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**BEYOND RED LIGHT ENFORCEMENT AGAINST THE  
GUILTY BUT INNOCENT: LOCAL  
REGULATIONS OF SECONDARY CULPRITS**

JEFFREY A. PARNES\*

I. INTRODUCTION

Automated traffic enforcement schemes, employing speed and red light cameras,<sup>1</sup> are increasingly used by local governments in the United States.<sup>2</sup> These are not to be confused with red light programs that are aimed at prostitution rather than bad driving.<sup>3</sup> In some schemes, traffic violations are pursued against the owners as well as the drivers of the recorded motor vehicles. Here, the *mens rea* requirements that typically accompany criminal code violations are lacking. A form of strict liability for ‘secondary culprits,’ those owning the vehicles, is justified because of their ability to control the ‘primary culprits,’ those using the vehicles, and because traffic accidents and their resulting injuries will be

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\* Professor Emeritus, Northern Illinois University College of Law; Visiting Professor, The John Marshall Law School, 2010–2011. Special thanks to Professor Lawrence Rosenthal, Margo Ely, and Zachary Townsend for their comments and to Ed Laube for his comments and terrific research assistance.

1. Robin Miller, Annotation, *Automated Traffic Enforcement Systems*, 26 A.L.R. 6TH 179, §2 (2007) (distinguishing speed cameras, operative since the early twentieth century to enforce speed limits, and red light cameras, operative since 1994 to enforce traffic signal rules). See also Kevin P. Shannon, *Speeding Toward Disaster: How Cleveland’s Traffic Cameras Violate the Ohio Constitution*, 55 CLEV. ST. L. REV. 607, 610–14 (2007).

2. Highway Loss Data Institute, *Communities Using Red Light and/or Speed Cameras*, INSURANCE INSTITUTE FOR HIGHWAY SAFETY, [http://www.iihs.org/research/topics/auto\\_enforce\\_cities.html](http://www.iihs.org/research/topics/auto_enforce_cities.html) (last visited Nov. 4, 2010) (as of January 2010, speed cameras were used in 12 states by 52 communities and red light cameras were used in 25 states and the District of Columbia by over 439 communities). See also Fran Spielman, *Red-light Cameras Yield*, CHICAGO SUN-TIMES, Oct. 26, 2009, available at <http://www.suntimes.com/news/cityhall/1845842,CST-NWS-redlight26.article> (189 red-light cameras in use at the end of 2009 in Chicago). Plans to have 330 red-light cameras in place by 2012 have been shelved chiefly because of the city’s “worst budget crisis in modern history.” *Id.*

3. See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 457 (1996) (Ginsburg, J., concurring) (describing Michigan’s “red light abatement” prescription in a case involving sex in a car with a prostitute).

reduced. Some empirical studies have demonstrated that reduced accidents follow implementation of automated traffic enforcement schemes aimed at drivers who speed and run red lights.<sup>4</sup>

While likely to continue to anger many citizens,<sup>5</sup> the surge of automated traffic enforcement schemes will also likely continue since significant deterrence of vehicle violations may follow and significant additional revenue for local governments will follow.<sup>6</sup> As well, many violations charged through automated schemes can be processed administratively outside the judicial article courts,<sup>7</sup> freeing traditional trial court judges to handle the pressing business of civil and criminal cases<sup>8</sup> and freeing prosecutors to focus on more serious offenses.<sup>9</sup> Increasing numbers of secondary culprits will be fined for the driving of others whose bad acts were never aided nor condoned, and may even have been strongly discouraged or expressly banned.

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4. See Carie A. Torrence, *Click! A Snapshot of Automated Traffic Enforcement Issues*, 50 MUN. LAW. 14, 14–15 (July/Aug. 2009). But see Erika Slife & Bob Sexter, *Red-light Cameras: First 14 Installed in Suburbs Show Mixed Results*, CHICAGO TRIBUNE, Dec. 18, 2009, available at [http://articles.chicagotribune.com/2009-12-18/news/chi-red-light-cameras-suburbs-18dec18\\_1\\_red-light-cameras-tickets-for-red-light-violators-idot-records-showed-collisions](http://articles.chicagotribune.com/2009-12-18/news/chi-red-light-cameras-suburbs-18dec18_1_red-light-cameras-tickets-for-red-light-violators-idot-records-showed-collisions).

5. Torrence, *supra* note 4, at 16–17 (describing the “public outcry in some communities” over local government use of automated traffic enforcement systems).

6. See, e.g., Jason George & Graydon Megan, *Red-light Cameras in Schaumburg Screech to a Halt*, CHICAGO TRIBUNE, July 15, 2009, available at <http://www.chicagotribune.com/news/local/chi-red-light-camerasjul15,0,7535797.story> (red light camera netted more than \$1 million, but the program was ended after data showed no reduction in accidents and local shoppers threatened to take their business elsewhere); Bob Sexter & Jason George, *Red-light Cameras Raking in Cash*, CHICAGO TRIBUNE, July 12, 2009, available at [http://articles.chicagotribune.com/2009-07-12/news/0907110254\\_1\\_red-light-cameras-camera-tickets-suburbs](http://articles.chicagotribune.com/2009-07-12/news/0907110254_1_red-light-cameras-camera-tickets-suburbs) (first red-light camera in Bellwood, Illinois “became a cash machine,” generating \$60,000 to \$70,000 a month); *Schwarzenegger Wants Red-light Cameras to Terminate Speeding*, USA TODAY, Jan. 18, 2010, <http://content.usatoday.com/communities/driveon/post/2010/01/schwarzenegger-wants-red-light-cameras-to-terminate-speeding/1> (“Los Angeles saw its revenue double to \$400,000 a month from cameras at just 32 intersections.”) [hereinafter *Schwarzenegger*].

7. For smaller local governments, interlocal agreements could allow some communities to utilize the preexisting ordinance violation bureaus of adjacent communities. See, e.g., H.B. 1186, 116th Gen. Assemb. (Ind. 2010).

8. Cf., Editorial, *State Courts at the Tipping Point*, N.Y. TIMES, Nov. 25, 2009, at A30 (budget cuts and other budget woes are impeding “core court functions”).

9. Cf., Henry K. Lee, *Many Contra Costa Crooks Won't Be Prosecuted*, SF GATE, Apr. 22, 2009, available at [http://articles.sfgate.com/2009-04-22/bay-area/17194086\\_1\\_prosecute-deputy-district-contra-costa-county](http://articles.sfgate.com/2009-04-22/bay-area/17194086_1_prosecute-deputy-district-contra-costa-county) (county's district attorney will no longer prosecute many misdemeanors, as assaults, thefts burglaries, vandalism, trespass and shoplifting, because of a budget deficit).

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There are limits to local governmental regulation of traffic violations involving secondary culprits. Besides public outcry, there are state and federal government preemptions as well as state and federal constitutional interests. The constitutional bars include interests in equal protection, non-excessive fines, and due process.

Notwithstanding these limits, there is much room for expanding automated traffic enforcement schemes aimed at secondary culprits. Judicial precedents, to be reviewed shortly, suggest that there can be expansions of non-automated traffic enforcement schemes, as well as non-traffic enforcement schemes aimed at secondary culprits involved with such matters as trash, alcohol, and drugs. Those seeking greater deterrence of undesirable acts and additional non-tax revenues will pursue such expansions.

This paper will first review contemporary local regulations of secondary culprits through automated traffic enforcement schemes, focusing on speeding, bad turn, and red light violations. It will then examine the limits on such regulations, focusing on recent federal court decisions sustaining automated local enforcement schemes challenged on preemption and constitutional grounds. Finally, it will explore potential new local governmental regulations of secondary culprits in and outside of traffic settings and with and without automated enforcement.

## II. AUTOMATED TRAFFIC ENFORCEMENT SCHEMES AIMED AT SECONDARY CULPRITS

Today there are many automated traffic enforcement schemes aimed at secondary culprits involving red lights. These schemes have been unsuccessfully challenged in court, as will be demonstrated. The challenged provisions are next reviewed, followed by an examination of the judicial precedents.

In Knoxville, Tennessee, there is “an ordinance regulating motorists approaching or at a red light.”<sup>10</sup> The Knoxville City Code states:

Vehicular traffic facing the signal shall stop before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain standing until green or “go” is shown alone; provided, however, that a right turn

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10. *City of Knoxville v. Brown*, 284 S.W.3d 330, 335 (Tenn. Ct. App. 2008).

on a red signal shall be permitted at all intersections within the city provided that the prospective turning car comes to a full and complete stop before turning and that the turning car shall yield the right-of-way to pedestrians and cross traffic traveling in accordance with their traffic signal. However, such turn will not endanger other traffic lawfully using the intersection.<sup>11</sup>

One of the methods utilized by Knoxville to enforce the code involves a “red light enforcement program” which involves photographing vehicles running red lights at certain intersections.<sup>12</sup> Violators are subject to a “civil penalty of \$50, without assessment of court costs or fees.”<sup>13</sup> Violators include the owners of the motor vehicles that prompted citations for violations observed in the red light enforcement program.<sup>14</sup> Yet an owner can escape responsibility if on the designated court date, the owner furnishes to the city court “the name and address of the person or entity who leased, rented, or otherwise had care, custody, and control of the vehicle at the time of the violation” or swears “the vehicle involved was stolen or was in the care, custody, or control of some person who did not have his permission to use the vehicle.”<sup>15</sup> Interestingly, in a similar enactment the Tennessee legislature does not allow owners to escape a comparable state law responsibility if the owner gives a name, the vehicle or plates were stolen, or the owner swears the vehicle at the relevant time was in the care, custody or control of a person without the owner’s permission.<sup>16</sup>

In Chicago, Illinois, a comparable automated traffic enforcement scheme operates for secondary culprits, though differently than in Knoxville. That scheme involves “cameras at traffic intersections throughout Chicago” designed to photograph vehicles “that either enter an intersection against a red traffic light or make a turn in the face of a red light when turning is

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11. *Id.* (quoting KNOXVILLE, TENN., CODE OF ORDINANCES, ch. 17, art. X, § 17-506(a)(3) (Municode 2009)).

12. *Id.* at 331.

13. *Id.* at 334 (quoting KNOXVILLE, TENN., CODE OF ORDINANCES, ch. 17, art. V, div. 1, § 17-210(d)(1)).

14. *Id.* at 333 (quoting KNOXVILLE, TENN., CODE OF ORDINANCES, ch. 17, art. V, div. 1, § 17-210(c)(3)).

15. *Id.* at 333–34 (quoting KNOXVILLE, TENN., CODE OF ORDINANCES, ch. 17, art. V, div. 1, § 17-210(c)(4)).

16. *Id.* at 336 (quoting TENN. CODE ANN. § 55-8-198).

prohibited.”<sup>17</sup> The registered vehicle owner is liable for a \$90 fine if a red light is run.<sup>18</sup> Responsibility can be avoided, however, if the registered owner “is either a motor vehicle dealership or a manufacturer and has formally leased the car pursuant to a written lease agreement.”<sup>19</sup> Responsibility is assigned to the lessee instead.<sup>20</sup> As well, responsibility can be avoided if the vehicle or plates were stolen, or the vehicle was sold,<sup>21</sup> or the signal was obscured, or the vehicle was yielding to an ambulance, or there is an otherwise valid defense under “state law.”<sup>22</sup> Owner responsibility cannot be avoided in Chicago, as it can in Knoxville, “by establishing someone else was in control” of the vehicle “at the time of the violation.”<sup>23</sup>

In Chicago, unlike Knoxville, red light enforcement hearings are done administratively. The Chicago Traffic Code “incorporates the City’s administrative scheme for parking violations.”<sup>24</sup>

Administrative hearings for red light and speeding violators also occur in Cleveland, Ohio,<sup>25</sup> where the city uses “the parking violations bureau for the initial appeal of the notice of violation issued by the Clerk of the Cleveland Municipal Court.”<sup>26</sup> Fines can be \$100<sup>27</sup> or more.<sup>28</sup> Adverse findings can be entered against

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17. *Idris v. City of Chi. (Idris I)*, 06 C 6085, 2008 WL 182248, at \*1 (N.D. Ill. Jan. 16, 2008) (citing CHI., ILL., MUN. CODE § 9-102-020(a)), *aff’d*, 552 F.3d 564 (7th Cir. 2009).

18. *Id.* (citing CHI., ILL., MUN. CODE § 9-102-020(a)).

19. *Id.* at \*2 (citing CHI., ILL., MUN. CODE § 9-102-020(a)(3)).

20. *Id.* (citing CHI., ILL., MUN. CODE § 9-102-020(a)(3)).

21. *Idris v. City of Chi. (Idris II)*, 552 F.3d 564, 565 (7th Cir. 2009).

22. *Id.* at 567.

23. *City of Knoxville v. Brown*, 284 S.W.3d 330, 339 (Tenn. Ct. App. 2008); *Id.* at 339 n.5 (“Unlike Knoxville’s ordinance, the ordinance for Chicago did not allow the vehicle’s owner to shift liability if the owner was able to prove he or she was not actually driving the vehicle.”).

24. *Idris I*, 2008 WL 182248, at \*9 (citing CHI., ILL., MUN. CODE § 9-102-050). This scheme is described in Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 14–16 (2007). The administrative scheme for adjudicating Chicago parking violations was established in 1990 and has been upheld when challenged under state and federal constitutional provisions. *Van Harken v. City of Chi.*, 713 N.E.2d 754 (Ill. App. Ct. 1999) (state); *Van Harken v. City of Chi.*, 103 F.3d 1346 (7th Cir. 1997) (federal).

25. CLEVELAND, OHIO, TRAFFIC CODE § 413.031(a), (k) (FindLaw through June 30, 2010).

26. *Gardner v. City of Cleveland*, 656 F. Supp. 2d 751, 755 (recognizing enforcement occurs through Cleveland Codified Ordinance section 431.031).

27. *Id.* at 758.

vehicle owners who were not, by way of defense, “driving at the time of the violation . . . .”<sup>29</sup> However, as in Knoxville, vehicle owner liability can be avoided if someone else was driving, the owner names that person in an affidavit, and the alleged driver does not deny being the driver.<sup>30</sup> Initial findings are made by “a Hearing Examiner in the City of Cleveland’s Parking Violations Bureau, Photo Safety Division . . . ,” whose decision can be appealed before “the Cuyahoga County Court of Common Pleas.”<sup>31</sup>

Thus, an automobile owner can be a secondary culprit within local traffic codes, incurring penalties based on an operator’s misconduct even when the owner was not directly involved. In Chicago and Cleveland, administrative schemes are used to assess such penalties upon innocent but guilty owners. However, there are limits on such local traffic laws.

### III. LIMITS ON LOCAL TRAFFIC REGULATIONS OF SECONDARY CULPRITS

To date, the courts have sustained the Knoxville, Chicago, and Cleveland regulations of secondary culprits through automated traffic enforcement schemes, while recognizing limits on possible expansion. Challengers have raised concerns about both governmental structure/authorization and individual constitutional interests.<sup>32</sup> The courts have suggested that certain future schemes

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28. CLEVELAND, OHIO, TRAFFIC CODE § 413.031(o) (FindLaw) (speeding 25 mph or more over the speed limit or “any violation of a school or construction zone speed limit” incurs a \$200 penalty).

29. *Gardner*, 656 F. Supp. 2d at 762.

30. CLEVELAND, OHIO, TRAFFIC CODE § 413.031(k) (FindLaw) (collection processes continue against the owner where the person named in the affidavit denies driving). *See also* McCarthy v. City of Cleveland, No. 1:09-CV-1298, 2009 WL 2424296, at \*4 (N.D. Ohio Aug. 6, 2009) (lessees properly fined as they had an opportunity to appeal which they did not utilize). By contrast, another Cleveland ordinance that allows vehicle forfeiture in a trial court when the vehicle is “used for the commission of a felony drug abuse offense” permits “innocent owners” defenses. CLEVELAND, OHIO, OFFENSES AND BUSINESS ACTIVITIES CODE § 607.05(a), (e) (FindLaw through June 30, 2010).

31. *Gardner*, 656 F. Supp. 2d at 754 (OHIO REV. CODE ANN. § 2506 (LexisNexis 2010) gives the right for an administrative appeal).

32. Critics of automated traffic enforcement schemes often have concerns extending beyond strict legal limits. *See, e.g.*, Williams v. Redflex Traffic Sys., Inc., No. 3:06-cv-400, 2008 WL 782540, at \*4 & n.2 (E.D. Tenn. 2008); *Id.* at \*4 n.2 (technological advances and local government pacts with private companies like Redflex “raise the Orwellian spectre of a future where traffic control is regulated by a corporate ‘Big Brother’”).

could fail on these grounds. Existing legal limits will now be explored.

#### A. State Government Preemption

State law can preempt local automated traffic enforcement schemes. State laws will preclude certain traffic acts from local regulations where, for example, statewide uniformity is reasonably desired.<sup>33</sup> In those states where this is true, local regulatory initiatives are forbidden no matter how reasonable.<sup>34</sup> By contrast, local schemes, and resulting diversity in traffic laws across the state, can be facilitated by state lawmakers. Certain traffic matters have been recognized by state legislators as needing local, rather than state, lawmaking. Thus, typically both state and local lawmakers regulate traffic, sometimes even the same traffic acts.<sup>35</sup>

Illinois legislators expressly invite some local automated traffic enforcement schemes. The Vehicle Code defines an “automated traffic law enforcement system” as “a device with one or more motor vehicle sensors working in conjunction with a red light signal to produce recorded images of motor vehicles entering an intersection against a red signal indication in violation of Section 11-306 of this Code or a similar provision of a local ordinance.”<sup>36</sup> The Code then recognizes local schemes may originate in a “county or municipality including a home rule county or municipality.”<sup>37</sup> It further recognizes, however, that the “regulation of the use of automated traffic law enforcement systems to record vehicle speeds is an exclusive power and

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33. See, e.g., *People ex rel. Ryan v. Village of Hanover Park*, 724 N.E.2d 132, 138–143 (Ill. App. Ct. 1999) (villages’ alternative traffic programs (aimed at speeders) disrupt the uniform enforcement of chapter 11 of the Vehicle Code because they eliminate trial court hearings and the records of traffic offenses being sent to the Secretary of State).

34. E.g., W. VA. CODE ANN. § 17C-6-7a(b) (West 2010) (“No police officer may utilize a traffic law photo-monitoring device to determine compliance with, or to detect a violation of, a municipal or county ordinance or any provision of this code that governs or regulates the operation of motor vehicles.”).

35. E.g., “Any incorporated municipality may by ordinance adopt, by reference, any [of certain Code sections on traffic control] and may by ordinance provide additional regulations for the operation of vehicles within the municipality, which shall not be in conflict with the provisions of the listed sections.” TENN. CODE ANN. § 55-10-307 (West 2010), which was employed in *City of Knoxville v. Brown*, 284 S.W.3d 330, 334–35 (Tenn. Ct. App. 2008).

36. 625 ILL. COMP. STAT. ANN. 5/11-208.6(a) (West 2010).

37. *Id.* Compare N.C. GEN. STAT. § 160A-300.1(c), (d) (West 2010) (authorizing only certain named local governments).



function of the State.”<sup>38</sup>

The Illinois Vehicle Code also sets standards for local automated traffic enforcement systems directed at red light runners and stop sign violators, among others. These standards include mandates on written notice of alleged violations to vehicle owners;<sup>39</sup> confidentiality of recorded images;<sup>40</sup> the manner of proving the defense of vehicle theft;<sup>41</sup> limits on civil penalties;<sup>42</sup> and notices to motorists regarding the placements of motor vehicle sensors at intersections.<sup>43</sup>

State government preemption can vary interstate. While recording vehicle speeds “is an exclusive power and function” of Illinois state government,<sup>44</sup> local speeding regulations based on automated systems are permitted elsewhere. In Cleveland, the Parking Violations Bureau hears appeals by owners of speeding vehicles.<sup>45</sup> Where all state governments confront budgetary woes, the cash cows born of red light enforcement schemes seem to me especially susceptible to intrastate political battles over control, particularly in such matters as speeding and other moving vehicle violations where both state and local powers have often been concurrently exercised.<sup>46</sup>

The Knoxville “red light enforcement program” was challenged on state preemption grounds, with the defendant urging the code provision “imposes a criminal fine,” not a civil fine, and

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38. 625 ILL. COMP. STAT. ANN. 5/11-208.6(c) (West 2010). Other state laws authorizing automated traffic enforcement schemes are briefly mentioned in *City of Davenport v. Seymour*, 755 N.W.2d 533, 536 (Iowa 2008) (“most states . . . have no legislation”).

39. 625 ILL. COMP. STAT. ANN. 5/11-208.6(d) (West 2010).

40. *Id.* 5/11-208.6(g).

41. *Id.* 5/11-208.6(i).

42. *Id.* 5/11-208.6(j). Compare, e.g., *City of De Kalb v. White*, 591 N.E.2d 522, 524 (Ill. App. Ct. 1992) (no “statutory proscription of a minimum fine” for speeders prosecuted under ordinances).

43. Ch. 625 § 5/11-208.6(k).

44. *Id.* 5/11-208.6(c).

45. CLEVELAND, OHIO, TRAFFIC CODE § 413.031(k) (FindLaw through June 30, 2010). The constitutionality of the Cleveland procedures was sustained in *Balaban v. City of Cleveland*, No. 1:07-cv-1366, 2010 WL 481283, at \*7–8 (N.D. Ohio Feb. 5, 2010).

46. See, e.g., *Schwarzenegger*, *supra* note 6 (“California Gov. Arnold Schwarzenegger figures the cash-strapped and deeply indebted state could pick up another \$338 million through June, 2011, by using speed sensors in red-light cameras at 500 intersections to nab speeders . . .”). State action is easily undertaken at so-called EZ Pass sites on major tollways (where perhaps speeding as well as toll payment failures could be addressed by charging vehicle owner credit cards already on file in order to keep EZ Pass devices operative).

thus is “an ultra vires act”—an act outside of local governmental powers.<sup>47</sup> A Tennessee appeals court rejected the challenge in 2008, finding that while the city program “triggered” certain “constitutional protections” that attend proceedings aimed at punishment and deterrence, the challenged red light enforcements were “civil in nature . . . well within the police power of the City of Knoxville.”<sup>48</sup>

### *B. Federal Constitutional Interests*

Beside state law preemption, the Knoxville, Chicago, and Cleveland automated traffic enforcement schemes have all been challenged on varying federal constitutional grounds. The rulings are now briefly reviewed.<sup>49</sup>

#### *1. Equal Protection*

The Chicago scheme was challenged in federal court on equal protection grounds because “it distinguishes between car dealerships and manufacturers on the one hand and all other car owners on the other.”<sup>50</sup> Only dealers and manufacturers escaped liability for violations involving their vehicles by proving their vehicles were leased. As no suspect class or fundamental right was alleged, the district court employed the rational basis test, which allows any sound reason to validate a challenged law.<sup>51</sup> The reason given here was that dealers and manufacturers, but not other owners, “‘turned over regular, active possession and use’” of their cars, thus having no “‘day-to-day control over who drives.’”<sup>52</sup>

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47. *City of Knoxville v. Brown*, 284 S.W.3d 330, 336 (Tenn. Ct. App. 2008).

48. *Id.* at 338. A review of the differing forms of state preemption of local automated traffic enforcement schemes is found in *City of Davenport v. Seymour*, 755 N.W.2d 533, 538–39 (Iowa 2008) (express preemption and implied preemption—which can be based on either “obvious, unavoidable” conflict with state law or “persuasive concrete evidence of an intent to preempt the field” by state lawmakers) and *Mendenhall v. City of Akron*, 881 N.E.2d 255, 260 (Ohio 2008) (analysis includes consideration of police versus local self-government powers, special versus general statutes and whether there is conflict between state and local laws involving the same misconduct).

49. Constitutional challenges to local red light enforcement schemes have also failed elsewhere. *See, e.g.*, *Shavitz v. City of High Point*, 270 F. Supp. 2d 702 (M.D. N.C. 2003); *Kilper v. City of Arnold*, No. 4:08cv0267 TCM, 2009 WL 2208404 (E.D. Mo. 2009).

50. *Idris I*, 06 C 6085, 2008 WL 182248, at \*3 (N.D. Ill. Jan. 16, 2008), *aff’d*, *Idris II*, 552 F.3d 564 (7th Cir. 2009).

51. *Id.* at \*4.

52. *Id.*

That reason was sufficient even if the lawmakers had no “legitimate purpose in mind” when they acted, as “retrospective logic” can justify a law challenged under the rational basis test.<sup>53</sup> The appeals court also found no inappropriate inequality, as a legitimate goal “is to impose the fine on the person who . . . is in charge of the car.”<sup>54</sup>

The Chicago scheme has also been challenged on equal protection grounds because the central business loop area/downtown is “exclusively segregated from these lights being equally and proportionately placed, as they are in other parts of the city,”<sup>55</sup> thus distinguishing drivers by where they drive. This challenge was also rejected in federal court as there is “no identifiable group of people who drive exclusively in the downtown areas” and no “separate and distinct group whose driving is limited to the outskirts.”<sup>56</sup> As well, the Chicago scheme was deemed rational in that it may well be the “high priority intersections are not located in the downtown area” and that local officials were looking “to get the most ‘bang for their buck’ by concentrating on the most notable lawbreakers.”<sup>57</sup> The Court found rational basis review was appropriate because no suspect class was targeted or fundamental right addressed by the ordinance. However, the Court left the door open to application of stricter review by noting that in this case there was no suggestion that “the red light cameras . . . were placed in certain neighborhoods with a distinct racial character or areas heavily populated with individuals of similar national origin.”<sup>58</sup>

## 2. *Excessive Fines*

The Cleveland scheme was challenged in federal court under the Excessive Fines Clause of the Eighth Amendment of the federal Constitution.<sup>59</sup> The challenge was rejected as the court deemed the penalties were “proportional” to the offenses, with

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53. *Id.* at \*5 (statute passes rational basis test even if revenue production was the goal).

54. *Idris II*, 552 F.3d at 567.

55. *Akbar v. Daley*, No. 09-cv-1289, 2009 WL 3055322, at \*1 (N.D. Ill. 2009).

56. *Id.* at 3.

57. *Id.* at 4.

58. *Id.* at \*4 n.4 (citing *Cruz v. Town of Cicero, Ill.*, 1999 WL 560989, at \*12 (N.D. Ill. July 28, 1999)). *See also* *Washington v. Davis*, 426 U.S. 229, 230 (1976) (equality principles may not be violated even if the law has “a racial disproportionate impact”).

59. *Gardner v. City of Cleveland*, 656 F. Supp. 2d 751, 763 (N.D. Ohio 2009).

increased fines for more significant speeding.<sup>60</sup>

### 3. *Substantive Due Process*

Both the Chicago and Cleveland ordinances were challenged on federal constitutional substantive due process grounds. In both cases, no fundamental rights (and no suspect classes) were involved;<sup>61</sup> therefore the schemes were sustained as they were found to be rational. The Cleveland ordinance was deemed “rationally related to the City’s goal of improving traffic safety.”<sup>62</sup> The Chicago ordinance was deemed to improve compliance with traffic laws and could not be called “unconstitutionally whimsical.”<sup>63</sup> While \$90, \$100, or \$200 dollar fines did not implicate federal constitutional property interests demanding more than rational government actions, the reviewing courts offered little guidance on when fines would be large enough, and thus more than modest,<sup>64</sup> so as to prompt less deferential judicial review. One federal district judge opined “fines and fees of over \$500 on car owners” who had no “innocent-owner defense” would be sustained on appeal if rational.<sup>65</sup>

### 4. *Procedural Due Process*

Federal constitutional procedural due process challengers must demonstrate that either before or after fines are levied and perhaps paid, violators are not afforded adequate processes to contest.<sup>66</sup> In a challenge to the Cleveland ordinance, a federal

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60. *Id.* (employing the proportionality test of *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). See also *Balaban v. City of Cleveland*, No. 1:07-cv-1366, 2010 WL 481283, at \*5 (N.D. Ohio Feb. 5, 2010) (fine of \$100 or \$200 not an excessive penalty); *Towers v. City of Chi.*, 173 F.3d 619, 623–26 (7th Cir. 1999) (rejecting excessive fines challenge to ordinance violations with \$500 fines); *State v. Forfeiture of: 2003 Chevrolet Pickup, Blue in Color, MT. License AFH-845 VIN/2GCEK19N731269822*, 202 P.3d 782, 783 (Mont. 2009) (the federal constitutional excessive fines provision has not yet been applied to the states by the U.S. Supreme Court). CLEVELAND, OHIO, TRAFFIC CODE § 413.031(o) (FindLaw through June 30, 2010) outlines the penalties for violations of the red-light enforcement scheme.

61. *Gardner*, 656 F. Supp. 2d at 761; *Idris II*, 552 F.3d 564, 566 (7th Cir. 2009).

62. *Gardner*, 656 F. Supp. 2d at 762.

63. *Idris II*, 552 F.3d at 566.

64. *Gardner*, 656 F. Supp. 2d at 763; *Idris II*, 552 F.3d at 566 (the property interest in a \$90 fine is “modest”).

65. *Idris I*, 2008 WL 182248, at \*7 (quoting *Towers v. City of Chi.*, 173 F.3d 619, 626 (7th Cir. 1999)).

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district court found adequate pre-deprivation processes.<sup>67</sup> Pre-deprivation process rights included “notice, a hearing and an opportunity to present evidence.”<sup>68</sup> Post-deprivation process rights included appeals to a local trial court of adverse hearing examiner findings.<sup>69</sup> Similarly, the Chicago ordinance was sustained in the federal courts upon procedural due process challenges. The district court sanctioned procedures including: the “use of hearsay evidence (i.e., the photographs captured by the automated cameras);” the withholding by the City of exculpatory evidence at initial hearings; the unavailability of an opportunity to cross examine the custodian of the photographs; the lack of juries; and the use of evidence inadmissible in criminal proceedings.<sup>70</sup> The appellate court concluded:

It is enough to say that photographs are at least as reliable as live testimony, that the due process clause allows administrative decisions to be made on paper (or photographic) records without regard to the hearsay rule . . . and that the procedures Chicago uses are functionally identical to those it uses to adjudicate parking tickets.<sup>71</sup>

### C. State Constitutional Interests

Beyond preemption and federal constitutional interests, local automated traffic enforcement schemes have been challenged on state constitutional grounds. Such challenges have been founded on state provisions that appear comparable to federal constitutional provisions, but nevertheless could be read to provide greater protections. They have also been founded on state provisions that expressly provide greater protections than are available federally.

#### 1. Comparable, But Enhanced, Protections

In a federal case challenging the Chicago automated traffic enforcement scheme, the trial judge correctly recognized that comparably worded federal and state constitutional rights can be

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67. *Gardner*, 656 F. Supp. 2d at 759.

68. *Id.* at 759. (citing CLEVELAND, OHIO, TRAFFIC CODE § 413.031(k) (FindLaw through June 30, 2010)).

69. *Gardner*, 2009 WL 2591621, at 5 (citing OHIO REV. CODE ANN. § 2506 (LexisNexis 2010)).

70. *Idris I*, 2008 WL 182248, at \*8–9.

71. *Idris II*, 552 F.3d 564, 567–68 (7th Cir. 2009).

applied quite differently, with the state provision creating “broader” protections.<sup>72</sup> Of course, narrower state protections are barred by federal constitutional Supremacy Clause principles.

A variety of approaches can be taken when considering whether to extend broader rights under comparable state constitutions. In one case, a state high court employed “six nonexclusive neutral criteria” which included the language in the state constitution and its differences with the federal constitutional text; the state history; preexisting state law; structural differences in federal and state constitutions; and matters of particular local concern.<sup>73</sup> In another case, a different state high court declared that its role is to provide “the first line of defense for individual liberties,” that may veer from U.S. Supreme Court precedents that retrench on Bill of Rights issues or fail to “adequately protect . . . basic rights and liberties.”<sup>74</sup>

## 2. *Broader Protections*

Beyond interests comparable to federal constitutional interests, explicit state constitutional interests, independent of and different from federal constitutional interests, are occasionally available to invalidate local automated traffic enforcement schemes. For example, the fifty-dollar penalty within the Knoxville City Code for running a red light was recognized as implicating the Tennessee constitutional provision declaring “no fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers.”<sup>75</sup> This provision was said by one court to apply to all fines, whether deemed civil or criminal in nature by legislators.<sup>76</sup> However, in the challenged Knoxville law establishing the red-light enforcement scheme, the constitutional provision was inapplicable because the fine was not more than fifty dollars.<sup>77</sup> The court hinted the provision would apply if the fine was over fifty dollars

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72. *Idris I*, 2008 WL 182248, at \*8 (recognizing broader Illinois constitutional procedural due process protections).

73. *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986).

74. *Kahn v. Griffin*, 701 N.W.2d 815, 828 (Minn. 2005).

75. TENN. CONST. art. VI, § 14; *City of Knoxville v. Brown*, 284 S.W.3d 330, 338 (Tenn. Ct. App. 2008).

76. *City of Knoxville*, 284 S.W.3d at 337 (quoting *Chattanooga v. Davis*, 54 S.W.3d 248, 261–62 (Tenn. 2001)).

77. *Id.* at 338.

and its primary legislative purpose was punitive rather than remedial or if the fine, though legislatively intended to be remedial, was nevertheless “so punitive in its actual purpose or effect that it cannot legitimately be viewed as remedial in nature.”<sup>78</sup> Thus, Knoxville seemingly could not implement schemes like those in Chicago or Cleveland due to its unique constitutional provisions on juries.

At times, explicit and independent state constitutional interests involve privacy. In Chicago and elsewhere in Illinois, local traffic regulations must respect the Illinois constitutional provision declaring: “The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.”<sup>79</sup> By contrast, the comparable federal constitutional provision speaks to only “unreasonable searches and seizures” of “persons, houses, papers, and effects . . . .”<sup>80</sup>

#### IV. POSSIBLE NEW REGULATIONS OF SECONDARY CULPRITS

The automated traffic enforcement schemes in Knoxville, Chicago, and Cleveland demonstrate that secondary culprits can be held financially accountable by local governments in civil proceedings<sup>81</sup> for misconduct involving their cars that is primarily undertaken by others. New local regulations directed at property owners could be expanded under the supporting judicial decisions not only to other acts involving cars, but also to other matters traditionally subject to local authority, including trash, tobacco, alcohol, and illegal drugs.

##### A. Adequate Control and Enforcement

In assessing possible expansions, one key guideline not yet well-defined involves the degree of property owner “control”

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78. *Id.* at 338 (quoting *Davis*, 54 S.W.3d at 264).

79. ILL. CONST. art. I, § 6.

80. U.S. CONST. amend. IV.

81. Under *Hudson v. United States*, 522 U.S. 93 (1997), courts have found that penalties against property owners arise in civil rather than criminal proceedings. Therefore, there are different process rights that attend criminal cases. *See, e.g.*, *Balaban v. City of Cleveland*, No. 1:07-cv-1366, 2010 WL 481283, at \*3–6 (N.D. Ohio Feb. 5, 2010); *Shavitz v. City of Highpoint*, 270 F. Supp. 2d 702, 712–17 (M.D. N.C. 2008).

needed to rationalize regulations of property owners as secondary culprits because they failed to oversee adequately the primary culprits who misused the property. In Chicago, though not in Knoxville or Cleveland,<sup>82</sup> car owners cannot shift automated traffic enforcement liabilities onto named primary culprits.<sup>83</sup> Ownership alone is a form of control that can satisfy due process.

The required control was found by a federal district court in the Chicago automated traffic scheme because car owners are able to “restrict . . . the use of their cars “ having “sole authority’ to ‘set the restrictions.’”<sup>84</sup> The trial judge further observed, however, that “a tenuous relationship” between a property owner and a wrongdoer could not lead to owner liability.<sup>85</sup> The federal appeals court elaborated, observing that threats of penalty on property owners prompt them to “choose” their property users “more carefully” and to increase their “vigilance.”<sup>86</sup> It noted that car owners subject to the Chicago automated enforcement scheme were like others subject to no-fault penalties, including a taxpayer responsible for an attorney’s or accountant’s errors;<sup>87</sup> a tenant responsible for “a guest’s misbehavior”<sup>88</sup> and a car owner responsible for a driver’s use of the car in “committing a crime.”<sup>89</sup> The appellate court also observed that even where reasonable

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82. Compare CHI., ILL., MUN. CODE § 9-102-040, with KNOXVILLE, TENN., CODE OF ORDINANCES, ch. 17, art. V, div. 1, § 17-210(c)(4), and CLEVELAND, OHIO, CODE § 413.031(k) (FindLaw through June 30, 2010).

83. In Chicago and elsewhere in Illinois, initial criminal, rather than civil or administrative, responsibilities of car owners seemingly cannot usually be founded on laws holding owners absolutely liable for misuse of their cars. See, e.g., *People v. Carpenter*, 888 N.E.2d 105, 119 (Ill. 2008) (under due process, criminal statutes typically must hold accountable only those engaged in “‘knowing’ conduct in furtherance of a clearly culpable objective”; thus a car owner could not be criminally prosecuted simply because the owner knew the car contained a “false or secret compartment[.]”).

84. *Idris I*, 2008 WL 182248, at \*7 (quoting *Towers v. City of Chi.*, 173 F.3d 619, 627 (7th Cir. 1999)).

85. *Id.* (citing *Town of Normal v. Seven Kegs*, 599 N.E.2d 1384, 1389 (Ill. App. Ct. 1992)) (beer distributor not liable for kegs that were misused by consumers who had received the kegs from a beer retailer).

86. *Idris II*, 552 F.3d 564, 566 (7th Cir. 2009).

87. *Id.* (citing *United States v. Boyle*, 469 U.S. 241, 252 (1985)).

88. *Id.* (citing *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002)).

89. *Id.* (citing *Bennis v. Michigan*, 516 U.S. 442, 444–46 (1996)). At times, by statute, car owners may not be responsible for a driver’s use. See, e.g., *People v. 1991 Dodge Ram Charger*, 620 N.E.2d 448, 453 (Ill. App. 2d 1993) (only one co-owner found liable in car forfeiture proceeding involving illegal drug sales by non-owner, because only one co-owner engaged in statutory “conduct”).



control failed, or was not exercised, car owners paying automated traffic enforcement fines “can pass the expense on to the real wrongdoer.”<sup>90</sup>

The appellate court’s rationale showed that property owners as secondary culprits are not limited to vehicles and automated enforcement schemes. In fact, the same appeals court had a few years earlier sustained two Chicago Municipal Code ordinances making vehicle owners absolutely responsible for up to five hundred dollars in fines when illegal drugs or firearms were found by law enforcement officers in the owners’ vehicles.<sup>91</sup> In that same case, the court reasoned the owners were culpable in that “they must have given some degree of consent to the use of their cars.”<sup>92</sup>

What remains unclear are the circumstances under which the owners’ “degree of consent to the use of their cars” is so marginal as to constitute tenuous relationships with the car users.<sup>93</sup> Are all parents, spouses, significant others, roommates and friends who lend their cars in sufficient “control”? What about separated

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90. *Idris II*, 552 F.3d at 566.

91. *Towers v. City of Chi.*, 173 F.3d 621, 626 (11th Cir. 1999) (sustaining CHI., ILL. MUN. CODE §§ 7-24-225 (drugs) & 8-20-015 (firearms) (Am. Legal Publ’g Corp. through Council Journal 2010)). Sections 8-8-060 (prostitution), 8-16-020 (children on streets at night), and 11-4-1115 (sound devices) of the Chicago Municipal Code, which also impose a fine for particular misuses of a vehicle, were also challenged by plaintiffs, as secondary culprits. *Towers*, 173 F.3d at 621 n.1.

Today, vehicle owners remain responsible “for an administrative penalty of \$1,000.00 plus any applicable towing and storage fees” for drugs. CHI., ILL. MUN. CODE § 7-24-225. In addition, the vehicle will be subject to seizure and impoundment if used in the commission of prostitution. *Id.* at § 8-8-060(d)(1). A “parent or guardian of a minor commits an offense if he . . . by insufficient control allows . . . the minor” to violate “curfew hours.” *Id.* at § 8-16-020(b)(2). The provision on “sound device restrictions,” *Id.* at § 11-4-1115, noted in *Towers*, has been repealed.

92. *Towers*, 173 F.3d at 625.

93. *Id.* Similar questions regarding adequate control in non-property settings also arise. Consider the Parental Responsibility provision in the Municipal Code of the City of De Kalb, Illinois, section 52.130, which says this about the definition of “knowingly”: “This requirement is intended to hold a neglectful or careless parent up to a reasonable community standard of parental responsibility through an objective test. It shall therefore be no defense that a parent was completely indifferent to the activities or conduct or whereabouts of such juvenile.” DEKALB, ILL., MUN. CODE § 52.130 (2010).

As well, similar questions regarding adequate owner control over non-car properties also arise. These answers might vary, for example, between movable and non-movable properties. An owner’s car can be removed from the owner’s sight, but a building cannot. The DeKalb Municipal Code section 12.01 on public nuisances declares responsibilities for a “person in possession, charge or control of any lot, building or premises.” *Id.* at § 12.01.

spouses, or mere acquaintances, or strangers who are entrusted by vehicle owners at the urging of others who are not strangers? And what about employers whose vehicles are allowed to be used by employees both on and off the clock? Absolute owner liability in the absence of lease or reported theft would make proceedings more efficient. Perhaps the fairness of such efficiencies should be left to the body politic rather than to substantive federal constitutional limits.<sup>94</sup>

Also unclear is the legitimacy of assessing civil penalties on property owners with lesser control over property users when penalties are not assessed on property owners with more control. For example, in Chicago, car owners are responsible when their cars are badly driven by spouses, children, or friends. But car owners who are dealerships or manufacturers with written leases are not responsible. Arguably, in important ways such lessors have more control. In sustaining the Chicago ordinance, Circuit Judge Easterbrook said a car owner who is not a lessor “can insist that the driver reimburse the outlay if he wants to use the car again (or maintain the friendship).”<sup>95</sup> Often such insistence will not prompt reimbursement. By contrast, lessors can demand reimbursement as a condition of the lease (and have credit car numbers to secure payments for fines, as well as payments for vehicle damage, arising during the lease).

A second key guideline not yet well defined involves who can be designated to charge secondary culprits with local government violations founded on the actions of primary culprits who are under “some degree” of control. In many local automated traffic enforcement settings, similar to the Knoxville, Chicago, and Cleveland schemes, local governments contract with private companies to provide, operate, and maintain surveillance equipment.<sup>96</sup> Local governments have also been authorized

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94. In rejecting an attack on the Chicago red light camera program, one federal judge, citing *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, said: “When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.” *Akbar v. Daley*, No. 09-cv-1289, 2009 WL 3055322, at \*6 (N.D. Ill. Sept. 18, 2009) (citing *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)) (citation omitted).

95. *Idris II*, 552 F.3d at 566.

96. The history of the Knoxville scheme, and the city’s contract with Redflex, a private Australian company, is reviewed in *Williams v. Redflex Traffic Systems, Inc.*, No. 3:06-cv-400, 2008 WL 782540, at \*2 (E.D. Tenn. Mar. 20, 2008).

themselves to acquire and utilize such equipment.<sup>97</sup> There seems to be little controversy here.

Property owners may also be charged as secondary culprits after law enforcement officers observe others misusing the property. For example, since 1990, Chicago has had an administrative adjudication scheme for parking tickets issued not only by police officers, but also by “traffic control aides, other designated members of the police department, parking enforcement aides, and other persons authorized by the City’s traffic compliance administrator to issue parking and compliance violation notices.”<sup>98</sup> There may be more controversy here if charging duties are moved from police and sheriff departments to others who are less trained and lower level officers, especially for violations that require judgment, discretion, and accurate perception. Humans may no longer be needed to detect many motor vehicle violations. But they still are required for many decisions regarding trash, alcohol, drugs, and other matters whose regulations are significantly left to local governments.

### B. Cars

Owners whose vehicles are misused, whether caught by automated schemes or law enforcement personnel, can be held responsible financially as secondary culprits. Owners may not be able to shift liability by naming the primary culprits. Financial penalties typically are fines, as in Knoxville, Chicago, and Cleveland. Fines prompt in personam proceedings because the fines can be satisfied with any property. Penalties can also involve monetary losses through forfeitures, as when vehicles are seized and sold for public benefit after use during a crime.<sup>99</sup> Forfeitures

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97. See, e.g., COLO. REV. STAT. § 42-4-110.5(5) (2010) (limiting methods by which the state and local governments using automated traffic enforcement schemes may contract with vendors and manufacturers of automated vehicle identification systems for use or purchase of equipment).

98. *Van Harken v. City of Chi.*, 713 N.E.2d 754, 757 n.1 (Ill. App. Ct. 1999) (citing CHI., ILL. MUN. CODE 9-100-030, 040 (1998)).

99. See, e.g., *Towers v. City of Chi.*, 173 F.3d 621, 626 (11th Cir. 1999). In *Towers*, the Court said the following regarding a motor vehicle regulatory scheme:

[W]e agree . . . that any distinction between in rem forfeitures (which proceed against the offending property) and in personam fines (which proceed against the owner) is one of form, but not substance. Both proceedings result in an economic penalty to the owner because his property was used improperly; both serve the same governmental purpose of deterring unlawful conduct. There is only one functional difference between an in rem forfeiture

became more attractive to governments in 1996, after the U.S. Supreme Court in *Bennis v. Michigan* sustained a Michigan civil forfeiture law over the objections of a secondary culprit, a woman whose husband engaged in an illegal sexual act in the family car which the woman jointly owned with her husband.<sup>100</sup>

Beyond automated traffic enforcement, Chicago imposes fines on the owners of vehicles used during bad acts by others.<sup>101</sup> The police fined Robert Sturdivant five hundred dollars in 1996 because they “witnessed a person in possession of an unregistered handgun run and jump into Robert Sturdivant’s car.”<sup>102</sup> At his final hearing,<sup>103</sup> Robert could not “assert an innocent-owner defense because the ordinance does not recognize such a defense.”<sup>104</sup>

The final hearing may have been more complicated had Robert Sturdivant’s car been subject to forfeiture for its misuse by another. In *Bennis*, in rejecting a federal constitutional Due Process and Takings Clause challenge, the U.S. Supreme Court sustained a car forfeiture. However, the Court found it important that a Michigan forfeiture court, acting against a vehicle owned by a husband and wife after the husband was caught in the vehicle with a prostitute, had remedial discretion regarding the total loss of the vehicle to the wife.<sup>105</sup> The Court explicitly noted that the Michigan trial judge considered discretionary authority under Michigan case law, including an ability to order a portion of the sale proceeds, less costs, be paid to an “innocent co-title holder.”<sup>106</sup> Justice Ginsburg observed in her concurrence that

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proceeding and the in personam fines at issue in this case: The in rem forfeiture proceeding results in varying economic consequences from defendant to defendant, based on the value of the property; the in personam fine results in a fixed economic penalty.

*Id.* at 626–27.

100. 516 U.S. 442, 443–44 (1996).

101. See CHI., ILL., MUN. CODE § 7-24-226 (2010).

102. *Towers*, 173 F.3d at 622.

103. Robert never received notice of his right to a preliminary hearing. *Id.* He “was without his vehicle for more than fifteen days before he was able to pay to have the car released to him.” *Id.*

104. *Id.* The court noted that Robert was more culpable than the plaintiff in *Bennis*, who had ownership rights with her spouse who used the car to procure a prostitute. Robert’s culpability was distinguished because he had “sole authority to decide to whom” to lend his car and “to set the restrictions and checks that were appropriate to ensure that the vehicle would not be used to support illegal conduct.” *Id.* at 627.

105. *Bennis*, 516 U.S. at 453.

106. *Id.* at 444–45 (the trial judge declined to exercise this discretion for plaintiff as the

such discretion was important to prevent “exorbitant applications” of forfeiture statutes.<sup>107</sup> Ordinances setting fixed non-excessive fines,<sup>108</sup> rather than forfeitures, for secondary culprits remove “the potential for drastically, or exorbitantly, harsh penalties on an innocent owner.”<sup>109</sup> Forfeitures rather than—or in addition to—fines are seemingly more appropriate when the misused property, though not illegal, has little or no significant value outside of illegal conduct.<sup>110</sup>

Beyond unregistered handguns and prostitution, other non-driving bad acts occurring in or with cars can expose car owners to strict liabilities for fines, if not forfeitures. In the class action case sustaining the fine on Robert Sturdivant, the federal appeals court noted that Chicago had vehicle-related ordinances regarding illegal drugs, children on streets at night, and sound devices.<sup>111</sup>

A few Chicago ordinances seemingly penalize car owners for the bad vehicle acts of others without any express indication of the need for some significant degree of owner control. One ordinance says:

(a) No person shall drive or be in actual physical control of any vehicle within the City of Chicago while under the influence of

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couple owned another car, so she would not be left “without transportation,” and the sale proceeds would amount to “practically nothing” after costs, as the car was eleven years old and recently bought for \$600). Such discretion can also be guided by statute. *See, e.g.*, 720 ILL. COMP. STAT. 5/36-1 (West 2010) (a spouse of a vehicle owner whose vehicle is seized for certain Vehicle Code violations can seek vehicle forfeiture to himself or herself or some family member by “showing that the seized vehicle is the only source of transportation” and “financial hardship to the family . . . outweighs the benefit to the State from the seizure . . .”).

107. *Bennis*, 516 U.S. at 457 (Ginsburg, J., concurring).

108. *See* *Browning-Ferris Industr. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 n.22 (1989) (not reaching issue of applicability of Eighth Amendment’s Excessive Fines Clause to states through Fourteenth Amendment). *But see, e.g.*, ILL. CONST. art. I, § 11 (“All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”) and *People v. One 2000 GMC VIN 3GNFK16T2YG169852*, 829 N.E.2d 437, 439–40 (Ill. App. Ct. 2005) (applying federal constitutional bar on excessive fines to a state vehicle forfeiture proceeding).

109. *Towers*, 173 F.3d at 627 (viewing the discretion in forfeiture settings as “a safety valve” that can eliminate statutory applications that “exact from the innocent owner a forfeiture of property of exorbitantly high value in proportion to the owner’s responsibility”).

110. *See, e.g., Bennis*, 516 U.S. at 459–60 (Stevens, J., dissenting) (forfeitures differ when the property is pure contraband, proceeds of criminal activity, or tools of the criminal’s trade); *id.* at 461 (the forfeiture of the third type of property is most “problematic,” though not as much when the property is principally used for an illegal purpose because “the law may reasonably presume that the owner . . . is aware of the principal use being made of that property”).

111. *Towers*, 173 F.3d at 621.

alcohol, other drug or drugs, intoxicating compound or compounds or any combination thereof . . .

(b) Any vehicle used in a violation of subsection (a) of this section shall be subject to seizure and impoundment . . . . The owner of record of such vehicle shall be liable to the city for an administrative penalty of \$1,000.00 in addition to fees for the towing and storage of the vehicle.<sup>112</sup>

A second ordinance deems the “owner of record of any motor vehicle that is used for transportation or the solicitation for the transportation of passengers for hire” in violation of the Chicago Municipal Code is “liable to the city for an administrative penalty of \$750.00 plus any towing and storage fees” if the vehicle is impounded.<sup>113</sup>

Impoundment laws sometimes create secondary culprit liability for vehicle owners. Local laws often authorize impoundments of unattended vehicles for such purposes as removing cars obstructing traffic,<sup>114</sup> removing cars in “tow away” zones,<sup>115</sup> securing damaged cars,<sup>116</sup> or recovering stolen items.<sup>117</sup>

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112. CHI., ILL., MUNICIPAL CODE § 7-24-226 (Am. Legal Publ’g Corp. through Council Journal 2010).

113. *Id.* § 9-112-555(a).

114. *See, e.g.*, CLEVELAND, OHIO, TRAFFIC CODE § 405.02(a) (FindLaw through June 30, 2010) (“Police officers are authorized to provide for the removal of a vehicle under the following circumstances: (a) When any vehicle is left unattended upon any street, alley or bridge and constitutes an unreasonable hazard or obstruction to the normal movement of traffic . . . .”); CHI., ILL., MUN. CODE § 9-92-030(b) (“Members of the police department and employees of the department of streets and sanitation . . . may authorize the removal of a vehicle from any public way . . . under the following circumstances: . . . When an unattended vehicle is unlawfully parked so as to constitute a hazard or obstruction to the normal movement of traffic.”); KNOXVILLE, TENN., CODE OF ORDINANCES ch. 17, art. II, div. 4, § 17-98(1) (Municode 2009) (“Members of the police department shall have the authority to impound any vehicle . . . under the following circumstances: . . . When a vehicle is parked, stopped or standing upon an alley, street or highway so as to obstruct or impede the flow of traffic thereon or endanger the safety of the public.”).

115. *See, e.g.*, CHI., ILL., MUN. CODE § 9-92-030(f) (“When an unattended vehicle is parked illegally in an officially designated and marked ‘tow zone’”); KNOXVILLE, TENN., CODE OF ORDINANCES ch. 17, art. II, div. 4, § 17-98(6) (“At any place where official signs or markings designate a no parking or tow away zone”).

116. *See, e.g.*, CHI., ILL., MUN. CODE § 9-92-030(a) (“When a vehicle upon any public way is so disabled as to constitute an obstruction to traffic and the person or persons in charge of the vehicle are by reason of physical injury incapacitated to such an extent as to be unable to provide for its custody or removal”); CLEVELAND, OHIO, TRAFFIC CODE § 405.02(f) (“When any vehicle has been damaged or wrecked so as to be inoperable . . .”).

117. CLEVELAND, OHIO, TRAFFIC CODE § 405.02(c) (“When any vehicle has been

When impoundments promote safety or property return, assessments against registered vehicle owners are not punitive in nature, but rather remedial as they are related to the costs of impoundment.<sup>118</sup>

Additional impoundments are also authorized locally in Chicago and Cleveland when vehicle operators violate criminal or traffic laws.<sup>119</sup> Again, fees are assessed against the owners. Here, while some assessments may be described as involving cost recovery, certain fees seem punitive. For example, in Chicago, when a vehicle operator eludes a police officer and the officer chooses not to pursue, the officer reports the occurrence. There later can follow a notice to impound.<sup>120</sup> The owner of the vehicle

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stolen or operated without the consent of the owner.”).

118. *See, e.g.*, CHI., ILL., MUN. CODE § 9-92-080 (“The owner or other person entitled to possession of a vehicle lawfully impounded . . . shall pay a fee of \$150.00, or \$250.00 if the vehicle has a gross weight of 8,000 pounds or more, to cover the cost of the towing and a fee of \$10.00 per day for the first five days and \$35.00 per day thereafter, or \$60.00 per day for the first five days and \$100.00 per day thereafter if the vehicle has a gross weight of 8,000 pounds or more, to cover the cost of storage, provided that no fees shall be assessed for any tow or storage with respect to a tow which has been determined to be erroneous.”); CLEVELAND, OHIO, TRAFFIC CODE § 405.04 (“Whenever any vehicle, except a bicycle, is stored in a vehicle pound for any reason, the person reclaiming the vehicle shall be charged a storage fee of nine dollars (\$9.00) for the first five days or fraction thereof, and thereafter shall be charged six dollars (\$6.00) for each day or fraction of a day.”); *id.* at § 405.06(a) (“In addition to the storage fee provided for in Section 405.04, the following fees shall be assessed against the owner or other person claiming an impounded vehicle: (1) An impound fee of thirty dollars (\$30.00), except that the impound fee shall be reduced to ten (\$10.00) dollars for a person reclaiming a recovered stolen vehicle. (2) A towing fee of ninety dollars (\$90.00), except that the towing fee shall be reduced to fifty dollars (\$50.00) for a person reclaiming a recovered stolen vehicle, and shall be increased to one hundred and twenty-five dollars (\$125.00) for a person reclaiming a vehicle impounded incident to an arrest. The towing charge shall be increased by ten dollars (\$10.00) if a dolly or flatbed is used or if a tire or tires are changed.”); KNOXVILLE, TENN., CODE OF ORDINANCES ch. 17, art. II, div. 4, §17-100(a),(b) (“(a) To offset the cost of impoundment, including the cost of maintaining the vehicle pound, all motor vehicles impounded . . . shall be subject to a fee of twenty dollars (\$20.00) plus the city’s actual cost for towing. (b) After the first seventy-two (72) hours, a daily storage fee of eight dollars (\$8.00) per twenty-four-hour day shall be imposed.”).

119. *See, e.g.*, CLEVELAND, OHIO, TRAFFIC CODE § 405.02(e) (“When any vehicle has been used in or connected with the commission of procuring, soliciting, prostitution, soliciting drug sales . . . or any felony.”); *id.* § 405.02(i) (“When any vehicle has been operated by any person who is driving without a lawful license or while his license has been suspended or revoked.”); CHI., ILL. MUN. CODE § 9-92-030(g) (“When a vehicle is in violation of any provision of the traffic code authorizing towing and impoundment for that violation”); *id.* § 9-92-030(h) (“When a vehicle is subject to towing or removal under the Illinois Vehicle Code, the Criminal Code of 1961, or any other law”); *id.* § 9-92-030(i) (“When towing or removal is necessary as an incident to arrest”).

120. CHI., ILL., MUN. CODE § 9-92-035(b) & (d).

used to elude “shall be subject to an administrative penalty of \$1,000.00 plus the cost of towing and storage of the vehicle.”<sup>121</sup> Another Chicago ordinance states:

The owner of record of any motor vehicle that contains any controlled substance or cannabis, as defined in the Controlled Substances Act and the Cannabis Control Act or that is used in the purchase, attempt to purchase, sale or attempt to sell such controlled substances or cannabis shall be liable to the city for an administrative penalty of \$1,000.00 plus any applicable towing and storage fees. Any such vehicles shall be subject to seizure and impoundment pursuant to this section.<sup>122</sup>

In Cleveland, when a vehicle is towed incident to an arrest of the driver, the standard towing fee of \$90.00 is increased to \$125.00.<sup>123</sup> The \$35.00 differential seems punitive as to an innocent owner who was uninvolved personally in the acts leading to arrest.

### C. Trash

Trash, like cars, is subject to significant local government regulation. And like innocent owners of cars, innocent owners of other property that is misused can be held financially responsible for the bad acts of the those who trash the property and over whom they exercise “some” control. Landlords arguably have significant authority over their tenants. So do private homeowners or co-owners over spouses, children, or others with whom they live, as well as over guests. Fines can be levied though the old jalopy was not created directly by the property owner of the land where it sits. Short-term immunities, or opportunities to rectify upon notice, would serve to remove what the earlier-noted court described as “the potential for drastically, or exorbitantly, harsh penalties on an innocent owner.”<sup>124</sup> Remedial discretion is not limited to post-charge hearings in forfeiture proceedings; it can be employed during pre-charge deliberations. Yet any such immunities or chances to rectify seemingly need not be afforded under the due process precedents.

In Chicago, largely innocent property owners seemingly can

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121. *Id.* § 9-92-035(g).

122. *Id.* § 7-24-225 (citations omitted).

123. CLEVELAND, OHIO, TRAFFIC CODE 405.06(a)(2).

124. *Towers v. City of Chi.*, 173 F.3d 619, 627 (7th Cir. 1999).



be fined for trash caused by others, as long as the owners had some degree of control over those who trashed the property, even where it is difficult to demonstrate lack of control. One ordinance says:

(a) No person shall deposit refuse in a standard or commercial refuse container, or compactor, in a manner that prevents complete closure of the container's cover, or deposit refuse on top of a container in a manner that interferes with opening of the container, or pile or stack refuse against a container.

(b) The owner, his agent or occupant of a property shall not allow any person to violate subsection (a) of this section. The presence of refuse preventing complete closure of the container's cover, deposited on or piled or stacked against a standard refuse container, a commercial refuse container, or compactor shall be prima facie evidence of violation of this subsection (b).

(c) Any person who violates any provision of this section shall be fined not less than \$200.00 and not more than \$500.00 for each offense.<sup>125</sup>

Similarly, in Knoxville an ordinance declares:

If the throwing, dumping or depositing of litter is done from a motor vehicle, it shall be prima facie evidence that the throwing, dumping or depositing was done by the driver of the motor vehicle, or if the license plate registration number is known, the registered owner thereof.<sup>126</sup>

As in Chicago, there is little guidance on the grounds under which innocent property owners can rebut the prima facie evidence against them. Given that the resulting fines would be small, thus prompting only minimal due process notice and hearing rights, even owners who could rebut will often be discouraged by not only the uncertainties, but also the costs. In Cleveland, it is a "minor misdemeanor" for a motor vehicle operator to "allow litter to be thrown" from the vehicle except into a receptacle.<sup>127</sup>

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125. CHI., ILL., MUN. CODE § 7-28-261. Incidentally, it appears that there is another instance of remedial discretion that serves to remove potentially harsh penalties on innocent property owners.

126. KNOXVILLE, TENN., CODE OF ORDINANCES ch. 13, art. VI, § 13-194.

127. CLEVELAND, OHIO, OFFENSES AND BUSINESS ACTIVITIES CODE § 613.06(b) &

Beyond fines, nuisance abatements involving trash can be directed against largely innocent property owners. For example, in Cleveland:

The owner, occupant or person in charge of any property within the City shall maintain such property free from any accumulation of garbage, rubbish, refuse or other waste which is not confined in approved receptacles for collection or so as to prevent rodent infestation. The permitting of any premises within the City to be littered with garbage, rubbish, refuse or other waste is hereby declared to be a nuisance and unlawful.<sup>128</sup>

Such a nuisance can be abated by city officials, with “the costs and expenses thereof . . . to be assessed against the property and thereby made a lien upon it and collected as other taxes.”<sup>129</sup>

#### *D. Alcohol, Tobacco, and Drugs*

Alcohol, tobacco, and drugs, like trash, can be misused on or in property, including cars, homes, and businesses. To the extent property owners have control over others who use illegal substances or abuse legal substances in or on their property, financial penalties or other consequences for owners might follow though the owners themselves did not participate directly in the use or abuse. In Cleveland, an ordinance declares:

No person, being the owner, lessee, occupant, or having custody, control or supervision of premises, or real estate . . . shall recklessly permit the premises to be used for the commission of a drug trafficking offense . . . after receipt of written notice from a law enforcement officer that a drug trafficking offense . . . has previously occurred on the premises, or real estate.<sup>130</sup>

It is “prima facie evidence that the owner or lessee” did not “recklessly permit” if the owner or lessee “has begun the process of evicting” the primary culprit(s) or “has identified for the police[,] . . . after receipt of notice[,]” the steps taken to “prevent commission of additional drug trafficking offenses on the premises.”<sup>131</sup> As well, an “owner or lessor who has filed an action for forcible entry and detainer to remove a lessee or occupant from

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613.99 (FindLaw through June 30, 2010).

128. *Id.* § 203.07.

129. *Id.* § 203.03.

130. *Id.* § 607.05(c).

131. *Id.* § 607.05(c), (c)(1) & (2).

the premises” is not liable.<sup>132</sup> In the absence of any of the express defenses, seemingly, there is much leeway in defining “control or supervision” as well as reckless permission. Those found guilty of violating this ordinance have committed “a misdemeanor of the first degree.”<sup>133</sup>

Real property owners in Cleveland are far less innocent than car owners prosecuted under the Cleveland red light program, as they must have received notice of an earlier offense and have thereafter acted recklessly in permitting a new offense.<sup>134</sup> It is reasonable for Cleveland lawmakers to believe car owners are better able to control their cars than occupants/home owners/rental property owners are able to control their premises.<sup>135</sup> These lawmakers could also reasonably determine there is more user privacy in the buildings than in the cars owned by others. Another Cleveland ordinance reflects a recognition of diminished control by premises owners as it declares that “a landlord shall give a tenant reasonable notice of his intent to enter the leased premises and enter only at reasonable times,” where twenty four hours is “presumed to be reasonable notice.”<sup>136</sup>

Business owners possessing certain licenses or permits regarding alcohol sales can also be subject to greater liability for the actions of others in the owners’ establishments. In Knoxville—within the ordinances on beer permit holders—a permittee is subject to permit revocation or suspension when the permittee allows any person to appear in the establishment or on the premises to:

- (1)Publicly or openly perform acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any other sexual acts prohibited by law;
- (2)Public or openly engage in the actual or simulated touching,

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132. *Id.* § 607.05(c).

133. *Id.* § 607.05(f).

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135. While occupants of a premise may not be liable for fines arising from first time illegal drug trafficking by others, they may be subject to eviction because they permitted such first time offenses. *See, e.g.*, 740 ILL. COMP. STAT. 40/11(a) (West 2010) (if lessee or occupant, on one occasion, permits unlawful drug trafficking in leased premises, the lease may be voided by the lessor).

136. CLEVELAND, OHIO, MUN. CODE § 375.06(a). In Chicago, a landlord usually must give notice of entry two days in advance. CHI., ILL., MUN. CODE § 5-12-050 (Am. Legal Publ’g Corp. through Council Journal July 2, 2010).

- caressing, or fondling of the breasts, buttocks, anus or genitals;
- (3) Publicly or openly engage in the actual or simulated displaying of the pubic hair, anus, buttocks, vulva, genitals, or breasts below the top of the areola of any person;
- (4) Publicly or openly wear or use any device or covering exposed to public view which simulates the human breasts, genitals, anus, pubic hair, or any portion thereof.<sup>137</sup>

In addition, a beer permit holder in Knoxville can be fined on a “per-offense” basis for “making or permitting to be made any sales to underaged persons.”<sup>138</sup> Here, owner culpability seems less than required in the Cleveland provision noted above where reckless permission was required.

As with car owners, certain business owners involved in alcohol, tobacco, or drugs can be penalized for the bad acts of others without any apparent need for direct and personal involvement. No permission is necessary. A Chicago ordinance declares that it is illegal for any person to “sell, give away, barter, exchange or otherwise furnish any tobacco products, tobacco product samples and/or tobacco accessories to any individual who is under 18 years of age.”<sup>139</sup> Upon violation, the person licensed to sell tobacco is subject to civil penalties, even if an employee committed the violation.<sup>140</sup>

## V. CONCLUSION

Local automated traffic enforcement schemes as well as local ticket writers are increasingly targeting property owners as secondary culprits. Here, responsibilities often arise for owners out of their failures to control others who misuse the properties. At times, property owners are absolutely responsible for the misuse of their property even without control failures. Property owners are punished when others misuse cars, trash neighborhoods, abuse liquor or abuse drugs. Commercial property owners without

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137. KNOXVILLE, TENN., CODE OF ORDINANCES ch. 4, art. II, div. 2, § 4-74.

138. *Id.* § 4-75(1).

139. CHI., ILL., MUN. CODE § 4-64-190.

140. *Id.* § 4-64-331 (“Every act or omission which constitutes an underage tobacco violation by an officer, director, manager or other agent or employee of any person licensed pursuant to this chapter shall be deemed to be the act of such licensee and such licensee shall be liable for all penalties and sanctions provided by this section in the same manner as if such act or omission had been done or omitted by the licensee personally.”).

significant personal misconduct can be punished for conduct involving tobacco or adult entertainment on their premises. Secondary culprits are punished most often by fine. At times, they are subject to property forfeitures. Federal and state constitutional objections have largely failed to stem the surge in local laws punishing innocent property owners, as have state preemption arguments. Secondary culprits are especially easy targets for local regulators seeking new revenue sources, (perhaps) as well as safer and cleaner communities.