Designing a Constitutional Ruse Drug Checkpoint: What Does the Fourth Amendment Really Protect?

By ALLISON M. LOW*

Introduction

TWO FRIENDS ARE DRIVING HOME after a night on the town. A few miles from their freeway exit, they see a sign that reads "Drug Checkpoint 1 Mile Ahead." There is nothing to worry about—neither party is carrying contraband and the driver is sober. But their exit is only a few miles away and the weary travelers want to avoid the hassle of a stop. The driver takes the first exit he sees after the sign; much to his surprise, he encounters a drug checkpoint located at the bottom of the off-ramp. The bewildered driver turns to his companion and asks; "Can they do that?"

Regardless of whether law enforcement *can* use such tactics, they *have*. In *City of Indianapolis v. Edmond*,[1] the U.S. Supreme Court struck down suspicionless checkpoints when employed primarily for the interdiction of drug trafficking. The Court, however, left a loophole for law enforcement and approved the use of narcotics checkpoints under the standard articulated in *Terry v. Ohio*:[2] "When law enforcement authorities pursue primarily general crime control purposes at checkpoints . . . stops *can only* be justified by some quantum of individualized suspicion."[3]

Using *Edmond* as a guidepost, several states have attempted to manufacture the requisite individualized suspicion by designing "ruse" narcotics checkpoints. Law enforcement officers post signs on a

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1. 531 U.S. 32 (2000).
2. 392 U.S. 1 (1968).
3. *See Edmond*, 531 U.S. at 47 (emphasis added).

freeway leading drivers to believe a narcotics checkpoint is one mile ahead, but the checkpoint is actually located at the bottom of the first off-ramp following the ruse sign. Individuals who take the first exit are stopped at the checkpoint based on the assumption that they exited deliberately to avoid the checkpoint—thus, exhibiting suspicious behavior. While most federal circuits find such stops unconstitutional,[4] at least one state supreme court has approved their use.[5]

Ruse drug checkpoints have been challenged successfully on two grounds: (1) the stop was made without reasonable suspicion; and (2) even if there was reasonable suspicion, it was manufactured by the officers.[6] This Comment argues these flaws are not fatal to the general ruse drug checkpoint design. In fact, several federal courts have approved the constitutionality of these checkpoints when slight modifications are made to the original checkpoint design; i.e., using a traffic violation to justify a stop for narcotics interdiction or stopping only those drivers who exhibit additional suspicious behavior in response to the ruse drug checkpoint.[7]

This Comment argues the new wave of approval for modified checkpoints cannot be explained by some imagined change in individualized suspicion. Rather, this difference illustrates the true ideological justification underlying Fourth Amendment protections. Fourth Amendment jurisprudence has encompassed two ambits of protections. First, the Fourth Amendment has been used to provide individual privacy protection; that is, it has been used to recognize that individuals have a fundamental right to keep secrets in certain circumstances. On the other hand, the Fourth Amendment has also been construed as a set of restrictions for law enforcement. For example, warranted searches indicate that invasions of privacy will be tolerated so long as law enforcement agents follow proper process and stick to certain preapproved modes of investigation.

This second formulation of the Fourth Amendment helps explain the approval of modified ruse drug checkpoints, despite their superficial changes. Such approval indicates that courts are not concerned with a fundamental Fourth Amendment protection of individual privacy, but rather are only concerned with restricting law enforcement to preapproved avenues of investigation when invading an individual's

4. *See* United States v. Yousif, 308 F.3d 820 (8th Cir. 2002); United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998).

5. *See* State v. Mack, 66 S.W.3d 706 (Mo. 2002) (Stith, J., dissenting).

6. *See infra* Part II.

7. *See infra* Part III.B.3.

privacy. The concept of the ruse drug checkpoint—stopping individuals who raise the suspicion of narcotics trafficking—is not "unconstitutional" per se. That is, the Fourth Amendment does not protect that ambit of individual secrecy. Rather, law enforcement must employ ruse drug checkpoints using a preapproved and standardized method of investigation in order to be permissible. Modified ruse drug checkpoints differ from their predecessors because they use such tactics, not because they magically root out greater individualized suspicion.

Part I reviews the progression of U.S. Supreme and Circuit Courts case law in building the foundation for ruse drug checkpoints. Part II describes ruse drug checkpoints in their original form and discusses the opposition to them. Part III reviews the challenges to ruse drug checkpoints, as originally designed, and discusses the various modifications made. This Part further notes that several state law enforcement agencies have implemented the modifications suggested herein and courts reviewing subsequent challenges to them have approved their use.[8] Part IV compares the differences between originally designed and modified checkpoints and argues the slight changes in operation are superficial. Part V reviews the two competing ideologies underlying the Fourth Amendment and suggests that modified checkpoints are being validated because they restrict law enforcement to specific investigation tactics that are more conventional than the deceptive ruse drug checkpoints—not because they provide a greater level of individual suspicion to justify the intrusion.

8. United States v. Loya, 528 F.3d 546, 552–53 (8th Cir. 2008) (finding that a driver's exit at a ruse drug checkpoint was valid and could be used in justifying a prolonged detention during which the officer developed reasonable suspicion and seized contraband found in the vehicle); United States v. Wright, 512 F.3d 466, 471 (8th Cir. 2008) (finding that a driver's seizure after exiting at a ruse drug checkpoint was constitutional when in conjunction with a traffic violation for failing to stop at the stop sign at the bottom of the exit ramp); United States v. Carpenter, 462 F.3d 981, 987 (8th Cir. 2006) (finding that the driver's exit at a ruse drug checkpoint was one factor in establishing the constitutionality of the seizure, and considering—along with the driver's exit at the ruse drug checkpoint—the driver's assertion that he was looking for a gas station despite the lack of signage indicating gas services, and the driver's stop along the side of the exit for no apparent reason); United States v. Flynn, 309 F.3d 736, 739 (10th Cir. 2002) (finding that "[t]he posting of signs to create a ruse does not constitute illegal police activity," and thus the officers could constitutionally recover contraband recovered after driver abandoned it in response to seeing a ruse drug checkpoint sign).

I. The Foundational Vehicle Checkpoint Law

The Fourth Amendment confers the right to be free from unreasonable searches and seizures.[9] This is not an unconditional right. The Supreme Court marked a limit on the Fourth Amendment when it recognized "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."[10] In *Terry*, a thirty-nine year veteran police officer working in a high-crime neighborhood observed two men exhibit behavior he believed consistent with planning a "stick-up."[11] Though the officer could not articulate a basis for his suspicion, he stopped the two men and subsequently arrested them after he found incriminating evidence. The Supreme Court found this investigatory detention valid, despite the absence of probable cause, as long as the "police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot."[12]

State law enforcement officers have stretched *Terry* to justify other law enforcement practices; particularly within the area of checkpoint stops.[13] A checkpoint stop—stopping all traffic on a thoroughfare for a brief investigation—constitutes a "seizure" within the meaning of the Fourth Amendment.[14] Although the Supreme Court confirmed *Terry*'s logic as appropriate for stops of individuals, such a standard was over-burdensome for stops of automobiles because "one's expectation of privacy in an automobile . . . [is] significantly different from the traditional expectation of privacy."[15] The Supreme Court determined that several different types of vehicle checkpoints, serving compelling governmental interests, may be made in the absence of individualized suspicion.[16] Despite these exceptions, the Court subsequently limited the breadth of this checkpoint departure.

9. U.S. CONST. amend. IV.

10. Terry v. Ohio, 392 U.S. 1, 22 (1968).

11. *Id.* at 6.

12. *Id.* at 30.

13. *See, e.g.*, State v. Mack, 66 S.W.3d 706 (Mo. 2002).

14. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976).

15. *Id.* at 561.

16. *See, e.g.*, *id.* at 543 (finding the government's interest in policing the Nation's borders by designing roadblocks for intercepting illegal aliens constitutional); *see also* Mich. Dept. of St. Police v. Sitz, 496 U.S. 444 (1990) (finding the government's interest in promoting highway safety by designing roadblocks for checking driver sobriety constitutional); Delaware v. Prouse, 440 U.S. 648 (1979) (finding the government's interest in promoting

In *City of Indianapolis v. Edmond*,[17] the Indianapolis police set up a vehicle checkpoint designed primarily to "interdict unlawful drugs."[18] Each checkpoint stopped a predetermined number of motorists. As a car stopped, an officer approached the vehicle and looked for circumstances consistent with drug trafficking. The officer was permitted to continue the detention or request a search of the vehicle if he developed some quantum of individualized suspicion during the stop. Importantly, such suspicion was not necessary to effectuate the stop in the first place. In finding these stops unconstitutional, the Supreme Court "decline[d] to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes."[19] However, the Court carefully qualified its decision by allowing such stops to proceed when some quantum of individualized suspicion was present.[20]

II. Ruse Drug Checkpoints As Originally Designed

A. The Ruse Drug Checkpoint Form

Using *Edmond* as a guidepost, several states have attempted to manufacture the requisite individualized suspicion by designing ruse narcotics checkpoints. These "first generation" ruse drug checkpoints are identically designed. Law enforcement officers, acting on written directives from the Chief of Police, set up a sign on a freeway that advises drivers of a narcotics checkpoint a mile or so ahead. In fact, the checkpoint is not on the highway as the signs suggest, but rather it is at the bottom of the off-ramp of the first exit following the notice of the checkpoint. Drivers who exit after the checkpoint signs are stopped and then arrested if evidence of narcotics trafficking is found as a result of that stop.

Typically, drivers have argued that the seizure was not supported by individualized suspicion and therefore was unreasonable. The state bears the burden of proving the quantum of individualized suspicion to justify the stop. States have argued that the driver's action in choosing to avoid the checkpoint and using the off-ramp is sufficient individualized suspicion to justify the checkpoint stop at the bottom of the off-ramp.

highway safety by designing roadblocks for checking drivers' licenses and registration constitutional). .

17. 531 U.S. 32 (2000).
18. *Id.* at 34.
19. *Id.* at 44.
20. *See id.* at 47.

The validity of this type of search caused a split in the federal circuit and among some appellate state courts.[21] In determining the constitutionality of these stops the issue before a reviewing court is whether the use of ruse drug checkpoint signs creates the quantum of individualized suspicion necessary to justify the seizure.

B. Challenges to the Original Design

The breadth of case law addressing this issue discusses the methods that law enforcement agencies use to justify these checkpoints. First, relying on *Illinois v. Wardlow*,[22] supporters argue the act of exiting is indicative of head-long flight and evasive activity and thus confers individualized suspicion. Second, they argue the circumstances attending such checkpoints (location, time, characteristics of the exit) reduce the likelihood the exit was taken for an innocent purpose and therefore further confers individualized suspicion. Third, supporters argue the evasive behavior and circumstances of the checkpoint, at least taken together if unpersuasive on their own, confer individualized suspicion. The weight of authority considering these arguments have found them insufficient to justify ruse drug checkpoints as originally designed.

1. Head-Long Flight/Evasive Activity Is Not Enough for a Seizure

In *Wardlow*, the Supreme Court considered the role of evasive behavior in developing individualized suspicion for a seizure.[23] Wardlow fled after police officers observed him standing next to a building in an area known for narcotics trafficking. The Court held that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[24] The Court noted this behavior, combined with other factors, might confer the quantum of individualized suspicion necessary to justify a stop, but then found the "propriety of the arrest itself" was not before the Court.[25]

Law enforcement agencies argue the act of flight justifies a seizure. In *United States v. Lester*,[26] Lester was arrested for driving while

21. *Compare* United States v. Yousif, 308 F.3d 820 (8th Cir. 2002), *and* United States v. Huguenin, 154 F.3d 547 (6th Cir. 1998), *with* State v. Mack, 66 S.W.3d 706 (Mo. 2002).

22. 528 U.S. 119 (2000).

23. *Id.*

24. *Id.* at 124–25.

25. *Id.* at 124, 126.

26. 148 F. Supp. 2d 597, 598 (D. Md. 2001).

intoxicated after being stopped by police because he had made a U-turn to avoid a military checkpoint.[27] The District Court of Maryland determined the U-turn was suspicious behavior, but not suspicious enough to support a finding of reasonable suspicion.[28] The court did note that a finding of individualized suspicion would have been more likely if the driver had made the U-turn *and* had driven erratically.[29] When reviewing a similar stop, the Fourth Circuit also qualified that if a U-turn was coupled with other suspicious behaviors to form a "series of evasive actions," then that might be sufficient to support a finding of reasonable suspicion.[30]

In both cases, the court determined that flight alone is not suspicious enough for a detention and that factors in addition to flight were necessary to justify the seizure.[31]

2. Eliminating Most Innocent Drivers with Unusual Checkpoint Circumstances Is Not Enough for a Seizure

The design of the checkpoint "must serve to eliminate a substantial portion of innocent travelers before the requirement of reasonable suspicion will be satisfied."[32] Only when the ruse checkpoint is designed specifically so that "drivers with drugs do indeed 'take the bait,'" can the exit confer individualized suspicion.[33] Reducing the number of innocent travelers is critical because "[g]eneral profiles that fit large numbers of innocent people do not establish reasonable suspicion."[34]

Proponents of ruse checkpoints argue that, while the checkpoints must be effective in eliminating innocent people to confer reasonableness on the seizure, "*Terry* accepts the risk that officers may stop innocent people."[35] Thus, an officer can have reasonable suspicion without altogether ruling out the possibility of innocent conduct.[36]

The Eighth Circuit disagreed with this logic as specifically applied to ruse drug checkpoints. The court found "the mere fact that some

27. *Id.* at 599.
28. *Id.* at 605.
29. *Id.*
30. United States v. Smith, 396 F.3d 579, 585–87 (4th Cir. 2005) (the seizure of a driver who evasively maneuvered into a stranger's driveway to avoid police roadblock was reasonable within the Fourth Amendment).
31. Illinois v. Wardlow, 528 U.S. 119, 124 (2000).
32. United States v. Brugal, 209 F.3d 353, 361 (4th Cir. 2000).
33. *See* State v. Mack, 66 S.W.3d 706, 709 (Mo. 2002).
34. United States v. Yousif, 308 F.3d 820, 828 (8th Cir. 2002).
35. *Wardlow*, 528 U.S. at 126.
36. United States v. Smith, 396 F.3d 579, 584 (4th Cir. 2005).

vehicles took the exit under such circumstances does not . . . create individualized reasonable suspicion of illegal activity as to every one of them" because "while some drivers may have wanted to avoid being caught for drug trafficking, many more took the exit for wholly innocent reasons . . . ."[37] In *United States v. Yousif*,[38] the Eighth Circuit held that ruse narcotics checkpoint signs did not create sufficient individualized suspicion, therefore, the seizure was unconstitutional.[39] The court found drivers could have taken the exit because they wanted "to avoid the inconvenience and delay of being stopped or because it was part of their intended route."[40] The fact that a driver is "traveling on a highway that was 'known' to the officers as a drug trafficking corridor cannot alone justify the stop because '[t]oo many people fit this description for it to justify a reasonable suspicion of criminal activity.' "[41]

A checkpoint only creates individual suspicion when it is specifically designed to eliminate a large portion of innocent travelers.[42] Although it is true that an officer with reasonable suspicion need not rule out the possibility of innocent conduct entirely,[43] the tenuous nature of a finding of individualized suspicion on ruse checkpoints is fatally weakened when the factors used to justify the stop also catch large numbers of innocent people.

3. The Totality of the Circumstances Is Not Enough for a Seizure

The U.S. Supreme Court found individualized suspicion "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot."[44] In finding some quantum of individualized suspicion, "reviewing courts must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."[45] In *United States v. Arvizu*,[46] a Border Patrol agent observed a vehicle on a remote side route that avoided the main thoroughfare and an immigration check-

37. *Yousif*, 308 F.3d at 827–28.
38. *Id.* at 827–29.
39. *Id.*
40. *Id.* at 828.
41. *Id.* (citation omitted).
42. *Id.*
43. *See* United States v. Smith, 396 F.3d 579, 584 (4th Cir. 2005).
44. Terry v. Ohio, 392 U.S. 1, 30 (1968).
45. United States v. Arvizu, 534 U.S. 266, 273 (2002) (citation omitted).
46. *Id.* at 266.

point. This route was notorious for drug trafficking, the car the driver used was a vehicle like those typically used for smuggling, and the driver's behavior was suspicious.[47] Based on the aggregation of these factors, the patrol officer stopped the vehicle and subsequently arrested the driver after discovering illegal narcotics in the vehicle. The Court noted "each of these factors alone is susceptible of innocent explanation," however, when taken together they provide reasonable suspicion to effectuate the stop.[48]

In applying the totality of the circumstances test specifically to ruse drug checkpoints, the Supreme Court of Missouri found the seizure at the checkpoint was based on reasonable suspicion.[49] In *State v. Mack*,[50] police officers operating a ruse drug checkpoint on a Thursday night observed Todd Mack traveling northbound on the highway.[51] After passing the ruse signs, Mack suddenly "shot over and almost missing it came up the off ramp . . . [while] moving [at] a pretty good pace."[52] While detained at the checkpoint, officers observed Mack was "nervous, had glazed and bloodshot eyes, and smelled of alcohol."[53] A search of the vehicle pursuant to probable cause obtained during the checkpoint seizure revealed narcotics. The Supreme Court of Missouri found the checkpoint seizure was reasonable. The court determined there were "significant efforts to reduce the legitimate reasons for taking the exit"—it was "set up in an isolated and sparsely populated area offering no services to motorists and was conducted on an evening that would otherwise have little traffic." It also considered Mack's "particular conduct in exiting at the checkpoint"—he "suddenly veered off onto the off ramp" and "almost missed the turn[.]"[54]

The Supreme Court of Missouri is the only court that has accepted this line of reasoning. Other courts who have considered this issue have rejected this argument because "these circumstances never would have arisen but for the existence of the illegal checkpoint."[55] In fact, other courts have found that any "individualized suspicion" in an exit at a ruse drug checkpoint cannot be used to justify the seizure

47. *Id.* at 269–70.
48. *Id.* at 277–78.
49. State v. Mack, 66 S.W.3d 706, 710 (Mo. 2002).
50. *Id.*
51. *Id.* at 707.
52. *Id.*
53. *Id.* at 708.
54. *Id.* at 709–10.
55. United States v. Yousif, 308 F.3d 820, 829 (8th Cir. 2002).

because it has been *manufactured* by the state.[56] As one judge explained, it is the state's behavior in designing a constitutionally untenable checkpoint that is suspicious and the individual's response is reasonable.[57] Further, aggregating facts like, as in *Mack*, the driver's swerve upon exit or the driver's appearance upon seizure[58] is no more than "an after-the-fact rationalization made to justify a stop that was clearly based on the fact that [the driver] exited the highway" at the ruse drug checkpoint exit.[59] As such, the court noted the following:

> [I]t is a contradiction in terms to say that police had a basis for "individualized" suspicion of a motorist by setting up a checkpoint that had the admitted programmatic purpose of searching for those engaged in drug-related activity, yet stopped all those who exited the highway at a certain point.[60]

Further, even if the ruse drug checkpoint produces some kind of suspicion, it is "group suspicion," not the individualized suspicion required by the Fourth Amendment for a seizure.[61] Therefore, the sum total of the driver's evasive behavior and the circumstances of the ruse drug checkpoint do not confer the requisite quantum of individualized suspicion necessary for a seizure to be constitutional.

4. These Criticisms Are Not Persuasive

In *Edmond*, the Supreme Court "decline[d] to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes[,]"[62] but allowed such stops to proceed when "justified by some quantum of individualized suspicion."[63] Relying on this loophole, states have attempted to manufacture the requisite individualized suspicion by designing "ruse" narcotics checkpoints. Proponents of these ruse checkpoints make three recurring arguments for their constitutionality, but the weight of authority in this area has disapproved of these checkpoints as originally designed. Nevertheless, as discussed *infra* Part III, these checkpoints can be effective and constitutional with slight modifications.

56. *Id.*
57. *See Mack*, 66 S.W.3d at 717 (Stith, J., dissenting).
58. *Id.* at 720.
59. *Id.*
60. *Id.* at 714.
61. *Id.*
62. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).
63. *Id.* at 47.

III. Modified Ruse Drug Checkpoints that Differ from Their Predecessors in Only Two Ways Are Constitutional

A. The Modifications

Law enforcement agencies have attempted to remedy the inadequacies of ruse drug checkpoints as originally designed. In designing constitutional ruse drug checkpoints, law enforcement has changed only two factors. First, the inevitability of the stop has been removed. Law enforcement could not legitimately say a motorist was stopped because of their individually suspicious behavior because, regardless of the behavior exhibited, motorists were stopped without exception at the bottom of the exit. Second, at a typical ruse drug checkpoint, law enforcement officers were only positioned at the bottom of the exit. From the bottom of the exit, officers are neither able to observe suspicious behavior in response to the sign nor dismiss the behavior of an innocent motorist legitimately taking the exit. For this reason, in modified checkpoints, an officer has been strategically placed on the freeway to observe drivers' response to the sign. Repositioning law enforcement personnel in this way has allowed them to constitutionally stop individually suspicious motorists in one of two ways: when the driver commits a traffic violation in conjunction with the exit or when the driver exhibits a quantum of individually suspicious behavior justifying seizure.

Law enforcement agencies argue these two factors remedy the constitutional inadequacies of first generation ruse drug checkpoints because they provide enough reasonable suspicion to validate the checkpoint. They argue that these new checkpoints strike a more even balance between the public interest served and the intrusion on the private individual. These checkpoints have been approved on several different occasions.[64]

B. The Constitutionality of the Modified Design

1. Traffic Violations Create Automatically Justifiable Stops

Traffic violations, even minor infractions, create probable cause to stop the driver of a vehicle.[65] For that reason, drivers who commit traffic violations in conjunction with an exit at a ruse drug checkpoint could be constitutionally seized *without* a finding of individualized suspicion. Even if a driver is stopped only for offending traffic laws, his

64. *See, e.g.*, *supra* note 8 and accompanying text.
65. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977).

vehicle can be searched for drugs provided the search does not extend the stop longer than necessary to effectuate its actual purpose of issuing a citation.[66] The constitutionality of this stop is not affected by the fact that the traffic stop serves as a pretext to search for drugs or by the fact that the police manufactured the circumstances surrounding the stop.[67]

There has never been a dispute that stopping a motorist for a traffic violation, however minor, is a valid and constitutional exercise of police power.[68] The obvious criticism of this design is that these stops are a pretext for narcotics searches.[69] Backing this criticism is the fear that routine traffic stops will "automatically becom[e] a foot in the door for all investigatory purposes . . . ."[70] The Supreme Court considered and dismissed this issue, holding "[n]ot only have we never held, outside the context of inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment; but we have repeatedly held and asserted the contrary."[71] The Court has continually reiterated that "a traffic-violation arrest . . . would not be rendered invalid by the fact that it was 'a mere pretext for a narcotics search[.]'"[72] These cases lead to the inescapable conclusion that the Supreme

66. United States v. Waldron, 178 F. Supp. 2d 738, 743–44 (W.D. Tex. 2002) (citing United States v. Machuaca-Berrera, 261 F.3d 425, 432 (5th Cir. 2001)).

67. *Edmond*, 531 U.S. at 45 (citing Whren v. United States, 517 U.S. 806, 810–13 (1996)).

68. United States v. Beck, 140 F.3d 1129, 1133 (8th Cir. 1998). Importantly, a driver stopped for this minor reason can only be stopped as long as necessary to complete the purpose of the stop—that is, only long enough for the officer to issue a citation or release the driver with a warning. Illinois v. Caballes, 543 U.S. 405, 407–08 (2005); *see also Beck*, 140 F.3d at 1134 ("[U]nless Officer Taylor had a reasonably articulable suspicion for believing that criminal activity was afoot, continued detention of Beck became unreasonable after he had finished processing Beck's traffic violation."); United States v. Mesa, 62 F.3d 159, 162 (6th Cir. 1995) ("Once the purposes of the initial traffic stop were completed, there is no doubt that the officer could not further detain the vehicle or its occupants unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention."). The most efficient way to effectuate an investigation for drug related activity during the small window of time left open to complete the purpose of the traffic stop is with the use of a drug-detection canine. The use of a narcotics canine does not extend the nature or scope of the stop beyond what would already be permitted in response to the traffic violation, since "[t]he fact that officers walk a narcotics-detection dog around the exterior of each car at [a checkpoint] does not transform the seizure into a search." *Edmond*, 531 U.S. at 40 (citing United States v. Place, 462 U.S. 696, 707 (1983)).

69. *Caballes*, 543 U.S. at 415 (Souter, J., dissenting).

70. *Id.*

71. Whren v. United States, 517 U.S. 806, 812 (1996).

72. *Id.* (citing United States v. Robinson, 414 U.S. 218, 221 n.1 (1973)); *see also Edmond*, 531 U.S. at 45.

Court "flatly dismissed the idea that an ulterior motive might serve to strip the agents of their legal justification."[73]

Seizing a driver for a traffic violation in conjunction with a ruse drug checkpoint sign is the most straightforward way to effectuate a constitutional ruse drug checkpoint. A driver committing even the slightest of traffic infractions may be validly stopped.[74] The Supreme Court approved similar stops, even though they could be considered pretexts for drug interdiction.[75] The purpose of a ruse drug checkpoint could, therefore, be constitutionally achieved by using this new design.

2. There Is Individualized Suspicion to Stop, Even Without a Traffic Violation

If a driver commits a traffic violation in conjunction with exiting at a ruse drug checkpoint, that driver's seizure will surely meet constitutional muster.[76] However, even if a driver commits no traffic violation, a seizure would be justified if a driver's response to the ruse drug checkpoint sign is individually suspicious.[77] At issue are the kinds of observations sufficient to create the requisite quantum of individualized suspicion necessary to justify the stop.[78]

Law enforcement officers operating ruse drug checkpoints, as originally designed, relied upon a driver's evasive behavior in response to the sign and the circumstances surrounding the checkpoint like its location, time of day and day of week in an attempt to amass the quantum of individualized suspicion necessary to justify the stop.[79] As discussed,[80] these factors alone were insufficient to justify first generation checkpoint seizures. However, modified ruse drug checkpoints that eliminate the inevitability of the stop are constitutional.

No matter what justification was used, every motorist exiting at an originally designed ruse drug checkpoint was stopped at the bottom of the off-ramp. The inevitability of the stop eliminated the possibility of individual suspicion because the driver was stopped regardless of

73. *Whren*, 517 U.S. at 812.

74. United States v. Beck, 140 F.3d 1129, 1134 (8th Cir. 1998) (citing Pennsylvania v. Mimms, 434 U.S. 106 (1977)).

75. *Whren*, 517 U.S. at 812–13 (citing *Robinson*, 414 U.S. at 221 n.1); *see also Edmond*, 531 U.S. at 45.

76. *See supra* Part III.A.

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

78. *See id.*

79. *See supra* Parts II.A–C.

80. *See supra* Part II.E.

the behavior exhibited. For this reason, not only should law enforcement refrain from stopping every vehicle exiting the freeway, but also an officer should be strategically placed on the freeway so that he may observe drivers' responses to the sign.

Substantially, the layout of the ruse drug checkpoint should remain the same. Law enforcement officers should operate on a freeway known for drug trafficking. They should place a sign on that freeway indicating "DRUG CHECKPOINT ONE MILE AHEAD." The sign should be placed right before a "dead exit" where there are no services offered and few legitimate reasons to take the exit. Officers should position themselves at the bottom of the exit, posed to stop motorists leaving the freeway. These officers, however, should not stop every motorist venturing down the exit. Additionally, an officer should be strategically placed at the top of the exit, acting as a lookout, watching drivers react to the ruse checkpoint sign. The lookout should watch for drivers committing a traffic violation when exiting the freeway and for drivers reacting evasively to the sign. The lookout should then inform the officers at the bottom of the exit which cars should be stopped on the basis of his observations. With this new design, law enforcement officers could efficiently and constitutionally stop motorists who either commit traffic violations in response to the sign or react evasively to it. Repositioning law enforcement personnel in this way would allow them to constitutionally stop motorists who exhibit individually suspicious behavior in direct response to seeing the ruse drug checkpoint sign.

Without an inevitable stop, the duration of the stop at a ruse drug checkpoint is uniformly shorter and the number of innocent motorists stopped is reduced. Therefore, this modification combined with the factors used to justify ruse drug checkpoints, as discussed *supra* Part II, and the considerable deference given to law enforcement officers,[81] garners enough individualized suspicion to establish constitutionality.

The Supreme Court has given law enforcement officers great deference.[82] The Court held, "for purposes of Fourth Amendment analysis, the choice among [what methods to apprehend drivers engaging in illegal conduct] remains with the governmental officials who have a unique understanding of, and [a] responsibility for, limited public re-

81. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–54 (1990).
82. *See id.*

sources, including a finite number of police officers."[83] Since the "reasonable suspicion standard is based largely on the common sense and experience of the investigating officer[,]"[84] a law enforcement officer's observations are given even greater weight when used to find the quantum of individualized suspicion necessary to justify a seizure. Upon review of a checkpoint seizure, the court views the facts supporting the officer's determination in the light most favorable to the officer.[85] In other words, when an officer determines there is enough individualized suspicion in an exit at a ruse drug checkpoint, his determination is given the benefit of the doubt even when reasonable minds may differ.[86] Therefore a finding of individualized suspicion at a ruse drug checkpoint is reasonable given the minimal intrusion on the driver when the inevitability of the stop is removed and the great deference to an officer in making determinations on which drivers to stop.[87]

3. Acceptance of Modified Ruse Drug Checkpoints

Ruse drug checkpoints, modified as suggested herein, have already been accepted in a variety of different jurisdictions.[88] In 2002, the Tenth Circuit determined that "[t]he posting of signs to create a ruse does not constitute illegal police activity."[89] In *United States v. Flynn*,[90] Flynn exited the freeway right after passing ruse drug checkpoint signs.[91] Law enforcement officers positioned on the freeway observed Flynn exit and exhibit suspicious behavior.[92] They radioed this information to other officers who were positioned on the exit ramp

83. *Id.* (finding that courts that should not be making "the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger[,]" but rather that determination is properly made by law enforcement officials).

84. United States v. Lester, 148 F. Supp. 2d 597, 600 (D. Md. 2001) (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)).

85. *See id.*

86. *Id.*

87. United States v. Beck, 140 F.3d 1129, 1136 (8th Cir. 1998) ("It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt . . . .").

88. *See, e.g.*, United States v. Wright, 512 F.3d 466, 467 (8th Cir. 2008); United States v. Carpenter, 462 F.3d 981, 987 (8th Cir. 2006); United States v. Flynn, 309 F.3d 736, 738 (10th Cir. 2002).

89. *Flynn*, 309 F.3d at 738.

90. *Id.* at 736.

91. *Id.* at 737.

92. *Id.*

and who effectuated Flynn's seizure.[93] The Tenth Circuit found law enforcement's use of ruse checkpoint signs did not violate Flynn's Fourth Amendment rights to be free from unreasonable seizures.[94]

More recently, the Eighth Circuit has approved the modifications to ruse drug checkpoints. This is significant because the Eighth Circuit leveled the most criticism at ruse drug checkpoints as originally designed.[95] In 2006, the court reviewed three checkpoints where officers posted ruse signs on the freeway, then observed traffic exiting, and tried "to get a reason to stop them."[96] On one occasion, the officer observed a motorist exiting the freeway and decided that the vehicle "just didn't look right for the area[.]"[97] When the car stopped at the bottom of the exit, the officer approached it.[98] The court found this initial encounter was not a seizure[99] until the officer later asked the driver to exit his vehicle.[100] In finding the seizure constitutional, the court found the driver's suspicious behavior in exiting after observing checkpoint signs combined with the fact that he had taken an exit with no available services, when viewed in the totality of the circumstances, provided sufficient justification to subject the driver to a brief detention and dog sniff.[101] On another occasion, state patrol troopers observed a driver exiting the freeway immediately after spotting ruse drug checkpoint signs.[102] After he failed to make a complete stop for the stop sign at the top of the exit ramp, troopers pulled him over.[103] In approving the use of ruse drug checkpoint signs in this instance, the Eighth Circuit distinguished this new kind of stop from prior drug checkpoints.[104] The court reasoned that the new checkpoints lacked the inevitable seizure that invalidated its predecessor.[105] Finally, in a similar case filed a mere couple of months later, the Eighth Circuit reaffirmed, under the totality of the circumstances, the fact that "the vehicle exited the interstate at a ruse checkpoint" combined with other suspicious conduct gave the officer sufficient justifi-

93. *Id.*
94. *Id.* at 738–39.
95. United States v. Yousif, 308 F.3d 820 (8th Cir. 2002).
96. United States v. Carpenter, 462 F.3d 981, 983 (8th Cir. 2006).
97. *Id.*
98. *Id.*
99. *Id.* at 985.
100. *Id.* at 986.
101. *Id.* at 986–87.
102. United States v. Wright, 512 F.3d 466, 467 (8th Cir. 2008).
103. *Id.*
104. *Id.* at 471.
105. *Id.*

cation to effectuate a stop and investigate further.[106] In these three cases, modified ruse drug checkpoints garnered the approval of the circuit that had been most critical of the originally designed ruse drug checkpoints. The Eighth Circuit's acceptance is the most compelling evidence of the validity the modifications suggested herein to ruse drug checkpoints.[107]

IV. Modified Checkpoints Are Not Any Less Intrusive on the Individual

Modified ruse drug checkpoints have gained court approval where their predecessors did not. But such approval may be undeserved, given the fact that the layout of the ruse drug checkpoint remains substantially the same. Law enforcement officers are still operating on major thoroughfares for drug trafficking and they are still using deceptive signs to lead drivers into dead exits. There are only two major differences: (1) positioning an officer at the top of the ramp with the hope that he may be able to observe a driver's evasive behavior in response to the ruse checkpoint sign; and (2) removing the inevitability of the stop at the bottom of the ramp. Courts approving these modified ruse drug checkpoints argue the imposition on an individual's privacy interest is now reduced given the abbreviated duration of the stop and the decreased probability that law enforcement will accidentally stop innocent drivers. Thus, those courts have determined modified checkpoints now garner enough individualized suspicion to establish constitutionality.[108]

No court, however, has held that there is a quantifiable increase in individualized suspicion justifying a stop at a modified ruse drug checkpoint as opposed to an originally designed ruse drug checkpoint. Rather, the rhetoric employed is that these stops are less intrusive on individuals—despite the fact that the number of factors aggregated to find suspicion remains the same. Courts instead argue that modified checkpoints are more "reasonable," and the public interest served outweighs the minimal intrusion on the individual.

The reasonableness of a seizure depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."[109] Ruse drug checkpoints

106. United States v. Loya, 528 F.3d 546, 554 (8th Cir. 2008).

107. Compare *Wright*, 512 F.3d at 466, *and Loya*, 528 F.3d at 546, *with* United States v. Yousif, 308 F.3d 820, 820 (8th Cir. 2002).

108. *See supra* Part II.

109. Brown v. Texas, 443 U.S. 47, 50 (1979) (citation omitted).

serve the weighty public interest of crime prevention.[110] In 2002, drug abuse cost the United States $180.9 billion.[111] In a "2001 National Household Survey on Drug Abuse, 15.9 million Americans ages 12 and older (7.1%) reported using an illicit drug in the month before the survey was conducted . . . and 41.7% reported some use of an illicit drug at least once during their lifetimes."[112] In 2007, this number jumped to 19.9 million Americans (or 8%).[113] Even the Supreme Court has acknowledged, "traffic in illegal narcotics creates social harms of the first magnitude."[114] "[T]he myriad forms of spin-off crime that it spawns" allows the drug trade to "remain daunting and complex."[115] Further, the Court conceded "[t]here is no doubt that traffic in illegal narcotics creates social harms of the first magnitude" and "[t]he detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs."[116] Thus, the Court found the fact that ruse drug "roadblocks serve . . . legitimate state interests cannot be serious be seriously disputed[.]"[117] But the Court went on to find that it "cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."[118]

There are four compelling arguments that ruse drug checkpoints, whether in their modified or original form, are severely intrusive on individual liberties. First, pages of scholarship have been devoted to haranguing the evils of "deceptive drug checkpoints."[119]

110. *Id.* at 52.

111. Nat'l Drug Intelligence Ctr., *National Drug Threat Assessment 2006*: *The Impact of Drugs on Society*, http://www.usdoj.gov/ndic/pubs11/18862/impact.htm (last visited May 10, 2010).

112. Michele Spiess, *Drug Data Summary March 2003*, ONDCP DRUG POLICY INFORMATION CLEARINGHOUSE, Oct. 24, 2006, *available at* http://www.whitehousedrugpolicy.gov/publications/factsht/drugdata/index.html.

113. Substance Abuse and Mental Health Servs. Admin. Office of Applied Studs., *Results from the 2007 National Survey on Drug Use and Health: National Findings*, DEP'T OF HEALTH AND HUM. SERVS., Sept. 4, 2008, *available at* http://www.oas.samhsa.gov/NSDUH/2k7NSDUH/2k7results.cfm#Ch2.

114. City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

115. *Id.*

116. *Id.* at 43.

117. *Id.* at 51 (Rehnquist, J., dissenting).

118. *Id.* at 44.

119. *See, e.g.*, Daniel R. Dinger & John S. Dinger, *Deceptive Drug Checkpoints and Individualized Suspicion: Can Law Enforcement Really Deceive Its Way into a Drug Trafficking Conviction?*, 39 IDAHO L. REV. 1 (2002); Travis Johnson, *Ruse Drug Checkpoints: How the Government's False Advertising May Diminish Your Fourth Amendment Rights*, 53 DRAKE L. REV. 781 (2005).

One author argues that ruse checkpoints result in a "sacrifice[ ] to our personal liberties[,]"[120] contending that approval of such checkpoints is "disturbing . . . because it does not establish any real boundaries for law enforcement officers . . . ."[121] Another concedes that while "[d]rug trafficking is a very serious problem that needs to be dealt with, . . . sacrificing Fourth Amendment protections in the name of victory is not the answer."[122] Additionally, addressing the constitutionality of ruse drug checkpoints specifically, the Eighth Circuit noted that "[r]easonable suspicion cannot be manufactured by the police themselves."[123]

Second, ruse drug checkpoints are even more intrusive on individual liberties than suspicionless drug checkpoints because at least with the latter, "[m]otorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere."[124] Third, public policy necessitates limiting the authority of law enforcement because if "the individual [were to be] subject to unfettered governmental intrusion every time he entered an automobile, the security granted by the Fourth Amendment would be seriously circumscribed."[125] Finally, "[t]here is something fundamentally unsettling and counter-intuitive about labeling as suspicious a person's conduct in avoiding the state's own unconstitutional conduct."[126] Each of these arguments presents a strong case for finding that ruse drug checkpoints contravene public policy.

Public policy mandates that drug trafficking be stopped and traffickers brought to justice. But public policy demands adherence to constitutional protections. With weighty constitutional considerations on the one hand, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose."[127] Therefore, despite the value

120. Kathryn L. Howard, *Stop in the Name of that Checkpoint: Sacrificing Our Fourth Amendment Right in Order to Prevent Criminal Activity*, 68 MO. L. REV. 485, 485 (2003).

121. *Id.* at 504.

122. Luke R. Spellmeier, *Bypassing the Fourth Amendment: The Missouri Supreme Court's Use of "Ruse" Reasonable Suspicion to Justify De Facto Drug Interdiction Checkpoints*, 42 WASHBURN L.J. 209, 209 (2002).

123. United States v. Yousif, 308 F.3d 820, 829 (8th Cir. 2002).

124. United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976); *see also* United States v. Huguenin, 154 F.3d 547, 560–61 (6th Cir 1998).

125. Deleware v. Prouse, 440 U.S. 648, 663 (1979).

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

127. City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).

these checkpoints have in terms of public protection,[128] the Supreme Court rightly decided that it "cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime."[129] Ruse drug checkpoints, whether in their modified or original form, are intrusive on individual privacy.

V. What Does the Fourth Amendment Really Protect?

Ruse drug checkpoints are inevitably intrusive, irrespective of whether they are modified or originally designed. Yet, they are received, depending on their form, quite differently by courts: modified stops are approved and originally designed checkpoints are not. The divergence in treatment suggests that courts are not really concerned with protecting the fundamental purity of individual rights. But what then does the Fourth Amendment really protect? Depending on how it is formulated, the Fourth Amendment acts as either a protection of fundamental rights or a set of prohibitions for law enforcement.

The Fourth Amendment provides that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[130] An entire body of scholarship is devoted to parsing the nuances of the Amendment and the protections it provides.

On the one hand, the Fourth Amendment is arguably a tool for privacy protection. Supreme Court Justice Antonin Scalia articulated this proposition clearly, when he explained the purpose of the Amendment "is to preserve that degree of respect for the privacy of persons and the inviolability of their property . . . ."[131] In *Minnesota v. Dickerson*,[132] the Supreme Court reviewed the frisk of an individual for contraband during a *Terry*-stop.[133] The majority found that the search went beyond the bounds marked by *Terry* because the officer did more than pat-down the suspect. He also detected a small lump in the suspect's pocket and squeezed and manipulated it to determine its identity, despite the fact he knew it was not a weapon.[134] In his

128. *Id.* at 43 (noting that "[t]he detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs").

129. *Id.* at 44.

130. U.S. CONST. amend IV.

131. Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring).

132. 508 U.S. 366 (1993).

133. *Id.* at 379.

134. *Id.* at 369.

concurrence, Justice Scalia emphasized the inviolability of individual privacy in one's person and belongings when there is no cause for arrest.[135] From this perspective, the doctrine operates on the presumption that individuals have a fundamental right to keep secrets and that right must be protected.

The alternative perspective is that the Fourth Amendment operates as a set of restrictions for law enforcement, rather than as an idealistic preservation of individual rights. Proponents of this proposition explain that the doctrine merely limits the intrusion to specific modes of investigatory activity. "What the Fourth Amendment protects[,]" the Supreme Court has said, "is the security a man relies upon when he places himself or his property within a constitutionally protected area . . . from *unwarranted* governmental intrusion."[136] Importantly, this is not an absolute protection of the individual. Rather, it is an observation that "the police must obtain a warrant when they intend to seize an object outside the scope of [any other preapproved means, such as] a valid search incident to arrest . . . ."[137]

Drug checkpoints exemplify the latter principle and show that courts are not concerned with the fundamental right to individual privacy. Drug interdiction by law enforcement is permissible so long as it is reasonable. A solution is "reasonable" if the gravity of the public interest served outweighs the intrusion on individual liberties.[138]

In *Edmond*, the Supreme Court determined that suspicionless narcotics checkpoints were not a "reasonable" solution because, despite the weighty public interest, they unduly infringed on the individual's rights.[139] The Eighth Circuit initially placed similar weight on an individual's right to privacy, as the most vocal opponent of ruse drug checkpoints.[140] Even though they articulated the same rhetoric, neither the *Edmond* Court nor the Eighth Circuit was concerned with the purity of individual privacy. The Supreme Court did not say that individuals have an absolute right to secrecy in the information at stake, and, in fact, it could not articulate such a rule. On various occasions, the Court has given very limited privacy protection (if any) to individuals engaged in drug trading[141] or engaged in operating a vehi-

135. *Id.* at 381 (Scalia, J. concurring).
136. Hoffa v. United States, 385 U.S. 293, 301 (1966) (emphasis added).
137. Coolidge v. New Hampshire, 403 U.S. 443, 484 (1971).
138. Brown v. Texas, 443 U.S. 47, 50 (1979) (citation omitted).
139. City of Indianapolis v. Edmond, 531 U.S. 32, 43–44 (2000).
140. United States v. Yousif, 308 F.3d 820, 828 (8th Cir. 2002).
141. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124 (2000). The Court found that an individual could be seized for avoiding a police encounter because of the presence of

cle.[142] Thus, the Court should have said that such checkpoints were not reasonable because they *overly* infringed on the individual.

In disapproving suspicionless checkpoints and ruse drug checkpoints as originally designed, courts carefully restricted law enforcement from using investigation tactics that were unduly intrusive—like those that stopped all traffic on a thoroughfare or that stopped all traffic that responded to the ruse sign without showing further individualized suspicion. Modified checkpoints that use traffic violations as a pretext for a stop and that remove the inevitability of the stop in response to the ruse drug checkpoint sign allow officers to achieve the same intrusions into individuals' privacy but with court approval. Rather than stopping every single car on a thoroughfare, only a select subset of motorists is stopped. Checkpoints are designed to eliminate a substantial portion of innocent travelers.[143] They are operated at a time of day, day of week, and place where the normal flow of traffic will not be disturbed.[144] Only those who take the ruse drug checkpoint exit *and* exhibit individually suspicious behavior are seized.[145] With these modifications, courts have approved the use of ruse drug checkpoints. In fact, it is this subsequent approval of ruse drug checkpoints that most obviously refutes any argument that the Fourth Amendment is concerned with a fundamental right to individual privacy. Ruse drug checkpoints still infringe on an individual's right to privacy. Yet, the difference between the modified checkpoints and their predecessors is they intrude on individual privacy *less* by forcing restrictions on the investigation tactics used by law enforcement. Thus, when using reasonable investigation tactics, law enforcement officers can constitutionally engage in the same intrusion on individual privacy.

other factors indicating that the individual was engaged in drug trafficking. Without these factors, the stop would not have been justified.

142. Carroll v. United States, 267 U.S. 132, 146 (1925) (holding that the "automobile exception" of the Fourth Amendment permits warrantless searches of vehicles because, inter alia, vehicles are presumed to have a lower expectation of privacy since they provide clear visibility of their contents through their windows and because their primary purpose is the transportation of people and not of the storage of personal property).

143. *See* United States v. Brugal, 209 F.3d 353, 361 (2000) (citing United States v. Sokolow, 490 U.S. 1, 7–11 (1989)).

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

145. *See supra* Part III.B.

Conclusion

In *City of Indianapolis v. Edmond*,[146] the Court prohibited the use of suspicionless narcotics checkpoints, yet reaffirmed the validity of traffic stops when officers believe that "criminal activity may be afoot."[147] Officers failed in their first attempt to manufacture the requisite quantum of individualized suspicion using ruse drug checkpoints. Early checkpoints were designed to stop all motorists who exited the freeway following the ruse drug point sign.[148] These seizures were unconstitutional because (1) they were justified by "after-the-fact" rationalizations,[149] and (2) they were self-contradictory, as law enforcement officers had to argue that each driver exhibited individualized suspicion but then "[stop] *all* those who exited the highway at the certain point."[150]

By modifying the design of their checkpoints, law enforcement officers have remedied the inadequacies of first generation ruse drug checkpoints, and these modified checkpoints have been approved by several different courts.[151] Officers now monitor the flow of traffic from above the off-ramp and the inevitability of the stop is removed. A driver may be seized for committing a traffic violation[152] and subjected to a canine sniff.[153] Or a driver may be seized for exhibiting suspicious behavior observed by an officer. When an officer's finding of suspicion based on these factors is given proper deference,[154] it outweighs the minimal intrusion of the stop. Thus, ruse drug checkpoints—as modified—pass constitutional muster where their predecessors did not.

The approval of modified checkpoints is a great achievement for law enforcement, and a telling revelation about the Fourth Amendment. At least in the context of drug interdiction, it means the Fourth Amendment stands as a restriction on law enforcement rather than a protection of fundamental individual rights. Modified ruse drug

146. 531 U.S. 32 (2000).
147. Terry v. Ohio, 392 U.S. 1, 30 (1968).
148. *See, e.g.*, *Mack*, 66 S.W. 3d at 707.
149. *Id.* at 720 (Stith, J., dissenting).
150. *Id.* at 714.
151. *See, e.g.*, United States v. Wright, 512 F.3d 466, 467 (8th Cir. 2008); United States v. Carpenter, 462 F.3d 981, 987 (8th Cir. 2006); United States v. Flynn, 309 F.3d 736, 738 (10th Cir. 2002).
152. United States v. Beck, 140 F.3d 1129, 1134 (8th Cir. 1998) (citing Pennsylvania v. Mimms, 434 U.S. 106 (1977)).
153. United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1999).
154. United States v. Lester, 148 F. Supp. 2d 597, 600 (D. Md. 2001) (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)).

checkpoints are not significantly less intrusive on individual privacy and there is not a significantly greater amount of individualized suspicion garnered in executing the stop.[155] Rather, the difference between permitted and prohibited is whether law enforcement has followed proper process in intruding on those rights.

155. *See supra* Part IV.