

A Brief History of Checkpoints (And What to do About Them)

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Imagine driving to the local school to pick up your kids. It's three o'clock in the afternoon, and the day is unseasonably nice. The sun is shining and your otherwise routine schedule is pleasant enough. You drive around a final corner to reach your destination when you suddenly approach a group of police cars. You abruptly halt and observe several officers standing right in the middle of the street. They signal you to stop. You pull up to the stopping point and roll down your window, wondering what could be happening.

The first officer announces that you have encountered a police checkpoint. He asks to see your driver license, registration, and insurance card. You present these items and ask if there is anything wrong. "Just a routine checkpoint," is the casual reply. He sizes up your papers and asks, "Are you the owner of the vehicle?" You reply affirmatively. He then scours your vehicle, both inside and out. The officer focuses on your youngest child in her car seat. He pokes his head about the back window opening, further examining the seat. He states nonchalantly, "Just checking for proper restraints on everyone in the car, ma'am." Your papers are handed back to you with a detached thank you. The officer signals you to proceed. "Have a nice day, ma'am."

This scenario is an all too common occurrence in America. A checkpoint, or roadblock as it is sometimes called, is a police technique that seeks to enforce various laws by stopping and engaging motorists without suspicion. The most familiar type of checkpoint might be those based on sobriety, but many other types exist. There are checkpoints for driver license, registration, insurance, seatbelts, child seats, safety inspections, citizenship, hunting, boating, and even fireworks.¹ Judicially documented cases of sobriety checkpoints began to appear in the early to mid-1980s.² Other checkpoints can be judicially traced back to the mid-1970s.³

The legality of checkpoints varies by state. The Insurance Institute for Highway Safety notes that sobriety checkpoints are illegal in 11 states⁴; however, various other types of checkpoints have occurred in most, if not all, of these 11 states.⁵ The 1990 *Michigan State Police v. Sitz* Supreme Court decision ruled that sobriety checkpoints are basically constitutional, and generally left it up to each state to determine that application.⁶

¹ See various state statutes and court decisions regarding authorization for these different types of checkpoints.

² Various checkpoints are referenced in footnote number 3 of Justice Stevens' dissent in *Michigan State Police v. Sitz*. No. 88-1897. Supreme Court of the US. 14 June 1990.

³ See *United States v. Martinez-Fuerte*. No. 74-1560. Supreme Court of the US. 6 July 1976. See also *Delaware v. Prouse*. No 77-1571. Supreme Court of the US. 27 March 1979.

⁴ "State Court Decisions on the Constitutionality of Sobriety Checkpoints." *Insurance Institute for Highway Safety*, 14 Mar. 2012. Web. 19 Mar. 2012.

⁵ States not permitting sobriety checkpoints often conduct or allow other types of checkpoints. A discussion of federal, internal border patrol checkpoints for states such as Washington and Texas can be found in the ACLU's 2006 article "Are You Living in a Constitution Free Zone?" American Civil Liberties Union, n.d. Web. 19 Mar. 2012. An excellent resource regarding internal border checkpoints can be found at www.checkpointusa.org. The author of this website, Terry Bressi, has an ongoing civil suit regarding an illegal checkpoint. Reports of Texas documentation checkpoints include "Police Conduct Drivers License Check Point." San Angelo Police Department, n.d. Web. 19 Mar. 2012. See also "Drivers License Checkpoint on Nile." KZTV 10, 15 Jun. 2011. Web. 19 Mar. 2012.

⁶ *Michigan State Police v. Sitz*. No. 88-1897. Supreme Court of the US. 14 June 1990.

Checkpoints are widespread, so the pointed question for the libertarian is how checkpoints can be so omnipresent in the face of clearly violating the spirit of the fourth amendment. The answer might actually have nothing to do with the fourth amendment, but rather everything to do with perceived expedience. It was Chief Justice William Rehnquist who shamefully dismissed the fourth amendment in his majority *Sitz* opinion. Rehnquist favored expedience when he declared that checkpoint effectiveness determination “. . . remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.”⁷ A dissenting Justice Stevens (joined by Justice Marshall and Justice Brennan) correctly deferred to the fourth amendment, but still entertained the expedience approach of Rehnquist. That approach was dubious, at best, with testimony from sheriffs and other officers confirming that approaches to drunk driving which did not use checkpoints simply worked better.⁸

The evidence regarding checkpoint effectiveness fared no better in the scientific and scholarly literature. The Centers for Disease Control review of 23 studies from the 1980s and 1990s touted checkpoint success, but a closer look revealed flawed execution and spurious relationships. The CDC rated the studies’ methodologies, ranking only three as “good.” The other 20 were rated “fair.”⁹

A closer examination of the Centers for Disease Control studies revealed the details of those problems; problems cited by CDC itself. CDC suggested that results from the 1997 Voas study “. . . are confounded due to overlap in media markets across intervention and comparison communities and checkpoint activities in comparison communities. A zero tolerance law for young drivers was implemented in California during the intervention period.” The conclusion of another study was “Well publicized roving patrols produced similar effects to checkpoints.” The 1990 Levy study had “Serious problems with colinearity with publicity campaigns in model.” Over half of the studies cited evidence from countries that perform random breath testing for motorists, an experience relatively unknown in the U.S.¹⁰ Scientists and others might even theorize about other confounding variables that possibly made an impact in the overall anti-drunk driving campaign aggressively implemented at the beginning of the 1980s.

The evidence for checkpoint ineffectiveness continued into the 2000s. The FBI weighed in when it compared saturation patrols to checkpoints in Ohio, Missouri, and Tennessee. The comparison showed that “Overall, measured in arrests per hour, a dedicated saturation patrol is the most effective method of apprehending offenders.”¹¹ That sentiment was echoed later in the year by the journal *Accident Analysis and Prevention* in its survey of law enforcement. It stated that “States with infrequent checkpoints claimed a lack of funding and police resources for not conducting more checkpoints, preferred saturation patrols over checkpoints because they were more ‘productive,’ and used large numbers of police officers at checkpoints.”¹²

⁷ *Ibid.*, 496 U.S. 454.

⁸ See footnotes 4, 11, 13, 14, and 19 in Justice Stevens’ dissent in *Michigan State Police v. Sitz*.

⁹ Centers for Disease Control. “Reducing Alcohol-impaired Driving : Sobriety Checkpoints : Summary Evidence Tables.” *The Community Guide*, 9 Feb. 2012. Web. 19 Mar. 2012.

¹⁰ *Ibid.*

¹¹ Greene, Jeffrey W. “Battling DUI : A Comparative Analysis of Checkpoints and Saturation Patrols.” *FBI Law Enforcement Bulletin* 72.1 (2003) : 1-6. Print.

¹² Fell, James C., et al. “Why Are Sobriety Checkpoints Not Widely Adopted as an Enforcement Strategy in the United States?” *Accident Analysis and Prevention* 35.6 (2003) : 897-902. Print.

Newspapers picked up on these findings, and their investigations confirmed the literature. A *Hagerstown Herald-Mail* interview of Maryland State Police Commander David Kloos revealed the squandered resource management and limited return on checkpoint operations. Kloos confirmed that a saturation patrol costs a fraction of a checkpoint and actually yields more arrests.¹³ The paltry arrest rates in Maryland's checkpoint programs a generation earlier¹⁴ might make one question why a failed program persisted.

If checkpoints do not result in arrests, then motorists might wonder about their purpose. Checkpoint supporters suggest deterrence as a purpose, but again, the evidence does not support the claim. The Maryland anti-drunk driving campaign called Checkpoint Strikeforce was evaluated for deterrence. The review found that there was no deterrent effect, whether for public perceptions, driving behaviors, or alcohol-related motor vehicle crashes and injuries.¹⁵ If one is not convinced by that study, would it not be logical to conclude that publicity regarding saturation patrols could just as easily be done as publicity for checkpoints? A press release by the Las Vegas Police Department last New Year's Eve emphasized police presence. "If you're driving impaired, look for the police behind you, because that's where we're going to be," says Captain Mark Tavarez. "It doesn't matter where you are in town."¹⁶ That sentiment was echoed by Lieutenant Adrian Vasquez of the Colorado Springs Police Department, a municipality that eliminated checkpoints in 2011. Vasquez explained regarding saturation patrols that "We've come to a realization that we actually get more bang for the buck from high visibility enforcements."¹⁷

Other issues of concern to law enforcement include legal loopholes and new technologies (e.g., texting) that allow drivers to immediately alert others regarding checkpoint locations. Various officers have voiced these concerns, in addition to the dominant argument of saturation patrols.¹⁸ Some of these concerns have resulted in positive action, including the Costa Mesa California police chief announcing his plans to eliminate checkpoints.¹⁹ The aforementioned police department in Colorado Springs and sheriff of that county also announced abandonment of checkpoints; however, it remains to be seen if the state police will implement their own roadblocks.²⁰

Courts have apparently dropped the ball on checkpoints, shelving the fourth amendment for perceived expedience. Some in law enforcement are willing to state the truth about checkpoints, but persistence of the method is still too widespread. That seemingly leaves state legislatures to address the issue. Utah²¹ and New Hampshire²² recently introduced bills that would limit the types of checkpoints discussed in this article. Legislation to implement checkpoints in Washington,²³ Oregon,²⁴ and Texas²⁵

¹³ Keels, Heather. "Sobriety Checkpoints Debated." *Hagerstown Herald-Mail* 28 Dec. 2008. Print.

¹⁴ *Ibid.*, *Michigan State Police v. Sitz*, 496 U.S. 461.

¹⁵ Beck, Kenneth. "Lessons Learned From Evaluating Maryland's Anti-Drunk Driving Campaign : Assessing the Evidence for Cognitive, Behavioral, and Public Health Impact." *Health Promotion Practice* 10.3 (2009) : 370-377. Print.

¹⁶ "Police Plan for DUI Saturation Patrols on New Year's Eve." KTNV TV. 29 Dec. 2011. Web. 20 Mar. 2012.

¹⁷ "Police Use New Tactics in DUI Crackdowns." KOAA TV. 28 Dec. 2011. Web. 20 Mar. 2012.

¹⁸ "Checkpoints : A Roadblock to Progress on Drunk Driving : The Experts Agree." American Beverage Institute. 2012. Web. 20 Mar. 2012.

¹⁹ Williams, Lauren. "Police to Switch Focus in Targeting Drunk Drivers : Costa Mesa City Council Members, Police Agree That Saturation Patrols are More Effective Than DUI Checkpoints." *Daily Pilot* 25 Nov. 2011. Print.

²⁰ Koen, Andy. "Mayor Calls for End to DUI Checkpoints." KOAA TV. 9 Nov. 2011. Web. 20 Mar. 2012.

²¹ Vehicle Checkpoint Amendments, H.B. 140, Utah House of Representatives (2012).

²² Prohibiting the Establishment of Sobriety Checkpoints, H.B. 1452, New Hampshire General Court (2012).

²³ Creating an Administrative Sobriety Checkpoint Program, H.B. 1912, Washington House of Representatives (2011).

²⁴ [Untitled], H.B. 3133, Oregon House of Representatives (2011).

²⁵ [Untitled], H.B. 439, Texas House of Representatives (2011).

failed in 2011. The Oregon legislation actually proposed carving out an exception to the search and seizure clause of that state's constitution. It is fortunate that all three of these state efforts failed fairly early in the process. The proposed legislation in Texas failed for an eighth straight year. A similar, current proposal in Wisconsin is likely to fail because no action has been taken on it since last year.²⁶

This article has, thus far, focused on the practical aspects of checkpoints. The libertarian however, might fairly inquire about aspects of principle. Some libertarians will even find it galling to concede principle in favor of practicalities (I actually had this conversation with two men who had unpleasant checkpoint experiences). The libertarian might ask, "What if checkpoints ARE shown to be effective?" The historical answer to that question has always been negative. Checkpoint design virtually guarantees ineffectiveness in the future. Effectiveness is precluded by the simple concept of passivity. That passivity is law enforcement contained in one spot, waiting for something to happen. Police wait for lawbreakers to approach them, while interacting with the law-abiding. The classic *guilty until proven innocent* is unequivocally contrary to the concept and practicality embodied in the fourth amendment.

It is heartening to know that some have not forsaken principle. Justice Brennan wrote in *Sitz* that ". . . consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis."²⁷ Justice Stevens recognized the unbridled discretion that officers could exercise at a checkpoint, discretion perhaps far different from that outlined in a policy manual or PR campaign. He stated, "A Michigan officer who questions a motorist at a sobriety checkpoint has virtually unlimited discretion to detain the driver on the basis of the slightest suspicion. . . . Any driver who had just consumed a glass of beer, or even a sip of wine, would almost certainly have the burden of demonstrating to the officer that her driving ability was not impaired."²⁸ It is this type of scenario that led MADD founder Candace Lightner to denounce the organization she founded. Lightner stated, "[MADD has] become far more neoprohibitionist than I had ever wanted or envisioned. . . . I didn't start MADD to deal with alcohol. I started MADD to deal with the issue of drunk driving."²⁹ The American Beverage Institute also asserts that the dinner wine sip has become problematic.³⁰ Justice Stevens conjured up memories of those late night movies of Nazis requesting "Papers, please," when he declared that ". . . unannounced investigatory seizures are . . . the hallmark of regimes far different from ours."³¹

The admonitions of these dissenting justices were not, unfortunately, enough to carry the day in *Sitz*. Their arguments however, provide an excellent foundation on which to approach this issue. We know that *guilty until proven innocent* is irreconcilable with the fourth amendment. Checkpoint supporters however, are unable, or willing, to make that connection. Their erroneous, perceived expedience is a glaring logical, and arguably moral, failure. Checkpoint supporters, in short, are not interested in your liberties. I propose that their practical reasons are so statistically wrong as to make them readily vulnerable in their arguments. You can, in short, keep the constitutional principle close at hand, while still overcoming erroneous claims of checkpoint success.

²⁶ An Act to amend 349.02(2) (a); and to create 20.395 (5) (bx) and 110.095 of the statutes; relating to: sobriety checkpoints and granting rule-making authority, A.B. 410, Wisconsin State Assembly (2011).

²⁷ *Ibid.*, *Michigan State Police v. Sitz* 496 U.S. 459.

²⁸ *Ibid.*, *Michigan State Police v. Sitz* 496 U.S. 465.

²⁹ Bresnahan, S. "MADD Struggles to Remain Relevant." *Washington Times* 6 Aug. 2002 : B1-2. Print.

³⁰ *Ibid.*, American Beverage Institute.

³¹ *Ibid.*, *Michigan State Police v. Sitz*, 496 U.S. 469.

If that task seems difficult in our current day, then I would point to evidence of hope referred to in this article: defeated checkpoint legislation, proposed anti-checkpoint legislation, law enforcement abandoning checkpoints, and the other voices cautioning us about what works and what does not work.

Legislation is our hope. I believe the Utah State Senate was afraid to debate the recent checkpoint bill simply because they did not have a reasoned argument. I think the bill will resurface in the near future. If so, then hopefully Utahans will be even more diligent in making their voices heard. This can be done with simple technology, such as sending an email to a representative or senator. Elected officials often listen to these correspondences, especially those that are thoughtful and compelling.

Education is our hope. Technology has vastly contributed to the understanding of issues that we care about. Discussion groups, YouTube videos, and alternative newscasts are an excellent way to have a dialogue about issues important to liberty. Those issues might not get covered by the 6 o'clock news, but you can bet many concerned people are discussing them on the internet.

Participation is our hope. The technology of the internet brought out these issues, but it is time to push these issues to the next level. Conversations with local lawmakers and executive branch officials (e.g., mayors) have been made easier with technology. Emails are a simple way to voice your concerns and even keep in touch. Local government meetings are often sparsely attended, so what better way to get your politician's ear than by becoming part of a meeting's agenda? Open records requests also means knowing what is happening (and not happening) at checkpoints. The reports of local police regarding each checkpoint are public information through the Freedom of Information Act.

Participation can be even more effective when one does not participate. Know your rights at a checkpoint. You cannot be compelled to incriminate yourself. Distinctions and guidelines for various types of checkpoints (e.g., sobriety vs. driver license) have been lost in what often sounds like a morass of legal doubletalk,³² but a basic familiarity with law enforcement restrictions can still go a long way in preserving your rights. An audio or video device will also help in recording encounters, especially to protect yourself. This is not to suggest that you will be seeking conflict, but simply to have a record of any police indiscretion that might occur.

Is the tide turning regarding support for checkpoints? Some evidence seems to suggest that support is eroding for checkpoints, so I am cautiously optimistic. My hope is that legislation, education, and participation will contribute to reclaiming one slice of the fourth amendment.

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³² A prime example is the US Supreme Court case *Indianapolis v. Edmond*. Justices in that case ruled that checkpoints can't be implemented when their "primary purpose is indistinguishable from the general interest in crime control." *Indianapolis v. Edmond*. No. 99-1030. Supreme Court of the US. 28 November 1990. The difficulty for the non-technical motorist is knowing what constitutes primary vs. secondary. Is not a sobriety checkpoint in the "general interest in crime control" too? It is also notable that what is distinguishable in the confines of a courtroom can often be indistinguishable with a wide discretionary police encounter in the street. It is these de jure vs. de facto realities that necessitate more limiting legislation.