CRIMINAL LAW — SEARCH AND SEIZURE — D.C. CIRCUIT HOLDS THAT POLICE CHECKPOINT PROGRAM LIKELY VIOLATES THE FOURTH AMENDMENT. — *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009).

Courts have long acknowledged that, although even brief stops at roadside checkpoints constitute seizures within the meaning of the Fourth Amendment,[1] police checkpoints are permissible under certain circumstances.[2] However, courts have struggled to define the precise contours of the line between acceptable and unacceptable checkpoint programs.[3] In an effort to clarify this ambiguity, the Supreme Court has established a two-step test for analyzing a checkpoint's constitutionality.[4] First, a checkpoint is per se unconstitutional if its "primary purpose" is simply "to serve the general interest in crime control" within the meaning of the Court's decision in *City of Indianapolis v. Edmond*.[5] Second, checkpoints with a primary purpose distinguishable from general crime control may still be invalidated under the three-part balancing test first established in *Brown v. Texas*.[6] Recently, in *Mills v. District of Columbia*,[7] the D.C. Circuit applied the *Edmond* test in holding that a police checkpoint program designed to deter violent gun crimes likely violated the Fourth Amendment.[8] Although the D.C. Circuit reached the right result, it should have invalidated the program by applying the *Brown* balancing test, not the *Edmond* per se approach. Applying the *Brown* test to evaluate deterrence-based checkpoint programs would be more faithful to Supreme Court

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[1] *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990) ("[A] Fourth Amendment 'seizure' occurs when a vehicle is stopped at a checkpoint."); United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976) ("It is agreed that checkpoint stops are 'seizures' within the meaning of the Fourth Amendment.").

[2] For a concise overview of recent checkpoint jurisprudence, see George M. Dery, III & Kevin Meehan, *Making the Roadblock a "Routine Part of American Life":* Illinois v. Lidster*'s Extension of Police Checkpoint Power*, 32 AM. J. CRIM. L. 105, 107–14 (2004).

[3] Brooks Holland, *The Road 'Round* Edmond*: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN. ST. L. REV. 293, 294 & n.7, 296–97 (2006).

[4] *See* Illinois v. Lidster, 540 U.S. 419, 426–27 (2004). Although the Supreme Court did not explicitly refer to a two-step test in *Lidster*, lower courts have construed the decision as establishing such a test. *See, e.g.*, United States v. Faulkner, 450 F.3d 466, 470 (9th Cir. 2006).

[5] 531 U.S. 32, 41–42 (2000). In *Edmond*, the Court held that drug interdiction checkpoints, which involved a license and registration check along with an open-view inspection of the vehicle and the use of narcotics-detection dogs, violated the Fourth Amendment. *Id.* at 35–36.

[6] 443 U.S. 47, 50–51 (1979). Under *Brown*, courts evaluating seizures "less intrusive than a traditional arrest" are to consider (1) "the gravity of the public concern served," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty" (commonly called "intrusiveness"). *Id.*

[7] 571 F.3d 1304 (D.C. Cir. 2009).

[8] *Id.*

precedent and would allow courts to develop a more nuanced, community-oriented Fourth Amendment jurisprudence.

The Trinidad neighborhood of Washington, D.C., has a long history of violent gun crime.[9] In early 2008, the area saw a surge in homicides and violent assaults, including a number of drive-by shootings.[10] In the aftermath of a triple homicide, the Metropolitan Police Department (MPD) issued Special Order 08-06, which established the Neighborhood Safety Zone (NSZ) program.[11] The first implementation of the NSZ program lasted from June 7, 2008, to June 12.[12] The MPD erected eleven vehicle checkpoints, creating a perimeter around a portion of Trinidad.[13] Under the terms of Special Order 08-06, MPD officers were required to stop all vehicles attempting to enter the NSZ and to determine whether the driver could provide one of six predetermined "legitimate reasons" to be in the area.[14] Individuals who were unable or unwilling to provide a verifiable reason were denied entrance to the neighborhood but were not charged with a criminal offense.[15] The Special Order prohibited officers from searching vehicles unless individualized suspicion developed during the course of the stop; during the first use of the NSZ, only one arrest was made — for "driving while in possession of an open container of alcohol."[16]

From the beginning, the NSZ generated widespread criticism from commentators.[17] Response within the community, however, appears to

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[9] For a detailed account of Trinidad's struggles with crime, see Paul Schwartzman, *Reality Checkpoint*, WASH. POST, July 8, 2008, at B1.

[10] *See* Mills v. District of Columbia, 584 F. Supp. 2d 47, 50 (D.D.C. 2008).

[11] *Id.* at 50–51.

[12] *See Mills*, 571 F.3d at 1306.

[13] *Id.* During the initial NSZ, the MPD established checkpoints around a particular block in the Trinidad neighborhood. *See* Brief for the Dist. of Columbia as Appellee at 5, *Mills*, 571 F.3d 1304 (D.C. Cir. 2009) (No. 08-7127), 2009 WL 857453.

[14] *Mills*, 571 F.3d at 1307. The six "legitimate reasons" were:

> [T]he motorist was (1) a resident of the NSZ; (2) employed or on a commercial delivery in the NSZ; (3) attending school or taking a child to school or day-care in the NSZ; (4) related to a resident of the NSZ; (5) elderly, disabled or seeking medical attention; and/or (6) attempting to attend a verified organized civic, community, or religious event in the NSZ.

Id.

[15] *Id.* Of the 951 vehicles stopped during the June NSZ, 48 were denied entry. *Id.*

[16] *Id.* Following a drive-by shooting early on July 19, 2009, MPD Chief Cathy Lanier authorized a second Trinidad NSZ, which ran until July 29. *See Mills*, 584 F. Supp. 2d at 52.

[17] *See, e.g.*, Michael Neibauer & Bill Myers, *Lanier Plans To Seal Off Rough 'Hoods in Latest Effort To Stop Wave of Violence*, WASH. EXAMINER, June 4, 2008, http://www.washingtonexaminer.com (search for "Lanier plans to seal off rough hoods"; then follow hyperlink to the article) (quoting critics who found the program "breathtaking" and "cockamamie" (internal quotation marks omitted)); Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/2008/06/04/lanier-plans-to-seal-off-rough-'hoods-in-latest-effort-to-stop-wave-of-violence (June 4, 2008, 22:12) ("I see no way th[e program] could be legal."). *But see* Editorial, *Political Checkpoint*, WASH. POST, June 19, 2008, at A18.

have been more mixed. Some Trinidad residents were strongly critical of the city's "police state" tactics,[18] and a survey of sixty residents conducted by Councilmember Harry Thomas, Jr. found that a majority of those surveyed opposed the plan.[19] At the same time, a petition circulated by Trinidad's Advisory Neighborhood Commissioners supporting the NSZ program garnered signatures from seventy-five residents.[20] Regardless of whether they agreed with the program, many residents complained that the MPD made its plans without adequately consulting or notifying them.[21]

On June 20, 2008, Caneisha Mills and three other individuals who had been denied entry into the NSZ filed a class action suit against the District of Columbia and the MPD in the United States District Court for the District of Columbia.[22] The district court denied the plaintiffs' request for a preliminary injunction, holding that the plaintiffs failed to demonstrate "a substantial likelihood of success on the merits" of their Fourth Amendment claim under either *Edmond* or *Brown*.[23]

A unanimous panel of the D.C. Circuit reversed and remanded.[24] In a strongly worded opinion by Chief Judge Sentelle,[25] the court held that the NSZ program likely violated the Fourth Amendment because it failed the *Edmond* "primary purpose" analysis.[26] The court reasoned that although NSZ checkpoints were intended for deterrence of violent crime, rather than for drug interdiction as in *Edmond*, this fact amounted to "a distinction without a difference."[27] City officials attempted to analogize the NSZ to the checkpoint program at issue in *Illinois v. Lidster*,[28] in which the Supreme Court upheld a highway checkpoint that stopped motorists in order to collect information about a fatal hit-and-run, but Chief Judge Sentelle rejected this comparison. He noted that whereas the checkpoint in *Lidster* was intended to produce information about a known crime that had already occurred, the

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[18] Allison Klein, *D.C. Police To Check Drivers in Violence-Plagued Trinidad*, WASH. POST, June 5, 2008, at A1 (quoting Trinidad resident Wilhelmina Lawson) (internal quotation mark omitted).

[19] Press Release, Harry Thomas, Jr., Councilmember, Council of D.C., Thomas Releases Findings of Survey of Trinidad Neighbors' Reaction to Checkpoints: Survey Results Indicate Residents' Assessment Is Mostly Negative (June 16, 2008), *available at* http://www.harrythomas5.org/sitebuildercontent/sitebuilderfiles/june162008pressrelease.pdf.

[20] Brief for the Dist. of Columbia as Appellee, *supra* note 13, at 8.

[21] *See, e.g.*, Scott McCabe & Bill Myers, *Police Checkpoints Don't Comfort Concerned Trinidad Residents*, WASH. EXAMINER, June 5, 2008, http://www.washingtonexaminer.com (search for "concerned Trinidad residents"; then follow the hyperlink to the article).

[22] *Mills*, 571 F.3d at 1307–08, 1308 n.1.

[23] Mills v. District of Columbia, 584 F. Supp. 2d 47, 55 (D.D.C. 2008); *see id.* at 54–62.

[24] *Mills*, 571 F.3d at 1312.

[25] Chief Judge Sentelle was joined by Judges Ginsburg and Rogers.

[26] *See Mills*, 571 F.3d at 1310.

[27] *Id.* at 1311.

[28] 540 U.S. 419 (2004).

success of the NSZ program depended on "the possibility, without individualized suspicion, that the driver stopped might be the potential perpetrator of an as-yet undetected, perhaps uncommitted, crime."[29]

The panel was similarly unconvinced by the city's argument that *Edmond*'s prohibition against checkpoints for general crime-control purposes applied only to checkpoints designed to look for evidence of a crime, and not those, like the NSZ, designed to deter crime. Chief Judge Sentelle noted that "[t]he individualized suspicion requirement is the rule under the Fourth Amendment, not the exception,"[30] and he concluded that "the general interest in crime control" should therefore be read broadly.[31] The court thus interpreted the phrase "general interest in crime control" as including not only stops whose primary purpose was seeking evidence, but also stops intended for investigation or deterrence.[32] Such a holding, according to the court, aligned with the Supreme Court's goal of "placing a 'check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose.'"[33]

On its face, the *Mills* decision seems an unremarkable example of the *Edmond* per se test. A more thorough examination of the court's reasoning, however, reveals that Chief Judge Sentelle's opinion downplays the substantial differences between the NSZ program and the checkpoints at issue in *Edmond*. Rather than adopt the D.C. Circuit's overbroad interpretation of *Edmond*, courts should recognize the limits of the per se approach and use the *Brown* balancing test as the standard for evaluating checkpoint programs that are designed to deter crime. In addition to being more consistent with Supreme Court precedent, analyzing such checkpoints under *Brown* would provide courts with an opportunity to consider the interests of those most affected by the checkpoints at issue — in this case, the residents of Trinidad.

Despite the court's claim that there is a "natural and usual" interpretation of "the general interest in crime control,"[34] its conclusion that the *Edmond* per se test invalidated the NSZ plan exaggerates the guidance provided by both Supreme Court and circuit precedent.[35] In

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[29] *Mills*, 571 F.3d at 1311.

[30] *Id.*

[31] *Id.* (internal quotation marks omitted).

[32] *Id.* at 1311–12.

[33] *Id.* at 1311 (quoting City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000)).

[34] *Id.* at 1312.

[35] Chief Judge Sentelle referenced the court's prior decisions in *United States v. Bowman*, 496 F.3d 685 (D.C. Cir. 2007), *United States v. Davis*, 270 F.3d 977 (D.C. Cir. 2001), and *United States v. McFayden,* 865 F.2d 1306 (D.C. Cir. 1989), in support of his conclusion that *Edmond* covered deterrence-based checkpoints. *Mills*, 571 F.3d at 1312. Each of those cases involved constitutional challenges to MPD police checkpoints, and in each case, as Chief Judge Sentelle wrote in *Mills*,

particular, the *Mills* decision is overbroad to the extent that it reads the relevant precedents as establishing a complete ban on deterrence-based checkpoints. As the district court rightly recognized, the factual differences between the stops at issue in *Edmond* and the NSZ in *Mills* caution against a liberal application of the per se rule.[36] In *Edmond*, the court considered a checkpoint program that truly was "general" in effect. The checkpoints in that case were designed to further the ever-present and ongoing war on drugs throughout the entire city of Indianapolis.[37] The NSZ program, in contrast, targeted a *particular* area in response to a *particular* set of crimes.

More importantly, while the *Edmond* checkpoint plan had as its goal the apprehension of narcotics traffickers, the purpose of the NSZ program was the *prevention* of crime.[38] An empirical comparison of the two programs — 104 arrests in *Edmond* versus one under the NSZ, despite a similar number of total stops[39] — suggests that the NSZ's goal was not simply "to *detect* evidence of ordinary criminal wrongdoing,"[40] the purpose deemed unacceptable in *Edmond*. Indeed, the MPD's actions seem more consistent with law enforcement officials' traditional peacekeeping and order-maintenance role than the broad investigatory authority asserted by the Indianapolis police in *Edmond*.[41] The D.C. Circuit's decision to reject the city's deterrence-versus-detection argument as "a distinction without a difference" is thus puzzling, especially in light of the Supreme Court's clarification of *Edmond*'s scope in *Lidster*. There, the Court reiterated its condemnation of "stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal . . . some crime,"[42] but cautioned that "the phrase 'the general interest in crime control'

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the D.C. Circuit treated deterrence of ordinary criminal activity as indistinguishable from efforts to detect those crimes. *Id.* Only *Bowman* and *Davis*, however, were decided after *Edmond*, and in both cases the court's opinion concerned only the sufficiency of the evidence establishing a permissible purpose, not whether deterrence was an impermissible primary purpose. *See Bowman*, 496 F.3d at 691, 693–95; *Davis*, 270 F.3d at 980–81. The *Mills* court thus had considerable leeway to reach a different conclusion in determining the constitutionality of the NSZ program.

36 *See* Mills v. District of Columbia, 584 F. Supp. 2d 47, 58 (D.D.C. 2008).

37 *Edmond*, 531 U.S. at 34.

38 *Cf.* United States v. Fraire, 575 F.3d 929 (9th Cir. 2009) (holding that an entry checkpoint at a national park was not per se invalid because "[t]he goal was prevention, not arrests," *id.* at 933).

39 *Compare Edmond*, 531 U.S. at 34–35 (1161 vehicles stopped, 104 arrests), *with Mills*, 584 F. Supp. 2d at 51 (951 vehicles stopped, 1 arrest).

40 *Edmond*, 531 U.S. at 38 (emphasis added).

41 In *Edmond*, the Supreme Court recognized that suspicionless checkpoints meant to prevent an emergency or to catch a fleeing criminal would likely be exempt from per se invalidation. *See id.* at 44. The Second Circuit used a similar emergency-prevention rationale to uphold a program of random baggage searches of riders on the New York City subway system against a challenge on *Edmond* grounds. *See* MacWade v. Kelly, 460 F.3d 260, 271 (2d Cir. 2006).

42 Illinois v. Lidster, 540 U.S. 419, 424 (2004) (emphasis omitted) (quoting *Edmond*, 531 U.S. at 44) (internal quotation marks omitted).

does not refer to every 'law enforcement' objective."[43] This language suggests that some police objectives do fall outside *Edmond*'s scope, but the Court has thus far failed to articulate what these objectives might be.

In the absence of such guidance, the D.C. Circuit should not have erred on the side of broadly applying *Edmond*, because the per se approach is flawed in its failure to consider community perspectives on the programs in question. As Professors Tracey Meares and Dan Kahan note, courts' current Fourth Amendment jurisprudence often ignores the extent to which communities affected by crime may "internalize[] the burden that a particular law imposes on individual freedom."[44] That is, community members affected by programs like the NSZ might willingly subject themselves to mild deprivations of their privacy at checkpoints in order to protect their communities from the far greater invasions of privacy caused by high crime rates.[45] Similarly, Professor William Stuntz argues that the conventional Fourth Amendment balancing test misperceives the realities of the rights at stake.[46] A more appropriate conception of the Fourth Amendment, according to Stuntz, recognizes that the individual privacy interest in being free from police intrusions must be balanced against the individual privacy interest in being free from criminal activity.[47] These critiques suggest that the degree of community support for controversial enforcement activities should be a key consideration for courts hearing Fourth Amendment cases. Yet the *Edmond* test elides any discussion of community interests, collapsing the constitutional inquiry into an abstract analysis of "primary purposes" and "general crime control."

Instead of following the D.C. Circuit's broad conception of the "primary purpose" test, courts should adopt a more restrained understanding of *Edmond*'s applicability. This is not to suggest that courts should abandon the per se test completely. Rather, courts should interpret *Edmond*'s per se standard to include only those programs designed primarily to detect general criminal activity. Other law enforcement activities — like the deterrence-oriented checkpoints at issue in *Mills* — should instead be evaluated under the balancing test proposed in *Brown*.

Applying this standard would enable courts to consider community perspectives on the program under consideration. At least two prongs of the *Brown* test — those concerning the gravity of public concern

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[43] *Id.* (quoting *Edmond*, 531 U.S. at 44 n.1).

[44] Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, 209.

[45] *See id.* at 209–10.

[46] William J. Stuntz, Essay, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2146 (2002).

[47] *See id.*

and the severity of the interference with liberty — could easily incorporate an analysis of community interests. Rather than assessing the gravity of the public concern based solely on intuition, courts could look to the level of concern voiced by the affected community.[48] *Brown*'s "intrusiveness" element also provides courts with an opportunity to examine community perspectives. For instance, evidence that community members and their elected officials strongly supported a disputed program could be used as a basis for concluding that the program is not unreasonably intrusive, while the opposite conclusion may be drawn from a widely unpopular program.[49]

Had the D.C. Circuit applied the *Brown* test in *Mills*, it would likely have reached the same result as it did under the per se test.[50] The first element, the gravity of the public concern,[51] would have weighed strongly in favor of finding the program constitutional given the risk to public safety presented by the Trinidad crime wave and the neighborhood's vociferous condemnation of the violence. The impact of the second element, an assessment of the program's effectiveness,[52] would have been less clear, however, since the plaintiffs and the city officials presented contradictory evidence about the NSZ's effect on crime rates in Trinidad.[53] With respect to the third element, although the privacy deprivations associated with a series of suspicionless checkpoints might not be overly intrusive if the program had substantial community support, it is unlikely the NSZ would have met this bar given the dissension its implementation caused within the neighborhood.

Openly balancing the liberty and security interests of those affected by programs like the NSZ would have a number of subsidiary benefits. A community-perspectives approach would promote judicial legitima-

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[48] The D.C. Circuit employed a similar approach in *United States v. McFayden*, 865 F.2d 1306 (D.C. Cir. 1989). In *McFayden*, the court held in part that regulation of vehicular traffic associated with open-air drug markets qualified as a legitimate interest, noting that "[m]otorists and residents alike had been complaining about serious traffic and crime problems" associated with the drug sales. *Id.* at 1312.

[49] An obvious question raised by any discussion of community perspectives is how to define the "community." *See, e.g.*, JEROME E. MCELROY ET AL., COMMUNITY POLICING 3–4 (1993) ("Virtually all commentators agree that the concept of 'community' as used in the rhetoric of community policing is imprecise . . . ." *Id.* at 3.). These definitional concerns are less pressing in a case like *Mills*, however, because the Trinidad neighborhood provides a natural framework for assessing the relevant community.

[50] In fact, a previous case from the District of Columbia Court of Appeals, *Galberth v. United States*, 590 A.2d 990 (D.C. 1991), used the *Brown* test to invalidate a Trinidad checkpoint program very similar to the NSZ. *See id.* Judge Rogers, then the Chief Judge of the D.C. Court of Appeals, held that, "in view of the insubstantiality of the government's deterrence interest," the *Brown* test weighed "in favor of the individual's liberty interest." *Id.* at 999.

[51] *See* Brown v. Texas, 443 U.S. 47, 50–51 (1979).

[52] *Id.*

[53] *Compare* Brief of Appellants at 38–39, *Mills*, 571 F.3d 1304 (D.C. Cir. 2009) (No. 08-7127), 2009 WL 857451, *with* Brief for the Dist. of Columbia as Appellee, *supra* note 13, at 6.

cy by recognizing that the need for judicial caution is especially strong in cases that require courts to grapple with the day-to-day realities of inner-city crime, a subject with which most judges likely have little personal experience.[54] Using the *Brown* analysis rather than the *Edmond* approach — and thereby facilitating the consideration of community input — could also address the primary complaint Trinidad residents expressed about the NSZ program: lack of police consultation with community members.[55] It seems probable that if police departments knew courts looked favorably on evidence of neighborhood input into program development, they would be more likely to pursue such consultation in order to demonstrate their programs' constitutionality. This increased police-community interaction can produce a variety of benefits for both community members and law enforcement officers.[56]

Supporters of the per se test argue that it ultimately provides greater protection from police malfeasance by creating a presumption that individual suspicion is necessary for all police seizures.[57] But there is little reason to suspect that relying on a balancing test when assessing the validity of preventative checkpoints will undermine Fourth Amendment rights. To begin with, *Edmond* will continue to be binding precedent in areas, like drug interdiction, in which the Supreme Court has made clear that police checkpoints are unacceptable. This fact greatly reduces the risk that courts' occasional acceptance of deterrence checkpoints will, via a "slippery slope" effect, substantially weaken checkpoint jurisprudence as a whole. Furthermore, as discussed above, the *Brown* approach could invalidate a suspect checkpoint program just as readily as could the per se test. This fact might at first seem to diminish the importance of the court's erroneous decision to apply *Edmond*. However, the panel's mistake is still significant because it is likely to encourage overapplication of the per se test in future cases. The D.C. Circuit's reliance on *Edmond*, though it led to the right result, obscured the delicate balance between liberty and order at the heart of the debate about our Fourth Amendment freedoms.

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[54] *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1177 (1998).

[55] *See* McCabe & Myers, *supra* note 21.

[56] *See* Jerome H. Skolnick & David H. Bayley, *Theme and Variation in Community Policing*, 10 CRIME & JUST. 1, 28–34 (1988).

[57] *See, e.g.*, Dery & Meehan, *supra* note 2, at 124–26 (warning that *Lidster*'s limitation of *Edmond*'s rule of presumptive invalidity may dilute Fourth Amendment protections).