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LAW REVIEW

Balancing Police Action Against an Underdeveloped Fundamental Right: Is There a Right to Travel Freely on Public Fora?

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I. INTRODUCTION

Violent crime fueled by drug profits is not a new problem for our nation's inner cities. Police struggle to adapt their tactics to changing street conditions while still safeguarding the constitutional rights of citizens they have sworn to protect. The summer of 2008 marked a tipping point for the Metropolitan Police Department ("MPD") of

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Washington, D.C. Drive-by shootings ravaged the neighborhood of Trinidad,[1] and the MPD responded with an innovative program designed to curb the violence.[2] The following hypothetical illustrates the basic facts of the program along with a collateral restriction of civil liberties that generated intense controversy.[3]

> Imagine if you and your spouse have a picnic under the same tree each year to commemorate your anniversary. That special day rolls around, and while you're travelling toward your picnic spot, you encounter a heavily-guarded police checkpoint. A law enforcement officer politely explains that there has been a recent crime wave in this area, and that the police have sealed off the entire neighborhood. The officer then requests your identification and, as directed by a municipal ordinance, asks why you are driving into Trinidad. You respond truthfully, but do not know that the ordinance requires a legitimate purpose for passing through the checkpoint and entering the neighborhood. Is your purpose sufficiently legitimate to pass scrutiny?

The MPD called it a Neighborhood Safety Zone ("NSZ").[4] In reality, it was a checkpoint program designed to exclude motorists seeking to enter this high-crime neighborhood without a legitimate purpose.[5] These checkpoints were set up at major entrances to the neighborhood, and auxiliary streets were blocked-off.[6] When a driver approached the checkpoint, as illustrated from the hypothetical, he was

1. For a contemporary history of Trinidad, *see* Paul Schwartzman, *Reality Checkpoint: Trinidad Residents Reflect on Their Neighborhood's Future*, WASH. POST, July 8, 2008 at B01.

2. *See* Allison Klein, *D.C. Police to Check Drivers In Violence-Plagued Trinidad*, WASH. POST, June 5, 2008 at A01 [hereinafter "*Police to Check Drivers*"] ("Since April 1, the Trinidad neighborhood has had seven homicides, 16 robberies and 20 assaults with dangerous weapons, according to police data.").

3. *Compare* Daniel LeDuc, *Council Grills Lanier, Nickles on Checkpoint*, WASH. POST, June 17, 2008 at B04 ("'We are tired of having to listen to gunfire. We are tired of having bullets pierce the sanctity of our homes.' Concerns about constitutional intrusions were 'academic discussion,' [Trinidad resident Kathy] Henderson said, adding that residents felt that 'our rights are being violated every time people descend on our community and commit crime.'") *with Police to Check Drivers*, *supra* note 2 ("'My reaction is, welcome to Baghdad, D.C.,' said Arthur Spitzer, legal director for the ACLU's Washington office. 'I mean, this is craziness. In this country, you don't have to show identification or explain to the police why you want to travel down a public street.'").

4. *See* Mills v. District of Columbia, 584 F. Supp. 2d 47 (D.D.C. 2008), *rev'd* 571 F.3d 1304 (D.C. Cir. July 10, 2009). *Mills* is a recent and highly publicized example of a high-crime exclusionary checkpoint.

5. *See infra* Part II.C for the definition of a "legitimate purpose."

6. *See Mills*, 584 F. Supp. 2d at 50-51.

asked for identification, and denied entry if he either did not provide a reason, or provided an inadequate reason.[7]

These types of high-crime exclusionary checkpoints are rare but not unique.[8] A procedurally similar checkpoint was conducted in New York City in 1992.[9] A common feature of these checkpoints is that drivers are permitted to park their cars outside the area and walk in without police interference.[10] In each case, only vehicles were barred.[11] And in each case, the public asked the obvious question: Is this legal?[12]

The NSZs present a compelling factual scenario with which to analyze whether citizens have a fundamental right to travel on public roadways.[13] If citizens have a right to localized travel, it is squarely implicated by exclusionary checkpoints. This Comment focuses on precedent establishing a fundamental right to this type of localized movement—properly phrased as the "right to travel freely on public fora."[14] This right has been described as "an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function."[15] However, this right is not meant to be so broad as to invalidate stop signs or enable motorists to justify double-parking.[16]

7. *See id.* For simplicity's sake, this Comment will use the masculine pronoun "he" to represent both the masculine and the feminine pronoun.

8. *See* Rachel R. Watson, Comment, *When Individual Liberty and Police Procedure Collide: The Unconstitutionality of High-Crime Area Checkpoints*, 24 U. DAYTON L. REV. 95, 103-04 (1998).

9. *See* Maxwell v. City of New York, 102 F.3d 664, 666 (2d Cir. 1996).

10. *See, e.g.*, *Mills*, 584 F. Supp. 2d at 61.

11. *See id.*; *Maxwell*, 102 F.3d at 666-68.

12. *See infra* Part II.A.

13. *See infra* Part III.B. Irrespective of the fact that the *Mills* and *Maxwell* courts analyzed the checkpoints under the Fourth Amendment's reasonableness standard, the Due Process Clause of the Fourteenth Amendment still protects fundamental liberty interests. Those cases were framed as Fourth Amendment challenges and did not explore whether other rights of the motorists were abridged. As discussed *infra* Part II.C, high-crime exclusionary checkpoints impose more than a temporary and limited inconvenience on a party. They bar entrance to a geographic area for all without a legitimate purpose, and so the Fourth Amendment is not the only right affected. *Cf.* Johnson v. City of Cincinnati, 310 F.3d 484, 491 (6th Cir. 2002) (rejecting the argument that the Fourth Amendment controlled a challenge to an ordinance that excluded individuals from a geographic area based on their criminal history). The *Johnson* case is discussed *infra* Part II.B.3.

14. *See infra* Part II.A.

15. *Johnson*, 310 F.3d at 498.

16. *See infra* Part III.B for a discussion of the level of scrutiny and its relationship to restrictions that facilitate the right to travel. *See also* Benjamin C. Sasse, Note, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 706-711 (2000) (suggesting a modified undue burden standard as the proper level of scrutiny to adequately protect the right to travel freely on public fora); Andrew C. Porter, Comment, *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 NW. U. L. REV. 820, 853-56 (1992).

The primary goal of this Comment is to apply a right to localized travel claim to a police checkpoint program in a way that has never been done. The exclusionary nature of the NSZs makes them an ideal testing ground for analyzing whether a fundamental right to travel freely on public fora exists. Since the NSZ program was never challenged on this ground,[17] this Comment acts as that lawsuit.

Part II.A examines the broad term "right to travel," and categorizes the leading circuit court cases while dispelling the myth that there is a circuit split on the issue of intrastate travel. Part II.B defines the NSZ as a high-crime exclusionary checkpoint, and contrasts traditional police checkpoints with the NSZ program. Part III analyzes Supreme Court and circuit precedent to see whether a fundamental right to "travel freely on public fora" exists, and considers varying levels of scrutiny. Part III.B discusses potential levels of scrutiny to be applied to localized travel claims. The NSZ checkpoint program is then analyzed to see whether it is narrowly tailored to achieve a compelling governmental purpose. Ultimately, this Comment concludes that a reviewing court would invalidate the NSZ checkpoint because it infringes upon the fundamental right to localized travel, and is not necessary to reduce violent crime.

II. BACKGROUND

A. What is the Right to Travel?

"The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence."[18] The Supreme Court has only ruled on the right to *inter*state travel, and has consistently held that this right is fundamental.[19] By contrast, the Court has never definitively addressed the existence of a right to *intra*state travel, explicitly reserving the issue

17. The NSZ program was challenged in *Mills* as unconstitutional under the Fourth Amendment, but plaintiffs there did not press a right to travel claim.

18. Saenz v. Roe, 526 U.S. 489, 498 (1999) (quoting United States v. Guest, 383 U.S. 745, 757 (1966)). The only textual guarantee of a right to travel is to members of Congress. U.S. CONST. art. I, § 6, cls. 1 & 2 ("The Senators and Representatives . . . . shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House . . . .").

19. *See Saenz*, 526 U.S. at 500 ("The 'right to travel' discussed in our cases embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.").

in the 1974 decision *Memorial Hospital v. Maricopa County*,[20] and not considering it since that decision.[21] *Memorial Hospital* invalidated Arizona's one-year residency requirement for state-funded non-emergency hospital care on equal protection grounds.[22] Because of the facts of this case, it is unsurprising that the Court used the term "intrastate travel" to refer to the correlative right.[23] But case law illustrates that this issue cannot be resolved simply by referring to whether a traveler crosses the state line.[24] Courts have recognized roughly five types of travel: (1) the right to freedom of movement;[25] (2) the right to travel freely on public fora;[26] (3) the right to intrastate travel;[27] (4) the right to interstate travel;[28] and (5) the right to international travel.[29]

This Comment focuses on the right to travel freely on public fora, and only touches on analogous rights to draw upon Supreme Court precedent, as in the case of interstate travel, or dispel notions that there is

20. Memorial Hospital v. Maricopa County, 415 U.S. 250, 255-56 (1974) (referring to the "constitutional distinction between interstate and intrastate travel" as "a question we do not now consider").

21. *See* Lutz v. City of York, 899 F.2d 255, 259-60 (3d Cir. 1990) (stating that "the Court has said nothing conclusive on the matter since [*Memorial Hospital*]"). *But see id.* at 260 n.8 (referring to *Kolender v. Lawson*, 461 U.S. 352 (1983), as a case decided after *Memorial Hospital* that did not conclusively decide the right to travel issue, but was decided on vagueness grounds, and thus "provide[s] at best indirect support for . . . the kind of localized intrastate movement at issue").

22. *Memorial Hospital*, 415 U.S. at 253.

23. *Id.*

24. *See* Sasse, *supra* note 16, at 698-703.

25. *See, e.g.*, Johnson v. City of Cincinnati, 310 F.3d 484, 495 (6th Cir. 2002) ("[W]e do not use the right to travel locally through public spaces and roadways synonymously with a right to freedom of movement. To be sure, a right of freedom of movement could encompass a right to localized travel, but it could also include interstate and international travel components.").

26. *See infra* Part III.A (finding the right to travel freely on public fora to be a fundamental right protected by substantive due process); Sasse, *supra* note 16, at 704-16.

27. *See infra* Part II.A (categorizing the right to "intrastate travel" into more doctrinally specific segments); Sasse, *supra* note 16, at 698-704.

28. *See* Nicole I. Hyland, Note, *On the Road Again: How Much Mileage Is Left on the Privileges or Immunities Clause and How Far Will it Travel?*, 70 FORDHAM L. REV. 187, 244-52 (2001) (describing the history of the right to interstate travel); Christopher S. Maynard, Note, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RES. L. REV. 297, 299-313 (2000) (same); Five Borough Bicycle Club v. City of New York, 483 F. Supp. 2d 351, 361-62 (S.D.N.Y. 2007) ("[T]he right to travel ordinarily refers to the right of a citizen to migrate freely from state to state. . . .") (internal quotation marks and footnote omitted).

29. *See, e.g.*, Haig v. Agee, 453 U.S. 280, 307 (1981) (taking a restrictive view of a right to international travel). *But see* Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment."). For an excellent analysis of the right to international travel, *see* Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008).

only one predominate term, as in the case of intrastate travel. To avoid being unduly repetitious, the "right to travel freely on public fora" will be used interchangeably with "the right to localized travel."

Simply put, the right to travel freely on public fora is the right of a citizen to walk along a public sidewalk or drive on a public roadway. It conveniently includes a broad textual restriction against the invasion of private property rights.[30] Access to a particular public *place*, such as a public building, more directly implicates the right to "freedom of movement," and is therefore beyond the scope of this Comment.[31] Additionally, this Comment does not address the impact of a formal emergency situation, such as an evacuation order or the imposition of martial law, on the right to travel freely on public fora.[32]

B. The Right to Intrastate Travel: A True Circuit Split?

Right-to-travel jurisprudence has been afflicted by two systemic problems. First, courts use imprecise and varied terminology when defining and discussing the right to travel in case law.[33] This Comment reviews federal appellate case law on intrastate and localized travel, draws distinctions between types of travel, and provides a system to categorize these cases.[34] Second, courts locate the right to travel in various constitutional provisions, often without providing a rationale for the decision.[35] After reviewing relevant precedent, the Third Circuit noted that the Supreme Court has found the right to interstate travel in

30. *See* JESSE DUKEMINIER, ET AL., PROPERTY 81 (6th ed. 2006) (describing property as "rights or relationships among people with respect to things" and including "the right to exclude" as an inherent aspect of real property ownership).

31. *See* Williams v. Town of Greenburgh, 535 F.3d 71, 76 (2d Cir. 2008) ("Indeed, it would distort the right to free travel beyond recognition to construe it as providing a substantive right to cross a *particular* parcel of land, enter a *chosen* dwelling, or gain admittance to a *specific* government building. Williams's right to intrastate travel might prevent the Town from burdening Williams's ability to drive, walk, or otherwise proceed from his home to the Center, but it has no bearing whatsoever on whether, upon Williams's arrival, the Town must admit him into the facility.").

32. *See, e.g.*, Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233, 241-42 (2008) (discussing *Dickerson v. City of Gretna*, a case involving the right to travel during Hurricane Katrina).

33. *Compare* Cole v. Hous. Auth. of Newport, 435 F.2d 807 (1st Cir. 1970) (interpreting the definition of "travel" recognized in *Shapiro v. Thompson*, 394 U.S. 618 (1969), as a "sense of migration with intent to settle and abide") *with* Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002) (listing cases that refer to the rights interchangeably) *and* Wright v. City of Jackson, 506 F.2d 900, 903 (5th Cir. 1975) (finding no "fundamental right to commute").

34. *See infra* Part II.B and accompanying text (discussing three types of "travel").

35. *See* Shapiro v. Thompson, 394 U.S. at 630 ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.").

seven different constitutional provisions.[36] As a general matter, these two problems help explain why the jurisprudence surrounding the right to travel is considered so confused.

The absence of guidance from the Supreme Court has created significant disagreement between courts that have considered a right to travel claim, regardless of whether it was framed as an intrastate right or a localized right.[37] Circuit courts have responded by recognizing various forms of the "right to intrastate travel" as fundamental,[38] creating a "split" between the Federal Courts of Appeals.[39] This Comment will argue, however, that factual differences prevent this jumble of case law from being considered a true circuit split.[40] Characterizing these cases as "recognizing" any type of travel is inexact and unadvisable because the claims are so diverse that they cannot realistically present a coherent jurisprudence.[41] Clear lines must be drawn between cases implicating different types of movement that is referred to under the overarching term "right to travel."

In a thoughtful Note on juvenile curfews, one student commentator aptly describes the difficulty in this area of the law in a heading titled "Doctrinal Disagreement or Sloppy Rights Talk?"[42] This Comment adopts that Commentator's classification, and attempts to demonstrate

36. Lutz v. City of York, 899 F.2d 255, 259-67 (3d Cir. 1990) (detailing the seven constitutional provisions where the right to travel had previously been found).

37. At this point, it seems like the Supreme Court has little interest in resolving this "circuit split." *See Johnson*, 310 F.3d at 484 (6th Cir. 2002), *cert. denied*, 539 U.S. 915 (2003).

38. Currently, the First, Second, Third, Sixth, and Ninth Circuits have recognized a limited fundamental constitutional right to intrastate travel. *See, e.g.*, *Johnson*, 310 F.3d at 484 (6th Cir. 2002); Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997); *Lutz*, 899 F.2d at 255 (3d Cir. 1990); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646 (2d Cir. 1971); Cole v. Hous. Auth. of Newport, 435 F.2d 807 (1st Cir. 1970). *See generally* Five Borough Bicycle Club v. City of New York, 483 F. Supp. 2d 351, 362 n. 68 (S.D.N.Y. 2007) (noting the circuit split); *see* Hyland, *supra* note 28, at 239 n.379.

39. Currently, the Fourth, Fifth, Seventh, and D.C. Circuits have not recognized the intrastate right to travel. *See, e.g.*, Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (en banc); Eldridge v. Bouchard, 645 F. Supp. 749 (W.D. Va. 1986), *aff'd without opinion*, 823 F.2d 546 (4th Cir. 1987); Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975); Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972). *See generally* Townes v. City of Saint Louis, 949 F. Supp 731 (E.D. Mo. 1996) (noting a split); Porter, *supra* note 16, at 842-46 (1992) (same).

40. *Compare Cole*, 435 F.2d at 811 (interpreting the definition of "travel" recognized in *Shapiro v. Thompson*, 394 U.S. 618 (1969), as a "sense of migration with intent to settle and abide") *with Johnson*, 310 F.3d at 498 (listing cases that refer to the rights interchangeably). *See generally* Sasse, *supra* note 16, at 698-99. This Comment owes much to Benjamin J. Sasse for the novel claim set forth in his Note.

41. *See infra* Part II.A and accompanying text.

42. *See* Sasse, *supra* note 16, at 698.

the need for case law to be separated according to the rights implicated by certain types of conduct.[43]

Three categories emerge from case law: "(1) a right to commute; (2) a right to receive public housing in the context of durational residency requirements; and (3) a right to travel freely within a given jurisdiction, or a right to travel on public fora."[44] A brief overview of a typical case under each category will give context to the debate surrounding a right to intrastate travel, and illustrate that this area cannot be considered a "circuit split."

1. A Right to Commute

Employees often claim that the broad right to travel includes a so-called "right to commute."[45] This claim is often asserted when employees challenge bona fide continuing residency requirements, which are local laws that require public employees to live within a specified geographic boundary of their employer.[46] Courts addressing the issue have held that the right to commute is not fundamental, and have subjected these laws to rational basis review.[47] An example of this type of case is *Wright v. City of Jackson*, which involved a suit by nonresident firefighters challenging an ordinance requiring municipal employees to live within City limits.[48]

The *Wright* court affirmed the district court's dismissal of the firefighters' claim, ruling that nothing in the Supreme Court's right to travel precedent requires the application of strict scrutiny.[49] The Fifth Circuit in *Wright* also relied on the Supreme Court's decision in *Detroit Police Officers Ass'n v. City of Detroit*, where the Court dismissed an identical "right to commute" claim from the Michigan Supreme Court for want of a federal question.[50] The *Wright* court noted that this dismissal

43. *See* Sasse, *supra* note 16, at 698-99.

44. Sasse, *supra* note 16, at 698-99 (internal citations and footnotes omitted).

45. *See* Sasse, *supra* note 16, at 699-700.

46. *See* Sasse, *supra* note 16, at 699-700.

47. *See e.g.*, Andre v. Bd. of Trs. of the Vill. of Maywood, 561 F.2d 48, 50 (7th Cir. 1977) (listing cases upholding similar residency restrictions on rational basis review).

48. Wright v. City of Jackson, 506 F.2d 900, 901-03 (5th Cir. 1975). The ordinance at issue "require[d] all municipal employees . . . to maintain their domicile and principal place of residence within the corporate limits of the City during the period of their employment." *Id.* at 901 n.1.

49. *Id.* at 903-04.

50. Detroit Police Officers Ass'n v. City of Detroit, 190 N.W.2d 97 (Mich. 1971), *cert. dismissed*, 405 U.S. 950 (1972) (reading in its entirety, "The appeal is dismissed for want of a substantial federal question.").

was a decision on the merits, and recognized that other courts considering the matter had come to the same conclusion.[51]

The "right to commute" cases illustrate only one type of claim brought under the larger term "intrastate travel." Although some courts point to decisions like *Wright* for the proposition that there is no fundamental right to intrastate travel, courts should exercise extreme care in analyzing the type of claim at issue, and not assume that a holding from a factually dissimilar case is mandatory authority.[52] The Supreme Court did not definitively rule on the existence *vel non* of a fundamental right to intrastate travel. Furthermore, circuit courts should not exaggerate the importance of this dismissal for want of a federal question. Treating decisions like *Wright* as binding for *all* intrastate and localized travel claims is a significant overstatement of its precedential value.[53]

2. Durational Residency Requirements

Durational residency requirements are laws that "require an individual to be in the jurisdiction for a certain amount of time before he can receive [a] government benefit or engage in some kind of activity."[54] These issues have been squarely addressed by the Supreme Court in the context of interstate travel,[55] and the intrastate travel cases are a logical extension of those opinions.

In *Shapiro v. Thompson*,[56] the Supreme Court invalidated laws requiring welfare recipients to reside in a state for at least one year to be

51. *Wright*, 506 F.2d at 902 (citing Ahern v. Murphy, 457 F.2d 363 (7th Cir. 1972)).

52. For a particularly egregious example of using dissimilar cases as binding precedent, *see Dickerson v. City of Gretna*, No. 05-6667, 2007 U.S. Dist. LEXIS 29460 at *5-11 (E.D. La. Mar. 30, 2007). *Dickerson* involved a right to intrastate travel claim brought by Hurricane Katrina evacuees after they were forcibly blocked from crossing a bridge into another municipality. *Id.* at *2-3. Plaintiffs' claim was dismissed on summary judgment for failure to state a federal cause of action. The court considered itself "bound by the Fifth Circuit precedent of *Wright*." *Id.* at *4, 11. *See* Crusto, *supra* note 32, at 241-42 (discussing *Dickerson*).

53. *Wright* and its progeny have amassed many critics. *See, e.g.*, Porter, *supra* note 16, at 835. *See generally* Comment, *The Significance of Dismissals "For Want of a Substantial Federal Question:" Original Sin in the Federal Courts*, 68 COLUM. L. REV. 785 (1968).

54. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 18.38(a) (4th ed. 2008) (analyzing Supreme Court case law invalidating durational residency requirements). For a good analysis of the right to intrastate travel and durational residency requirements, *see* Hyland, *supra* note 28, at 230-37 (using the Privileges or Immunities Clause of the Fourteenth Amendment to provide certain rights to intrastate travel).

55. *See id.* § 18.38(a) (noting that most Supreme Court rulings involved residency requirements).

56. Shapiro v. Thompson, 394 U.S. 618 (1969).

eligible for benefits.[57] The Court concluded that the residency classification infringed upon the fundamental right to travel, and applied strict scrutiny to the laws, requiring them to be necessary to promote a compelling governmental interest.[58] Similar laws have been invalidated because they deter the exercise of *interstate* travel, sometimes referred to as the "right of migration."[59]

Many circuit courts apply the Supreme Court's rationale to invalidate similarly protectionist laws which precondition certain benefits on the length of residency.[60] Recognizing the policies behind *Shapiro*, the Second Circuit in *King v. New Rochelle Municipal Housing Authority* reasoned that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."[61] This quote is often echoed by proponents of the right to intrastate travel.

The law in *King* required persons seeking public housing to reside in the City of New Rochelle for at least five years before becoming eligible.[62] This requirement plainly discriminates against both in-state and out-of-state residents.[63] Here, where the distinction is between city residents and everyone else, it is unclear why the state line has any importance.

Durational residency cases, both in the Supreme Court and lower courts, provide broad dicta for courts to draw upon when determining whether the right to travel freely on public fora is historically valued. But it is difficult to analogize the social and economic protectionist rationale that underlies the durational residency cases with the right to localized travel. Perhaps the strength in this line of cases is the recognition that the failure to cross state lines does not automatically doom a right to travel claim.

57. *Id.* at 641. *Shapiro* actually considered three claims—two state statutes invalidated under the Equal Protection Clause of the Fourteenth Amendment and a District of Columbia statute invalidated under the Due Process Clause of the Fifth Amendment. *Id.* at 621-27.

58. *Id.* at 634.

59. *See* Saenz v. Roe, 526 U.S. 489, 500 (1999); Hyland, *supra* note 28, at 194 (describing the third right mentioned in *Saenz* as "the right of migration").

60. *See, e.g.*, Cole v. Hous. Auth. of Newport, 435 F.2d 807 (1st Cir. 1970).

61. King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648 (2d Cir. 1971).

62. *King*, 442 F.2d at 647.

63. *Id.* (Ms. King "moved from North Carolina to New Rochelle" and Ms. Frazier "moved to New Rochelle from Yonkers, New York."); *see* Hyland, *supra* note 28, at 189-90 (using a similar example as a hypothetical to "illustrate the intrastate right to travel issue").

3. A Right to Travel Freely on Public Fora

The strongest support for a fundamental right to travel freely on public fora is provided by the Third Circuit's decision in *Lutz v. City of York*,[64] and the Sixth Circuit's decision in *Johnson v. City of Cincinnati*.[65] Both courts found the right in the Due Process Clause of the Fourteenth Amendment.[66] *Lutz* was authored in 1990 by Judge Edward R. Becker of the Third Circuit; it appears to be the first case to thoroughly research the right to localized travel and clearly articulate why substantive due process protected the right.[67]

The ordinance in *Lutz* was one city's response to the growing problem of "unnecessary repetitive driving," also known as "car cruising."[68] Police set up a monitoring point on two main streets to enforce the ordinance that criminalizes "driving a motor vehicle on a street past a traffic control point . . . more than twice in any two (2) hour period, between the hours of 7:00 p.m. and 3:30 a.m."[69] A conviction resulted in a fifty dollar fine.[70]

The question presented was a simple one: "whether the constitutional right to travel extends to localized intrastate movement."[71] After analyzing the court defined the right to localized travel as "the right to travel locally through public spaces and roadways."[72] Finally, the court concluded that the right was protected by the Fourteenth Amendment because it was "deeply rooted in the Nation's history and tradition."[73] The cruising ordinance was upheld, however, after application of an intermediate form of scrutiny.[74]

In *Johnson v. City of Cincinnati*, the Sixth Circuit analyzed the constitutionality of a municipal ordinance that excluded individuals with

64. Lutz v. City of York, 899 F.2d 255 (3d Cir. 1990).

65. Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002).

66. *See Lutz*, 899 F.2d at 267; *Johnson*, 310 F.3d at 489.

67. *See, e.g.*, *Lutz*, 899 F.2d at 259-67.

68. *Id.* at 257-58 (describing the serious traffic congestion problem that resulted from York's car cruisers, and affidavits of local police and firefighters detailing the public health issues specifically attributed to the cruisers). *See generally* Steven N. Gofman, *Car Cruising: One Generation's Innocent Fun Becomes the Next Generation's Crime*, 41 BRANDEIS L.J. 1 (2002).

69. *Id.* at 257 (citation omitted). The ordinance specifically exempted "[m]unicipal and commercial vehicles." *Id.*

70. *Id.*

71. *Id.* at 261.

72. *Id.* at 268.

73. *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)); *see infra* Part III.A for a discussion of the substantive due process framework.

74. *See infra* Part III.B for a critique of using the time, place, and manner doctrine as the degree of scrutiny for a checkpoint.

specific prior criminal drug convictions from sections of the city.[75] The ordinance made it a misdemeanor for these individuals to enter a "drug exclusion zone."[76] While a person could obtain a waiver for enumerated reasons, such as living or working within the area,[77] the plaintiffs did not fall within these exceptions, so their applications were denied.[78] Plaintiffs claimed the ordinance was unconstitutional on a number of grounds, including, *inter alia*, freedom of speech and association, and right to intrastate travel under the Due Process and Equal Protection Clauses.[79]

The district court held that the ordinance was invalid as an unconstitutional infringement of Plaintiffs' freedom of association and "freedom of movement in the form of intrastate travel."[80] Importantly, plaintiffs were also awarded $38,500 in fees.[81] An intervening Ohio Supreme Court decision, *State v. Burnett*,[82] also invalidated the ordinance on both federal and state constitutional grounds, defining the intrastate right to travel as "the right to travel locally through public spaces and roadways of this state."[83] The Sixth Circuit decided that plaintiffs' appeal was not moot because if no fundamental rights had been violated, the district court's award of fees was erroneous.[84]

In reviewing relevant circuit precedent,[85] the court did not find a case that was directly on point.[86] The court distinguished a legally similar case, the 1976 decision in *Wardwell v. Board of Education of the City of Cincinnati*,[87] based on the type of ordinance—a "continuing

75. *See* Johnson v. City of Cincinnati, 310 F.3d 484, 487-88 (6th Cir. 2002).

76. *See id.* at 488 ("The Ordinance defines drug-exclusion zones as 'areas where the number of arrests for . . . drug-abuse related crimes for the twelve (12) month period preceding the original designation is significantly higher than that for other similarly situated/sized areas of the city.'") (quoting Cincinnati Municipal Code § 755-5).

77. *See id.* at 487-88.

78. *See id.* at 489.

79. *See id.*

80. *Id.* For an overview of First Amendment law as it relates to travel claims, see Jeanne M. Woods, Essay, *Travel that Talks: Toward First Amendment Protection for Freedom of Movement*, 65 GEO. WASH. L. REV. 106 (1996).

81. *See Johnson*, 310 F.3d at 489-90.

82. State v. Burnett, 755 N.E.2d 857 (Ohio 2001).

83. *Id.* at 865.

84. *Johnson*, 310 F.3d at 489-90 (analyzing the *Burnett* decision and deciding that "the parties still have an actual case or controversy with respect to the district court's award of attorney fees").

85. *See id.* at 493 (describing a common appellate rule that prior panel decisions are binding on subsequent panels, and clarifying that "[t]his rule does not, however, extend to dicta"); 6TH CIR. R. 206(c) ("Reported panel opinions are binding on subsequent panels.").

86. *See id. Contra id.* at 508-09 (Gilman, J. dissenting) (interpreting *Wardwell* as holding there is no fundamental right to intrastate travel).

87. Wardwell v. Bd. of Educ. of the City of Cincinatti, 529 F.2d 625 (6th Cir. 1976).

residency requirement."[88] *Johnson* narrowly interpreted *Wardwell*'s holding by concluding that continuing residency requirements receive less deferential rational basis review.[89] By distinguishing *Wardwell*, the court was able to analyze the drug-exclusion zone under the Substantive Due Process Clause.[90] *Johnson* adopted the Third Circuit's definition of the right, and concluded that "the right to travel locally through public spaces and roadways" is a fundamental right.[91] The court, however, disagreed with the *Lutz* court's decision to apply intermediate scrutiny.[92] Instead, the *Johnson* court applied strict scrutiny to invalidate the ordinance.[93]

C. A Description of High-Crime Exclusionary Checkpoints

Police checkpoints come in all shapes and sizes.[94] As noted earlier, the NSZs are not normal checkpoints. The unique feature of a high-crime exclusionary checkpoint is that the motorist is denied entry to the barricaded area if they do not provide a legitimate purpose for entering the neighborhood. This interest is usually a personal, professional, commercial, or expressive connection to the neighborhood.[95]

Most jurists would analyze the NSZ checkpoints under the Fourth Amendment's prohibition on unreasonable seizures.[96] And checkpoints have consistently been held to be "seizures" under the meaning of the Fourth Amendment.[97] But upon closer inspection, this "seizure" is

88. *See Johnson*, 310 F.3d at 493-94.

89. *See id.*

90. *See id.* at 495-96. The decision by the *Johnson* court to distinguish *Wardwell* also provides further evidence that the categorization set forth in this Comment is proper, and that the right to intrastate travel should not be labeled as a "circuit split." *See* Sasse, *supra* note 16, at 698-703 (creating the categorization in the first instance).

91. *See id.* at 498.

92. *See id.* at 504-06.

93. *See id.*

94. *See* 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.7 (4th ed. 2004) ("Roadblocks or vehicle checkpoints are utilized by law enforcement officers for a great variety of purposes."). This Comment has used the term "checkpoint" because the MPD used this term to describe the NSZ program.

95. Watson, *supra* note 8, at 103 (defining a "high-crime area checkpoint" as generally encompass[ing] a particular geographical area and involv[ing] blanket stops to ascertain the individual's purpose for attempting to enter the area").

96. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."). Indeed the two most widely publicized high crime exclusionary seizures, Maxwell v. City of New York, 102 F.3d 664 (2d Cir. 1996), and Mills v. District of Columbia, 584 F. Supp. 2d 47 (D.D.C. 2008), were both evaluated under the Fourth Amendment's balancing test.

97. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) ("It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.").

distinguishable from the temporary and limited intrusions that the Supreme Court traditionally considers under the Fourth Amendment.[98] Requiring a driver to stop at a checkpoint does constitute a seizure under the Fourth Amendment, but the government's restriction upon an individual's liberty does not end when they leave the checkpoint. High-crime area checkpoints are more like the drug exclusion zones at issue in *Johnson* because they bar certain individuals from entering a specific geographic area.[99]

The Neighborhood Safety Zone program is the most recent example of a high-crime exclusionary checkpoint.[100] In *Mills v. District of Columbia*, plaintiffs' class action challenged the constitutionality of the NSZ as an unreasonable seizure under the Fourth Amendment, and sought, *inter alia*, an injunction against the future use of the NSZ.[101] The District Court for the District of Columbia rejected plaintiffs' argument that the NSZ's purpose was "generalized crime control" and therefore unconstitutional under *City of Indianapolis v. Edmond*.[102] The D.C. Circuit reversed, finding that the purpose of the roadblock program—to deter and prevent crime—was an interest in generalized crime control, and concluded an injunction must issue because of plaintiffs' high likelihood of success on the merits.[103] The case was only litigated as a Fourth Amendment challenge, and the plaintiffs in *Mills* did not press any version of a right to travel claim. An evaluation of whether a right to travel claim exists, and whether the NSZ is constitutional in light of this claim, is a separate and distinct analysis that would be useful for future litigation. An initial description of the NSZ program will provide context for the subsequent discussion regarding whether there is a fundamental right to localized travel.

On June 4, 2008, in response to recent violence in the Trinidad neighborhood of Washington, D.C., the MPD enacted Special Order 08-06 ("Special Order"), which authorized the NSZ checkpoint program.[104]

98. *See id.* at 55 (noting that when "[t]he lowered expectation of privacy in one's automobile is coupled with the limited nature of the intrusion: a brief, standardized, nonintrusive seizure" results).

99. *See* Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002).

100. The NSZ was implemented between June 7-12 and July 19-28, 2008. *See* Mills v. District of Columbia, 584 F. Supp. 2d 47, 50, 52 (D.D.C. 2008).

101. *See id.* at 50.

102. 531 U.S. 32 (2000). *See generally* Brooks Holland, *The Road 'Round Edmond: Steering Through Primary Purposes and Crime Control Agendas*, 111 PENN ST. L. REV. 293 (2006) (analyzing the "primary purpose" standard from *Edmond*).

103. Mills v. District of Columbia, 571 F.3d 1304, 1309-11 (D.C. Cir. July 10, 2009).

104. *Mills,* 584 F. Supp. 2d at 50-51. There were actually three Special Orders issued during this case. They were: SO-08-06 # 1 (effective June 5, 2008, establishing the first NSZ); SO-08-06 # 2 (effective July 18, 2008, establishing the second NSZ); and SO-08-06 (effective July 24, 2008, authorizing a five-day extension of the second NSZ). The

The NSZ checkpoints were first implemented on June 7, 2008, pursuant to the guidelines set forth in the Special Order, which set up "eleven vehicle checkpoints over the course of five days at locations around the zone's perimeter."[105] Checkpoints were established between Saturday, June 7 and Thursday, June 12, and between Saturday, July 19 and Sunday, July 28.[106]

It was clear that the MPD intended a unique checkpoint specifically designed to prevent the type of vehicle-related violence that plagued the Trinidad neighborhood.[107] The MPD's solution was to limit vehicular traffic[108] by using checkpoints to prevent vehicles without a "legitimate purpose" from entering the area designated as a NSZ.[109] The District described the duties of the officers during the operation of the checkpoint as follows:

> [The Special Order] . . . specifically dictates that officers staffing the checkpoint are simply to inquire whether the operator of a stopped vehicle has a legitimate reason for entering the NPZ along with such additional information as would enable the officers to reasonably verify the accuracy of the driver's stated reason. The inquiry was to be and was limited to confirmation of the driver's residence in the NSZ or identification of an invitation to a civic or community event within the NSZ or of a contact phone number for the destination address.[110]

main difference between the first and the subsequent orders was the removal of a data monitoring requirement. Law enforcement officers were previously keeping track of motorists at the checkpoints. *See id.* at 52 (discussing the change in the second NSZ program).

105. *Id.* at 50.

106. *See id.* at 50, 52.

107. *See id.* at 50 (describing a "tragic triple-homicide" that occurred on May 31, 2008 and stating that in "the preceding year, the neighborhood had been subject to twenty-five assaults involving a firearm, five of which resulted in homicides and six of which involved the use of vehicles").

108. The Special Order stated that officers running the checkpoint were not authorized to restrict the flow of pedestrian traffic entering or leaving the NSZ. *See id.* at 51 (describing that motorists denied entry or who refused to provide information were to be informed that they were free to "park their vehicle outside the NSZ and enter the NSZ on foot").

109. *See id.* at 50 ("According to [Chief of Police] Cathy Lanier, the checkpoints "served as a fence to keep violent criminals out of Trinidad," rather than "nets to capture evidence of ordinary criminal wrongdoing.") (internal quotation marks omitted).

110. *See* Opposition of Defendant District of Columbia to Plaintiffs' Motion for Preliminary Injunction at 5-6, Mills v. District of Columbia, 584 F. Supp. 2d 47 (D.D.C. 2008) (No. 08-1061) (stating that "[a]t no time were officers to travel to the location that an operator identified as her destination under the NSZ Initiative").

When a NSZ program is in effect, therefore, the likelihood of driving into the targeted neighborhood for an anniversary picnic depends on whether your picnic is deemed a "legitimate reason" to enter.

The MPD Special Order establishing the program enumerated seven purposes for entering Trinidad including:

> (1) The person resides in the NSZ;
> (2) The person is employed in the NSZ or is on a commercial delivery;
> (3) The person attends school or a day-care facility, or is taking a child to, or picking up a child from, a school or day-care facility in the NSZ;
> (4) The person is a relative of a person who resides in the NSZ;
> (5) The person is seeking medical attention, is elderly, or is disabled; and/or
> (6) The person is attempting to attend a verified organized civic, community or religious event within the NSZ; or
> [7] Entry could also be granted in exigent circumstances, but only by an official the rank of Sergeant or above.[111]

It appears that "anniversary picnic" does not fit within any of the enumerated categories, and therefore is not a sufficiently legitimate purpose to allow entry into Trinidad. By enumerating certain classes, the NSZ necessarily excluded everyone else from driving into the neighborhood.

III. ANALYSIS

A. Substantive Due Process

The use of substantive due process is among the most contentious topics in constitutional law today.[112] Yet even the most conservative Justices have recognized that the Fourteenth Amendment protects *some* unenumerated rights.[113] An active debate in this area is what analytical

111. *Mills,* 584 F. Supp. 2d at 51 n.1 (citing District of Columbia, Special Order #1 SO-08-06 (June 4, 2008)).

112. *See, e.g.*, Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64 (2006) (describing substantive due process as the *most* controversial doctrine).

113. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997) (Rehnquist, C.J.). This Comment will not discuss the normative questions regarding the propriety of finding unenumerated rights. *See* Earl M. Maltz and Ira C. Lupu, *Judicial Competence and Fundamental Rights*, 78 MICH. L. REV. 284, 296 n.3 (1979) (noting that strict originalists do not recognize the existence of any unenumerated rights).

framework should be used to determine whether a right is protected by the Constitution.[114] The *Lutz* court decided to use Justice Scalia's "narrow" framework as articulated in *Michael H. v. Gerald D.*,[115] reasoning that using this framework would reduce the possibility that the judiciary was "overextending the doctrine" of substantive due process.[116]

The Supreme Court clearly described this test in *Washington v. Glucksberg*:

> Our established method of substantive-due-process analysis has two primary features. . . . [First,] we have required . . . a "careful description" of the asserted fundamental liberty interest. [Second,] we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition" . . . and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed."[117]

The first requirement of *Glucksberg*—defining the liberty interest—is a recurring and difficult question of question of constitutional law. Often called the "level of generality" problem,[118] it has been defined as "at what level of generality should the right previously protected, and the right currently claimed, be described?"[119] Thankfully, this Comment can fall back on the wisdom of the Third and Sixth Circuits that defined the right as one "to travel locally through public spaces and roadways."[120]

114. It is unclear what the determinative test for finding unenumerated rights is in the current Court. One commentator synthesized the Court's precedent into three types of analysis: "historical tradition," "reasoned judgment," and "evolving national values." *See* Conkle, *supra* note 112, at 64-68; Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that the Substantive Due Process clause protects a fundamental right for consenting adults to engage in homosexual conduct).

115. Michael H. v. Gerald D., 491 U.S. 110, 122 (1988). This test was reaffirmed by the majority of the Court in *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). *Johnson v. City of Cincinnati* used the *Glucksberg* variation of the *Michael H.* test. Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002).

116. Lutz v. City of York 899 F.2d 255, 268 (3d Cir. 1990) ("Solely for purposes of this appeal, we adopt Justice Scalia's view, not because it represents the views of the Court, but because if a fundamental right of intrastate travel can be recognized under a view of substantive due process expressly rejected by a majority of the Court as unduly *narrow,* then clearly we will not have overextended the doctrine by so doing.") (footnote omitted).

117. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (citations omitted).

118. *See* LAURENCE H. TRIBE AND MICHAEL C. DORF, ON READING THE CONSTITUTION 73 (1991) (discussing the level of generality problem).

119. *See* TRIBE, *supra* note 118, at 73 (emphasis omitted); *cf.* Hutchins v. District of Columbia, 188 F.3d 531, 538 (D.C. Cir. 1999) (proper level of generality at which to describe the right is 'the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified'" (quoting *Michael H.*, 491 U.S. at 127 n.6)).

120. *Johnson*, 310 F.3d at 495; *Lutz*, 899 F.2d at 268.

The Supreme Court's focus on the right to travel across state lines has created volumes of dicta that courts and commentators wield to support the existence of a right to travel freely on public fora.[121] And while these words cannot be construed as holdings, they evidence a historical tradition to protect localized travel.[122] One need only cherry-pick from Supreme Court decisions, as did the Sixth Circuit in *Johnson v. City of Cincinnati*, to conclude that a right to travel freely on public fora enjoys a position deeply rooted in our nation's history.[123]

Blackstone noted that "the personal liberty of individuals . . . consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law."[124] The Articles of Confederation expressly mentioned a right to travel, stating that "the people of each State shall have free ingress and regress to and from any other State. . . ."[125] Early cases from the Supreme Court evince a similar protection over travel to and from other states.[126]

The close relationship between interstate and intrastate travel has also been stressed by many jurists.[127] While discussing the invalidation of segregation laws, the Court stressed that "[t]he right of any person to travel interstate irrespective of race, creed, or color is protected by the Constitution. Certainly his right to travel intrastate is as basic."[128]

Commentators have recognized that the right to travel freely on public fora is a predicate right for the exercise of many other rights.[129] If this right is restricted, then other rights are restricted as well. How can the right to interstate travel as developed by the Court truly be exercised if a citizen does not have the right to travel to the state border? Similar arguments have been made with respect to the First Amendment's protection of freedom of association.[130]

121. *See, e.g.*, *Johnson*, 310 F.3d at 495-97.

122. *See, e.g.*, *id.*

123. *See id.* at 495-500; Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990); Sasse, *supra* note 16, at 703-07.

124. 1 William Blackstone Commentaries * 134.

125. ARTICLES OF CONFEDERATION, art. IV (1781); *see* Porter, *supra* note 16, at 821-22.

126. "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." United States v. Guest, 383 U.S. 745, 757 (1966).

127. *See, e.g.*, *supra* notes 70-82 and accompanying text.

128. Bell v. State of Maryland, 378 U.S. 226, 255 (1964); *see* McCool v. City of Philadelphia, 494 F. Supp. 2d 307, 313-14 (E.D. Pa 2007) (concluding that the "right to intrastate travel . . . encompasses the right to change residences within a state").

129. *See, e.g.*, Sasse, *supra* note 16, at 706.

130. *See* Lutz v. City of York, 899 F.2d 255, 266 (3d Cir. 1990) (citing Aptheker v. Secretary of State, 378 U.S. 500 (1964)).

Considered in a different way, the right to travel freely is merely a statement that the government cannot restrain a citizen's liberty without sufficient justification; "Beginning with *Meyer v. Nebraska* and continuing through *Focha v. Louisiana*, the Court has consistently assumed that the Due Process Clause 'encompasses freedom from bodily restraint and punishment.' Indeed, the Court has been 'careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty.'"[131] When the historical treatment of a citizen's liberty interest is viewed in this way, it seems more natural to accept a fundamental right to travel freely on public fora.

The Supreme Court's loitering precedents also show a strong historical tradition of protecting citizens' right to free movement. In *City of Chicago v. Morales*, the Court relied on the vagueness doctrine to strike down a Chicago ordinance that prohibits gang members from loitering in public places.[132] And while the Court did not recognize a "fundamental right to loiter,"[133] its message is clear:

> [T]he freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute or personal liberty" protected by the Constitution. Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage."[134]

If a plurality of the Court in *Morales* supported the freedom to remain in a public place without arbitrary interference, it follows that an individual has the freedom to initially travel to that public place.[135]

B. Defining a Level of Scrutiny

The recognition of a fundamental right to travel freely on public fora does not mean that traffic laws no longer apply, or that a person has the right to drive through a street fair. The Third Circuit in *Lutz* explained the delicate balancing at the heart of selecting the appropriate level of scrutiny:

131. *See* Sasse, *supra* note 16, at 705 (footnotes omitted).
132. City of Chicago v. Morales, 527 U.S. 41, 45 (1999).
133. *See id.* at 53 n.20. *But see id.* at 84 (Scalia, J. dissenting) (criticizing the plurality's support for a fundamental right to loiter).
134. *Id.* at 53-54 (citations omitted).
135. Part II of the *Morales* opinion was written by Justice Stevens, and was joined by Justices O'Connor, Kennedy, Souter, Ginsburg and Breyer. *See id.* at 44.

> [J]ust as the right to speak cannot conceivably imply the right to speak whenever, wherever and however one pleases—even in public fora specifically used for public speech—so too the right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel. Unlimited access to public fora or roadways would result not in maximizing individuals' opportunity to engage in protected activity, but chaos. To prevent that, state and local governments must enjoy some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of speech and travel.[136]

The history of travel on public fora is a highly regulated one; indeed, a central purpose of regulation is to facilitate travel.[137] In most areas of the law, the selection of the appropriate level of judicial scrutiny to analyze regulations is simple. If a law infringes upon a fundamental right, it is upheld only if it survives strict scrutiny.[138] This heightened review requires the law to be "narrowly tailored to serve a compelling state interest."[139] If a law infringes upon a right which is not fundamental, it is subjected to rational basis review. This requires it to be "rationally related to legitimate government interests."[140]

It is clear that the typical application of strict scrutiny to a right to localized travel would not be rational, or judicially defensible. The state would bear the burden of proof to uphold the law against a tough standard based on very minor infringements.[141] Granted, this is the framework the Supreme Court uses when evaluating durational residency restrictions against interstate travel challenges.[142] But the frequency with which the right to localized travel is slightly restricted and the substantial policy differences between the two doctrines mandate a different result.[143]

136. Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990).

137. *See id.*; Roger I. Roots, *The Orphaned Right: The Right to Travel by* Automobile, 1890-1950, 30 OKLAHOMA CITY U. L. REV. 245, 259-61 (2005) (describing the history of the driver's license).

138. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

139. *Id.* (quotation marks and citation omitted).

140. *Id.* at 728.

141. *See* Part III.C *infra* discussing the application of strict scrutiny.

142. *See* Saenz v. Roe, 526 U.S. 489, 491 (1999).

143. *Compare id.* at 504-05 (invalidating a California welfare law using the Equal Protection Clause of the Fourteenth Amendment because it discriminated slightly against those who were moving into the state) *with* Five Borough Bicycle Club v. City of New York, 483 F. Supp. 2d 351, 362 (S.D.N.Y. 2007) (recognizing that "[w]hen a statute or regulation has "[m]erely an effect on travel," it does not "raise an issue of constitutional dimension" (quoting Soto-Lopez v. New York City Civil Serv. Comm'n, 755 F.2d 266, 278 (2d Cir. 1985)) (alteration in original).

A more flexible standard of judicial review must be found, one that protects individual rights while allowing the Government to restrict those rights to protect the public interest. The *Lutz* court applied the "time, place, and manner" doctrine from First Amendment jurisprudence to the curfew law.[144] This doctrine is a version of intermediate scrutiny that is used to determine whether governmental restrictions on free speech in public fora are constitutional.[145]

However, the time, place, and manner doctrine applies intermediate scrutiny to *all* restrictions on travel. The straightforward application of intermediate scrutiny, without an exception for *de minimis* infringement, might invalidate useful and necessary government regulation on travel. This form of intermediate scrutiny has been described as being both "overprotective and underprotective" of the right to travel on public fora.[146] As mentioned earlier, traffic control measures are meant to prevent the chaos that would naturally result if there was no regulation.[147] For this reason, "incidental" burdens on the right to localized travel should not be subjected to heightened scrutiny.[148] An intermediate level of scrutiny would also fail to protect the right against certain "direct" burdens, such as the NSZ program, because they arguably satisfy the standard. Instead, strict scrutiny should apply to ensure that the fundamental right to localized travel is protected.[149]

A novel solution to this problem is to apply the "undue burden" standard from the Supreme Court's decision in *Planned Parenthood v. Casey* to the travel context.[150] At its core, this standard recognizes that not all infringements on liberty interests are unwarranted.[151] A restriction is considered an undue burden if "a state regulation has the purpose or effect of placing a substantial obstacle in the path of" the exercise of a fundamental right.[152] A restriction that constituted an undue burden would be subjected to review under strict scrutiny.[153]

144. *See* Lutz v. City of York, 899 F.2d 255, 269 (3d Cir. 1990).

145. *See* ROTUNDA, *supra* note 67, § 20.47(a) at 459.

146. Sasse, *supra* note 16, at 708.

147. *See* Lutz, 899 F.2d at 269; Sasse, *supra* note 16, at 707-09.

148. *See* Sasse, *supra* note 16, at 708 (using traffic lights as an example of an "incidental" burden and a curfew law as an example of a "direct" burden).

149. *See* Sasse, *supra* note 16, at 708.

150. Planned Parenthood v. Casey, 505 U.S. 833, 876-77 (1992); *see* Sasse, *supra* note 16, at 708.

151. *See id.* at 876 (recognizing that "[t]he very notion that the State has a substantial interest in potential life leads to the conclusion that not all regulations must be deemed unwarranted").

152. *Id.* at 877; *see* Sasse, *supra* note 16, at 709.

153. *See* Sasse, *supra* note 16, at 709. The *Casey* plurality considered an undue burden on the right to an abortion as an invalid infringement per se. *See Casey*, 505 U.S.

This modified undue burden level of scrutiny appears to be a workable standard because it does not function any differently than the normal strict scrutiny analysis for most restrictive or "blanket" bans.[154] Using the drug-exclusion zone from *Johnson v. City of Cincinnati* as an example, a court would find that the ordinance completely bars certain individuals from exercising their right to localized travel.[155] This ordinance would constitute an undue burden, and a reviewing court would apply strict scrutiny. The result would be the same if the NSZ checkpoints were evaluated because individual's right to travel freely on public fora is restricted.[156] Thus, the result is the same under both the undue burden standard and the traditional strict scrutiny standard.

C. Analysis of the NSZ Program

An analysis under strict scrutiny requires a court to use its independent judgment to determine whether a law is "narrowly tailored to serve a compelling state interest."[157] The state bears the burden of proof throughout this analysis.[158] The first step is to identify the state interest at issue, and then determine whether it can be considered "compelling." The state interest is also referred to as the "state's purpose."[159] The second step requires the state to "show that the law is *necessary* to achieve the objective."[160] The *Johnson* court provided a good overview of the analysis at this step:

> To determine whether the [law] is narrowly tailored to achieve the City's compelling interest in reducing . . . drug-related crime, we . . . determine whether the [law] is the least restrictive means to accomplish the City's goal. In making this latter inquiry, we ask whether any other methods exist to achieve the desired results of enhancing the quality of life and protecting the health, safety, and welfare of citizens in high drug-crime neighborhoods. If there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of

at 876-77. Commentator Sasse frames the question as a "threshold inquiry," which this author agrees is more doctrinally sound. Sasse, *supra* note 16, at 709.

154. This is because the threshold inquiry would almost always be satisfied with a broad restriction on the fundamental right to localized travel. The strict scrutiny analysis would then determine whether the restriction is unconstitutional.

155. Johnson v. City of Cincinnati, 310 F.3d 484, 502 (6th Cir. 2002).

156. *See supra* Part II.

157. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quotation marks and citation omitted).

158. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986).

159. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, § 10.1 (3d ed. 2006).

160. CHEMERINSKY, *supra* note 159, at § 10.1.

> greater interference. If it acts at all, it must choose less drastic means.[161]

1. Compelling State Interest

It is clear that the MPD's interest in deterring homicides, drive-by shootings, and drug-related violence is an important one. The NSZ checkpoints targeted the most violent section of D.C., which had a reported 22 homicides between January 1 and June 5, 2008.[162] The July 19 NSZ checkpoint was established in response to multiple homicides that were linked to drive-by shootings.[163] The Supreme Court has consistently recognized that "[i]t is a traditional exercise of the States police powers to protect the health and safety of their citizens."[164]

In the end, a reviewing court might uphold the state's interest as compelling, or even gloss over the analysis to determine whether the construction of the program is narrowly tailored. This author recognizes the dire and complex problems that violent crime presents. Moreover, protecting the residents of Trinidad from realistic threats of homicide is undoubtedly an important interest, and arguably the most compelling interest the state could assert. It is unclear whether searching judicial review would invalidate the NSZ based on the MPD's asserted purpose. Because of this uncertainty, the following analysis will assume that a reviewing court concludes that the MPD's purpose is sufficiently compelling.

2. Least Restrictive Alternative

The state must next prove that the law is the least restrictive alternative. This analysis requires the law to be necessary to achieve the previously asserted state interest.[165] Professor Chemerinsky notes that no formula exists for "deciding whether a means is necessary or whether a less restrictive means can suffice. The government's burden when there is an infringement of a fundamental right is to prove that no other alternative, less restrictive of the right, can work."[166]

161. Johnson v. City of Cincinnati, 310 F.3d 484, 503 (6th Cir. 2002) (internal quotation marks and citations omitted).

162. *See Police to Check Drivers*, *supra* note 2 ("The 5th Police District, which includes Trinidad, has had 22 killings this year, one more than all of last year. Since April 1, the Trinidad neighborhood has had seven homicides, 16 robberies and 20 assaults with dangerous weapons, according to police data.").

163. Mills v. District of Columbia, 584 F. Supp. 2d 47, 52 (D.D.C. 2008).

164. Hill v. Colorado, 530 U.S. 703, 715 (2000) (quotation marks and citation omitted).

165. *See* CHEMERINSKY, *supra* note 159, at § 10.1.

166. *See* CHEMERINSKY, *supra* note 159, at § 10.1.

When this searching inquiry is applied to the manner in which the NSZ checkpoint infringed on the fundamental right to travel freely on public fora, the government bears a heavy, if not impossible, burden. The difficulty of the burden is compounded in the area of crime control, where myriad legislative actions are available to remedy this problem. The efforts of the MPD to narrowly tailor this program will be reviewed, along with what appear to be significant oversights in certain areas. Ultimately, the MPD will likely fail to meet its burden of proof that the NSZ program is necessary to achieve its purpose of reducing violent crime and deterring drive-by shootings. The MPD simply has too many alternative methods to reduce crime in Trinidad for a court to conclude that this roadblock program is necessary. The Special Order establishing the NSZ program could therefore be invalidated as an unconstitutional restriction of the right to travel freely on public fora.

In *Johnson v. City of Cincinnati*, the Sixth Circuit invalidated an ordinance that excluded those with a prior criminal drug conviction from entering a specified area.[167] Like the determination of where NSZ checkpoints are placed,[168] objective criteria in the form of crime data was used to determine what neighborhoods became drug-exclusionary zones.[169] Unlike the NSZ program, however, the individuals being excluded from the area in *Johnson* had a direct reason for being excluded from *that specific area*, namely their prior drug convictions. Deciding which individuals were excluded from entering Trinidad was not about the relationship a person had with the area; it was about the absence of a relationship. This critical difference between the two programs clearly shows that the NSZ is not narrowly tailored. The *Johnson* ordinance *excluded* a specific group of people, exempting all others and allowing these individuals to freely exercise their right to localized travel. The NSZ program *included* a specific group of people, subjected them to a burden,[170] and excluded every other individual in the country. Moreover,

167. *See* Johnson v. City of Cincinnati, 310 F.3d 484, 487-88 (6th Cir. 2002).

168. Mills v. District of Columbia, 584 F. Supp. 2d 47, 56 n.3 (D.D.C. 2008) ("The Special Order states that the following types of evidence may support the existence of a neighborhood violent crime problem sufficient to establish a NSZ: pertinent violent crime data, information contained in citizen and community reports and complaints relevant to documented violent crimes, and information gathered from criminal intelligence sources relevant to documented violent crimes.").

169. *See Johnson*, 310 F.3d at 488 ("The Ordinance defines drug-exclusion zones as 'areas where the number of arrests for . . . drug-abuse related crimes for the twelve (12) month period preceding the original designation is significantly higher than that for other similarly situated/sized areas of the city.'" (quoting Cincinnati Municipal Code § 755-5)).

170. A Trinidad resident with valid identification that goes through one NSZ checkpoint is arguably burdened as much as a person subjected to one DUI checkpoint. Clearly, however, the burdens of continuously driving through the checkpoints, social

the checkpoints excluded the vast majority of people, none of whom had been individually adjudicated as guilty of a crime.

The least restrictive alternative standard is simply phrased, but often difficult to implement. Often this is because there are political, social, and moral considerations that would influence jurists contemplating the constitutionality of the NSZ program. From a strictly legal standpoint, the NSZ program is not necessary to effectuate the District's goals of protecting their citizens. Indeed, the NSZ was doomed the moment that the "narrowly tailored" prong of strict scrutiny was rephrased as requiring the program to be "necessary" to achieve the state's purpose.

IV. CONCLUSION

> The District of Columbia, like most major metropolitan areas and many rural communities, is in the midst of a crisis. As the local and national media daily report, the sale and use of illicit drugs in the District of Columbia has combined in recent years with long-standing problems of economic and social inequity to create an unprecedented explosion of violence. The drug scourge and its accompanying violence tend to make victims of those who can bear it least: the poor, minorities and the disadvantaged.
>
> The disease is undisputed; the question is how to cure. Facile, knee-jerk responses will not suffice. Just as mere punishment will never cure the drug addict, so mere martial tactics will never wean the District from its addiction to violence and illegal trafficking in drugs. Having said this, the Court emphasizes that any legislative response to the District's crisis is none of this Court's business, except insofar as it may impact upon the constitutional rights of the District's citizenry.[171]

These strong words were crafted nineteen years before the NSZ program was conceived, but are equally applicable today.[172] Problems common to troubled neighborhoods—street crime, narcotics, gang warfare, drive-by shootings—exist because of other, more systemic problems such as unemployment, poverty, and lack of education. Solutions to these underlying problems obviously cannot be found in checkpoint programs or increased police presence alone. But when solutions are attempted, even in a neighborhood that needs immediate

stigmatization, and the inaccessibility to many friends who are excluded make the checkpoints incomparable.

171. Waters v. Barry, 711 F. Supp. 1125, 1127 (D.D.C. 1989) (invalidating a District of Columbia curfew ordinance).

172. The first day of the NSZ was on June 7, 2008. *Mills,* 584 F. Supp. 2d at 50.

help, the government must not infringe upon an individual's liberty interest without sufficient justification. The promise of an immediate end to violence cannot excuse nearsighted police tactics.