warrant

that the bags contained narcotics, and as such existed, Place's Fourth Amendment rights were not violated. *Id*. at 698-700. The Supreme Court stated that *Terry* allowed seizures based on reasonable and articulable suspicion, premised on objective facts, and that the exclusion of the probable cause requirement, or articulable suspicion, was justified by balancing the nature and quality of the intrusion of the individual's Fourth Amendment interests against the governmental interests. *Id*. at 702-03. Place argued that a general interest in law enforcement (versus a special interest) cannot justify an intrusion on one's Fourth Amendment right. *Id*. at 703-04. He also argued that the *Terry* stop is inapplicable to the investigative detentions of property because the exclusion is premised on the underlying principle that such a stop is less intrusive to a person's liberty than a formal arrest, and as to property, there are no degrees of intrusion; therefore once the property is seized, dispossession is absolute. *Id.* at 705. To this the Court responded that detentions of property can also vary in their intrusiveness, as such seizures may come after a person has "relinquished control of the property to a third party" or "police may [simply] confine their investigation to an on-the-spot inquiry." *Id*. at 705-06. The Court ultimately held that the principles of *Terry* applied to allow an officer, who reasonably believes a traveler to be transporting narcotics, to detain the luggage and briefly investigate the circumstances that arouse his suspicion, provided the investigation is properly limited in scope. *Id*. at 706.

Finally, the Court in *United States v. Mendenhall*, 446 U.S. 544 (1980), added one more prong to the seizure definition. A person has been "seized" if, in view of all of the circumstances surrounding the incident, a *reasonable* person would have believed that he or she was not free to leave. *Id*. at 554. Here, when federal drug agents approached the defendant in an airport, identified themselves, and asked to see her identification and ticket, she handed it to the officers. *Id*. at 547-48. The Court held that such actions of the agents did not constitute a seizure because nothing suggested that the defendant had any objective reason to believe that she was *not* free to walk away. *Id*. at 555.

> [This conclusion] is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

Id. at 555-56 (citation omitted).

29. Implicating the principles laid out in *Katz*, namely that the Fourth Amendment protects people from *unreasonable* intrusions into their *legitimate* privacy expectations, and further having affirmed that a person does in fact possess a privacy interest in their personalty, one of the signature propositions to emerge from *Place*, which becomes relevant in the principle case, is that information obtained through a dog sniff is less intrusive than a typical search, and a "sniff" does not rise to the level of a "search" for purposes of the Fourth Amendment. *Place*, 462 U.S. at 707. The Court acknowledged that the agents did in fact "seize" Place's luggage. *Id*.

30. DRESSLER, *supra* note 28, at 69.

application,"[31] the substance of which is a reasonable ground for belief of guilt.[32] Probable cause exists where the facts and circumstances within the officer's knowledge, relying on reasonably trustworthy information, are sufficient to make a man of reasonable caution believe that an offense has been or is being committed.[33] Essentially, it is the threshold proof requirement of the Fourth Amendment—the higher it is set, the greater the role becomes for the judge in sustaining warrants and protecting the public against police searches and seizures.[34]

The most fundamental principle remains that *only* those search and seizures that are *unreasonable* are prohibited. Searches and seizures are *presumed* to be unreasonable *unless* carried out pursuant to a warrant, and such a warrant must be based upon probable cause.[35] However, the Supreme Court, in a variety of circumstances, has carved out instances where a search or seizure may fall within a special needs category beyond what is normal for law enforcement, making either or both the warrant and probable cause requirements impracticable.[36] These exclusions relate primarily to the areas of: (1) administrative searches,[37] (2) searches of individuals pursuant to "special

31. SALTZBURG & CAPRA, *supra* note 27, at 33.

32. Brinegar v. United States, 338 U.S. 160, 175 (1949) (citing McCarthy v. DeArmit, 99 Pa. 63, 69 (1881)).

33. *Id*. at 175-76 (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

34. SALTZBURG & CAPRA, *supra* note 27, at 73. For further information concerning probable cause, see generally DRESSLER, *supra* note 28, ch. 9. See also Spinelli v. United States, 393 U.S. 410 (1969) and Aguilar v. Texas, 378 U.S. 108 (1964), which marked the beginning of "probable cause" gaining judicial attention. SALTZBURG & CAPRA, *supra* note 27, at 73.

35. SALTZBURG & CAPRA, *supra* note 27, at 33.

36. DRESSLER, *supra* note 28, at 279 (alterations in original) (footnote omitted).

37. These judicially fashioned exclusions began with *Frank v. Maryland*, 359 U.S. 360 (1959), and the companion cases *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), where the Court took its first step away from the traditional notion of "probable cause" and replaced it with a "reasonableness" standard. DRESSLER, *supra* note 28, at 280-81. The facts mirror each other in all three cases. Plaintiffs—a homeowner in *Frank*, lessee of a ground floor apartment in *Camara*, and a warehouse owner in *See*—refused to permit a city inspection of their premises without a search warrant and argued that such a warrantless inspection violated their Fourth Amendment rights. *See Camara*, 387 U.S. at 525-26; *See*, 387 U.S. at 541-42; *Frank*, 359 U.S. at 361. Even though the result was the same, the rationale of *Camara* and *See* (decided the same day) essentially overruled that of *Frank*. The *Frank* Court has been interpreted as carving out an administrative exclusion to the traditional rule that warrantless searches are unreasonable. *Camara*, 387 U.S. at 529.

> [M]unicipal fire, health, and housing inspection programs 'touch at most upon the periphery of the important interest safeguarded by the Fourteenth Amendment's protection against official intrusion' because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances. Since the inspector does not ask that the property owner open his doors to a search for 'evidence of criminal action' which may be used to secure the owner's criminal conviction, historic interests of 'self-protection'

needs"[38] and (3) roadblocks or vehicle checkpoints.[39] The first two exclusions, as evidenced by their names, relate to searches and focus on the primary

jointly protected by the Fourth and Fifth Amendments are said not to be involved, but only the less intense 'right to be secure from intrusion into personal privacy.'

Id. at 530 (footnote omitted) (citation omitted). *Camara* and *See* agree that routine inspections of a physical condition are less intrusive; nevertheless they depart company with *Frank* which asserts that such Fourth Amendment interests are merely peripheral. *Id.*; *See*, 387 U.S. at 542 ("find[ing] the principles enunciated in the *Camara* opinion applicable [in *See*]"). As searches pursuant to criminal investigations have as their base specific items they may be trying to recover, civil inspection programs are aimed at securing a citywide compliance with a particular provision. *Camara*, 387 U.S. at 535. The normative standard in the former is that there is "probable cause" to issue a warrant, but in the latter, the Court reasoned that the particular inspection must simply be "reasonable." *Id*.

There is a unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. *Id*. at 535-36. Essentially, *Camara* and *See* developed an administrative search version of "probable cause" that does *not* require the type of individualized suspicion that plays a role in probable cause. Except in the event of an emergency, such a search must be "reasonable," a term defined by balancing the "need to search against the invasion with the search entails." *Id*. at 537; DRESSLER, *supra* note 28, at 281. This same balancing test was used one year later in *Terry*. *See supra* note 28 and accompanying text.

Since *See*, a three-part test has developed which spoke to the warrantless and non-exigent search of a "closely regulated" business. In *New York v. Burger*, 482 U.S. 691 (1987), the Court held that (1) the regulatory scheme must advance a substantial government interest, (2) the inspection must be necessary to further that scheme, and (3) the statute's inspection program must provide a constitutionally adequate substitute for a warrant, advising the owner of the commercial premise that the search is being made pursuant to law with a properly defined scope and limiting the discretion of the inspecting officers. *Id*. at 702-03.

38. Where the "administrative" cases involved "essentially limited, nonpersonal investigations, the 'special needs' cases are full-fledged searches aimed at discerning evidence of individual wrongdoing." Jennifer Y. Buffaloe, "*Special Needs" And The Fourth Amendment: An Exception Poised To Swallow The Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529, 536 (1997). This category generally includes searches of students and employees in the absence of a warrant and probable cause. In *New Jersey v. T.L.O.*, 469 U.S 325 (1985), the Court applied the reasonableness balancing test and ruled that public school teachers and administrators may search students provided that: (1) there were reasonable grounds for suspecting that the search would turn up evidence that the student has violated or is violating the law or school rules, and (2) the measures adopted in the search reasonably relate to the objective of the search, and are "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id*. at 341. Here, two female students were caught smoking in the bathroom in violation of school rules. The students were brought before the vice-principal. When the defendant denied that she had been smoking, the administrator demanded her purse, opened it, and observed a package of cigarettes. He removed the cigarettes, and in doing so discovered cigarette paper, which is often used to make marijuana cigarettes. Based on that observation, he conducted a full search of the defendant's purse, during which he found other evidence that implicated her in the sale of marijuana. The evidence was handed over to the police and used in a

purpose. However, in the final exclusion, characterized primarily as a "seizure," the pressing difficulty is whether the same purpose inquiry is equally relevant. As discussed below in the *Edmond* dissent, the emphasis on

juvenile court proceeding against her. *Id*. at 328-29. The Court determined that the normal warrant and probable cause requirements would frustrate "the swift and informal disciplinary procedures" necessary in schools, and the standard that would govern the legality of this search would be one based on reasonableness, "spar[ing] teachers and school administrators the necessity of schooling themselves in the necessities of probable cause and permit them to regulate conduct according to reason and common sense." *Id*. at 340, 343; Buffaloe, *supra*, at 536. The "special need" language is found in Justice Blackmun's concurrence, where he echoes the sentiment of the Court:

> The Court correctly states that we have recognized limited exceptions to the probable-cause requirement '[w]here a careful balancing of governmental and private interests suggest that the public interest is best served' by a lesser standard. [W]e have used such a balancing test . . . only when we were confronted with 'a special law enforcement need for greater flexibility.'

T.L.O., 469 U.S. at 351 (Blackmun, J., concurring) (alterations in original) (citation omitted). The Court went on to state:

> Education 'is perhaps the most important function' of government, and government has a heightened obligation to safeguard students whom it compels to attend school. The *special need* for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the educational process itself justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests.

Id. at 353 (emphasis added).

The Court did away with the notion of individualized suspicion in two companion cases, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), as well as in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). *Skinner* and *Von Raab* concerned mandatory urinalyses test for employees, based on a triggering event—a train accident in *Skinner* and application for employment in *Von Raab*. In justifying its departure from warrants and probable cause, the Court said there was a "special need in regulating the conduct of railroad employees to ensure safety," and a special governmental need to dissuade those persons eligible for sensitive positions from drugs. Buffaloe, *supra*, at 539-40. Yet, in *Acton*, there is an even further departure from individualized suspicion. In desperation of curbing a disciplinary problem in its student athletes, the School District instituted a policy of random drug testing, the authorization form for which the defendant's parents refused to sign, consequently banning him from the school football team. *Acton*, 515 U.S. at 650-51. The Court considered "the decreased expectation of privacy [of student athletes], the relative unobtrusiveness of the search and the severity of the need met," and upheld this suspicionless random urinalyses test as reasonable and therefore constitutional. *Id*. at 664-65. For an in-depth discussion on the "special needs" exception, see generally Buffaloe, *supra* (arguing that this exception is so broad and far-reaching that it turns the warrant requirement on its head) and Loree L. French, Skinner v. Railway Labor Executives' Ass'n *and the Fourth Amendment Warrant-Probable Cause Requirement: Special Needs Exception Creating a Shakedown Inspection*, 40 CATH. U. L. REV. 117, 126-39 (1990).

39. DRESSLER, *supra* note 28, at 280-300; SALTZBURG & CAPRA, *supra* note 27, at 299; 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6, at 307 (3d ed. 1996) [hereinafter *Treatise I*].

"purpose" in the search analysis is due to the traditional notions of privacy one can expect to have in their own home; whereas, this same notion of privacy expectation is not usually present in the seizure analysis of one's automobile on a public highway.

B. Vehicle Checkpoints: Uncertain Reliance on "Purpose"

The most relevant exception with which this Note is concerned is the vehicle checkpoint, also known as a roadblock stop. Law enforcement personnel utilize vehicle checkpoints as a primary means of enforcing vehicle regulations on the highway. Checkpoints have been maintained to verify driver's license and registration, inspect vehicles in accordance with safety standards, check driver sobriety, weigh and check truck cargo and identify those vehicles transporting illegal aliens.[40] A common thread woven into each of these vehicle stops is that they are "suspicionless." In other words, the very establishment of the checkpoint program is to prevent or check the *mere possibility* that one may be drunk, have an expired or invalid driver's license or registration, or be attempting to smuggle aliens across the border. The notion of probable cause or individualized suspicion, therefore, is immaterial; rather the essence of the stop is one of a legitimate public interest.[41]

1. Supreme Court Roadblock Case #1: *United States v. Martinez-Fuerte*

The first of two leading Supreme Court cases to discuss seizures pursuant to roadblocks is *United States v. Martinez-Fuerte*, in which several respondents, including Martinez-Fuerte, were charged with counts of illegally transporting Mexican aliens across the border.[42] Each respondent brought motions to suppress the evidence on the ground that the operation of the checkpoint was in violation of the Fourth Amendment.[43] The United States District Court for the Southern District of California denied Martinez-Fuerte's motion to suppress, but granted similar motions in two other cases.[44] Martinez-Fuerte appealed his conviction, and the Government appealed the granting of the motions in the other respective cases.[45] The Ninth Circuit consolidated all three appeals, and ultimately reversed Martinez-Fuerte's conviction, and affirmed the orders to suppress in the other cases.[46] The Court,

40. *See Treatise I*, *supra* note 39, at 307. *See also* discussion *infra* Part B.

41. *See Martinez-Fuerte*, 428 U.S. at 562.

42. *Id*. at 547-49 (citing United States v. Ortiz, 422 U.S. 891, 893 (1975)) (concerning a checkpoint located on Interstate 5 near San Clemente, California, 66 miles north of the Mexican border).

43. *Id*. at 548.

44. *Id*. at 549. The prosecution of Martinez-Fuerte was before a different District Judge than in the other cases. *Id*. at 549 n.4.

45. *Id*. at 549.

46. *Martinez-Fuerte*, 428 U.S. at 549.

in a 7-2 decision, affirmed the judgment of the Court of Appeals for the Fifth Circuit, which had affirmed the conviction of one respondent, and reversed and remanded the judgment of the Court of Appeals for the Ninth Circuit, with directions to affirm the conviction of Martinez-Fuerte and to remand the other cases to the District Court for further proceedings.[47]

The Court began its analysis in *Martinez-Fuerte* by recognizing the national policy of the United States to limit the influx of immigration by way of permanent, temporary and roving checkpoints set up by the Border Patrol.[48] It is established that checkpoint stops are "seizures" within the meaning of the Fourth Amendment, yet respondents argued that such routine vehicle stops were invalid in the absence of reasonable suspicion and, in the alternative, that "routine checkpoint stops are permissible only when the practice has the advance judicial authorization of a warrant."[49]

In viewing the substance of the analysis to rest upon balancing the interests at stake, the Court concluded that routine stops do not intrude upon one's privacy in the same manner as the inspection of one's home would,[50] because the stops involve only a brief detention, and an appreciably less-likely creation of fear or concern.[51] Moreover, it added that a prerequisite of reasonable suspicion to vehicle stops would be impracticable given that the heavy flow of traffic would make it virtually impossible to allow for the "particularized study of any given car as a possible carrier of illegal aliens."[52] The Court then prevented any further "individualized suspicion" advances, asserting:

> [T]he Fourth Amendment imposes no irreducible requirement of such suspicion [as] is clear from *Camara v. Municipal Court* . . . [where] the Court examined the government interests advanced to justify such routine intrusions "upon the constitutionally protected interests of the private citizen" and concluded that under the circumstances the government interests outweighed those of the private citizen.[53]

47. *Id.* at 567.

48. *Id*. at 551-53.

> Permanent checkpoints . . . are maintained at or near intersections of important roads leading away from the border. They operate on a coordinate basis designed to avoid circumvention by smugglers and others who transport the illegal aliens. Temporary checkpoints, which operate like permanent ones, occasionally are established in other strategic locations. Finally, roving patrols are maintained to supplement the checkpoint system.

Id. at 552 (footnote omitted). The Court focused on the permanent checkpoint in this case. *Id*. at 553.

49. *Id*. at 556.

50. *See* discussion *supra* note 37 concerning the inspection of one's home.

51. *Martinez-Fuerte*, 428 U.S. at 556-58.

52. *Id*. at 557.

53. *Id*. at 560-61 (citations omitted).

The Court found it was justified in applying the *Camara* conclusion because it was dealing neither with "searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection."[54] However, it also concluded that such a model was not on all fours with *Martinez-Fuerte* because the strong interests that justify a warrant were not present in this case.[55] Specifically, the intrusion into one's private dwelling justified the issuing of a warrant in *Camara* because the occupant had no way of knowing whether inspection of his premises was necessary to enforce the municipal code, no way of knowing the lawful limits of the inspector's power to search and no way of knowing whether the inspector himself was properly authorized.[56] On the other hand, the visible manifestations of the checkpoints in *Martinez-Fuerte* provide motorists with substantially the same assurances as the warrants in *Camara*.[57]

The Court ultimately held that stops for brief questioning routinely conducted at permanent checkpoints did not violate the Fourth Amendment and did not require a warrant.[58] Moreover, as checkpoint *searches* are constitutional only if justified by consent or probable cause, the Court limited *Martinez-Fuerte* to "the type of stops described in this opinion [and stated that] [a]ny further detention must be based on consent or probable cause."[59]

Between *Martinez-Fuerte* and the second leading roadblock case, the Court decided two fundamental cases, *Delaware v. Prouse*[60] and *Brown v. Texas*.[61] The Court suggested the possibility of another legitimate roadblock in *Prouse*, and in *Brown*, it set forth a three-part balancing test to determine the reasonableness of seizures.[62]

In *Prouse*, a police officer observed marijuana in plain view in the defendant's car during a routine stop to check for a valid driver's license and vehicle registration.[63] While it was agreed that states have a vital interest in ensuring that only qualified drivers are permitted on the road, the Court suppressed the narcotics because it was not convinced that the officer's actions were necessary given the alternative mechanisms available to further the legitimate interest.[64] The Court further found it troubling that no empirical

54. *Id*. at 561 (citation omitted).

55. *Id*. at 564-65.

56. *Martinez-Fuerte*, 428 U.S. at 565 (citing *Camara*, 387 U.S. at 532).

57. *Id.* at 565; *Camara*, 387 U.S. 523 (1967).

58. *Martinez-Fuerte*, 428 U.S. at 566.

59. *Id*. at 566-67.

60. Delaware v. Prouse, 440 U.S. 648 (1979).

61. Brown v. Texas, 443 U.S. 47 (1979).

62. *Prouse*, 440 U.S. at 663; *Brown*, 443 U.S. at 50-51.

63. *Prouse*, 440 U.S. at 650-51.

64. *Id*. at 659-60. Outside the traditional observation of traffic violations, Delaware also required that vehicles carry and display current license plates, evidence of proper registration, pass an annual safety inspection and be properly insured. *Id*. at 660.

data existed to override the assumption that the "contribution to highway safety made by discretionary stops selected from among drivers generally [would] be marginal at best."[65] The Court concluded that stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile were unreasonable under the Fourth Amendment, outside of having at least an articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered.[66] Nonetheless, this did not bar Delaware or any other State from "developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."[67]

In *Brown*, the Court introduced what later became the "*Brown* Balancing Test." Here two police officers on patrol observed the appellant and another man walking in opposite directions in an alley that was known for high drug activity.[68] Believing that the two men had previously been together, the officers stopped the appellant and asked for his identification because he "looked suspicious" and the officer had not previously seen him in the area.[69] The appellant refused the request, and the officer arrested him pursuant to a Texas statute which criminalizes a person's "refuse[al] to give his name and address to an officer 'who has lawfully stopped him and requested the information.'"[70] After the Court held that enforcement of the statute violated the appellant's Fourth Amendment rights, Justice Burger set forth a three-pronged test to determine when a brief detention of a person is reasonable.[71] He stated that the constitutionality of a seizure depends upon "weighing . . . the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[72] Further, this seizure "must be based on specific, objective facts indicating that society's legitimate interest requires the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying the explicit, neutral limitations on the conduct of individual officers."[73]

65. *Id*. at 660. The Court added that such a marginal contribution to roadway safety does not justify subjecting every vehicle to a roadside seizure. *Id*. at 661.

66. *Id.* at 663.

67. *Id*.

68. Brown v. Texas, 443 U.S. 47, 48-49 (1979).

69. *Id*.

70. *Id*. at 49 (footnote omitted).

71. *Id.* at 50-51.

72. *Id*. at 51.

73. *Brown*, 443 U.S. at 51 (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979)).

2. Supreme Court Roadblock Case #2: *Michigan Department of State Police v. Sitz*

The second leading Supreme Court roadblock case is *Michigan Department of State Police v. Sitz*.[74] In *Sitz*, the Court distinguished a previous line of cases[75] and upheld the use of a sobriety checkpoint without the presence of individualized suspicion of wrongdoing.[76] Also known as DWI (Driving While Intoxicated) roadblocks,[77] the site of these temporary checkpoints[78] are usually determined by administrative officers based upon empirical data indicating that drunk drivers in a particular locale pose a safety problem to law-abiding drivers.[79] Additionally, "[l]aw enforcement officials usually do not attempt to secure prior judicial approval for either the location of the roadblock or the conduct of the stops."[80] Prior to *Sitz*, many states, though not all, were striking down these sobriety roadblocks on constitutional grounds, finding injustice in allowing police to stop motorists for evidence of intoxication without individualized suspicion.[81]

The Court asserted that the lower court, which previously ruled that this method was unconstitutional, erroneously analyzed the three-prong test from *Brown* to determine whether the brief detention of a person is reasonable.[82] Both courts found that the *first prong* was legitimately satisfied because drunk driving was recognized as a substantial state interest in *Prouse*,[83] but found the *third prong* to be significant. Although the objective intrusion (a twenty-five second delay) was minimal, the subjective intrusion was substantial because it had the potential to generate fear and surprise in "approaching motorists [who might not] be aware of their option to make U-turns or turnoffs to avoid the

74. 496 U.S. 444 (1990).

75. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); *Prouse*, 440 U.S. 648; *Brown*, 443 U.S. 47. In *Brignoni-Ponce*, roving border patrol agents were not justified to stop a vehicle solely on the ground that its passengers appeared to be of Mexican ancestry. The Court held that roving agents may not detain a person in a vehicle even briefly for questioning in the absence of reasonable suspicion of illegal presence in the country. *Brignoni-Ponce*, 422 U.S. at 876, 885-87. *See also* DRESSLER, *supra* note 28, at 284. For a discussion of *Prouse* and *Brown*, see *supra* notes 63-73 and accompanying text.

76. *Sitz*, 496 U.S. 444.

77. *Treatise I*, *supra* note 39, at 687.

78. *See supra* note 48 (distinguishing permanent, temporary and roving checkpoints).

79. *Treatise I*, *supra* note 39, at 688.

80. *Id*.

81. DRESSLER, *supra* note 28, at 286-87. For further discussion of those cases that upheld DWI roadblocks, see *Treatise I*, *supra* note 39, at 689 n.95. See also *id.* for those cases striking down DWI roadblocks.

82. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 445 (1990).

83. *See supra* notes 63-67 and accompanying text; *Sitz*, 496 U.S. at 451; Delaware v. Prouse, 440 U.S. 648, 658-62 (1979); *Treatise I*, *supra* note 39, at 690.

checkpoints."[84] The Supreme Court, instead of comparing the intrusion to roving border patrols as the lower courts did, compared it to a fixed, brief stop at a checkpoint for illegal aliens, stating that the intrusion on motorists' security was slight.[85] As to the *second prong*, the lower court also said this was not met because the program did not sufficiently advance public interest. The Court held that the lower court's reliance on the second prong to evaluate the "effectiveness" of the program was misplaced in that the passage was "not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."[86]

The Court went on to distinguish *Prouse*, which also weighed the degree to which the seizures advanced public interest of highway safety, commenting that *Prouse* was totally void of any empirical data to support the advancement of such seizures.[87] However, in *Sitz* the state provided actual statistics of the program's effectiveness and further produced an expert witness to testify that sobriety checkpoints produced around a one percent arrest rate.[88] It concluded that the balancing of the state's interest in preventing drunk driving and the degree of intrusion upon the individual motorists who were stopped tipped the scales in favor of the state program, and it was therefore consistent with the Fourth Amendment.[89]

Finally, *Whren v. United States* served to limit the Fourth Amendment prohibition against unreasonable seizures to an "objective" analysis.[90] Patrolling what was known as a high drug area of the District of Columbia, officers, in plainclothes and an unmarked car, pulled over a vehicle because of its suspicious behavior.[91] The officers observed the vehicle's "youthful

84. *Sitz*, 496 U.S. at 452. The lower court evinced this notion of generating fear and surprise from a similar condemnation of actions of the roving patrols in *Brignoni-Ponce*. DRESSLER, *supra* note 28, at 288.

85. *Sitz*, 496 U.S. at 451-53 (citing United States v. Martinez-Fuerte, 428 U.S 543, 558 (1976)).

86. *Id.* at 453.

87. *Id*. at 454-55. Approximately 1.6 percent of the drivers that passed through the checkpoint were arrested for alcohol impairment. *Id*. at 455. An expert further testified that "experience in other States demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around 1 percent of all motorists stopped." *Id*. The Court concluded that "this 'record . . . provide[d] a rather complete picture of the effectiveness of the checkpoint' and we sustained its constitutionality." *Id*.

88. *Id*.

89. *Sitz*, 496 U.S. at 455. On remand from the Supreme Court, however, the Michigan Supreme Court reinstated its original decision that the roadblock was unconstitutional, reasoning that seizures within the primary goal of enforcing the criminal law have generally required some essence of reasonable suspicion. *See* Sitz v. Mich. Dep't of State Police, 506 N.W.2d 209, 224-25 (Mich. 1993).

90. 517 U.S. 806 (1986).

91. *Id.* at 808-09.

occupants waiting at a stop sign [and] the driver looking down into the lap of the passenger at his right. [Having] remained stopped at the intersection for what seemed an unusually long time—more than twenty seconds—the [vehicle] turned suddenly to its right, without signaling, and sped off at an 'unreasonable' speed."[92] Upon pulling the vehicle over and moving towards it, one officer immediately observed two bags in the petitioner's hands, which appeared to contain crack cocaine, arrested the occupants and retrieved the narcotics.[93]

Accepting the argument that the officers had probable cause to believe that a traffic violation had occurred, the petitioners argued that, in the realm of civil traffic violations, mere probable cause was not enough.[94] They asserted that because total compliance with traffic codes is virtually impossible, it just opened the door for any officer "to catch any given motorist in a technical violation [thus] creat[ing] the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists."[95]

Consequently, the petitioners asserted that the traditional Fourth Amendment test for traffic stops, based on probable cause, should be replaced by a more subjective test asking "whether a police officer, acting reasonably, would have made the stop for the reason given," essentially preventing any type of pretextual stop. [96]

The Court, while agreeing that the Constitution prevented any sort of "selective enforcement of the law," reminded the petitioners that the appropriate grounds for such an argument is the Equal Protection Clause and not the Fourth Amendment because "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[97] The underlying basis

92. *Id*. at 808.

93. *Id*. at 808-09.

94. *Id.* at 810. *See also* D.C. MUN. REGS. tit 18, § 2213.4 (1995) (District of Columbia traffic code) ("An operator shall . . . give full time and attention to the operation of the vehicle."); § 2204.3 ("No person shall turn any vehicle . . . without giving an appropriate signal."); § 2200.3 ("No person shall drive a vehicle . . . at a speed greater than is reasonable and prudent under the conditions.").

95. *Whren*, 517 U.S. at 810. The petitioners, who were black, argued that such a loose probable cause standard allowed officers to stop motorists on the basis of "decidedly impermissible factors, such as the race of the car's occupants." *Id*.

96. *Id*. For petitioner's cases supporting their position that the Court had disapproved pretextual stops, see *id.* at 811-12. The Court responded to the petitioner's cases by stating that they had never held, outside the context of inventory and administrative searches, that "an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but [had] repeatedly held [to] the contrary." *Id.* at 812-13.

97. *Id*. at 813. The Court seemed to probe into the petitioner's proposed subjective test and found it nothing more than a roundabout way to "combat . . . the perceived 'danger' of the pretextual stop." *Id*. at 814. The proposed test's "whole purpose is to prevent the police from

for the gamut of Fourth Amendment cases is *not* to establish the subjective intent of individual officers—for then the petitioners' argument of revealing subjective intent through objective means may work—but rather the principle basis is to *allow* certain actions to be taken under certain circumstances, regardless of subjective intent.[98] Finally, the Court added that to apply the petitioners' test would result in great difficulty because the actions of the "reasonable officer" vary from jurisdiction to jurisdiction, and the protection of the Fourth Amendment should not be so inconsistent.[99]

The Court concluded by noting that because the officers had probable cause to believe that a traffic violation had been committed, that rendered the stop reasonable per the Fourth Amendment and the evidence seized was therefore admissible.[100]

II. CIRCUIT SPLIT: THE LEGALITY OF PRETEXTUAL ROADBLOCKS—A CRITICAL ANALYSIS OF *BROWN V. TEXAS*

The majority in *City of Indianapolis v. Edmond*, discussed below in Part III, placed notable emphasis on the primary purpose. The dissent, however, maintained that the *Brown* Balancing Test should guide the Court. While the Supreme Court's decision is the controlling law, the circuit courts split on this issue, prior to *Edmond*, provided a relevant understanding into the perspectives of both the majority and the dissent.

Courts have generally used *Brown's* three-pronged test[101] to determine the reasonableness of seizures, observing that such reasonableness must strike a "balance between the public interest and the individual's right to personal security free from arbitrary inferences by law officers."[102] The question being when, if at all, the pretext of general law enforcement can be the basis for law officers seizing evidence of more serious crimes. The only relevant Supreme Court roadblock case that has applied *Brown* is *Sitz*; however, *Brown* itself relied on both *Martinez-Fuerte* and *Prouse* in defining its scope.

Brown noted that protecting individuals from the "unfettered discretion of officers," is a central concern that is best met by requiring that a seizure be based on specific, objective facts indicating "society's legitimate interest [in] the seizure of the particular individual, or that the seizure [is] carried out pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers," which is extracted both from *Prouse* and *Martinez-*

doing under the guise of enforcing the traffic code what they would like to do for different reasons." *Id.*

98. *Id.* at 814.

99. *Id.* at 815.

100. *Whren*, 517 U.S. at 819.

101. *See supra* notes 68-73 and accompanying text.

102. Brown v. Texas, 443 U.S. 47, 50 (1979).

Fuerte.[103] Finally, *Sitz* prompts that in considering the severity of the intrusion on individual liberty, the court must look both at the objective nature of the intrusion (duration of the stop and intensity of the inquiry) and its subjective intrusion (the potential to generate fear and surprise to law-abiding motorists).[104]

Of greater merit, as evidenced by the majority opinion in *Edmond*, is the stated or underlying "purpose" for the checkpoint program. Yet, as the dissent points out in *Goldsmith II*, the plain language of the Fourth Amendment does not lend itself to such an inquiry.[105] In looking for the starting place for this contention, the search ended at *United States v. McFayden*.[106] In *McFayden*, narcotics were discovered in the defendant's automobile after it was stopped at a police traffic roadblock.[107] The court found that the roadblock passed constitutional muster because it was "established to respond to identified problems of traffic congestion; it was designed to improve traffic enforcement in neighborhoods experiencing serious problems; [and] its *principal purpose* was to allow police to check for a driver's license and vehicle registration [advancing] the legitimate governmental interests it was designed to serve."[108] In the assessment of the legality of the roadblock, *McFayden* stated there was one additional factor that must be considered—whether "a roadblock purportedly established to check licenses could be located and conducted in such a way as to indicate that its principal purpose was the detection of crimes unrelated to licensing."[109] The Court went on to say that since the purpose of the roadblock, to check drivers' licenses and car registrations, was legitimate, then officers were not required to close their eyes if in the process of their legitimate activities they found evidence of other crimes.[110]

The cases finding these checkpoints "illegal"[111] balanced the public interest and the right of the individual analysis by way of determining the *primary purpose* of the program, to satisfy the first factor of the *Brown* test. One court found the primary purpose to be related to "Operation Clean Sweep,

103. *Id*. at 51 (citing Delaware v. Prouse, 440 U.S. 648, 654-55, 663 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 558-62 (1976)).

104. United States v. Huguenin, 154 F.3d 547, 552 (1998) (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990)).

105. *See Goldsmith II*, 183 F.3d 659, 667 (7th Cir. 1999).

106. 865 F.2d 1306 (D.C. Cir. 1989).

107. *Id*. at 1307.

108. *Id*. (emphasis added).

109. *Id*. at 1312 (citing 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(a), at 63-64 (2d ed. 1987)) [hereinafter *Treatise II*].

110. *Id*. (citing United States v. Lopez, 777 F.2d 543, 547 (10th Cir. 1985); *Treatise II*, *supra* note 109, at 64 n.58).

111. Galberth v. United States, 590 A.2d 990 (D.C. Cir. 1991); United States v. Morales-Zamora, 974 F.2d 149 (1992); United States v. Huguenin, 154 F.3d 547, 552 (1998); Wilson v. Commonwealth, 509 S.E.2d 540 (1999); *Goldsmith II*, 183 F.3d 659 (7th Cir. 1999).

violence, drugs and guns" and less related to traffic problems.[112] Another court found the primary purpose was to detect narcotics, despite the alleged purpose of detecting drunk drivers, commenting that "[the state's] actions [spoke] louder than [its] words."[113] Still another court had a very easy task in determining the primary purpose where the chief of police "admitted that the 'primary goal,' or 'underlying purpose,' of the roadblocks was to 'look for drugs,'" even though he asserted that another reason was to check drivers' licenses, vehicle registrations and proof of insurance.[114] The Seventh Circuit in *Goldsmith II* also found that the primary purpose of the Indianapolis checkpoint, as conceded, was to catch drug offenders, aside from the fact that the police often discovered violations of traffic laws.[115]

In sum, those courts finding that the primary purpose of the programs was to further general law enforcement purposes, as in the above cases, also found that individual suspicion must exist before a suspect could be seized or else the Fourth Amendment was violated.[116] Where law enforcement established a checkpoint for a lawful purpose and performed an unlawful search for contraband during the stop, such a roadblock was pretextual, and any evidence obtained was tainted.[117] Moreover, some courts expressly disagreed with the "mixed-motive" checkpoint theory, which held that the entire checkpoint was legitimate so long as *one* of the underlying purposes, no matter how minor, was lawful.[118] No Court of Appeals has agreed with the "mixed-motive" analysis, but rather has upheld roadblocks only if the *primary* purpose was lawful.[119]

These same cases relied a great deal on statistical and empirical data in determining the second factor of *Brown*, the degree to which the seizure advanced the public interest. Similar to the Court distinguishing *Prouse* from *Sitz* based on the lack of empirical data in *Prouse*,[120] the "illegal" cases computed a percentage based on the approximate number of cars stopped at the checkpoint, and the number of arrests made in relation to the focus of the program, and gauged that percentage as a level of effectiveness of the

112. *Galberth*, 590 A.2d at 997.

113. *Huguenin*, 154 F.3d at 555.

114. *Morales-Zamora*, 974 F.2d at 150.

115. *Goldsmith II*, 183 F.3d at 665.

116. *Galberth*, 590 A.2d at 998-99, 1001; *Huguenin*, 154 F.3d at 563 (citing Brown v. Texas, 443 U.S. 47, 51 (1979)).

117. *Morales-Zamora*, 974 F.2d at 152-53. "'[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.' Like the rains from heaven, constitutional rights fall on the just and the unjust." *Id*. at 153 (quoting Arizona v. Hicks, 480 U.S. 321, 329 (1987)).

118. *Huguenin*, 154 F.3d at 553-54. This case refers to *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), discussed *infra* notes 128-134 and accompanying text.

119. *Huguenin*, 154 F.3d at 554.

120. *See supra* note 87 and accompanying text.

checkpoint, often citing to the 1.6 percent approved in *Sitz*.[121] In sum, if the government failed to produce enough or sufficient evidence to show that the very nature of its program advanced the public interest, the program was less likely to be upheld.

Finally, the objective-subjective intrusion plays into *Brown's* third factor—how severe the interference is with individual liberty. Here, the courts generally had little problem with the objective intrusion, as most of the stops were lasting no more than ten to fifteen seconds, up to two to three minutes.[122] Yet, the main concern seemed to come with the subjective intrusion—probing the elements of "fear and surprise" in the motorist. Such an intrusion was high where the motorists felt

> that they [were] being singled out by random, roving-patrol stops, which frequently [took] place on seldom-traveled roads. The fear and surprise [was] decreased if the stops [were] operated in a regularized manner, and if they "appear[ed] to and actually involve[d] less discretionary enforcement activity." When the motorist could "see that other vehicles [were] being stopped [and could] see visible signs of the officer's authority he [would be] much less likely to be frightened or annoyed by the intrusion."[123]

The courts, in some of these cases, found the subjective intrusion to be substantial where: the roadblock was set up as a trap, tricking the motorist into thinking that the checkpoint was one-half or another mile down the road, but was actually located at the bottom of an exit ramp, where few people normally exit;[124] there were no barriers, signs, traffic cones or other visible means of alerting motorist that they are approaching a checkpoint;[125] and there were no

121. *See, e.g.*, *Huguenin*, 154 F.3d at 559 (0.29% level of effectiveness); Wilson v. Commonwealth, 509 S.E.2d 540, 542 (1999) (stating that the Commonwealth needed to present some evidence establishing that "the method employed will be an effective tool for addressing the public concern involved" where security checkpoints were set up at the Hoffler Apartment Complex in response to resident complaints about trespassers and drug dealers on the premises); *Galberth*, 590 A.2d at 999. There was no empirical data that the roadblock technique effectively promoted the government's interest, as the Court found it was "common sense" that in an area that suddenly becomes "saturated" with police would effectively disrupt normal activity. *Id.*; *Goldsmith II*, 183 F.3d at 661-62 (mentioning briefly that the "hit rate" for Indianapolis' program is 9%, but seeming to dismiss this fact, vying that court's do not usually address reasonableness at the program level where general criminal law enforcement is the basis for the search.).

122. *Cf. Huguenin*, 154 F.3d at 560 (noting that the detention lasted several minutes which, while not objectively long, was still a great deal longer than those detentions that were less than thirty seconds and upheld in *Sitz*) *with Galberth*, 590 A.2d at 992. The detention lasted for approximately two to three minutes, but the court did not comment on whether or not that was unusually long. *Id*. *See also Goldsmith I*, 38 F. Supp. 2d 1016, 1019 (S.D. Ind. 1998) (typical stop lasts two to three minutes).

123. *Huguenin*, 154 F.3d at 560-61 (citations omitted).

124. *Id*. at 561. The exit ramp was located in a secluded area, and there was no notice to the motorist regarding what was about to take place. *Id.*

125. *Galberth*, 590 A.2d at 992; *Huguenin*, 154 F.3d at 561.

procedural guidelines established in how to approach the car.[126] The holdings, in sum, were concerned with the primary purpose of the roadblock, finding them to either be one of general law enforcement or pretextual for the same and therefore unconstitutional.

Under *Brown*, those cases finding the roadblocks to be "legal," including the District Court in *Goldsmith I*,[127] did not focus on the primary purpose of the checkpoints, but rather found merit in a dual-purpose. They further determined the objective and subjective intrusions to be minimal, ultimately upholding the states' actions. The first factor, the state's interests, was easily satisfied. Even though the "primary" purpose of these checkpoints was to interdict drugs, these courts have adopted a mixed-motive approach,[128] allowing states to prohibit the flow of narcotics,[129] where a license check, registration check or the like was also conducted.[130]

As to the second factor, the effectiveness of the program in promoting the state's interest, the courts again either found this was easily met, to the extent that the percentage rate was higher than the accepted 1.6% rate in *Sitz*, and 0.5% accepted in *Martinez-Fuerte*,[131] or instead determined that a program was

126. *Cf. Huguenin*, 154 F.3d at 561 (officer "just happened to be there when [defendants] came up") *with Galberth*, 590 A.2d at 992 (Field Operations Bureau developed manual containing guidelines for each technique).

127. Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995); State v. Damask, 936 S.W.2d 565 (Mo. 1996); *Goldsmith I*, 38 F. Supp. 2d 1016.

128. The *Damask* court noted that neither it nor the Supreme Court had addressed the specific question of a drug interdiction program being allowed to serve as the primary purpose for a checkpoint, but cited to cases that upheld a "dual-purpose" checkpoint. 936 S.W.2d at 572. The *Merrett* court stated that where a state has one lawful, justifiable purpose in establishing the roadblock, such as checking driver's license and vehicle registration, the additional purpose of controlling the flow of narcotics does not "render the roadblock unconstitutional." 58 F.3d at 1550-51. *See also* State v. Everson, 474 N.W.2d 695, 701 (N.D. 1991) (holding that the safety inspection served as a legitimate state interest, even though the primary interest was to prohibit the flow of drugs).

129. *See Goldsmith I*, 38 F. Supp. 2d at 1022 (noting the government's interest in interdicting narcotics is beyond serious dispute); *Damask*, 936 S.W.2d at 571 ("Drug trafficking has created a 'veritable national crisis in law enforcement' and is 'one of the greatest problems affecting the health and welfare of our population.'") (quoting Nat'l Treasury Employees v. Von Raab, 489 U.S. 656, 668 (1989); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)).

130. *See Merrett*, 58 F.3d at 1551. The program advanced a sufficient state interest where it was to ensure compliance with the state driver's license and vehicle registration laws. *Id*. (citing Delaware v. Prouse, 440 U.S. 648, 657-58 (1979)).

131. *See Merrett*, 58 F.3d at 1551 (mentioning that the programs vehicle citation rate of 4.6% effectively advanced the state's interest); *Goldsmith I*, 38 F. Supp. 2d at 1022-23. The checkpoints resulted in fifty-five drug-related arrests out of 1,161 vehicles stopped, a ratio of 4.7%. *Id*.

"effective" even if the checkpoint was at least a reasonably effective tool in advancing the state's interest, versus being the *most* effective means.[132]

Concerning the final *Brown* factor, the level of intrusion, both subjective and objective, was found to be minimal, differing from the above cases where only the objective intrusion was found to be minimal. In accord with the above cases, the objective intrusion was minimal where the stops were short in duration,[133] but contrary to the above, the subjective intrusion was also found to be minimal. The critical factors were whether the checkpoint adequately informed oncoming motorists of the stop, and whether the checkpoint was operated in such a way as to minimize officers' boundless discretion in both their questioning and stopping of vehicles.[134] The courts generally found that because specific plans and guidelines existed both prior to the actual checkpoint and during its on-scene operation, such as directing officers as to the amount and placement of signs, the number of officers to approach the

132. *See Damask*, 936 S.W.2d at 572 (commenting that whether a checkpoint is the most effective means of achieving the state's interest is not dispositive. "The courts need only decide whether, balanced with the importance of the governmental interest and the degree of intrusion, checkpoints are at least reasonably effective as a tool in advancing the government's interest."); *Goldsmith I*, 38 F. Supp. 2d at 1022 (noting that the choice among reasonable alternatives to achieve a particular state interest remains with "the governmental officials who have a unique understanding of [the] limited public resources."); *see also* State v. Welch, 755 S.W.2d 624, 633 (Mo. Ct. App. 1988) ("[T]here is no necessity of numbers to establish the constitutional validity of such operations.").

133. *See Goldsmith I*, 38 F. Supp. 2d at 1024 (commenting that the typical stop lasted two to three minutes); *Damask*, 936 S.W.2d at 574 (finding vehicles, on average, were stopped for no more than two minutes); *Merrett*, 58 F.3d at 1551 (holding nothing in the record indicated that any motorist was detained longer than reasonably necessary to check the driver's license and registration).

134. *See Goldsmith I*, 38 F. Supp. 2d at 1023 (citing the critical factors as being first "whether it is set up in a manner which informs incoming motorists that this is an official stop and, secondly, whether it gives the officers conducting the stop unbridled discretion to randomly target individual motorists.") (citing United States v. Trevino, 60 F.3d 333, 337 (7th Cir. 1995)); *Damask*, 936 S.W.2d at 574. The critical factor is first whether the checkpoint is "planned and operated" in such a way that officer discretion is minimized. Questions are asked concerning the prior planning and outside input, specific guidelines, adequate dissemination to field personnel, outside supervision, non-arbitrary reasons for choosing the checkpoint, and non-discretionary criteria in stopping vehicles, and second, the extent to which the stop might generate fear or concern on the part of the motorist. *Id.*; *see also Merrett*, 58 F.3d at 1551-52. Because the state planner anticipated a possible delay for motorists, they instructed officers to wave cars through at the sign of congestion. However, the officers on the scene did not adequately adhere to such instructions, and the court determined that this inquiry depends on "whether [the drivers] reasonably believed they were not free to turn around and to avoid the checkpoint. The clock . . . begins to run when a reasonable person would believe he cannot leave the line and avoid the checkpoint." *Id.* (citing United States v. Mendenhall, 446 U.S. 544 (1980)).

vehicles and the type of questions to be asked, the subjective intrusion was minimal.[135]

III. *CITY OF INDIANAPOLIS V. EDMOND*: PRIMARY OR *NOT* PRIMARY—WHAT IS THE PURPOSE?

A. Majority: Carving out a "Primary" Purpose Prong in the Fourth Amendment Analysis of Searches

After stating the general rule that searches and seizures must be reasonable and stating those narrow situations where the usual rule does not apply,[136] the Court, in a majority opinion led by Justice O'Conner, explained what had appeared to be the crucial factor in the leading roadblock cases: the *primary purpose*.

In *Martinez-Fuerte*, where two immigration checkpoints were constructed on major United States highways, 100 miles from the Mexican border, the Court stated the significant factor in its decision was that the "balance tipped in favor of the Government's interests in policing the Nation's borders."[137] In *Sitz*, where a Michigan highway sobriety checkpoint program was established, the Court also held that

> [t]his checkpoint . . . was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways. [Further], [t]he gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road weighed heavily in [the Court's] determination that the program was constitutional.[138]

Finally, in *Prouse*, though a spot-check of motorists driver's licenses and vehicle registration was invalidated *only* because the officer's conduct was unconstitutional,[139] the Court "suggested that '[q]uestioning of all oncoming

135. *See Goldsmith I*, 38 F. Supp. 2d at 1023. Motorists were informed of the dates of the checkpoint in advance, by virtue of the "massive law enforcement presence" as well as the coverage by the media. *Id.* In addition, the Indianapolis Police Department restricted a large amount of individual officer discretion with an on-scene supervisor, who was also bound by the official guidelines instituted by the Chief of Police. *Id.*; *Damask*, 936 S.W.2d at 574-75. The checkpoint was operated according to plans that existed about five months prior to the actual checkpoint operation, and the specific guidelines set forth in the plans limited officer discretion as to the actual operation and set up of the checkpoint. *Id.*; *Merrett*, 58 F.3d at 1552 (reasoning that the reasonableness of the intrusion depends upon whether or not motorist reasonably believe that they are free to leave, the court comments that outside one recorded motorists that had a long delay, nothing else in the record indicates that motorists believed that they could not leave the line). *See supra* note 134 (concerning a driver's reasonable belief that they are free to leave).

136. *See supra* notes 13-17.

137. City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000).

138. *Id.* at 39.

139. The officer's conduct was described as "standardless and unconstrained discretion." Delaware v. Prouse, 440 U.S. 648, 661 (1979).

traffic at roadblock-type stops' would be a lawful means of serving the interest in highway safety."[140]

The Court noted that the common thread of "highway safety" ran through all of the cases, as distinguishable from a general interest in crime control.[141] Unlike the above cases, however, the State in the case at bar conceded its primary purpose for the checkpoint was to intercept illegal narcotics, yet the Court had never approved a checkpoint program whose *primary* purpose was to detect evidence of general criminal wrongdoing.[142]

The State set forth several arguments that focused on the primary purpose, similar to those in *Martinez-Fuerte* and *Sitz*, to justify its checkpoint program. First, it proposed that it had the same *ultimate* purpose of "arresting those suspected of committing crimes."[143] Yet the Court quickly dismissed the argument, commenting that

> [i]f we were to rest the case at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose. [And ultimately] the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life.[144]

Second, the State emphasized the severity of the drug problem, as a whole, to justify its program. [145] Again, the Court found no merit in this argument. Recognizing the social harm created by drug trafficking and the burden this illegal activity has placed upon law enforcement, the Court commented that similar qualms could be made of many other illegal activities. It further added that the "gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[146]

Third, the State attempted to analogize its own checkpoint to the "anti-smuggling" purpose of the checkpoint in *Martinez-Fuerte*, in which the Court held the "traffic was too heavy to permit 'particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens.'"[147] While the Court asserted that such logic is more apropos and forceful for the Indianapolis checkpoints, it also found that such logic prevails any time a vehicle "is employed to conceal contraband or other evidence of a crime," and

140. *Edmond*, 531 U.S. at 39.

141. *Id*. at 40.

142. *Id*. at 40-41.

143. *Id.* at 41-42; United States v. Martinez-Fuerte, 428 U.S. 543, 545-50 (1976); Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447, 450 (1990).

144. *Edmond*, 531 U.S. at 42.

145. *Id*.

146. *Id*. at 42.

147. *Id*. (citing *Martinez-Fuerte*, 428 U.S. at 557).

is therefore not comparable.[148] Returning again to the predominate primary purpose argument, the Court once more pointed out that the primary purpose of the Indianapolis checkpoint was a general interest in crime control, and the fundamental requirement of individualized suspicion, save for some circumstances, should not be suspended in such situations.[149]

Relying on *Whren* and *Bond*, the State next argued that such precedent precludes an inquiry into the "purpose" aspect of a checkpoint program, yet the Court found that these cases did not control the present case.[150] The *Whren* Court was faced with considering whether a temporary stop of a motorist based upon probable cause was inconsistent with the Fourth Amendment's prohibition against unreasonable seizures, unless a reasonable officer would have been motivated to stop the car with the purpose of enforcing a traffic law.[151] The Court, agreeing that selective enforcement was unconstitutional, and finding the proper basis for such an objection to be the Equal Protection Clause and not the Fourth Amendment, ultimately concluded that subjective intentions of officers play no role in the Fourth Amendment analysis.[152] Therefore, the *Edmond* Court found that while *Whren* precluded "subjective intentions" playing a role in the Fourth Amendment analysis, "*Whren* [did] not preclude an inquiry into programmatic purpose[s]."[153] In *Bond*, the Court was faced with the question of whether an officer violated reasonable expectations while examining carry-on luggage in the overhead compartment of a bus.[154]

148. *Id*. The Court noted that the Indianapolis checkpoint lacked the border context element that was crucial in *Martinez-Fuerte*. *Id*. It also stated that this "connection" to the roadway, asserted by the petitioner, is very different from the close connection to roadway safety presented in *Sitz* and *Prouse*. *Id*.

149. *Edmond*, 531 U.S. at 44. "While we do not limit the purposes that may justify a checkpoint program to any rigid set of categories, we decline to approve a program whose primary purpose is ultimately indistinguishable from the general interest in crime control." *Id*. (footnote omitted).

150. *Id*. at 45. *See supra* notes 20, 90-100 and accompanying text (discussing *Whren* and *Bond*).

151. *Whren*, 517 U.S. at 808.

152. *Id.* at 813; *Edmond*, 531 U.S. at 45.

153. *Edmond*, 531 U.S. at 45-46; *Whren*, 517 U.S. at 813. For petitioner's arguments in *Whren*, see *supra* notes 20-22.

154. Bond v. United States, 529 U.S. 334, 335 (2000). The petitioner was a passenger on a Greyhound bus which Agent Cantu boarded to check for immigrants. *Id.* Cantu squeezed the soft luggage passengers had brought on board that was placed in the overhead compartments. *Id*. Cantu squeezed petitioner's bag and felt a "brick-like" object in the bag. *Id*. at 336. The petitioner admitted the bag was his and allowed Cantu to open it. *Id.* Cantu discovered a brick of methamphetamine, and petitioner was indicted for conspiracy to possess, and possession with intent to distribute, methamphetamine. *Id*. The petitioner argued that Cantu conducted an illegal search of his bag. *Id*. While he "conceded that other passengers had access to his bag, [he] contended that Agent Cantu manipulated the bag in a way that other passengers would not." *Id*. It was undisputed that petitioner had a privacy interest in his bag, but "the Government assert[ed]

Again applying the principles set forth in *Whren*, the *Bond* Court reaffirmed the standard that subjective intentions of officers are irrelevant to such analysis.[155] The *Edmond* Court went on to comment that because *Bond* was not an "ordinary probable-cause" analysis case, subjective intent was irrelevant, in that precedent required a focus on the "objective effects of the actions of an individual officer."[156] By contrast, cases concerning intrusions that occurred pursuant to a general scheme lacking individualized suspicion have often required an inquiry into purpose at the programmatic level.

Finally, the State *again* argued that its checkpoint was justified by its lawful secondary purpose of keeping impaired drivers off the road and checking licenses and registration.[157] Matter-of-factly, the Court appeared to place an exclamation point behind the primary purpose, remarking that giving merit to a secondary purpose justification would allow law enforcement authorities to establish checkpoints for virtually any purpose so long as a lawful check was attached, such as a license or sobriety check.[158] In addition, the Court recognized that challenges may exist in positing a purpose inquiry, but held nonetheless that courts "routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful."[159] Moreover, despite the reasonableness inquiry being primarily objective under the Fourth Amendment, the special need and administrative exclusions demonstrated that purpose may be relevant in suspicionless intrusions pursuant to general schemes.[160]

The Court concluded by reaffirming that its present holding did not alter the state of the approved checkpoints in *Martinez-Fuerte* and *Sitz*, nor the

that by exposing his bag to the public, petitioner lost a reasonable expectation that his bag would not be physically manipulated." *Id*. The Court asked first, "whether the individual, by his conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that 'he [sought] to preserve [something] as private.' [And] [s]econd . . . whether the individual's expectation of privacy is 'one that society is prepared to recognize as reasonable.'" *Id*. at 338. The Court concluded that the petitioner intended to preserve the privacy of his bag by placing it directly above his seat, and although a bus passenger expects other passengers or employees to have to move the bag "for one reason or another . . . [h]e does not expect that other passengers or bus employees will . . . feel the bag in an exploratory manner." *Id.* at 338-39. The Court held that Cantu's "physical manipulation" of petitioner's bag violated the Fourth Amendment. *Id*. at 339.

155. *Id*. at 338 n.2.

156. *Edmond*, 531 U.S. at 46.

157. *Id*.

158. *Id*. Note that the Court's emphasis on the primary purpose, as well as its seeming distaste to permit a valid secondary purpose, is in clear contrast to footnote 2 of its opinion. *See infra* notes 190-193 and accompanying text (discussing further footnote 2).

159. *Edmond*, 531 U.S. at 46-47.

160. *Id*.

suggested lawful checkpoint in *Prouse*, yet such checkpoints must still balance the interests at stake and the effectiveness of the program.[161] However, when general crime control objectives are sought, they must be justified by some "quantum of individualized suspicion."[162] Furthermore, the Court's holding neither affected searches at airports or government buildings where "the need for such measures to ensure public safety can be particularly acute,"[163] nor impaired the ability of officers to respond to information appropriately learned at a checkpoint justified by a lawful primary purpose.[164] Finally, the Court reinstated the principle from *Whren* that the purpose inquiry is only to happen at the programmatic level and is not an invitation to probe the minds of individual officers at the scene.[165] Because the State conceded what its primary purpose was, and the Court found it to be one of general crime control, lacking individualized suspicion, the State's program violated the Fourth Amendment and the judgment of the Seventh Circuit was affirmed.

B. Dissent: Keeping the Fourth Amendment Analysis "Objective"

Justices Thomas and Scalia joined Justice Rehnquist's dissent, where he stated that the Indianapolis' checkpoint seizures served the State's "accepted and significant" interest of protecting the highways from drunk drivers and verifying driver's license and vehicle registration; and that there was nothing in the record indicating that the use of a drug-sniffing dog lengthened the seizures.[166] Grounded in *Brown*, the dissent rested its opinion on two primary arguments: first, that the majority failed to apply the clear-cut analysis set forth by the leading roadblock cases, and second, that it added an unwarranted "non-law-enforcement primary purpose" prong to the Fourth Amendment analysis.

The crux of the dissent's analysis centered on the "*Brown* Balancing Test." A roadblock seizure is constitutional if it is

> carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. [There must be] a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.[167]

In both *Martinez-Fuerte* and *Sitz*, the Court balanced the State's interest (illegal immigrants in *Martinez-Fuerte*; drunk driving in *Sitz*), against the objective intrusions (twenty-five seconds to five minutes) and the subjective

161. *Id*.
162. *Id*.
163. *Id*.
164. *Edmond*, 531 U.S. at 46-47.
165. *Id.* at 48. *See supra* notes 97-98 and accompanying text.
166. *Edmond*, 531 U.S. at 48. Justice Thomas joined Part I of the dissent only.
167. *Id.* at 49 (citing Brown v. Texas, 443 U.S. 47, 50-51 (1979)).

intrusion (minimal in both cases due to the standardized operations), and upheld both checkpoints as effective means of advancing the States' interest.[168]

Unlike the majority, which ultimately distinguished the Indianapolis checkpoint from those in *Martinez-Fuerte*, *Sitz* and *Prouse* by the primary purpose, the dissent found that the present checkpoint "follow[ed] naturally" from the leading cases.[169] Regardless of the State conceding its primary purpose was to intercept the flow of illegal narcotics, the dissent asserted that based on the straightforward Fourth Amendment analysis, such a fact should not be controlling:[170] "Even accepting the Court's conclusion that the checkpoints at issue in *Martinez-Fuerte* and *Sitz* were not primarily related to criminal law enforcement, the question whether a law enforcement purpose could support a roadblock seizure is not presented in this case."[171] Applying *Edmond* to the first prong of the *Brown* test, the dissent pointed out that the secondary purpose for the Indianapolis checkpoint, checking for valid driver's licenses' and vehicle registrations, was expressly suggested in *Prouse* as being a justifiable and legitimate state interest, therefore it was irrelevant that the petitioners *also* hoped to intercept drugs.[172] As to the second and third *Brown* prongs, the dissent found that the seizure was objectively reasonable, lasting only two to three minutes, and subjectively reasonable, as the intrusion was limited by clearly marked checkpoints and uniformed officers with specific guidelines.[173] The only difference then, the dissent noted, was that the present case involved the presence of a dog; however, it had previously been held that a "sniff test" by a trained narcotics dog did not rise to the level of a search under the Fourth Amendment.[174] The dissent's Fourth Amendment analysis

168. *Id.* at 50.

169. *Id*.

170. *Id*.

171. *Edmond*, 531 U.S. at 50 (footnote omitted).

172. *Goldsmith I*, 38 F. Supp. 2d 1016, 1026 (S.D. Ind. 1998); Delaware v. Prouse, 440 U.S. 648, 663 (1979); *Edmond*, 531 U.S. at 51. "Once the constitutional requirements for a particular seizure are satisfied, the subjective expectations of those responsible for it are irrelevant. Because the objective intrusion of a valid seizure does not turn upon anyone's subjective thoughts, neither should our constitutional analysis." *Edmond*, 531 U.S. at 52. The dissent relied on *Whren*, where the Court held that an officer's subjective intent would not invalidate an otherwise objective and justifiable vehicle stop. *Id.* at 51-52; Whren v. United States, 517 U.S. 806, 813 (1986). The reasonableness of the vehicle stop in *Whren* turned on whether there was probable cause to believe that a traffic law had been violated, and similarly the reasonableness of highway checkpoints, in the case at bar, turns on whether such checkpoints serve a legitimate state interest with minimal intrusion. *Edmond*, 531 U.S. at 51-52. Just as the *Whren* stops were found to be objectively reasonable, "so too the roadblocks here are objectively reasonable because they serve the substantial interests of preventing drunken driving and checking for drivers license and vehicle registrations with minimal intrusions on motorists." *Id.*

173. *Edmond*, 531 U.S. at 51-53.

174. *Id.* at 52. For a discussion of a dog "sniff" in *Place*, see *supra* note 28-29. A dog "sniff" does not rise to the level of a search because the protection of the Fourth Amendment "protects

concluded by mentioning the Indianapolis checkpoint success rate—forty-nine arrests for offenses unrelated to drugs, emphasizing the fact that the State *did* have a legitimate interest outside of narcotics, and therefore the stops should be constitutional.[175]

Lastly, the dissent contended the majority added an unwarranted "non-law-enforcement primary purpose" prong to its Fourth Amendment analysis, a scrutiny more appropriate in the area of *searches*, but *not* "brief roadblock seizures."[176] The purpose prong that the Court found so "indispensable" had previously been rejected because "seizures of automobiles 'deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection.'"[177] The latter represents what is termed the "special needs" doctrine, permitting limited intrusions to search a person's body and home, "[however] there [are] no such intrusions here."[178] The dissent argued that the traditional privacy and freedom the Fourth Amendment protects in *searches* is significantly different from one's expectation of privacy in an automobile, because automobiles are "subjected to pervasive and continuing governmental regulation and controls."[179] As a result, the lowered expectation of privacy, along with the minimal intrusion, equals a brief, standardized, non-intrusive seizure, and one which cannot be compared to the intrusive search of the body or home.[180] The dissent compared the "special needs" inquiry, which serves to both define and limit the permissible scope of those searches, with the *Brown* balancing test, defining and limiting the permissible scope of automobile seizures, and concluded that the additional purpose prong was both unnecessary to ensure Fourth

people from unreasonable government intrusions into their legitimate expectations of privacy." *Place*, 462 U.S. at 706-07. The information obtained through the investigative technique of a dog's sniff is "much less intrusive than a typical search," and does not subject the owner of the property to the "embarrassment [or] inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.* at 707.

175. *Edmond*, 531 U.S. at 53.

176. *Id.* The dissent cites *Martinez-Fuerte*, where the Court consistently looked at "the scope of the stop" in examining a program's constitutionality. *Id.* *See* United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976).

177. *Edmond*, 531 U.S. at 54 (citing *Martinez-Fuerte*, 428 U.S. at 561). The dissent pointed to the respondents in *Sitz* who argued that *Brown* was not the proper analysis to use for roadblock seizure cases. *Id.* at 53. In *Sitz* the Court held that it was "perfectly plain" from *Von Raab*, referring to *Martinez-Fuerte*, that *Von Raab* was "in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways." *Id.* *Martinez-Fuerte* and *Brown* are the relevant authorities. *Id.*; *see* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449-50 (1990).

178. *Edmond*, 531 U.S. at 54.

179. *Id.* (citing South Dakota v. Opperman, 428 U.S. 364, 368 (1976)).

180. *Id.*

Amendment rights and was bound to produce mass confusion as to the "purpose" of a particular seizure.[181]

Justice Thomas did not join Part II of the dissent, proposing that *Martinez-Fuerte* and *Sitz* were decided incorrectly. He stated, "I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."[182] He added, however, that because respondents failed to propose the overruling of these leading cases, he would refrain from considering such an argument.[183]

C. Author's Analysis: Strong Start . . . But A Weak Finish for the Majority

The majority is to be commended for its holding in that it serves to protect the privacy rights of every motorist on the road, preventing *innocent* individuals from being subjected to checkpoints at the whim of law enforcement. Even though the Court has previously expressed that the privacy rights of innocent individuals will *at times* be invaded, it has also noted that such an invasion generally is supported by at least some notion of suspicion.[184] However, while the holding appears valid for policy reasons, the Court's analysis appears unsound when one examines the relevant precedent.

First, after drawing the line of validity at checkpoints established for general criminal law enforcement purposes, the line begins to thin at what is considered protecting society and pure general criminal enforcement. The Court used the former reason to uphold the state's actions in *Martinez-Fuerte* and *Sitz*, and the latter to strike down the present checkpoint. Yet, as the dissent pointed out, prohibiting the flow of illegal drugs into the country undoubtedly serves to protect society, both young and old. The Court seems to use *Martinez-Fuerte* and *Sitz* to lay the foundation as to what valid "primary purposes" are; even still, while the transportation of illegal aliens and sobriety checks are relevant, the more pressing issue is why the Court upheld them. It may be argued that the cases were *not* upheld because the interests presented were the primary purpose, but rather because the state's interests were legitimate and pressing. While immigration issues and drunk driving are present concerns, there can be no doubt that drugs in this country is, too, a viable concern that must haunt every law enforcement agency in the country. As portrayed by the media, drugs are everywhere; from the oldest citizen to the

181. *Id*.

182. *Id*. at 56.

183. *Edmond*, 531 U.S. at 56.

184. The Seventh Circuit in *Goldsmith II* identified at least four situations in which the innocent individual may be intruded upon where there is a basis for law enforcement to believe that a particular search or seizure, distinct from a random or general search or seizure, will yield evidence of a crime. *Goldsmith II*, 183 F.3d 659, 666 (7th Cir. 1999).

youngest child on the playground, and the urgency of police departments in trying to combat this enemy any way they know how can be understood, or at minimum, should be a sufficient and legitimate enough interest to stand on its own without conforming to *Martinez-Fuerte* or *Sitz*. However, as stated above, in combating this war on drugs, every citizen driving a car should not be subjected to the efforts of the law enforcement in controlling the enemy. There must be limits, boundaries and guidelines.

Second, as both the majority and dissent cite *Whren* as standing for the proposition that the subjective intentions of officers do not play a role in the Fourth Amendment analysis, the majority is correct in asserting that *Whren* does not *preclude* inquiry into the purpose of a checkpoint. Yet, it is unclear how this crucial "primary" factor became concrete, or justified by precedent. Regarding *Martinez-Fuerte*, *Sitz* and *Prouse*, the majority states:

> [E]ach of the checkpoint programs that [it has] approved [were] designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.[185]

In fact, though the word "primary" is not even mentioned in *Martinez-Fuerte*,[186] and only brought up in a footnote in *Sitz* during the testimony of the commander of the Michigan State Police Department concerning his purpose in effectuating the checkpoint program, this was not relied upon by the Court.[187]

The Court began to unravel the legitimacy of Indianapolis checkpoint simply because *each* of the other programs it had upheld dealt with problems "closely related" to policing the border and ensuring roadway safety. Yet the reality of the situation is that there have only been *two* cases, decided in 1976 and 1990, concerning the types of checkpoints which are legitimate. It seems unreasonable that in the year 2001, an age where one of the most pressing concerns facing our society is illegal narcotics, this problem could not be

185. *Edmond*, 531 U.S. at 41-42.

186. The word "sole" precedes "purpose" in one context where the Court is analyzing the subjective intrusion on motorists. *Martinez-Fuerte*, 428 U.S. at 560. The defendants arrested suggested that they were stigmatized by being referred to the secondary inspection area, but the Court stated that the defendants overstated the consequences.

> Referrals are made for the *sole purpose* of conducting a routine and limited inquiry into residence status that cannot feasibly be made of every motorist where the traffic is heavy. Moreover, selective referrals rather than questioning the occupants of every car tend to advance some Fourth Amendment interests by minimizing the intrusion on the general motoring public.

Id. (emphasis added).

187. *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 470-72 n.13 (1990).

considered "closely related" to the primary purposes in the leading cases.[188] Consequently, the State has the stronger argument as to how the checkpoints at issue can be reconciled with *Martinez-Fuerte*. While drivers "high" on drugs may not be a grave concern, compared to the drunk drivers in *Sitz*, it might be argued that it is relatively well-known that most drugs are smuggled into the country, resembling *Martinez-Fuerte*. As for *Whren*, it is not clear whether the Court is ingenious or unwise for contending that because inquiry was irrelevant *only* to the subjective intentions of the officer, inquiry into the programmatic purpose is allowed.[189] The ingenuity comes if the Court was attempting to find any way to strike down the checkpoint, but the imprudence is revealed if *Whren's* openness is later used to justify the Court creating further limitations to vehicle checkpoints.

Finally, in what is perhaps the most damaging part of the Court's opinion, the constant focus upon the newfound "primary" purpose analysis leaves the door wide open for an influx of cases where states have set up checkpoints that have a "secondary" purpose to, for example, stop the flow of illegal narcotics. Almost acknowledging that this "door" has been left open, the Court maintains in footnote 2:

> [W]e need not decide whether the State may establish a checkpoint program with the primary purpose of checking licenses or driver sobriety and a secondary purpose of interdicting narcotics. Specifically, we express no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car.[190]

The questions that this "primary" purpose analysis has left are: 1) what constitutes a "primary" purpose and who is to determine that, and 2) what becomes of the projected footnote, where the *secondary* purpose of a checkpoint program is to prevent the flow of narcotics, and the *primary* purpose is to check for driver's license and the like?

The problem presented in the *first* inquiry is that undoubtedly states are in the best position to determine what is primary for them, and while the courts acknowledge this, it is debatable that in the end, the determination of what constitutes a primary purpose will be left up to the courts.[191] While the determination may depend upon what has been held in other jurisdictions to be primary; it may ultimately go back to *Sitz*, *Martinez-Fuerte* and *Prouse*, a worthwhile, but restricting and non-evolving view of present state concerns. It

188. The Court recognized the national policy of the United States to limit the increase of immigration in *Martinez-Fuerte*, 428 U.S. at 551. It further recognized the magnitude of drunken driving problem in *Sitz*, 496 U.S. at 449, 451.

189. *See supra* notes 90-100 and accompanying text (discussing *Whren*).

190. *Edmond*, 531 U.S. at 47 n.2. See *supra* note 154 (referencing footnote 2).

191. *See generally Sitz*, 496 U.S. at 453-54 (stating that the choice among reasonable alternatives for effectuating state interests is best left in hands of that state as they have a unique understanding of the situation).

is perfectly logical to conclude or at least purport that a roadblock is not the most effective means of combating drugs, because the accident rate between drugs and driving is probably nowhere near the caliber of drinking and driving, but who is to say that in a city whose biggest problem is illegal drugs, many vehicle accidents are not caused by such, that *that* purpose is not primary? If a state claims eliminating illegal drugs is a legitimate interest, and it can produce empirical data supporting its proposition, why should any court be allowed to step in and say such an interest is essentially invalid to support a checkpoint because it is one of general criminal law enforcement, where no individualized suspicion exists?

As to the *second* inquiry, this evidences the fact that the Court has gotten itself into a dilemma by stressing what is the primary purpose. So what of the checkpoint that makes interdicting drugs its secondary purpose, but conducts sobriety checks as its "primary" purpose? Simple. States will begin instituting lawful and justifiable checkpoints all over the place to achieve the underlying means of intercepting drugs or any other substance they deem to be a legitimate state interest.[192] Actually, it is not even clear if the secondary purpose has to be legitimate at all. As to those courts that adopted this "mixed-motive" approach, they are the realistic consequences of the majority's opinion—that virtually any and every type of checkpoint will be upheld, boundaries will be nonexistent and the power given to law enforcement will be unstoppable. If that is the end that the majority seeks to achieve, then it has done so with this primary purpose. To put it another way, if the majority's goal was to give law enforcement some power to be able to attack this war on drugs, then it has done so rather creatively, without upsetting the controlling precedent. But if its goal was to prevent law enforcement from being able to set up a checkpoint for any reason, absent individualized suspicion, upsetting the Fourth Amendment, then it has failed.

Perhaps a better way to achieve the latter would have been to eliminate the use of the word primary altogether and assert that the *only* purpose for such suspicionless checkpoints, save for the recognized exclusions, must be one of a legitimate state interest that is not bent on "catching the bad guy," but furthering the safety and welfare of society. But again, it may be difficult to argue that controlling the flow of illegal drugs does not fit into this category. Note that this revision does not take power away from officers to be able to seize drugs they do find, but such seizure would have to happen the old fashion way, the way the Framers intended, based upon probable cause.

In addition, eliminating the use of the narcotics dog at the initial stop might solve the underlying problem. The need for a narcotics dog in the airport, and governmental buildings has been settled as valid, but according to the Court,

192. This conclusion is not a new concept. The majority in *Edmond* recognized the same possibility. *See supra* note 154 and accompanying text.

the same need does not exist at checkpoints. The rational is that the use of a narcotics dog is for one purpose only, to find drugs. If the Court deems that such an action is not lawful without individualized suspicion, then officers should not use the dogs *until* such probable cause, and the need for the dog, arises. This may ensure that checkpoints are set up for reasons the Court finds lawful and justifiable, and still give officers the tools to be able to combat drugs. For example, if a car is stopped according to a preceding plan and specific guidelines, for a legitimate reason, and during the stop the officer has reasonable suspicion to believe that the vehicle may be carrying drugs; they may *then* bring the dog out to sniff the car. Even though *Place* asserts that a dog "sniff" does not rise to the level of a "search" for purposes of the Fourth Amendment,[193] allowing the dog to sniff the car simultaneous with the officer checking for drugs contradicts the very essence of the Court's opinion; undermining the evil it is trying to prevent—giving unbridled power and discretion to police in the area of general criminal enforcement of the law. It is not suggested that *Place* was decided incorrectly, but if the Court wishes to enforce its viewpoint that interdicting drugs requires individualized suspicion, then as *Place* pertains to roadblocks, it should be reevaluated.

As for the dissent, while the checkpoint at issue should not be allowed more for policy reasons than anything else, the merit of its opinion is pointed out in the majority errors.

First, the dissent presents the better argument that the present case follows naturally from the two leading roadblock cases and *Brown*. The majority does not even mention the "*Brown* Balancing Test" in its own analysis—the straightforward constitutional test, the very foundation of which establishes the reasonableness of a checkpoint program. The framework set out from these cases only requires inquiry into the state's interest, the effectiveness of the program in advancing that state interest and the intrusion imposed upon the motorists.

The state interests in *Martinez-Fuerte* and *Sitz*, illegal aliens and drunk driving, were considered grave, and the flow of illegal narcotics has equally been found to be a grave concern for the States. Prong one is satisfied. Next, turning to the effectiveness of the checkpoint, there is no argument that the effectiveness of the Indianapolis checkpoint surpassed those percentages that were upheld in *Martinez-Fuerte* and *Sitz*. Prong two is satisfied. Finally, the level of intrusion, evaluated on both an objective and subjective level, is where the greatest differences lay between the conflicting circuits that have heard this issue. The objective intrusion was generally found to be minimal, but the cases striking down the checkpoints found the subjective intrusion to be great. Had the majority analyzed *Brown*, it would have been unable to successfully rely upon the same data because those conclusions seemed to be solely based upon

193. *See supra* note 174.

a handful of cases whose checkpoints were set up in a way to "trick" the motorists into the vehicle stop,[194] but in both *Martinez-Fuerte* and *Sitz* and the present case, the checkpoints were clearly marked, guidelines clearly established and protocol clearly followed to avoid officer discretion. Prong three is satisfied.

As the dissent recognized, the only difference between the leading cases and the present one is the presence of a dog, but so long as the Court holds that a dog "sniff" does not constitute a search for which individualized suspicion would be required, and a dog is allowed to be present at legitimate and justifiable checkpoints, then the checkpoint passes the Court's own *Brown* test.

Second, though a proper argument advanced by the dissent was that the present case did *not* require asking the question of whether a law enforcement purpose could support a roadblock seizure, the more paramount argument is that the Fourth Amendment analysis appropriate for seizures does not speak to primary purpose.[195] Such language is not present in *Martinez-Fuerte*, *Sitz* or *Whren*. *Martinez-Fuerte* and *Sitz* were upheld because of the valid reasons for conducting the roadblock seizures; and *Whren*, which the majority interpreted as leaving open an inquiry into the programmatic purpose of a checkpoint, was seen by both the majority and dissent as precluding the subjective intentions of an officer from being introduced in the Fourth Amendment analysis. Therefore, if the former two cases stand for the proposition that legitimate state interests can support a roadblock seizure, and drug trafficking is considered such an interest; and if *Whren*'s proposition is valid, that the subjective intentions of the officers hoping to interdict drugs is irrelevant, then the present checkpoint was sufficient to warrant a roadblock. There is no mention of primary purpose.

Moreover, the dissent correctly cited those cases where the majority looked to the purpose of the state's actions,[196] and those cases concerned the *searches* of one's home or business where the intrusion involved was great because the expectation of privacy was so high. However, in the case at bar, it has been repeatedly noted that expectation of privacy in one's automobile is significantly different than the above.

Finally, there may be some validity in Justice Thomas's implication that *Martinez-Fuerte* and *Sitz* were decided incorrectly. His assertion that the Framers might not have approved of the application of the Fourth Amendment—a tenet that affords every citizen a blanket of protection from unreasonable intrusion into their persons or home—being diminished to a test of reasonableness has some force behind it. Since its inception, the Fourth Amendment has been a measure of security for the average citizen to have

194. *See supra* notes 146-148.

195. *Edmond*, 531 U.S. at 53.

196. *See id*. at 54 (citing cases relied on by dissent).

some control over the government, and to take that away because the seizure is deemed reasonable seems to be yet another blow in the citizen's shield. An additional argument may be advanced that the two cases were decided without due consideration as to how and where the boundaries and limits would be drawn in determining what types of interest would be considered legitimate—such as whether or not all subsequent cases would have to be analogized in accord with the leading cases, or if the cases simply represent two examples of legitimate interests. The majority seems to want to enforce the former,[197] but it seems illogical that the interests of fifty states should be forced to conform to only two choices, created twenty-four and ten years ago, respectively.

IV. CONCLUSION

A new twist on a previous scenario, *City of Indianapolis v. Edmond*, presented the Court with a great challenge—balancing the privacy rights of its citizens with the necessary job functions of our law enforcement. For valuable policy reasons, the holding of the majority is the correct one. The line has to be drawn somewhere preventing even the most valiant of law enforcement objectives from intruding upon the rights of innocent individuals without the pre-requisite probable cause. However, the route the majority took to reach its conclusion is unsettling because it does not appear to be in line with the controlling precedent.

The Fourth Amendment deems all searches and seizures unreasonable without individualized suspicion except for the limited exclusions. The vehicular roadblock exclusion requires that the checkpoint be of a legitimate public interest and reasonable, and through *Martinez-Fuerte* and *Brown*, the constitutional test for reasonableness developed. Yet, in this latest opinion, as pointed out by the dissent, the majority does not even mention the *Brown* test, but instead carves out a new crucial factor, primary purpose, a factor that has never before been an essential element in *seizure* cases. The implication of this primary purpose factor, which is essential in *search* cases, and now finds its way into the *seizure* cases, leaves wide open the door for law enforcement to satisfy the primary prong by one of the interests already upheld, and then have a secondary purpose be whatever it wishes, such as interdicting illegal narcotics.

The effects of this implication may be twofold: if the evil the Court tried to prevent with its opinion was an unbridled discretion of law enforcement to intrude upon the public, its goal was undermined because the secondary purpose was left to the discretion of the police. However if emphasis of the "primary" purpose was simply to not upset the controlling precedent, and *hint* that a secondary purpose may still be used to effectuate a state's program, then

197. *See supra* note 185 and accompanying text.

the Court has, in a roundabout way, creatively kept the power in the hands of law enforcement. Regardless of its intent, the Court's silence as to the constitutional test fashioned for these types of cases remains curiously questionable, because strict application of *Brown* lends itself to an arguable finding that the Indianapolis checkpoint should have been upheld.

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