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

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I.

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.[4]

While likely to continue to anger many citizens,[5] 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.[6] As well, many violations charged through automated schemes can be processed administratively outside the judicial article courts,[7] freeing traditional trial court judges to handle the pressing business of civil and criminal cases[8] and freeing prosecutors to focus on more serious offenses.[9] 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.

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 Secter, *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.

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 Secter & 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 (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 (county's district attorney will no longer prosecute many misdemeanors, as assaults, thefts burglaries, vandalism, trespass and shoplifting, because of a budget deficit).

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.

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.[11]

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.[12] Violators are subject to a "civil penalty of $50, without assessment of court costs or fees."[13] Violators include the owners of the motor vehicles that prompted citations for violations observed in the red light enforcement program.[14] 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."[15] 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.[16]

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

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."[17] The registered vehicle owner is liable for a $90 fine if a red light is run.[18] 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

vehicle owners who were not, by way of defense, "driving at the time of the violation . . . ."[29] 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.[30] 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."[31]

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.

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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.[33] In those states where this is true, local regulatory initiatives are forbidden no matter how reasonable.[34] 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.[35]

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."[36]

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.[53] 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."[54]

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,'"[55] thus distinguishing drivers by where they drive. This challenge was also rejected in

increased fines for more significant speeding.[60]

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;[61] 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."[62] The Chicago ordinance was deemed to improve compliance with traffic laws and could not be called "unconstitutionally whimsical."[63] While $90, $100, or $200 dollar fines did not implicate federal constitutional property interests demanding more than rational government actions, ID.TbsttiojudicttioTTs00e430.00031 Tc9470531 T5 789.4

applied quite differently, with the state provision creating "broader" protections.[72] 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

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."

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,[82] car owners cannot shift automated traffic enforcement liabilities onto named primary culprits.[83] 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.'"[84] The trial judge further observed, however, that "a tenuous relationship" between a property owner and a wrongdoer could not lead to owner liability.[85] 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."[86] 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;[87] a tenant responsible for "a guest's misbehavior"[88] and a car owner responsible for a driver's use of the car in "committing a crime."[89] The appellate court also observed that even where reasonable

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").

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.[94]

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)."[95] 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.[96] Local governments have also been authorized

94. In rejecting an attack on the Chicago red light camera program, one federal judge,

themselves to acquire and utilize such equipment.[97] 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."[98] 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

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.[100]

Beyond automated traffic enforcement, Chicago imposes fines on the owners of vehicles used during bad acts by others.[101] 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."[102] At his final hearing,[103] Robert could not "assert an innocent-owner defense because the ordinance does not recognize such a defense."[104]

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.[105] 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.'"[106] Justice Ginsburg observed in her concurrence that

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

such discretion was important to prevent "exorbitant applications" of forfeiture statutes.[107] Ordinances setting fixed non-excessive fines,[108] rather than forfeitures, for secondary culprits remove "the potential for drastically, or exorbitantly, harsh penalties on an innocent owner."[109] 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.[110]

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.[111]

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

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 va

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.[118]

Additional impoundments are also authorized locally in Chicago and Cleveland when vehicle operators violate criminal or traffic laws.[119] 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.[120] The owner of the vehicle

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."[121] 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.[122]

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.[123] 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."[124] 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

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.[125]

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.[126]

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.[127]

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) &

the premises" is not liable.[132] 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."[133]

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.[134] 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.[135] 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."[136]

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,

132. *Id.* § 607.05(c).

133. *Id.* § 607.05(f).

134.

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.[137]

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."[138] 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."[139] Upon violation, the person licensed to sell tobacco is subject to civil g 8 TET7t9(r)-1g825 Clen825 T14r ferbn10roHiTJ0.0H