PER SE REASONABLE SUSPICION: POLICE AUTHORITY TO STOP THOSE WHO FLEE FROM ROAD CHECKPOINTS

SHAN PATEL

INTRODUCTION

Picture this scenario: It is closing time for bars and all the customers are forced to leave. Rather than calling a taxi, an intoxicated patron decides to take his chances and drive home. He exits the parking lot and turns onto the road to his house. Suddenly he sees traffic cones and flashing blue lights ahead—a sobriety checkpoint. Panic hits the driver with full force as he contemplates what to do. Then he launches into a plan of action. The driver makes an abrupt, but legal, U-turn using a driveway and reverses direction to avoid the checkpoint. He knows another way home that does not require passing through the checkpoint. A police officer sees his evasive action and pursues him. Should the officer be able to stop the driver as he attempts to flee? Would it make a difference if the intoxicated driver was actually smuggling illegal aliens or a convicted felon? What if he was a terrorist with a bomb in his car?

This scenario is not far-fetched; many drivers have sought to evade checkpoints.[1] Courts, however, have disagreed over whether law enforcement officials may stop the fleeing vehicles. This Note investigates the legal issues surrounding the evasion of police checkpoints and argues that the Supreme Court should adopt a bright-line rule that allows police to stop vehicles that attempt to evade checkpoints.[2]

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1. *See infra* notes 99–105 and accompanying text.

2. Such a rule instructs states on how to read the Fourth Amendment. Of course, states are free to reach different conclusions (that better protect individual liberties) based on their own constitutions.

In arguing for a bright-line rule, this Note considers three factors. First, it looks at the effect that permitting individuals to avoid checkpoints has on the rights of individuals who continue through the checkpoint. In essence, this involves a discussion of the justifications behind allowing checkpoints in the first instance. Second, it evaluates the rights of the fleeing motorists—namely, whether there is reasonable suspicion to stop them. Finally, it briefly addresses the benefits of a bright-line rule, both in furthering the essential purpose of the Fourth Amendment and in serving as a practical tool for law enforcement.

Part I introduces the legal background, including both the legal rationale for allowing checkpoints and whether reasonable suspicion applies in the flight context. Part II illustrates the differing conclusions courts have reached concerning whether vehicles can be stopped solely for evading a checkpoint. Part III argues in favor of per se reasonable suspicion for fleeing vehicles. The conclusion briefly discusses the policy benefits that this bright-line rule would create.

I. LEGAL BACKGROUND

A. The Fourth Amendment and the Reasonableness Standard

The Fourth Amendment of the Constitution protects individuals from unreasonable searches and seizures.[3] The Supreme Court has stated that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'"[4] Courts evaluate the reasonableness of a specific police practice by comparing the act's intrusion on the individual with the legitimate government interest it serves.[5] Generally, the government's interest is measured against an objective standard, such as probable cause or reasonable suspicion,

3. U.S. CONST. amend. IV. The Court has extended federal protection against unreasonable searches and seizures through the Due Process Clause of the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.").

4. Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)) (internal citation omitted).

5. *Id.* at 654.

which sets the bar for when intrusion on the individual is permissible.[6] As a result, "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing."[7] Such suspicion, however, is not an irreducible requirement of the Fourth Amendment,[8] and there are limited instances in which the general rule is not applied.[9] Vehicular checkpoints, for example, are held to a different standard.

1. *Stopping a Vehicle Is a Seizure and Hence Must Be Reasonable*. The Court has held that "whenever a police officer accosts an individual and restrains his freedom to [move] away, he has 'seized' that person."[10] By stopping a vehicle, an officer has effectively restrained the driver's ability to move freely, and thus such a stop is a seizure.[11] This is true even for limited stops in which an officer quickly checks a driver's identification and then allows the driver to depart.[12] Thus, even a brief stop, whether carried out at a checkpoint or by a roving patrol car, constitutes a seizure and therefore must be reasonable to meet constitutional scrutiny.[13] But checkpoint stops

6. *Id.* at 654–55.

7. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000).

8. United States v. Martinez-Fuerte, 428 U.S. 543, 560–61 (1976).

9. *Edmond*, 531 U.S. at 37. For example, the Court has upheld "suspicionless searches" when the search furthers "'special needs[] beyond the normal need for law enforcement'" and when the search is limited and has a valid administrative purpose. *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)). The "special needs" rationale has been used to justify drug testing programs. *See, e.g.*, *Vernonia*, 515 U.S. at 664–65 (holding a school's policy of drug testing all student athletes to be reasonable and constitutional); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (holding that a United States Customs Service policy of drug testing employees seeking certain positions was reasonable). Administrative searches often seek compliance with regulatory statutes. *See, e.g.*, New York v. Burger, 482 U.S. 691, 702 (1987) (upholding the search of a junkyard because it was a "closely regulated" business) (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978)); Camara v. Mun. Ct. of S.F., 387 U.S. 523, 538 (1967) (holding a health code constitutional if "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling").

10. Terry v. Ohio, 392 U.S. 1, 16 (1968).

11. *See Prouse*, 440 U.S. at 653 ("[S]topping an automobile and detaining its occupants constitute a 'seizure' . . . even though the purpose of the stop is limited and the resulting detention quite brief.").

12. *Id.*

13. *Id.* at 653–54; *see also Martinez-Fuerte*, 428 U.S. at 556 (holding that checkpoint stops are seizures).

differ from roving patrol stops.[14] A checkpoint seeks to stop all cars passing through a fixed point, but a roving stop is made at the discretion of a police officer who suspects that a specific car is violating a law. As a result, roving patrol stops are subject to a different reasonableness inquiry than checkpoint stops.[15]

2. *Reasonable Suspicion Required for Roving Patrol Stops*. The traditional roving patrol stop only passes constitutional muster if the officer had reasonable suspicion that "criminal activity [was] afoot."[16] This standard stems from the landmark 1968 decision in *Terry v. Ohio*[17] that upheld a police officer's right to stop and frisk a suspect even if the officer lacked probable cause to arrest the suspect.[18] In *Terry*, an officer observed two men repeatedly peering in a store window, which aroused his suspicion that they were casing the store.[19] The officer approached the suspects, identified himself as a police officer, and requested their names.[20] After the suspects mumbled a response, the officer patted down the exterior of their clothing and removed two illegally concealed weapons from their overcoats.[21] The trial court denied the defendants' motion to suppress the evidence, and the Supreme Court granted certiorari to determine if the officer obtained the evidence in violation of the defendants' Fourth Amendment right against unreasonable searches and seizures.[22]

The Court declared that the Fourth Amendment covers stopping and frisking suspects, even if they are not arrested, because they have

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14. Roving patrol stops are the traditional stops in which police officers turn on their lights (or make other signals) to pull over a vehicle. This Note uses the terms "roving patrol stop" and "discretionary stop" interchangeably.

15. *Compare infra* text accompanying notes 29–32, *with* text accompanying notes 56–61.

16. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) ("We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the original stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

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

18. *Id.* at 20.

19. *Id.* at 6.

20. *Id.* at 6–7.

21. *Id.* at 7.

22. *Id.* at 8.

been seized as soon as they are prevented from walking away.[23] But the Court clarified that probable cause was not needed to justify a stop that was based upon a patrol officer's contemporaneous observations.[24] Rather, the reasonableness of the stop must be determined by balancing the government's need for the seizure with the degree of its invasion.[25] Police officers need to cite "specific and articulable facts" that make an intrusion reasonable,[26] allowing for an objective determination of whether the facts would "warrant a man of reasonable caution" to believe that the action was justified.[27] The Court stated that reasonable suspicion of criminal activity legitimizes an initial stop, and if during that stop the officer becomes reasonably suspicious that the suspect is armed and dangerous, a frisk of the suspect's outer clothing is constitutional.[28]

Given that traffic stops, like pedestrian stops, are seizures,[29] they must be based upon probable cause or pass the objective reasonableness balancing test created in *Camara v. Municipal Court*[30] and applied in *Terry*.[31] Thus, in the absence of probable cause, officers on roving patrol need specific articulable facts, or inferences from such facts, that create suspicion of criminal activity.[32] In analyzing whether such suspicion existed, reviewing courts must look at all of the circumstances of a given case to determine whether an officer had a specific and objective basis for the discretionary stop.[33] Although it

23. *Id.* at 16.

24. *Id.* at 20.

25. *Id.* at 20–21.

26. *Id.* at 21.

27. *Id.* at 21–22 (internal quotations omitted).

28. *Id.* at 30. The Court applied the standard to the case at hand and decided that both the initial stop and subsequent frisk were justified. *Id.* at 28.

29. Delaware v. Prouse, 440 U.S. 648, 653 (1979).

30. Camara v. Mun. Ct. of S.F., 387 U.S. 523, 534–37 (1967).

31. *Prouse*, 440 U.S. at 654.

32. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); *see also* United States v. Cortez, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."). Warrantless searches need probable cause, which exists when the facts are such that a reasonable man would believe that a crime is in progress or that one has been committed. Draper v. United States, 358 U.S. 307, 313 (1959). The reasonable suspicion standard is different in that it deals with the *suspicion* of criminal activity, whereas probable cause requires the *belief* that such activity is occurring.

33. United States v. Arvizu, 534 U.S. 266, 273 (2002).

is an objective test, the expertise and training of the officer is relevant in evaluating reasonable suspicion.[34]

Even when the government has a strong interest in suspicionless roving patrol stops, the Supreme Court has refused to waive the articulable suspicion requirement. In 1975, for example, the Court refused to allow discretionary stops aimed at combating illegal immigration in *United States v. Brignoni-Ponce*.[35] In that case, officers stopped a vehicle because the passengers appeared to be Mexican and the vehicle was traveling north near a closed Border Patrol checkpoint in Southern California.[36] The Border Patrol based its argument for the stop's justification on a statute that allowed the Border Patrol to make suspicionless stops of vehicles within one hundred miles of the border.[37] In evaluating the constitutionality of the statute, the Court again employed a balancing test, weighing the interests of the government against the level of intrusion.[38] Despite finding that the interest in curbing illegal immigration was great and the brief detention only created a modest intrusion, the Court held that the roving stop was still unreasonable.[39]

The Court explained that smuggling activities, including human trafficking, generally give rise to specific grounds for identifying perpetrators, and hence, allowing officers to stop vehicles under a standard of reasonable suspicion would adequately protect the government's interest.[40] Second, the majority noted that there is a huge amount of legal traffic within one hundred miles of the two thousand-mile border.[41] Suspicionless roving patrols allow officers to use broad discretion to stop whomever they please and thus violate the central tenet of the Fourth Amendment.[42] In sum, although there is a legitimate government interest and minimal intrusion to the individual, suspicionless roving patrol stops are unreasonable due to issues with their effectiveness and the unfettered police discretion that they permit. Although the Court's holding was fatal to

34. *Id*.

35. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

36. *Id.* at 875.

37. *Id*. at 877.

38. *Id.* at 878.

39. *Id.* at 879–80, 882.

40. *Id.* at 883; *see also infra* Part I.B.2 (discussing the reasonable suspicion standard).

41. *Brignoni-Ponce*, 422 U.S. at 883.

42. *Id.* at 882; *see also supra* notes 3–9 and accompanying text (discussing the essential purpose of the Fourth Amendment).

suspicionless roving patrol stops in the interior of the country, such detentions sufficiently close to the border appear to be valid.[43]

Four years later, the Court once again ruled against suspicionless discretionary stops. In *Delaware v. Prouse*,[44] a police officer, merely because he was not preoccupied, stopped a vehicle to check the driver's license and registration.[45] In evaluating the permissibility of the stop, the Court again employed the Fourth Amendment reasonableness balancing test: balancing the state's interest in upholding the stop with the level of intrusion suffered by the individual.[46] The Court admitted that the government had a valid safety interest in ensuring that drivers and their vehicles had the requisite qualifications to be on the road.[47] But it also explained that the intrusion of the temporary seizure on the individual was great, because the stop could be inconvenient, waste time, and cause severe anxiety for the driver.[48]

To determine whether a legitimate government interest justified the intrusion, the Court looked at whether the discretionary stop was a "sufficiently productive mechanism" to further the government's interests.[49] In concluding that the stop was not productive, and thus unreasonable, the Court evaluated alternative mechanisms for enforcing vehicle safety regulations.[50] It explained that the best way to enforce vehicle safety regulations is to pull over vehicles that violated traffic laws.[51] There are countless legitimate vehicle stops every day at which officers routinely request the driver's license and registration.[52] Without empirical data showing the effectiveness of suspicionless stops, the Court believed that stopping observed violators is a more effective approach because a violator is more likely than a random law-abiding driver to lack a valid license or registration.[53] Thus, the marginal utility of the discretionary stops did not justify the intrusion

43. *Brignoni-Ponce*, 422 U.S. at 884. The implication here is that 100 miles from the border is not sufficiently close to the border to warrant suspicionless roving stops.

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

45. *Id.* at 650.

46. *Id.* at 654.

47. *Id.* at 658.

48. *Id.* at 657.

49. *Id*. at 659.

50. *Id.*

51. *Id*.

52. *Id*.

53. *Id*.

to the individual.[54] Furthermore, such stops allow unfettered discretion by officers to act on hunches and are counter to the Fourth Amendment's central aim—limiting the discretion of government officials to stop and search whomever they please.[55]

3. *Individualized Suspicion Not Needed for Fixed Road Checkpoints*. This Note has already mentioned that individualized suspicion is not an irreducible constitutional requirement of a legitimate stop.[56] Fixed road checkpoints are an exception to the traditional rule, in part because individuals do not have the same expectation of privacy in vehicles as they do in their residences.[57] Moreover, a routine checkpoint does not usually involve a search.[58] In general, courts evaluate fixed checkpoint stops by balancing the government's interest in the stop with the level of intrusion imposed on the individual.[59] This evaluation includes an inquiry into both the effectiveness of the practice (to see if it furthers the government's interests) and the extent to which police discretion is limited (to judge the level of intrusion on the individual).[60] In essence, if (1) the government has a permissible interest, (2) the checkpoint furthers that interest, and (3) the intrusion on the individual is slight, the checkpoint stop is valid even without individualized suspicion.[61]

The modern debate over the constitutionality of road checkpoints began as a result of the fight against illegal immigration. In *United States v. Martinez-Fuerte*,[62] the defendants challenged the constitutionality of permanent immigration checkpoints about sixty

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54. *Id*. at 659, 661.

55. *Id*. at 661; *see also supra* notes 3–9 and accompanying text (discussing the essential purpose of the Fourth Amendment).

56. *See supra* notes 8–9 and accompanying text.

57. United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976). This on its own, however, is not enough to defeat the need for articulable suspicion, because discretionary stops of vehicles are not immune from that requirement. That said, there are differences between roving patrol and checkpoint stops that alter the factors in the balancing test and allow checkpoint stops to forgo individualized suspicion. (Fixed checkpoint stops, for example, stop everyone and thus lower the *relative* intrusion on the driver.) *See infra* Part III.B.

58. *Martinez-Fuerte*, 428 U.S. at 561.

59. *Prouse*, 440 U.S. at 654.

60. *See infra* notes 61–97 and accompanying text (illustrating the balancing test in action).

61. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 452, 455 (1990) (outlining the reasonableness test that governs road checkpoints). *But cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (refusing to suspend the requirement of individualized suspicion when the checkpoint is used "for the ordinary enterprise of investigating crimes").

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

miles north of the Mexican border.[63] Applying its traditional balancing test, the Court's initial findings were similar to its evaluation of the suspicionless roving patrol stops in *Brignoni-Ponce*.[64] The *Martinez-Fuerte* Court found that the government's interest in limiting illegal immigration was great and that it had great difficulty policing the two thousand-mile U.S.-Mexican border.[65] In terms of the Fourth Amendment rights of the vehicles' occupants, the intrusion was limited, given that the stop was very brief—often consisting of only one or two questions.[66] However, even with these findings, the *Brignoni-Ponce* Court had found the searches unreasonable, due to the effectiveness of the reasonable suspicion standard and the disdain for unfettered police discretion in roving patrols.[67] The *Martinez-Fuerte* Court, in contrast, decided that permanent interior immigration checkpoints *were* reasonable due to their effectiveness (vis-à-vis a reasonable suspicion standard) and the limits they imposed on the discretion of government authorities.[68]

Regarding the effectiveness of suspicionless checkpoints, the Court explained that they were vital tools for curbing illegal immigration:

> [Such a] program . . . is necessary because the flow of illegal aliens cannot be controlled effectively at the border . . . . These checkpoints are located on important highways; in their absence such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens . . . . And the prospect of such inquiries forces others onto less efficient roads that are less heavily traveled, slowing their movement and making them more vulnerable to detection by roving patrols . . . . A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car . . . [and] such a requirement would largely eliminate any deterrent to . . . smuggling operations . . . [on main] highways . . . .[69]

63. *Id.* at 545, 549, 550.
64. *See supra* notes 35–43 and accompanying text.
65. *Martinez-Fuerte*, 428 U.S. at 557.
66. *Id.* at 557–58.
67. United States v. Brignoni-Ponce, 422 U.S. 873, 882–83 (1975).
68. *Martinez-Fuerte*, 428 U.S. at 557–59.
69. *Id.* at 556–57.

Next, the Court explained that checkpoints grant less discretion to law enforcement officers.[70] Unlike suspicionless roving patrol stops, routine checkpoints do not greatly interfere with legitimate traffic, because motorists can always ascertain the location of fixed checkpoints.[71] In addition, permissible checkpoints should treat all drivers objectively:

> The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective [policy] . . . . [S]uch officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.[72]

Note that in evaluating whether a search adequately limited law enforcement discretion, the Court looked at whether drivers would likely be caught off guard by the stop or fear that it is illegitimate.[73]

Sobriety checkpoints have also been deemed permissible under the Fourth Amendment. In *Michigan Department of State Police v. Sitz*,[74] state citizens challenged the constitutionality of Michigan's sobriety checkpoint program.[75] In upholding the program, the Court again employed the reasonableness balancing test by balancing the government's interest in eliminating drunk driving against the intrusiveness of the stop, which it divided into objective and subjective intrusions.[76]

Regarding the first prong of the balancing test, the *Sitz* majority found that the government has a clear interest in reducing the extensive damage and fatalities caused by drunk driving.[77] To succeed, however, the checkpoint has to promote that public interest effectively.[78] In evaluating effectiveness, the Court clarified that elected officials, as opposed to courts, should determine which police

70. *Id.*
71. *Id.* at 559.
72. *Id.*
73. *Id.* at 558–59.
74. Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
75. *Id.* at 447–48.
76. *Id.* at 452, 455.
77. *Id.* at 451.
78. *Id.* at 453–54.

techniques should be used to combat a public threat.[79] The Michigan policy passed this effectiveness test because the legislative determination to set up the checkpoint was backed by empirical evidence showing that the proportion of arrests for drunk driving to total drivers passing through the checkpoint was between 1 and 1.5 percent.[80]

In terms of the second prong of the balancing test, the Court reiterated that the extremely brief nature of a checkpoint stop is a slight intrusion to the individual.[81] Calling this the objective intrusion, the majority then proceeded to investigate the subjective intrusion, which dealt with the fear and surprise experienced by law-abiding drivers approaching the checkpoint.[82] The Court described this subjective intrusion as minimal, noting that stopped motorists can see clear evidence both of the officials' authority and that others have been stopped.[83] In addition, a checkpoint's location is determined by guidelines that limit the discretion of individual officers.[84]

In 2004, the Supreme Court upheld the constitutionality of a third type of road checkpoint: information-seeking stops that solicit information regarding past crimes.[85] Local police in Illinois set up a highway roadblock to distribute flyers about a hit-and-run that occurred a week earlier and to request public help in locating the culprit.[86] A motorist who was arrested for driving while intoxicated, in part due to the presence of the checkpoint, challenged its constitutionality.[87] The Court held that the checkpoint met each part of the reasonableness balancing test and thus was permissible.[88] First, there was grave public concern as a result of the crime, and the police

79. *Id.* at 454.

80. *Id.* at 455.

81. *Id.* at 451.

82. *Id.* at 452. Splitting the intrusion component into "objective" and "subjective" components is akin to previous evaluations that first look at the actual intrusion created by a stop and then evaluate the level of discretion given to officers. If the discretion is too broad, the checkpoint is invalid in part because it can lead to arbitrary detentions and can scare and surprise unsuspecting motorists. *See, e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (providing that broad discretion given to officials invalidates even brief seizures).

83. *Sitz*, 496 U.S at 453.

84. *Id.*

85. Illinois v. Lidster, 540 U.S. 419, 422–23 (2004).

86. *Id.* at 422.

87. *Id.*

88. *Id.* at 427.

needed help in finding the perpetrator.[89] In addition, the timing of the checkpoint effectively furthered the government's interest; given that the roadblock was set up in the vicinity of the accident and at around the same time of day that the accident had occurred, it was reasonable to believe that motorists in the area might have relevant information.[90] Second, the objective intrusion was minimal both because the stop was brief and because the subjective intrusion was equally limited given that the police stopped everyone and hence there was no cause for anxiety among those detained.[91]

Vehicle document checkpoints are also likely constitutional, though the Court has not directly addressed such checkpoints. The *Prouse* Court stated that document checkpoints could be constitutional if they somehow limited the discretion of law enforcement officials.[92] Specifically, the majority authorized the questioning of all vehicles at a checkpoint as an alternative.[93] A document checkpoint of this type was implicitly upheld in a later case, when narcotics found in plain view during a driver's license checkpoint were deemed admissible in court.[94] In addition, the *Prouse* majority clarified that truck weigh stations and inspection checkpoints are legitimate even though they subject trucks to greater inspection than other vehicles.[95]

Finally, in dicta, the Court has implicitly authorized the use of road checkpoints in various areas in which the government's interest in the stop is very great. These include airports, government buildings, and military bases—places "where the need for such [searches] to ensure public safety can be particularly acute."[96] Moreover, the "Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent

89. *Id.*

90. *Id.*

91. *Id.*

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

93. *Id.*

94. Texas v. Brown, 460 U.S. 730, 733, 739 (1983) (plurality opinion).

95. *Prouse*, 440 U.S. at 663 n.26.

96. City of Indianapolis v. Edmond, 531 U.S. 32, 48 (2000); *see also* United States v. Green, 293 F.3d 855, 859 (5th Cir. 2002) ("[T]he protection of the nation's military installations from acts of domestic or international terrorism is a unique endeavor, . . . [and] vehicles pose a special risk" of delivering "car bombs.").

terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route."[97]

B. Evading Fixed Road Checkpoints and the Flight Doctrine

1. *Defining "Evasion" at Fixed Road Checkpoints*. It is difficult to ascertain what exactly constitutes evasion of a fixed checkpoint. After all, the act of evasion is heavily intertwined with the subjective intent of the actor, and, as a result, it is nearly impossible to prove conclusively that someone intended to avoid the police unless that person confesses. Still, police can rely on common sense and circumstantial evidence to determine when there is reasonable suspicion that a driver sought to evade a checkpoint.[98]

Police have considered a broad range of driver activity to be indicative of evasive behavior. Clear-cut examples of evasive behavior include drivers who make U-turns or reverse direction at the sight of a checkpoint.[99] For example, a vehicle that suddenly stops and backs away from a checkpoint is characteristic of evasion.[100] Similarly,

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97. *Edmond*, 531 U.S. at 44. Although the Supreme Court has generally upheld road checkpoints as reasonable stops, it found a highway checkpoint unconstitutional when its primary goal was arresting motorists in possession of illicit narcotics. *Id.* at 34, 48. In *Edmond*, the Court distinguished a narcotics checkpoint from other permissible checkpoints because the drug checkpoint's purpose was to advance "the general interest in crime control." *Id.* at 44. Immigration and sobriety checkpoints, in contrast, have the more specific purposes of "policing the border" and "ensuring roadway safety," respectively. *Id.* at 41. The Court explained that the immigration concerns specific to the border and "vehicle-bound threat" of drunk drivers justified roadblocks in *Martinez-Fuerte* and *Sitz*. *Id.* at 43. Similarly, searches in airports and government buildings are legitimate due to the "acute" threat present in those locales. *Id*. at 47–48. The government's general interest in controlling crime, however, is not specific enough to warrant a suspension of individualized suspicion. *Id.* at 43–44. Allowing roadblocks for "general crime control" would give law enforcement officials the power to utilize suspicionless checkpoints for nearly any purpose, because there is always some "possibility that interrogation and inspection may reveal" evidence that an individual has committed a crime. *Id.*

98. In fact, police always rely on such observations when making articulable suspicion judgments. For example, they have the right to stop a criminal fleeing from a high-crime area without conclusive knowledge that the individual committed a crime. *See* Illinois v. Wardlow, 528 U.S. 119, 125 (2000); *see also infra* notes 113–26 and accompanying text.

99. The cases cited immediately *infra* at notes 100–05 are for illustrative purposes only. That is, they provide examples of what police (at the local level) believed was evasive behavior. In many cases, the courts overturned those decisions, either finding the behavior not clearly evasive or finding an absence of reasonable suspicion to pull over a vehicle that avoided a checkpoint. The latter finding is the crux of the issue that drives this Note. For further discussion of how these cases were resolved, see *infra* Part II.B.

100. *See* State v. McCleery, 560 N.W.2d 789, 791 (Neb. 1997) (motorist stopped for putting his car in reverse and backing away from a checkpoint).

a driver who uses a driveway or parking lot to make a U-turn also creates suspicion of evasive intent.[101] In addition, police in Virginia stopped a driver who drove through the parking lot of a gas station at the corner of an intersection where a checkpoint had been set up, under the rationale that he was trying to avoid the fixed stop.[102] Police at checkpoints have also stopped vehicles for less obvious evasive behavior. Drivers have been questioned when they pull into driveways or parking lots near checkpoints and simply park their cars.[103] In fact, in certain states, vehicles that make legal turns onto other roads in sight of a checkpoint can be stopped under the suspicion that they purposely made the turns to avoid the police.[104] Of course, police often use a combination of these evasive characteristics to conclude that a driver is attempting to avoid a checkpoint.[105]

Given that identifying evasive behavior remains a subjective task, it is difficult to create an objective definition of what constitutes such behavior. Unsurprisingly then, courts have differed on what constitutes evading a checkpoint.[106] Presumably, legal U-turns within sight of a checkpoint raise reasonable suspicion of evasive behavior.

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101. *See* Coffman v. State, 759 S.W.2d 573, 574 (Ark. Ct. App. 1988) (vehicle stopped for pulling into and out of a driveway to make a U-turn); State v. Binion, 900 S.W.2d 702, 704 (Tenn. Crim. App. 1994) (driver stopped for making a U-turn through a store's parking lot); Lovelace v. Commonwealth, 554 S.E.2d 688, 691 (Va. Ct. App. 2001) (vehicle stopped for making a U-turn through a semicircular driveway); *see also infra* notes 148–149 and accompanying text.

102. Bass v. Commonwealth, 525 S.E.2d 921, 922 (Va. 2000).

103. *See* Smith v. State, 515 So. 2d 149, 151 (Ala. Crim. App. 1987) (vehicle detained for making a quick turn into a driveway); State v. D'Angelo, 605 A.2d 68, 71 (Me. 1992) (vehicle detained for turning into a driveway that an officer did not believe was the driver's); People v. Chaffee, 590 N.Y.S.2d 625, 626 (App. Div. 1992) (vehicle stopped after it turned into a motel parking lot).

104. *See* State v. Foreman, 527 S.E.2d 921, 924 (N.C. 2000) (holding that a vehicle that makes a legal turn onto another road within sight of a checkpoint can be stopped by the police). It is interesting to note that in this case, an officer had actually been instructed to patrol secondary streets to ensure that vehicles did not try to make legal turns onto them. *Id.* at 922; *see also* Steinbeck v. Commonwealth, 862 S.W.2d 912, 912 (Ky. Ct. App. 1993) (vehicle stopped for making a legal turn onto an unpaved road seventy-five to one hundred yards from a checkpoint).

105. *See, e.g.*, State v. Thill, 474 N.W.2d 86, 86 (S.D. 1991) (police stopped a southbound motorist who made a U-turn prior to a checkpoint and then utilized side streets to continue back in a southern direction). Here, the driver did more than simply make a U-turn—in essence, he made two U-turns to circumvent the checkpoint. *Id.*; *see also* United States v. Arvizu, 534 U.S. 266, 269–70 (2002) (vehicle stopped due to a number of suspicious circumstances, one of which was the fact that it was on a road often used by smugglers to circumvent a fixed checkpoint).

106. *See generally infra* Part II.A.

Though many other behaviors may indicate attempted evasion, the debate over which behaviors raise reasonable suspicions remains outside the scope of this Note, given that much litigation revolves around U-turns. In short, this Note seeks to determine how police should respond to evasion regardless of its definition.[107]

2. *The Flight Doctrine and Reasonable Suspicion*. The inquiry at the heart of whether it is constitutionally permissible to stop a car that evades a road checkpoint is whether the driver's actions create reasonable suspicion of criminal activity. These circumstances are analogous to an individual who flees at the mere sight of police. In such cases, courts have generally found that unprovoked flight can be one factor, but not the only one, in justifying a stop.[108]

In *Florida v. Royer*,[109] the Supreme Court stated that when an officer approaches an individual and seeks voluntary responses to questions, the individual is not obligated to answer those questions.[110] In fact, the person may ignore the questions and walk away.[111] In a later case, the Court clarified that police need more than a mere

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107. Because the issue of this Note is framed around otherwise "legal" evasive action upon approaching a checkpoint, it is vital to emphasize that such action exists. On one end of the spectrum is legal vehicular action that is so far removed from the checkpoint that it cannot realistically be called evasive. For example, an automobile that makes a legal turn onto another road a mile from a checkpoint hardly creates reasonable suspicion that it was evading the checkpoint. At the other end of the spectrum are blatantly illegal U-turns (for example, over a median) immediately in front of a checkpoint. Obviously, an illegal traffic maneuver to avoid a checkpoint is irrelevant for this analysis, because such vehicles can be stopped for having committed a traffic offense. *See, e.g.*, ESPN.com News Services, *Ex-Duke Star Redick Charged With Drunken Driving*, June 14, 2006, http://sports.espn.go.com/nba/draft2006/news/story?id=2482061 (last visited Mar. 24, 2007) (discussing a college basketball star's illegal U-turn prior to a sobriety checkpoint). Significant middle ground exists between these extremes (for example, legal U-turns), and those are the circumstances this Note seeks to address. It is unlikely that police will render the issue moot by simply erecting roadblocks in areas where no legal U-turn or turn onto another road can be made. First, this would essentially limit checkpoints to highways and severely limit their effectiveness. They would be less random, and well-informed drivers could easily avoid them by simply traveling on local roads. Moreover, a number of routes, which are commonly used for drunk driving or smuggling, would be untouched by checkpoint deterrence because they are local roads. Second, the numerous court cases that deal with the legitimacy of stopping individuals who take legal actions to avoid checkpoints indicate that this is far from a dead issue. *See supra* notes 100–105 and accompanying text.

108. *See* Jeffrey F. Ghent, Annotation, *Search and Seizure: "Furtive" Movement or Gesture As Justifying Police Search*, 45 A.L.R.3d 581, 3–7 (2005) (referencing numerous authorities regarding the role of flight, among other furtive gestures, in creating reasonable suspicion).

109. Florida v. Royer, 460 U.S. 491 (1983).

110. *Id.* at 497–98.

111. *Id.*

refusal to cooperate to justify detention.[112] Nevertheless, there is a significant difference between refusing to answer an officer's questions and immediately fleeing when an officer comes into view. Acknowledging this distinction, the Court specifically examined the question of whether flight can give rise to reasonable suspicion in *Illinois v. Wardlow*.[113]

In *Wardlow*, police were patrolling a section of Chicago known for significant drug trafficking when the defendant, Wardlow, saw the officers and fled.[114] The police pursued and stopped Wardlow, and during a protective pat-down they discovered a concealed handgun.[115] In determining that reasonable suspicion supported the stop, the Court distinguished these circumstances from *Royer* and its progeny:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning.[116]

The Court stated that nervous and evasive behavior can contribute to a finding of reasonable suspicion.[117] In addition, it explained that "[h]eadlong flight—wherever it occurs—is the consummate act of evasion: [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[118]

Reasonable suspicion was not justified in this case solely because of headlong flight.[119] The location's characteristics, specifically those that made it a high-crime area, were also taken into account.[120] Thus, reasonable suspicion was justified in this case due to both Wardlow fleeing at the sight of police and the location being a high-crime area.[121] The Court refused to establish a per se rule that fleeing the police, without more, automatically gives rise to articulable

112. Florida v. Bostick, 501 U.S. 429, 437 (1991).
113. Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000).
114. *Id*. at 121–22.
115. *Id.*
116. *Id.* at 125.
117. *Id.* at 124.
118. *Id*.
119. *Id.*
120. *Id.*
121. *Id.*

suspicion.[122] But the Court also rejected the opposite per se rule—that a *Terry* stop can never be justified solely because a suspect fled at the sight of police.[123]

By not providing a bright-line rule, the Court in *Wardlow* failed to clarify the exact importance of fleeing in a reasonable suspicion analysis and instead opted for a case-by-case analysis that evaluates all of the circumstances.[124] The Court, however, made three important points regarding when fleeing gives rise to reasonable suspicion. First, it reiterated that evasive behavior such as fleeing from police is one factor to be considered in evaluating whether a stop is warranted.[125] Second, it held that articulable suspicion was created when an individual fled from police in a high-crime area.[126] Third, it stated that the mere fact that an individual could have purely innocent reasons for appearing to flee police was not enough to negate reasonable suspicion.[127] Regarding this third point, the Court stated that even in *Terry* the suspects who cased the store committed no unlawful act and could have had innocent explanations for their behavior.[128] But that did not invalidate the stop:

> In allowing . . . detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.[129]

Despite this holding, the specific circumstances in which flight from police will justify reasonable suspicion are unclear (with the exception of flight from a high-crime area). As a result, the circuit courts and state courts remain split on whether unprovoked flight alone warrants

122. *Id.* at 126 (Stevens, J., concurring in part and dissenting in part).
123. *Id.*
124. *Id.* at 126–27.
125. *Id.* at 124.
126. *Id.*
127. *Id.* at 125.
128. *Id.*
129. *Id.* at 126.

an investigatory stop.[130] This difference of opinion has also manifested itself in Supreme Court opinions.[131]

II. OPINIONS DIFFER AS TO WHETHER AVOIDING A CHECKPOINT GIVES RISE TO A REASONABLE SUSPICION

Courts have differed over whether avoiding a checkpoint grants officers per se reasonable suspicion to stop a motorist. Although several state courts have failed to find per se suspicion, a few have stated otherwise. Part of this uncertainty stems from the Supreme Court's silence on the issue.

A. Supreme Court Precedent

The Supreme Court has never directly addressed the issue of whether attempting to evade a road checkpoint creates a reasonable suspicion that criminal activity is afoot.[132] The Court tangentially referenced the issue in *United States v. Arvizu*.[133] In that case, a roving Border Patrol agent stopped a minivan north of the Mexican border because of its numerous suspicious characteristics, including its presence on a road that smugglers used to circumvent a fixed road checkpoint.[134] In upholding the constitutionality of the stop, the Court

130. *Compare* United States v. Jackson, 741 F.2d 223, 224 (8th Cir. 1984) (holding a *Terry* stop constitutional when it was based on a suspect fleeing from police and yelling, "It's the police, man, run"), *and* United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977) (holding that flight from a lawful authority gives rise to reasonable suspicion of criminal activity), *and* Platt v. State, 589 N.E.2d 222, 226–27 (Ind. 1992) (holding that flight at the sight of police is suspicious and authorizes an investigatory stop), *and* State v. Anderson, 454 N.W.2d 763, 767 (Wis. 1990) (holding that flight in a car at the sight of police was sufficient to warrant a *Terry* stop), *with* People v. Wilson, 784 P.2d 325, 326–27 (Colo. 1989) (deciding that the act of running in the opposite direction of companions at the sight of police did not give the officers an articulable suspicion of criminal activity), *and* State v. Hicks, 488 N.W.2d 359, 366 (Neb. 1992) (holding that a seizure is not justified when the cause of stop is based solely on the defendant's effort to elude the police), *and* State v. Tucker, 642 A.2d 401, 408 (N.J. 1994) (holding that the defendant's flight at the sight of police was not enough to justify his seizure).

131. *See* Michigan v. Chesternut, 486 U.S. 567, 576 (1988) (Kennedy and Scalia, JJ., concurring) ("[T]he evidence should have been admitted, for respondent's unprovoked flight gave the police ample cause to stop him . . . . [But to admit the evidence, t]he Court instead concentrates on the significance of the chase.").

132. The Court upheld the conviction of a driver who was arrested after he drove *through* a checkpoint without stopping, but ignoring the request of law enforcement officials to stop raises different concerns than avoiding the officers altogether. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 448, 455 (1990); *see also* State v. Mitchell, 592 S.E.2d 543, 544, 546–47 (2004) (upholding the conviction of a driver who drove through a checkpoint without stopping).

133. United States v. Arvizu, 534 U.S. 266, 273 (2002).

134. *Id.* at 269–70.

stated that, when evaluating reasonable suspicion, courts must look at all of the circumstances to ensure that the officer had a specific objective basis for suspecting criminal activity.[135] In looking at the circumstances of the stop, location may prove determinative.[136] For example, "failure to acknowledge a sighted law enforcement officer might well be unremarkable in one [place] (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona)."[137] The Court cited the commonsense inference that the driver was avoiding the checkpoint as one of the circumstances that contributed to the reasonable suspicion of illegal activity.[138] Hence, although it did not address whether the inference that a driver was avoiding a checkpoint would independently give rise to reasonable suspicion, the Court found such furtive action deserving of consideration in a totality of the circumstances analysis.[139]

B. State Split

Although there is no disagreement that committing a traffic violation to elude a road checkpoint creates cause to stop the vehicle,[140] there is significant disagreement among lower courts as to whether evading a checkpoint without breaking any traffic laws creates independent reasonable suspicion of criminal activity.

A number of jurisdictions have held that avoiding or evading a checkpoint is per se suspicious and thus warrants a stop. The North Carolina Supreme Court, for example, explained that "the purpose of any checkpoint . . . would be defeated if drivers had the option to 'legally avoid,' ignore or circumvent [a] checkpoint."[141] Thus, the court found reasonable suspicion when a vehicle made an abrupt turn

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135. *Id.* at 273.

136. *Id.* at 275–76.

137. *Id.* at 276.

138. *Id.* at 277.

139. *Id.* The Court also reiterated the *Wardlow* conclusion that a "determination [of] reasonable suspicion . . . need not rule out the possibility of innocent conduct." *Id.*

140. *See, e.g.*, United States v. Scheetz, 293 F.3d 175, 182–83 (4th Cir. 2002) (holding that a stop was justified due to an illegal U-turn made by a motorist); United States v. Jones, 298 F. Supp. 2d 35, 38 (D.D.C. 2003) (finding probable cause when a defendant violated traffic laws in attempting to back away from a checkpoint); *see also* Commonwealth v. Frombach, 617 A.2d 15, 17, 20 (Pa. Super. Ct. 1992) (finding reasonable suspicion that a motorist was violating the Vehicle Code when the driver made an abrupt turn without signaling prior to reaching a checkpoint).

141. State v. Foreman, 527 S.E.2d 921, 924 (N.C. 2000).

after passing a sign advertising an approaching sobriety checkpoint.[142] The Mississippi Supreme Court ruled that pulling into a driveway immediately before a checkpoint is an act of evasion that warrants an investigatory stop.[143] An Alabama court justified a *Terry* stop under a similar rationale when a vehicle quickly turned into a driveway after coming into view of a roadblock.[144] In addition, an Arkansas court upheld the stop of a vehicle that made a U-turn through a driveway as it approached a checkpoint, even though the arresting officers admitted that the stop was based only on the vehicle's apparent attempt to avoid the checkpoint and not any criminal activity.[145]

The majority of courts, however, have refused to adopt a bright-line rule that avoiding a checkpoint automatically gives rise to reasonable suspicion of criminal activity. In these jurisdictions, avoidance is simply viewed as one factor in determining the existence of reasonable suspicion.

Some courts employing this approach have concluded that stops of motorists who avoid checkpoints are justified as long as other factors contribute to the "totality" of the suspicion.[146] For example, a Kentucky court found reasonable suspicion based on a vehicle's evasive turn onto an unpaved road, the investigating officer's prior experience, and the time of day.[147] The Court of Appeals of Virginia came to a similar conclusion when a vehicle briefly paused as it approached a checkpoint and then turned into a driveway in an attempt to make a U-turn.[148] In addition, some jurisdictions have justified stops of vehicles that make U-turns prior to checkpoints, as long as the training and experience of the specific officers involved

142. *Id.* at 922–24.

143. Boches v. State, 506 So. 2d 254, 256, 264 (Miss. 1987); *see also* Boyd v. State, 751 So. 2d 1050, 1051–52 (Miss. Ct. App. 1998) (finding reasonable suspicion to pull over a vehicle that had made a legal turn to avoid a roadblock).

144. Smith v. State, 515 So. 2d 149, 151–52 (Ala. Crim. App. 1987).

145. Coffman v. State, 759 S.W.2d 573, 574–75 (Ark. Ct. App. 1988).

146. Generally, these courts have implicitly, not explicitly, rejected the premise that avoidance alone causes reasonable suspicion. *See infra* notes 147–149, 151 and accompanying text.

147. Steinbeck v. Commonwealth, 862 S.W.2d 912, 912, 914 (Ky. Ct. App. 1993).

148. Lovelace v. Commonwealth, 554 S.E.2d 688, 691 (Va. Ct. App. 2001); *see also* State v. D'Angelo, 605 A.2d 68, 71 (Me. 1992) (finding reasonable suspicion when suspects pulled into driveway seventy-five yards before a checkpoint and the officer had "reason to believe that the vehicle did not belong there"); People v. Chaffee, 590 N.Y.S.2d 625, 626–27 (App. Div. 1992) (finding reasonable suspicion when a car stopped short of checkpoint, pulled into a motel parking lot, and drove around without parking).

convince them that the U-turns are suspicious.[149] Drawing an interesting parallel to *Wardlow*,[150] a Pennsylvania appellate court used this logic to justify the stop of a vehicle that sought to avoid a checkpoint in a "'well-known' drug trafficking area."[151]

A number of jurisdictions have explicitly concluded that a legal traffic maneuver that results in a motorist avoiding a checkpoint does not, on its own, constitute reasonable suspicion.[152] The Pennsylvania Supreme Court stated that "there is no requirement that a driver go through a roadblock[, and thus f]ailing to go through the roadblock in and of itself . . . provides no basis for police intervention."[153] In explaining its rationale for a similar conclusion, the Utah Court of Appeals explained that the act of avoiding a checkpoint "merely demonstrates a desire to avoid police confrontation . . . and at best only gives rise to a *hunch* that criminal activity may be afoot."[154] Along these lines, the Supreme Court of Virginia determined that circumventing a checkpoint by legally driving through the parking lot of a gas station did not give rise to reasonable suspicion because stopping such a vehicle would only be based on a hunch.[155] Similarly, an Ohio court found that legal turns made by vehicles approaching checkpoints do not suffice to create the individualized suspicion necessary for a stop.[156] Some states, such as Pennsylvania, Maine, Delaware, Utah, and Oregon have held that legal U-turns made prior to checkpoints also do not give rise to the level of suspicion needed

149. Snyder v. State, 538 N.E.2d 961, 963, 966 (Ind. Ct. App. 1989); Stroud v. Commonwealth, 370 S.E.2d 721, 722–23 (Va. Ct. App. 1988); *see also* State v. Thill, 474 N.W.2d 86, 86, 88 (S.D. 1991) (finding reasonable suspicion when a southbound motorist made a U-turn prior to a checkpoint and then utilized side streets to continue back in a southern direction).

150. *See supra* note 113–123 and accompanying text.

151. Commonwealth v. Metz, 602 A.2d 1328, 1335 (Pa. Super. Ct. 1992). Although the *Metz* court explicitly refused to adopt a per se rule, *id.*, its justification (and justifications based solely on the "training and experience" of officers) amounts to a per se rule, because all officers will likely claim that their training or experience caused them to be suspicious of a vehicle evading a checkpoint. In fact, on an intuitive level, most adults likely could cite their "life experience" in concluding that people who avoid checkpoints have a potentially unlawful reasons for doing so.

152. *See infra* notes 153–159 and accompanying text.

153. Commonwealth v. Scavello, 734 A.2d 386, 388 (Pa. 1999) (citation omitted).

154. State v. Talbot, 792 P.2d 489, 495 (Utah Ct. App. 1990) (emphasis added).

155. Bass v. Commonwealth, 525 S.E.2d 921, 922–23, 925 (Va. 2000); *see also* Jorgensen v. State, 428 S.E.2d 440, 441 (Ga. Ct. App. 1993) (holding that an officer's "intuition" that a driver was avoiding a checkpoint by pulling into an apartment complex in which he did not live did not justify the stop); State v. Binion, 900 S.W.2d 702, 704, 706 (Tenn. Crim. App. 1994) (holding no grounds existed to stop a motorist who made a U-turn through the parking lot of a store).

156. State v. Bryson, 755 N.E.2d 964, 968–69 (Ohio Ct. App. 2001).

for an investigatory stop.[157] The Nebraska Supreme Court went one step further by invalidating the *Terry* stop of a motorist who, upon seeing a sobriety checkpoint, put her car in reverse and backed into a closed grocery store's parking lot.[158] The court explained that because she was not cited for any traffic violations, the driver had been pulled over solely due to her avoidance of the checkpoint, and thus the officers lacked adequate suspicion to justify the seizure.[159] Finally, the Florida Highway Patrol has put out a police manual that explicitly instructs officers that a driver's effort to avoid a checkpoint is not enough to warrant a stop absent other suspicious circumstances.[160]

III. JUSTIFICATIONS FOR CREATING A BRIGHT-LINE RULE THAT REASONABLE SUSPICION EXISTS WHEN MOTORISTS EVADE ROAD CHECKPOINTS

A bright-line rule that a vehicle that flees from a roadblock necessarily arouses reasonable suspicion would be constitutional and preferable to vaguer standards for three independent reasons. First, allowing drivers to legally turn around at checkpoints undermines the constitutional justification behind the checkpoints. Second, road checkpoint evasions involve flight from police under circumstances that should suffice to create reasonable suspicion under existing flight doctrine. Finally, a bright-line rule will help limit police discretion and thus further the essential purpose of the Fourth Amendment.

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157. *See* Howard v. Voshell, 621 A.2d 804, 807 (Del. Super. Ct. 1992) (no reasonable suspicion when a U-turn was made legally before a checkpoint); State v. Powell, 591 A.2d 1306, 1307, 1308 (Me. 1991) (unreasonable for officer to believe that a U-turn made outside the perimeter of a checkpoint was made to avoid the checkpoint); Pooler v. Motor Vehicles Div. 746 P.2d 716, 718 (Or. Ct. App. 1987) (stop after a legal U-turn invalid); *Scavello*, 734 A.2d at 387–88 (legal U-turn executed to avoid a checkpoint does not create reasonable suspicion); *Talbot*, 792 P.2d at 495 (invalid stop of a vehicle that made a U-turn one-quarter of a mile before a checkpoint).

158. State v. McCleery, 560 N.W.2d 789, 791 (1997).

159. *Id.* at 793.

160. FLORIDA HIGHWAY PATROL, COMPREHENSIVE ROADSIDE SAFETY CHECKPOINTS, at 4 (Sept. 1, 1996), *available at* http://www.fhp.state.fl.us/html/Manuals/fh17-08.pdf; *see also* THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, THE USE OF SOBRIETY CHECKPOINTS FOR IMPAIRED DRIVING ENFORCEMENT, at A-3 (Nov. 1990), *available at* http://ntl.bts.gov/lib/5000/5900/5919/checkpt.pdf (stating a driver's intent to avoid a checkpoint does not justify an officer stopping that driver).

A. Allowing Motorists to Evade Checkpoints Undermines the Justifications Behind Checkpoints

Checkpoints are justified by employing a reasonableness balancing test that measures the government's interest in the seizures against the level of intrusion on the individual.[161] In evaluating these factors, courts look specifically at whether the checkpoint furthers the government's interest and whether the intrusion is limited with regard to the level of discretion employed by individual officers.[162] Allowing individuals to evade checkpoints both undermines the effectiveness of the checkpoints and increases the discretion of law enforcement officials. The following "effectiveness" and "discretionary" discussions relate to the constitutionality of the actual checkpoint, as opposed to the permissibility of stopping the fleeing vehicles. Thus, the evaluation focuses on the interests of the motorists who actually go through the checkpoint, to whom the reasonableness standard applies.

1. *Ensuring Effectiveness*. The Supreme Court has upheld border and sobriety checkpoints, among others, partially because it believed they were effective at protecting against illegal immigration and drunk drivers.[163] Conversely, the *Brignoni-Ponce* and *Prouse* majorities invalidated suspicionless roving stops because there was no evidence that they were any more effective than the existing law enforcement mechanisms.[164] As a result, suspicionless checkpoints are only justified if they are effective in achieving the government's legitimate goals.

To reiterate the words of North Carolina's highest court, "the purpose of any checkpoint . . . would be defeated if drivers had the option to 'legally avoid,' ignore or circumvent [a] checkpoint."[165] Intuitively, the individuals who are most likely to avoid a checkpoint are the ones with something to hide. Imagine that all drivers have a legal right to avoid a checkpoint and everyone realizes it. What type of driver would most likely take advantage of this option? Presumably, the answer is drivers who have something to hide. At the

161. *See supra* Part I.A.
162. Delaware v. Prouse, 440 U.S. 648, 654 (1979).
163. *See supra* Part I.A.
164. *Prouse*, 440 U.S. at 659; United States v. Brignoni-Ponce, 422 U.S. 873, 883 (1975).
165. State v. Foreman, 527 S.E.2d 921, 924 (N.C. 2000).

sight of a checkpoint, the most rational decision for intoxicated drivers, smugglers, and terrorists would be to turn around and flee. As a result, the checkpoints would only process law-abiding citizens, and the 0.12 to 1.5 percent of individuals screened at checkpoints who are usually arrested would fall to zero.[166]

This hypothetical illuminates two main problems with a system that allows individuals to evade checkpoints. First, by not pursuing motorists who have exhibited suspicious behavior, law enforcement officers allow potentially dangerous individuals to continue roaming the nation's roads. In fact, the decreased deterrent effect of the toothless checkpoints could increase the number of drunk drivers on the roads. Perhaps worse, police may give up opportunities to catch smugglers, terrorists, or other dangerous felons, who pose great risks to the public at large. Second, the essential justification for the checkpoint would no longer exist, because the checkpoint would no longer serve any legitimate government interest, given that no one would be caught. Thus, even the brief stop would become an unreasonable seizure.

The most obvious flaw in this hypothetical is that many motorists will not be aware of their right to turn around at the sight of a checkpoint, and others may take a risk and attempt to fool investigators.[167] This argument, however, illustrates another problem with letting knowledgeable citizens evade checkpoints: such a system punishes ignorant and foolhardy criminals, yet allows more intelligent perpetrators to drive away. Morally, this seems to be a dubious standard on which to justify checkpoint searches.[168] Practically, if the Supreme Court announced that all drivers could make legal U-turns within sight of a checkpoint without ramifications, the word would

166. Mich. Dep't of State v. Sitz, 496 U.S. 444, 455 (1990). The *Sitz* Court compared the typical 1 percent arrest rate at sobriety checkpoints (and 1.5 percent rate in that case) with constitutionally accepted immigration checkpoints that had "success" rates of 0.12 percent of vehicles (involving 0.5 percent of the total number of individuals passing through the checkpoints). *Id.*

167. Another potential flaw is that police could potentially erect roadblocks in a way that eliminates the possibility of legal U-turns. For a response to this critique, see the discussion *supra* note 107.

168. In contrast, it should be noted that consent-based searches have been upheld regardless of whether the individuals knew that they had the right to refuse the search. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 249 (1973) (holding that the knowledge of the right to refuse a search is not a prerequisite to a valid consent-based search). *But see id.* at 288 (Marshall, J., dissenting) (criticizing a policy that encourages law enforcement to capitalize on the ignorance of suspects).

spread fast—especially among the drunk drivers, smugglers, and terrorists who would be most affected by the policy.

2. *Limiting Discretion of Individual Law Enforcement Officers*. The second prong of the reasonableness test evaluates the degree to which the checkpoint stop is an intrusion to the motorist. The objective intrusion is small because the stop is brief. The subjective intrusion, however, varies depending on the nature of the checkpoint. The intrusion can be reduced by minimizing the checkpoint's psychological impact on the driver and minimizing the surprise and fear that the stop causes. Permissible checkpoints sufficiently limit police discretion by employing rigid guidelines and bright-line rules. These limitations on discretion help reassure motorists that everyone is being stopped and that they are not being singled out. This minimizes surprise and fear, thereby limiting the subjective intrusion of these stops.[169]

Allowing individuals to evade a roadblock raises legitimate concerns regarding the subjective intrusion to those who enter the checkpoint. The search might appear extremely discretionary to confused motorists, as officials search individuals who pass through, while letting others take evasive action and go free. Utilizing the evasive action as a nondeterminative characteristic of reasonable suspicion increases the potential confusion of unaware motorists. In other words, because officers will consider evasive behavior as only one factor in determining the validity of a *Terry* stop, officers will stop some fleeing vehicles while allowing others to leave.[170] Once again, the reasons for this distinction will be unclear to many motorists, and it may appear that the police are exercising unfettered discretion.[171]

Subjective intrusions to individuals traveling through checkpoints have more to do with perceived law enforcement discretion than the realities of police practices. Individuals who are confused as to why they are being stopped while others are free to leave may be genuinely surprised and scared by the checkpoint. In reality, this confusion will rarely occur because few drivers stopped at checkpoints will know what happens to those who flee. Still, a bright-

169. *See supra* Part I.A.3.

170. *See supra* Part II.B.

171. This would be particularly confusing for motorists who follow another vehicle that makes a U-turn and then wonder why they were pulled over and the other vehicle was not.

line rule that guarantees that evasive vehicles will be stopped would ensure the appearance of equal treatment of all motorists, thereby minimizing the subjective intrusion on those who go through checkpoints.

3. *Addressing the Objection from Libertarians and Civil Rights Advocates*. Libertarians and civil rights advocates are likely to be outraged by proposals that give government authorities more power to intrude into the private lives of Americans.[172] Their objections, however, are better suited for opposing the fixed checkpoint in general. Although this Note does not claim that checkpoints that stop hundreds of drivers who have shown no suspicion of any wrongdoing are desirable, it does seem likely that libertarians would oppose these checkpoints. If such checkpoints are legitimate, however, it is important to ensure that they are effective. Otherwise, the initial stop at the checkpoint would be even *more* of an intrusion on the individual, because it would serve little governmental purpose to detain innocent drivers. Allowing officers to stop those fleeing checkpoints ensures that those checkpoints do their job. In addition, stopping all those who evade a checkpoint limits officers' discretion and guarantees that police treat everyone equally and do not needlessly stop citizens.[173] Hence, libertarians and civil rights advocates should support this measure as it both increases the effectiveness of the initial checkpoint and eliminates the unfettered discretion of police officers.[174]

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172. Libertarians generally support a society with as little government interference as possible. *See, e.g.*, Frequently Asked Questions About the Libertarian Party, http://www.lp.org/article_85.shtml (last visited Mar. 24, 2007) (listing information from the Libertarian National Committee). Civil rights advocates generally favor protections against government intrusions into citizens' private affairs. *See, e.g.*, ACLU, About Us, http://www.aclu.com/about/index.html (last visited Mar. 24, 2007) (outlining the mission of a prominent civil rights interest group). Libertarian and civil rights activists have yet to form a public opinion on per se stops of motorists fleeing checkpoints. Hence, the libertarian and civil rights "objection" is this Note's own interpretation of how typical libertarian and civil rights advocates might respond to its proposal.

173. To clarify, as long as the checkpoint is effective in catching some criminals, law enforcement does not needlessly stop citizens, even if innocent drivers are stopped. Libertarians and civil rights advocates may oppose checkpoints in the first place and thus oppose this entire system. The point is, however, that once it is accepted that fixed road checkpoints are legitimate, it is in their interest to embrace per se reasonable suspicion for those who flee.

174. Whether libertarians and civil rights advocates will support per se stops of fleeing vehicles is another matter; this argument merely concludes that they should support them on a theoretical level.

B. The Flight Doctrine and Evading Checkpoints

Whereas the previous discussion evaluated the effect of allowing some motorists to flee on the rights of those who continue through the checkpoint,[175] this Section examines the issue with respect to the Fourth Amendment rights of those who flee. The two issues involve different standards because the justification for stopping individuals who evade checkpoints is reasonable suspicion, whereas no such suspicion is needed at fixed checkpoint stops.

As a threshold matter, evading a checkpoint by making a U-turn or turning off the road is a type of flight from lawful authority. Admittedly, one can argue that evasive drivers are just exercising their *Royer* right to refuse to answer an officer's questions.[176] But the *Wardlow* Court explained that evading police is different from mere refusal to cooperate: "[f]light, by its very nature, is not 'going about one's business'; in fact, it is just the opposite."[177] This holds true for individuals who decide to turn around at the sight of a checkpoint. Going about their business would entail continuing through the roadblock. After all, they must have had some interest in the route because they freely chose it. Moreover, unlike pedestrians, drivers may have to take severe detours when attempting to circumvent roadblocks, because their routes are limited to the roads available to them.[178] Thus, stopping individuals who flee from checkpoints is not stopping individuals who are merely trying to go about their business—the checkpoint has already interfered with their "business." In addition, it is important to remember that stopping fleeing individuals does not change their *Royer* right to remain silent in the face of questioning.[179]

The *Arvizu* Court explained that in evaluating indicia for reasonable suspicion, reviewing courts must look at the totality of the circumstances.[180] One of these circumstances is driver action that raises an inference that the driver is trying to avoid a checkpoint.[181]

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175. *See supra* Part III.A.

176. Florida v. Royer, 460 U.S. 491, 498 (1983).

177. Illinois v. Wardlow, 528 U.S. 119, 125 (2000).

178. Pedestrians, conversely, have few limitations on where they can walk.

179. *Wardlow*, 528 U.S. at 125.

180. United States v. Arvizu, 534 U.S. 266, 273 (2002).

181. *See id.* (finding such an inference appropriate when a minivan was driving on a dirt road often used by drug smugglers, and the driver refused to acknowledge the police officer, slowed down at his approach, and appeared to instruct his children to wave).

The *Wardlow* Court added that "flight . . . is the consummate act of evasion: [i]t is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."[182] Even state courts arguing against a bright-line rule agree that apparent evasive conduct by a driver approaching a checkpoint should be considered when determining if there are grounds for a *Terry* stop.[183] Thus, there is little debate that evasion gives rise to reasonable suspicion of wrongdoing.

The question is whether evading a checkpoint is sufficient on its own to pass a reasonable suspicion analysis. In looking at the totality of the circumstances, location may prove determinative, as ignoring a police officer may be routine in one setting but extremely out of the ordinary in another.[184] As a result, fleeing from a high-crime area is enough on its own to constitute reasonable suspicion, as the flight in conjunction with the location gives rise to individualized suspicion.[185] Evading a checkpoint is no different. Unlike unprovoked flight at the mere sight of the police, individuals know that they will actually be stopped at a checkpoint. This emphasizes the inference that they have something to hide if they flee. Just as the existence of a high-crime area contributes to reasonable suspicion analysis in flight cases, the presence of a checkpoint is an important factor in the current scenario. Looking at the totality of the circumstances, the evasive action taken within sight of a checkpoint creates reasonable suspicion, allowing officers to make a *Terry* stop.[186]

1. *Addressing the Counterarguments.* The strongest counterargument against stopping individuals who avoid checkpoints is that they may have innocent reasons for taking evasive action. For example, perhaps the driver is in a rush, thinks there is an accident ahead, or merely forgot something at home. But the fact that an individual could have purely innocent reasons for evasive action has no bearing on reasonable suspicion.[187] As long as an officer has

182. *Wardlow*, 528 U.S. at 124.

183. *See supra* notes 153–159.

184. *Arvizu*, 534 U.S. at 276.

185. *Wardlow*, 528 U.S. at 119.

186. It should be emphasized that flight often gives rise to reasonable suspicion. In fact, the lower courts are split on whether unprovoked flight, on its own, is enough to constitute reasonable suspicion (and two Supreme Court justices feel that it is). *See supra* note 131 and accompanying text. Thus, it is far from a stretch to state that flight *from a checkpoint* should tip the balance in favor of reasonable suspicion.

187. *Wardlow*, 528 U.S. at 125.

articulable facts that lead to logical inferences of criminal activity, the stop is justified.[188] A *Terry* stop need not result in confirmed criminal activity, because such a stop "accepts the risk that officers may stop innocent people."[189] In fact, the Fourth Amendment allows this risk in the context of more extreme seizures, such as arrests and detentions based on probable cause.[190] The risk of momentarily detaining innocent drivers is especially permissible, given that individuals have reduced expectations of privacy in their automobiles.[191] Here, it is important to emphasize that a *Terry* stop is a minimal intrusion, and if an officer fails to find probable cause of criminal activity, the detained person is quickly freed.[192] Thus, even though there are innocent reasons for avoiding a checkpoint, the minimal intrusion of stopping a fleeing vehicle is justified by the articulable suspicion that evasive behavior creates.

Libertarians may also posit that per se reasonable suspicion impermissibly *prevents* a driver from taking any action that looks evasive. For example, if within visual proximity of a checkpoint a driver suddenly remembers leaving the stove on at home, the driver will not be able to make a U-turn to return home. Such a critique, however, is misguided. First, drivers consent to abide by state and federal laws when they are on the road, and hence their vehicular action is always limited. As a result, the driver responding to the small crisis of the stove is already limited. The driver cannot speed home, cannot make an illegal left turn even if it would make the trip quicker, and must abide by numerous other traffic laws. Going through a checkpoint or being stopped for evading that checkpoint is simply akin to any other traffic regulation.[193] Second, and more to the point, this Note does not propose that a driver *cannot* make a U-turn in visual proximity of a roadblock. Such action is not illegal, and drivers will not be arrested for legally evasive actions. They can legally decide to avoid the checkpoint, and the only consequence will be a brief, nonthreatening investigatory stop. Once the officer determines that there is no further suspicion of criminal wrongdoing that would justify

188. United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975).

189. *Wardlow*, 528 U.S. at 126.

190. *Id.*

191. United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

192. *Wardlow*, 528 U.S. at 119.

193. This relates to the issue of consent. When citizens engage in the privilege of driving on government roads, they consent to the rules set forth by that government.

a longer detention, the driver is free to go.[194] Evasive action on its own is not punished.

2. *Bright-Line Rules Decrease Police Discretion and Meet the Essential Purpose of the Fourth Amendment.* Finally, it is worth noting that bright-line rules of criminal procedure help uphold the purpose of the Fourth Amendment and have the practical benefit of informing officers of exactly what they can and cannot do.

The Court has noted that "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'"[195] Bright-line rules ensure that the government treats all citizens equally. Complicated subjective judgments by officers, although necessary in some cases, should be avoided when possible. In the context of road checkpoint evasion, forcing officers to evaluate the evasive nature in conjunction with other suspicious characteristics gives officers significant leeway to make discretionary decisions concerning whom they stop. In reality, officers can justify stopping vehicles by simply explaining that, based on their experiences and training, the evasion was suspicious. As a result, officers can pick and choose which vehicles they stop and justify their actions based on hard-to-review subjective criteria.

In addition, a bright-line rule has significant practical value. Rather than having to engage in a complicated reasonable suspicion analysis or to pore over countless court decisions, officers will know they automatically have cause to stop evasive vehicles.[196] As it has done in other cases, a Supreme Court ruling instituting a bright-line

194. Again it is important to emphasize the limited and brief nature of a *Terry* stop. *See Wardlow*, 528 U.S. at 126 (describing an investigatory stop as a minimal intrusion in which if an officer finds no evidence of wrongdoing, the officer must let the individual go).

195. Delaware v. Prouse, 440 U.S. 648, 653–54 (1979) (citing Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)) (citations omitted).

196. Admittedly, debate could still exist as to what constitutes evasion. Although this Note addresses the issue in Part I.B., the Note's main focus is addressing the threshold question as to whether evasion (regardless of its definition) creates reasonable suspicion.

standard would give officers in the field clear guidance about what actions they may take.[197]

CONCLUSION

Although this Note addresses the legal justifications for stopping vehicles that evade checkpoints, the policy justifications are also compelling. Simply put, the public has an interest in helping the police catch criminals, especially those who are dangerous threats to the public at large. Drunk drivers and fleeing felons, for example, clearly pose a risk to those around them due to their propensities to get into accidents and commit crimes. But the issue really crystallizes in the context of potential terrorism, in which the victims could be numerous. Especially in a global society in which suicide-attacks are becoming more frequent, law enforcement officials must have the tools to follow up on suspicious activity. Allowing terrorists with bombs to escape easily by making U-turns at checkpoints also gives them the opportunity to launch new attacks. As such, granting law enforcement officials per se reasonable suspicion to stop those who flee checkpoints would give officials a useful tool in the battle against terrorism, drunk driving, and other crimes.

197. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30 (1968) (specifically limiting a protective frisk to a suspect's outer clothing); Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (explicitly instructing police as to what rights must be read to suspects).