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COMMENT: Photo Radar in Arizona: Is it Constitutional?

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SUMMARY:

... Like photo radar, it is "[a] cold, opaque eye, hiding its mysterious interior." ... Even though Hildebrandt was decided in 1955, its rejection of a rebuttable presumption that the registered owner of an automobile is also the operator of the automobile at the time of a violation remains one of the most significant legal concerns regarding photo radar today. ... It is also well established that the Due Process Clause, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." ... In this respect, photo radar may fall more clearly within the proscribed limitations of the Due Process Clause than the typical traffic ticket. ... This precedent becomes extremely important to the photo radar constitutional inquiry as it relates to the rebuttable presumption that the registered owner of a vehicle is also its operator at the time of the violation. ... As the Court stated in *Joint Anti-Fascist Refugee Committee v. McGrath*, "'Due Process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [but represents] a profound attitude of fairness" The procedural safeguards concurrently implemented with photo radar and photo red-light seem more than consistent with this fairness. ...

TEXT:

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It's a typical Monday morning. You jump into your car and ease down the street. On your way to work, you stop by the ATM for cash and McDonald's for coffee and an Egg McMuffin. You join the masses on the freeway, contributing your esoteric comments to the inconsiderate drivers hindering your journey. Finally, you arrive at your building six minutes after 8 A.M., and enter the garage only to find that someone has taken your favorite parking space. You frantically take the elevator up to your floor, greet others with the congenial "Good Morning," and plop down at your desk. Another routine workweek has just begun.

Chances are, however, that most of your gestures, movements, actions, and expressions during this episode were videotaped and are now permanently preserved for anyone's viewing pleasure. After you leave work for the day, and frequent your favorite restaurant or do some shopping at the mall, the "eye-in-the-sky" follows. n1 The truth of the matter is, whether Americans like it or not, they are being watched in every facet of their daily lives. n2

Even the most sacred of sanctuaries, the proverbial water closet, has been invaded by modern video surveillance. "The chrome-plated, flush handle in the men's room has been replaced with what the plumbing company calls an [*1210] electronic sensor that flushes the toilet automatically." n3 This electronic sensor, however, is not merely an inanimate object performing the mundane job for which it has been trained. Instead, it is "[a] ghoulish black eye encased in a plastic eyelid that has heavy, mascara darkness." n4 This electronic eye continuously keeps watch over all those who pass-no

one and no thing is beyond its view. n5 Like photo radar, it is "[a] cold, opaque eye, hiding its mysterious interior." n6

From Los Angeles to New York, Chicago to Dallas, "photo radar has become one of America's hottest new trends in traffic control." n7 In the Phoenix Metropolitan Area, cities are "flocking to photo radar" to facilitate the traffic enforcement goals of lowering speeds and reducing accidents. n8 Critics complain that the cities are looking to rake in big dollars with the implementation of an unconstitutional tax while trampling on individuals' right to privacy. n9 Supporters retort that photo radar promotes "public safety by encouraging compliance with our speed limits" n10 and liberates police departments, "who can now better use personnel to fight other crimes . . ." n11 All of this without raising taxes a penny. n12

As is obvious from these general introductory comments, "once photo radar . . . is understood, most people hold extreme feelings on the subject—there seems to be no middle ground among law-makers or citizens in the debate on its use." n13 "The never-blinking cameras have made photo enforcement . . . [another] government[al] program[] that people love to hate." n14 Those in favor of the device proclaim that "speeders are much [*1211] more malicious and dangerous than photo radar ever could be." n15 Those against the "Orwellian Nightmare" claim that photo radar "doesn't allow any room for extraordinary circumstances, it invades driver privacy, n16 it prevents police officers from interacting with the public and it's a cash cow masquerading as traffic enforcement." n17

Because the underlying controversy revolving around this modern mystery rests upon relatively foreign concepts, Part I of this Comment provides a detailed analysis of the technology behind photo radar and its sister cohort, photo red-light. Part II introduces the manner in which four Arizona cities have incorporated photo radar into their traffic management schemes and the debates currently taking place in other Arizona cities considering the technology. A brief discussion of the speed-trailer alternative to photo radar also appears in this section. Part III examines the most significant constitutional issues raised by the system. Finally, Part IV explores the Arizona legislature's response to photo radar and concludes with ending remarks and comments.

I. What is Photo Radar?

Of the devices used to assist the police in maintaining safe and reasonable roadways, the radar speedmeter, which records the speeds of passing vehicles suspected of exceeding the speed limit, was one of the most dramatic innovations of the 20th Century. n18 "The radar speedmeter was originally developed for use by traffic engineers in studying vehicle speeds in relation to zoning, curves, grades, intersection approaches, etc." n19 Yet, soon after the effectiveness of the radar speedmeter became widely publicized, police and highway departments began using the device to obtain information related to the speeding habits of drivers in different localities, to establish speed zones, and most importantly, to enforce speed laws. n20

Radar devices come in one of two general types. The military primarily uses "pulse" radar which:

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operates by sending forth at regular intervals a beam of radio microwaves which, coming into contact with the object to be detected, is reflected or bounced back to the receiver. The waves move in both directions at the speed of light, so that by computing the time lapse between sending and reception, the distance of the detected object may be determined, and by computing distance changes over a time interval, the speed of movement of the object can be learned. n21

The other, most common, type of radar is used primarily for traffic control and operates "by a similar but distinct method, in which a continuous beam of microwaves is sent out at a fixed frequency . . ." n22 Speed is determined by measuring the change in the ratio of the frequency that occurs when a physical object interrupts the continuous flow of

microwaves. n23 This result, coined the "Doppler effect," is commonly experienced "when driving past a car whose horn or siren is sounding, the pitch or frequency of the sound falling suddenly just as the vehicle is passed." n24

Photo radar incorporates low-level Doppler radar technology to determine the speed of a motor vehicle while simultaneously photographing the driver and the vehicle's license plate. n25 The device is most commonly mounted in the rear compartment of a police truck or van. n26 The police vehicle then parks alongside a road where speeding is common. n27 As oncoming traffic passes, the radar device calculates the speed of each vehicle and determines whether the vehicle is exceeding the posted speed limit. n28 If the vehicle is [*1213] speeding, the photo radar device emits a visible flash as it photographs the vehicle's driver and then, as the vehicle passes, the device takes another photograph of the rear license plate. n29 The device automatically imprints the photographs with the date, time, and location of the violation, along with the speed at which the vehicle was traveling. n30 The traffic offense is then processed and a traffic ticket issued. n31 Within seven to ten working days, the registered owner of the vehicle receives the traffic ticket by first class mail. n32

A. History of Photographic Speed Detection Devices and Early Legal Challenges

Although Paradise Valley was the first city in Arizona to implement photo radar in September, 1987, n33 the history of photographic speed detection devices dates back to the early years of this century. In *Commonwealth v. Buxton*, n34 the earliest ancestor of photo radar—the photographic speed recorder—survived the defendant's challenge that the record of the device offered was inadmissible, "first, because of the insufficiency of the ex parte experiments intended to show the reliability of the machine, and second, because of the failure of the government to show the trustworthiness of . . . [the] stop-watch mechanism, an integral part of the apparatus." n35 The photographic speed recorder operated by taking one picture from behind a moving automobile, and then exactly one second later taking another picture. n36 By comparing the difference in the size of the automobile between the two photographs, the speed at which the vehicle was traveling could be [*1214] calculated with relative precision. n37 The Supreme Judicial Court of Massachusetts found that the recorder's results were reliable according to the "immutable working of natural laws." n38 Upon this finding, the Court held that the trial court did not abuse its discretion in admitting the evidence in question. n39

In 1955, in *People v. Hildebrandt*, n40 the Court of Appeals of New York faced the issue of whether "it may be inferred, from the fact that a person is the owner of an automobile, that he is its driver at a particular time." n41 The police used a "phototraffic camera" which, like the speedometer used in *Buxton*, took "two photos, at a set time interval apart, of a moving vehicle." n42 Here, however, the defendant did not challenge the device's accuracy or method of operation. n43 Instead, the defendant argued that "the driver of the automobile was not identified by the policeman or arrested at the time, and [he] got no notice, till two weeks later, that he was charged with the offense." n44 The prosecution responded to this challenge by asserting that there is a "rebuttable presumption" that the registered owner of an automobile is also its operator, much like the presumption already recognized in New York with respect to parking tickets. n45

The court did not agree with the prosecution's assertion and distinguished the use of the "phototraffic camera" from the issuance of parking tickets. n46 "[P]arking violations are of a special sort. The car is left unattended, there is usually no one present to be arrested, and it is not unreasonable to charge to the owner an illegal storage of his vehicle in a public street." n47

In contrast, the court held that "it is hardly a normal or ready inference or deduction that an automobile which speeds along a highway is being driven by its owner, and by no other person." n48 The court further stated that:

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The device used may be efficient and scientifically trustworthy, its use may make pursuit and immediate arrest inconvenient or unnecessary, and highway safety may be promoted by eliminating such pursuits. But it takes more than necessity to validate a presumption in a criminal case and here we do not even have a presumption. n49

This decision firmly established the New York requirement that the driver of an automobile must be identified at the time of the offense if the police are going to continue to use such photographic technology to enforce traffic violations. Even though *Hildebrandt* was decided in 1955, its rejection of a rebuttable presumption that the registered owner of an automobile is also the operator of the automobile at the time of a violation remains one of the most significant legal concerns regarding photo radar today. n50

A mere three years after the *Hildebrandt* decision, a substantially similar photo recording device was tested for its accuracy in *People v. Pett*. n51 A device known as the "Foto-Patrol" determined that the defendant's automobile was speeding and took a photograph of the automobile's license plate. n52 The defendant challenged his conviction on the grounds that the accuracy of the device in question had never been upheld in earlier decisions. n53 The court rejected this argument, noting that "[t]here has been and always will be a first time in everything . . . [T]he Foto-Patrol device accurately recorded the defendant's speed at the time in question . . . [and this finding] was further substantiated by the tests made by the police cars [*1216] which had been calibrated [for speed]" n54 Additionally, the officer's own observations as to the defendant's speed supported the court's decision. n55

From these early decisions, it is obvious that the controversy surrounding modern-day photo radar is not of recent occurrence. In fact, the challenges to photo radar occurring today have roots dating back to 1909. n56 Most courts facing these challenges have: (1) upheld the reliability of speed detection devices, including those incorporating photo-technology; n57 and (2) held that the photographs provided by these devices constitute admissible evidence. n58 Yet, because of the legal presumption of innocence until proven otherwise, some identification of the operator of the vehicle is often required before a court will find that the prosecution has met its burden. n59

B. Supporters and Detractors of Photo Radar

These findings provide a fair sampling of the settled legal issues surrounding modern-day photo radar. There are, however, numerous other concerns that have been raised by city officials and extensively discussed in newspaper articles. This underlying controversy has separated supporters and detractors of photo radar into two distinctly vehement groups.

The supporters of photo radar argue that the program saves lives while objectively enforcing the traffic laws. n60 "It doesn't snap pictures of age or sex. Of a minority, a VW or a Mercedes. It does not take pictures of NRA decals, religious icons or 'I Love My Family' bumper stickers." n61 "The camera doesn't care who you are . . . You could be the mayor, the chief of police—it doesn't matter." n62

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Supporters further argue that photo radar issues a substantially greater number of tickets than a patrolling officer while freeing officers for other police duties, including the patrol of residential neighborhoods. n63 Because only one officer monitors the camera from a position off the targeted roadway, patrolling officers no longer have the hazardous duty of chasing, stopping and confronting drivers on what are often busy streets and highways. n64

Detractors claim that photo radar is an invasion of privacy, n65 "that it is 'sneaky' and gives the police an unfair advantage." n66 George Orwell's 1984 is frequently referred to by those in opposition of photo radar along with the term "Big Brotherish" government. n67

A plausible argument can be made that a photo radar system punishes the otherwise law-abiding citizens, those who comply with state vehicle registration requirements. When the vehicle's license plate is checked through a state or city's

computer, law-abiding citizens will receive their ticket in the mail while those who do not register their vehicle or who have license plates from another vehicle on the vehicle photographed evade detection. n68

Detractors also state that photo radar deprives drivers of the ability to explain why they violated the traffic law, and more importantly, prevents police officers from exercising their situational judgment when issuing a ticket. n69 Although a camera cannot lie, it also cannot truly see. The fact that your wife is having a baby is no excuse to photo radar. Detractors further assert that hidden cameras which mail tickets over a week after an alleged offense do nothing to make people drive safer on the day that the violation occurred. n70 They also decry the impersonal aspect of photo radar [*1218] and argue that it is simply another money-making scheme for the city, rather than a benefit to the public's safety. n71

Moreover, it is argued that unjustified reliance on photo radar deprives the public of the opportunity to apprehend dangerous criminals who foolishly violate traffic laws after committing their more heinous crimes. "If a camera were monitoring the Oklahoma interstate where [Timothy] McVeigh was traveling, the nation might never have an arrest [in] the April 1995 bombing of the federal building in Oklahoma City." n72 Others argue that because they were traveling with the flow of traffic they should not be singled out for punishment. n73 Finally, the technological slippery slope argument is another favorite of detractors. n74

Aside from these arguments, the most serious criticism of photo radar is reserved for the "rebuttable presumption" that the owner of the vehicle was also its driver at the time of the offense. This implicates the owner of a vehicle for no other reason except that he or she has the car registered in his or her name. Accordingly, the owner must defend himself against a charge which he may very well know nothing about. n75

II. The Implementation of Photo Radar in Arizona

Texas was the first state to adopt modern photo radar technology; however, the two cities that began using the technology have since dropped their programs. n76 This abandonment has left the Town of Paradise Valley, Arizona, with the national photo radar longevity record, stationing police trucks and vans equipped with radar cameras along its rolling streets for over a decade. n77

Although the town contains no specific ordinance authorizing the use of photo radar, the Paradise Valley Town Code provides that when a vehicle violates the speed restrictions, "proof of the identity of the person in whose name such vehicle is registered . . . may be sufficient evidence that such person was responsible for such violation, in the absence of probative [*1219] contrary evidence and if the magistrate is so persuaded." n78 Furthermore, if the registered owner of the vehicle was not the operator at the time of the violation, the registered owner is required by the Paradise Valley Town Code to identify the vehicle's operator if the owner is asked for this information and knows the operator's identity. n79

The results from Paradise Valley's photo radar program are quite convincing. n80 According to a recent Paradise Valley Police Department report, "vehicle accidents dropped steadily from 1988 to 1993" since the adoption of photo radar. n81 In 1986, Paradise Valley recorded 460 traffic accidents. n82 This figure dropped by more than half to 208 in 1993. n83 Since then, however, the town has seen a minor increase in traffic accidents. n84 The town does not believe that its photo radar program is losing effectiveness; the increase is thought to be due to the growing traffic volume over the last few years. n85 Even considering this minor increase, the 1996 statistics are still 31 percent below the 1987 figures. n86 The number of citations issued annually has also greatly increased with the use of photo technology. n87

In the fall of 1996, Paradise Valley pioneered another photo radar concept: Photo red-light. n88 Photo red-light incorporates similar technology to that of photo radar but focuses upon citing red-light runners rather than [*1220]

speeders. n89 The cameras take pictures of both the driver and rear license plate of automobiles traveling straight through an intersection more than three-tenths of a second after the traffic light has turned red. n90 "The camera snaps when the car trips two loops buried in the pavement." n91 The cameras are not programmed to take pictures of cars illegally running left-turn arrows. n92 Moreover, "drivers making a legal right turn on red or who entered the intersection on a green or yellow light will not be cited." n93 Since its implementation, the number of red-light citations has dropped significantly because the photo red-light cameras were installed at dangerous Paradise Valley intersections. n94

Paradise Valley points to these figures in support of its contention that these programs increase public safety and are not just another method of taxing "lead-footed motorists." n95 For each speeding ticket issued by photo radar, Paradise Valley must pay twenty-eight dollars to its independent contractor, American Traffic Systems. n96 The fee increases to thirty-five dollars for every photo red-light ticket issued. n97 These operational fees, "leave[] the town with \$18 to \$57 per violation." n98 With this remaining revenue, the town must pay the salaries of four newly hired clerks who deal with the growing caseload resulting directly from the increase in photo radar citations. n99 Because the fines are the same irrespective of whether an officer writes the ticket or whether a camera spits out the citation, the city would [*1221] obtain greater profits from each ticket if it relied solely upon its patrolling officers for the enforcement of its traffic laws. n100

The town that brought photo radar to Arizona also provided the only appellate case to date upholding a photo radar challenge. In *Tonner v. Paradise Valley Magistrate's Court*, n101 a photo radar device detected a vehicle traveling at fifty-six miles per hour in a forty mile per hour zone. n102 The vehicle was registered to the General Motors Acceptance Corporation (GMAC). n103 "A summons and Arizona traffic ticket and complaint were mailed to GMAC alleging . . . [that the automobile was traveling] at a speed greater than is reasonable and prudent." n104 Upon receipt, GMAC forwarded the summons and complaint to the Tonners—the lessees of the photographed vehicle. n105 The Paradise Valley Magistrate's Court reissued the summons, traffic ticket and complaint, naming Tonner as the vehicle's operator at the time of the alleged violation. n106

The court sent the summons, traffic ticket, complaint, and two copies of the notice and acknowledgment of receipt of summons and complaint via first class mail to the Tonners along with a return, postage-paid envelope. n107 Under the Arizona Rules of Civil Procedure, however, service is not complete until the acknowledgment is returned. n108 Tonner never signed nor returned the notice and acknowledgment of receipt of summons and complaint and failed to appear on his court date. n109 The Magistrate's Court entered judgment against Tonner and ordered Tonner to pay a civil sanction. n110 The town argued that the use of first-class mail for delivery of a summons and complaint is sufficient to obtain personal jurisdiction over a defendant, and it was not necessary for Tonner to actually return the acknowledgment of receipt. n111

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Division One of the Arizona Court of Appeals disagreed with the town's argument and held that "[i]f the acknowledgment of receipt is not executed, service is not complete . . . even if there is evidence that the summons and complaint were received." n112 Until service is complete, the court does not have personal jurisdiction over a defendant and thus, any judgment entered against that defendant is void. n113 Because the town attempted service by mail under Arizona Rules of Civil Procedure, Rule 4.1(c), service was not complete without the defendant's voluntary compliance. n114 The court went on to explain that the town's recourse was "to continue the hearing and serve the complaint by some other authorized method." n115

This case illustrates a significant problem with the Arizona law—a person cited with a photo radar generated ticket can successfully defeat the charge by simply ignoring the material sent to him in the mail. n116 In this respect, Tonner actually has little to do with the technology behind photo radar or its constitutional implications because "the same result could occur with a parking violation in Arizona." n117 The more important lesson from this case is the persistence that Paradise Valley has continued to demonstrate in the face of adversity. n118 Since its conception in 1987, Paradise Valley has expanded the number of photo radar vehicles patrolling its streets and has also pioneered the new and highly effective photo red-light. These successful efforts have influenced several neighboring Arizona communities to begin their own

photo radar endeavors.

Recognizing the success of the Paradise Valley program, Scottsdale, Arizona implemented its photo traffic enforcement program on January 23, 1997. n119 Three GMC Jimmys equipped with photo radar technology now patrol "high accident locations, school zones and areas where people complain about speeding." n120 Scottsdale also rotates three sets of photo red-light cameras among eight intersections selected for their high number of [*1223] accidents. n121 With its first year complete, city officials are saying that photo radar is achieving exactly what they had hoped—a reduction in the number of accidents by encouraging the public to drive slower and more responsibly. n122

In the six years prior to the implementation of Scottsdale's photo radar program, accidents within Scottsdale City Limits increased an average of six percent each year. n123 Then in 1997, for the first time in seven years, the number of accidents decreased by thirteen percent over the previous year's statistics. n124 In high collision areas, there was a twenty percent drop. n125 These figures likely suggest that Scottsdale drivers have learned to respect the "ubiquitous lens." n126 In its first month of operation, photo radar was clicking off an average of 17.2 speeding violations an hour. n127 By October, 1997, "that number had dropped to [only] 6.6 photo radar violations per hour." n128

A majority of Scottsdale residents appear to be in favor of the never blinking eye-in-the-sky as well. When asked whether they supported or opposed the implementation of photo radar and photo red-light, sixty-five percent of the respondents said that they favored its use, twenty-three percent were opposed to its use, and twelve percent were uncertain. n129 "That compares favorably with the results of a survey conducted in May 1996, prior to [the] installation of the program." n130

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During that survey, only fifty-five percent of Scottsdale drivers favored the program, while thirty-nine percent opposed it, and six percent were unsure of their opinion. n131 After being informed that the number of accidents had decreased where photo radar and photo red-light had been installed, seventy-five percent of those surveyed supported the program, while twenty percent said they did not, and five percent remained uncertain. n132 When asked about expanding the program, sixty-eight percent agreed or strongly agreed that photo radar and photo red-light should be used at more locations. n133 Twenty-nine percent disagreed or strongly disagreed, and two percent were uncertain as to how they felt about an expansion of the system. n134

Critics in Scottsdale argue that photo radar and photo red-light are simply money-makers for the city, but this does not seem to be the case after their first year in use. "Most of those nailed by photo radar in Scottsdale [during 1997] had their tickets dismissed, according to City Court records." n135 About a third of those cited had their tickets dismissed altogether, a third had their tickets dismissed after attending traffic school, and the remaining third paid a civil sanction. n136 Of the 38,983 tickets issued in 1997 by photo radar and photo red-light, 12,999 people pleaded guilty and simply paid their fine. n137 The courts, the City Prosecutor's Office, and the police dismissed 12,802 citations, mainly "because the driver in the photograph did not match the [gender of the] registered owner of the vehicle or could not be identified . . ." n138 Another 12,161 people signed up for traffic school and had their tickets dismissed after attending the program. n139 "Of those who contested their citations in court, 576 were found guilty and paid a fine, while [nineteen] were found not guilty [and exonerated]." n140

Because so many of the photo radar citations were dismissed, there was no big jackpot for Scottsdale in 1997 either. n141 Even though the amount of fines collected from the cameras and traffic school receipts totaled [*1225] \$2,371,518, photo radar netted only \$363,596 for the Scottsdale general fund—less than one percent of the city's total operating budget. n142

The State of Arizona, which receives a surcharge for each traffic ticket issued by a municipality, received \$575,473.

n143 Another \$695,254 went to American Traffic Systems. n144 "The city spent \$318,000 . . . for a program manager, prosecutor, legal secretary, hearing officer, and court clerks." n145 The public-education fund, which pays for traffic-safety radio and other educational materials, received \$152,000. n146 Finally, ten dollars of every ticket went to the Scottsdale City Court for court fees. n147 This left the Scottsdale "general fund \$363,596 richer." n148

Following Paradise Valley's and Scottsdale's lead, both Tempe and Mesa began issuing tickets to drivers caught on camera for speeding or running red lights in early 1997. n149 Tempe activated its photo radar/photo red-light program on April 18, 1997. n150 Tempe's main goal is to increase public safety by encouraging drivers to slow down, which in turn reduces the number of accidents. n151 From 1991 to 1996, Tempe experienced a twenty-percent increase in the number of accidents occurring each year. n152 The majority of these accidents resulted from excessive speed, red-light runners, and failing to yield to oncoming traffic. n153 A few of these accidents resulted from speeds in excess of those legally permissible on interstate freeways. n154 For this reason, "[t]he majority of photo enforcement tickets [in Tempe] have been for excessive speed." n155 More than 3,800 tickets were issued between the time photo radar became operational on April 18, 1997 and June [*1226] 30, 1997. n156 Since then, however, the number of citations has steadily dropped along with the speeds of offending drivers. n157 Photo radar has been "credited with a twenty-one percent drop in speeding tickets while . . . in operation." n158 Mesa has reported a 2.3% drop since its adoption of photo radar. n159 The number of people running red lights at Tempe's two photo red-light intersections has also decreased by twenty-five percent, even though the cameras are still recording approximately 500 photos a month. n160

Tempe and Mesa, unlike Paradise Valley and Scottsdale, are bending over backwards not to set speed traps on their city streets. n161 Both cities openly advertise that their cameras are set to photograph only those vehicles traveling at least eleven miles over the posted speed limit. n162 Both also have signs at their city limits indicating that photo traffic enforcement cameras are in use. n163 Each city also places a warning sign approximately thirty feet before their photo radar vans, allowing speeding drivers to adjust their speed before being photographed. n164

A person wishing to challenge the reliability of the Tempe or Mesa photo radar systems "can go to the Police Department to view the picture before the case goes to court." n165 If the driver is not clearly identified in the photograph, the citation is dismissed. n166 "Factors such as glare, bad lighting and film problems have canceled many citations If the person driving the car is not the same sex as the owner of the car, the ticket is automatically thrown out." n167 Using this intentionally high standard ensures that photo [*1227] radar is not being used as simply another money-making tool; its purpose is public safety. n168

Because of these efforts, a recent poll suggests that Tempe residents overwhelmingly approve of photo radar and photo red-light. n169 Eighty-one percent of Tempe voters support the city's use of red-light cameras and seventy-eight percent support the use of photo radar. n170 Mesa residents also are strongly in favor of photo radar. n171 A recent survey of 399 registered Mesa voters indicated "that 82 percent of respondents favor the red light program, while 75 percent approve of photo radar in speed enforcement." n172

Other valley cities contemplating the adoption of photo radar are hoping to encourage drivers to drive more responsibly without having to resort to such "Big-Brotherish" tactics as photo radar and photo red-light. n173 In Chandler, speed trailers are set up along residential streets, announcing each oncoming motorist's speed in bright orange numbers. n174 Motorists driving past the sign see not only their current speed on the display board but also the posted speed limit. n175 "Unlike the photo radar devices being used throughout the Valley, the trailers don't snap pictures, and speeders won't receive citations in the mail. At most, police will send a 'courtesy' letter to the motorist warning them about their lead foot." n176 "There are no tickets, [*1228] just information." n177 Speed trailers are much more economical than photo radar as well, having a price tag of approximately \$15,000. n178

Glendale has focused its efforts and finances on educating motorists rather than using machines to nab speeders.

The city began its "It's our town, please slow down!" speed reduction campaign by attaching stickers to the sides of approximately 50,000 residential garbage containers citywide. n179 These stickers are intended to serve as reminders to drivers to drive slowly, particularly in residential areas. n180 Glendale has also increased its speeding fines, and has provided more funding for public information and education programs, as alternatives to photo radar. n181 The city proclaims "[p]ublic education is what makes traffic safety work," not intrusive governmental controls. n182

Most interesting, is that Arizona's largest and most populated city, Phoenix, has yet to adopt its own photo traffic enforcement program to battle its growing accident rates. n183 It does not seem likely that Phoenix will adopt a photo radar program to target speeders anytime in the near future, either. n184 The city is concerned that photo radar is not only inherently controversial, but because the number of speeding citations would undoubtedly increase, it would create a serious backlog for the city's already over-worked court system. n185 There is, however, consideration about installing photo red-light technology at about twenty of the city's most dangerous intersections. n186 "The city estimates that 31,000 citations a year [*1229] would be issued and that the program could spark a drop in the number and severity of accidents." n187

III. The Constitutional Implications of Photo Radar

Because there is no constitutionally enumerated right to drive or, for that matter, a right to speed or run red-lights, n188 a thorough examination into the language of the United States and Arizona Constitutions is required to determine the legality of photo radar. n189 In an attempt to address all possible constitutional arguments, n190 this section provides a detailed analysis of due process concerns, including both procedural and substantive issues, n191 the right to present a defense, n192 equal protection under the law, n193 and the right to privacy. n194

A. Due Process

The Due Process Clause of the Fourteenth Amendment provides that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law." n195 Similarly, Arizona's Constitution also provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." n196 Because these vague standards allow much room for debate, the United States Supreme Court has continuously wrestled with circumscribing the exact boundaries of the Due Process Clause.

Recently, the Court stated that "the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing power, [*1230] or employing it as an instrument of oppression.'" n197 "It refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded . . . then the deprivation has not been by due process of law." n198

The clause, however, does not guarantee the people "certain minimal levels of safety and security"; it only limits the State's power to act. n199 "[The clause] forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." n200

It is also well established that the Due Process Clause, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." n201 "[D]ue process is flexible and calls for such . . . protections as the particular situation demands." n202 In application, these guarantees are typically divided into two distinct, yet overlapping, categories. Procedural due process attempts to limit the "way in which government can act" whereas substantive due process places restrictions on "what the government can do." n203

1. Procedural Due Process

Two questions must be asked under a procedural due process analysis: (1) Is there a deprivation? and (2) If there is a deprivation, is it a protected life, liberty or property interest? n204 Before one even considers the due process implications of any State action, the answers to both of these questions must be "yes." n205 More specifically, the Supreme Court typically applies a three part test to determine what process is constitutionally due by balancing: (1) "the private interest that will be affected by the official action;" (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute . . . safeguards;" and (3) "the Government's interest." n206

[*1231]

First and foremost, it is not difficult to find an initial deprivation since "every action of government in enforcing its laws involves some sort of deprivation." n207 Photo radar, however, seems less intrusive than most governmental action, including the standard traffic stop, because "no officer stops the vehicle or detains the operator while a traffic citation or warning is issued." n208 In this respect, photo radar may fall more clearly within the proscribed limitations of the Due Process Clause than the typical traffic ticket. Yet, after receiving the photo radar citation in the mail, the operator must still examine the ticket and view the photograph to determine if he is the culpable party. n209 Even though this is a minor deprivation, it satisfies the requirements of the first due process question. Thus, "[t]he operative question becomes whether there is a protected life, liberty or [private] property interest" that photo radar violates. n210

In *Bell v. Burson*, n211 the Supreme Court held that there is a recognizable property interest in a driver's license. n212 By finding that a driver's license may be essential to a person's livelihood (e.g. it may be required to legally commute to a person's place of employment as well as serve as a means of identification), the Court acknowledged the potential due process implications with the revocation of one's driver's license. n213 In *Arizona*, points are assessed against a driver receiving a photo radar ticket just as any other traffic violation. Consequently, photo radar presents the threat of losing one's license—a recognizable property interest. n214 This argument, however, seems quite flimsy because no traditional traffic citation has ever been challenged on the grounds that conviction leads to a deprivation of [*1232] property. n215 Thus, the private interest implicated by the use of photo radar seems to be quite minimal at most.

In addressing the second element of the balancing test, the Court recognizes that the Due Process Clause does not require that "the procedures used to guard against an erroneous deprivation . . . be so comprehensive as to preclude any possibility of error." n216 "The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations." n217 In fact, "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard." n218 This precedent becomes extremely important to the photo radar constitutional inquiry as it relates to the rebuttable presumption that the registered owner of a vehicle is also its operator at the time of the violation.

This rebuttable presumption is found explicitly within the Paradise Valley Municipal Code at

11-2-18(C). n219 Rebuttable presumptions have been upheld as constitutional for parking ordinances, illegal dumping, and drug-forfeiture laws. n220 In the criminal context, rebuttable presumptions "have been upheld as not violative of due process as long as there is a 'rational connection' between the basic facts the prosecution proved and the ultimate fact presumed, and [that] the latter is 'more likely than not to flow from' the former." n221

In a typical photo radar case, there seems to be a rational connection between the actual "operator and the registered owner of the vehicle (the ultimate fact presumed)" because it seems reasonable that the owner should know who was driving the car at the time of the violation. n222 Accordingly, the registered "owner would merely need to identify that user" to escape [*1233] liability. n223 This, however, raises the interesting question of whether a city is legally permitted to shift the burden of proof onto the defendant to disclose the identity of the culpable party. n224 Such practice

has been widely used in Paradise Valley for over a decade and may spread to neighboring communities in the near future. Thus, until the Arizona Supreme Court rules on this issue, it seems that all an aggrieved speeder can do is argue about fundamental fairness without having any true precedent in his arsenal.

Finally, the Arizona municipalities which have adopted photo radar technology have a clear interest in protecting the public from unsafe drivers and have enacted extensive safeguards to further demonstrate that legitimate interest. A few of the Arizona cities that have adopted photo radar post signs at both the city limits and on the roadway just before the location of the camera. n225 In addition, photo radar vehicles typically have salient markings that are intended to notify oncoming drivers that photo radar is in use. n226 The locations of the photo radar vehicles and photo red-light cameras are also published in daily newspapers. n227 These procedural safeguards reinforce the cities' position that photo radar is being used to increase public safety and not as a mere "speed trap" in hopes of increasing the town's general fund. n228

Furthermore, Tempe and Mesa both compare the gender of the registered owner with that of the offending operator to determine if the owner was also the vehicle's operator. n229 If the genders of the owner and operator are not the same, then no ticket is issued. n230 Blurry or unclear photos are also thrown out before being mailed. n231 Additionally, the registered owner is given the opportunity to view the photograph at the police station, prior to the court date, and if there is any question as to the operator's identity, the [*1234] ticket is simply dismissed. n232 Finally, the usual legal protections are still afforded through a fair and impartial court system which allows aggrieved drivers to contest their photo radar citations in the same manner as any other traffic violation. n233

Because a State has a "compelling interest in highway safety," n234 the procedures currently being used in several Arizona cities seem more than enough to ensure that photo radar complies with procedural due process. As the Court stated in *Joint Anti-Fascist Refugee Committee v. McGrath*, n235 "'Due Process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . [but represents] a profound attitude of fairness" n236 The procedural safeguards concurrently implemented with photo radar and photo red-light seem more than consistent with this fairness. n237

2. Substantive Due Process

Substantive due process limits a State's ability to interfere with protected life, liberty and property rights. n238 In deciding substantive due process issues, the Court has typically used two different standards of review. n239 Strict scrutiny—requiring a State to demonstrate both a compelling interest for its action and that its action is narrowly tailored to the achievement of that compelling interest—has been typically employed for "fundamental rights." n240 For all other inquires, the Court essentially defers to the legislative body which enacted the challenged law. Such deference occurs by the Court applying a rational basis test whereby "only a rational relation need be established between the law and a legitimate government interest for the law to be upheld." n241 In viewing Court's past decisions, virtually any law can pass muster under this minimal scrutiny. n242

[*1235]

Because photo radar does not fall within the protected categories of fundamental rights, any challenge will likely be viewed under the rational basis standard of review. Under this deferential standard, there is little chance that a court would not find a rational basis for the implementation of photo radar in Arizona. Excessive speed, running red lights, and failing to yield are three common causes of traffic accidents and fatalities. n243 Since its adoption of photo radar, Paradise Valley has seen its annual number of accidents drop by thirty-one percent. n244 Scottsdale, Tempe, and Mesa have also experienced similar success with their photo radar programs. n245 Even if not solely attributable to photo radar and photo red-light, these statistics are certainly influenced by the camera's ability to persuade the public to conform its driving habits to those that are more reasonable and safe. Hence, under the rational basis standard of review, photo radar is clearly reasonably related to a municipality's interest in public safety.

For these reasons, it seems that the recent adoption of photo radar and photo red-light in the four Arizona municipalities discussed in Part II does not violate the Due Process Clause of either the United States or Arizona Constitutions.

B. The Right to Present a Defense

Some detractors argue that photo radar violates the Sixth Amendment because the driver is not "given an immediate opportunity to protest the citation or explain extraordinary circumstances." n246 Additional arguments focus on "where a violator is not aware that he has been photographed by the [camera] unit, despite the fact that there are signs posted...and...flashing cameras." n247 Without this notice, the violator may have forgotten the exigency justifying the violation by the time he receives the citation in the mail. n248 Because a picture doesn't always provide the entire story, a person may not truly deserve the sanction that the camera demands he get. n249 But [*1236] the critical question is, do these problems run afoul of a person's constitutionally protected right to present a defense? n250

In *United States v. Delario*, n251 the Fifth Circuit held that "[b]ecause there is no sixth amendment right to a speedy indictment, the appellant must prove a denial of fifth amendment due process." n252 As previously discussed, photo radar passed muster under a Fifth Amendment analysis. n253 Moreover, mere delay alone is not sufficient to raise Sixth Amendment concerns. n254 "The appellant must show that 'the government intentionally delayed the indictment to gain a tactical advantage, and that the delay caused [him] actual and substantive prejudice.'" n255 Under this standard, the court found "no merit in Delario's objection to the post-indictment delay of eight and a half months." n256

In Arizona, photo radar and photo red-light citations are mailed within seven to ten days after the date of the violation. n257 Not only is this delay much less than the eight and half months found permissible in *Delario*, it also seems reasonable that any major exigency justifying the violation would remain fresh in the accused's memory for this amount of time. The accused can then raise his exigency defense by contesting the citation in a court of law. Furthermore, "the delay in government action in a photo radar case is not based on an intentional attempt [by the government] to gain a tactical advantage . . . [but is simply] due to necessary administrative procedures." n258

Now it may be true that "lesser exigencies, such as indigestion or lack of attention due to a dropped cigarette—although possibly sufficient to convince a police officer to withhold a citation or even a judge to acquit—would almost certainly be forgotten." n259 This may implicate the Sixth Amendment [*1237] to at least a slight degree. Yet, this alone is a far cry from actual and substantive prejudice. There may have been passengers in the car at the time of the offense that can remind the accused of the exigent circumstances or some other event might spontaneously refresh the accused's memory. Finally, there is nothing to guarantee that a randomly chosen officer would be persuaded by such flimsy excuses in the first place. n260

Because the government does not intentionally delay the delivery of photo radar citations, photo radar does not seem to pose any constitutional problems with respect to the accused's right to present a defense. In addition, the accused is likely to remember any legitimate emergency excuse in sufficient detail to adequately explain such circumstances in a court of law.

C. Equal Protection under the Law

Many victims of photo radar argue that "they were following the flow of traffic, had good driving records, drove safe cars and were driving reasonably and prudently" for the conditions present. n261 In fact, "a car going 55 mph when the

flow of traffic is 65 (regardless of the posted speed limit) is more of a hazard than all the [other cars], which are exceeding the limit." n262 Consequently, driving the speed limit under certain conditions may be more unreasonable and unsafe than traveling with the general "flow of traffic."

This "flow of traffic" argument seems to contemplate a diffusion of responsibility whereby a driver traveling with the flow of traffic believes that he should not be singled out for punishment. Because he was the unlucky one caught by photo radar, while others, driving just as fast, if not faster, escaped the electronic-eye, he argues that he has been denied equal protection under the law. However, "[i]n evaluating a law to see if there is an equal protection violation, the question is not whether persons are being treated differently—many laws do exactly that—but whether [the] government has some appropriate justification for doing so." n263

Other Arizona detractors argue that because some cities (e.g. Mesa) do not ticket state vehicles when caught speeding by the never-blinking camera, n264 photo radar discriminates against the non-municipal public. [*1238] Although this fact seems offensive and potentially illegal at first blush, it doesn't raise any legitimate constitutional problems. The Arizona Constitution builds upon the Fourteenth Amendment to the United States Constitution n265 by providing that "[n]o law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." n266 This essentially means that "all persons similarly circumstanced shall be treated alike." n267 However, because the Arizona Constitution explicitly exempts municipal bodies from the requirements of Article 2, section 13, the equal protection challenge against Mesa's program is constitutionally unfounded.

When addressing a legitimate equal protection issue, the Supreme Court reviews the challenge under three related, yet distinct standards. Generally, any legislative action is presumed valid and will be sustained if there is some rational relation to a legitimate state interest. n268 "When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude." n269 Legislative action which is based on gender, or illegitimacy calls for a heightened standard of review and is subjected to intermediate scrutiny. n270 Such legislation "fails unless it is substantially related to a sufficiently important governmental interest." n271 Finally, when a statute attempts to classify individuals by race, alienage, or national origin it will be subjected to the most exacting scrutiny because these factors typically provide no sensible ground for differential treatment. n272 Such laws will be sustained only if they are "suitably tailored to serve a compelling state interest." n273

Because photo radar does not discriminate by race, alienage, gender, etc. and is directly related to social legislation—attempting to maintain the health, safety, and general welfare of the public through reasonable enforcement of the traffic laws—any equal protection challenge would likely be subjected [*1239] only to the rational basis standard of review. As noted in the due process discussion, virtually any legislation can pass muster under this lenient standard. n274 In addition, the Arizona Constitution explicitly grants cities the power to discriminate among municipal and non-municipal traffic offenders. n275 Finally, because driving is not a constitutionally guaranteed right, and because "[t]he only people who get caught by photo radar are those who are [already] breaking the law . . ." n276 photo radar likely satisfies the requirements of equal protection.

D. The Right to Privacy

"Freedom from government interference in the private lives of its citizens is paramount to the greatness of our society The passage of . . . photo radar . . . places our liberty in jeopardy" because it has no bounds. n277 Modern day technology "allows for a photo radar unit to be contained in a shoebox-sized device on every road and highway to capture every driver exceeding the speed limit by 0.1 mph or more." n278

The Fourth Amendment acknowledges a privacy interest by guaranteeing "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" n279 The touchstone for deciding if a Fourth Amendment violation has occurred is whether the alleged search violated the defendant's legitimate privacy expectation. n280 The Arizona Constitution clarifies this right even further by providing that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." n281

In *Katz v. United States*, n282 Justice Harlan resolved the Fourth Amendment question by concluding that there is a twofold analysis to [*1240] determine whether a person has a legitimate expectation of privacy. n283 First, the individual must manifest an actual (subjective) expectation of privacy in the object of the challenged search; and second, that expectation must be one which society is prepared to recognize as objectively reasonable. n284 Therefore, to hold that photo radar violates the Fourth Amendment or Arizona Constitution, a defendant must not only have a subjective expectation of privacy in the operation and identification of his motor vehicle, but that expectation must be one that society would recognize as objectively reasonable. n285

Time and again, the Supreme Court has been unwilling to protect a privacy expectation in items intentionally or inevitably exposed to the public. n286 In *Harris v. United States*, n287 the Court held that the observation of objects in plain view does not implicate the Fourth Amendment so long as the officer has a right to be at the place of observation. n288 It is quite obvious that a person operating an automobile on a public street is in plain view of the public eye. n289 Thus, when a driver rolls out on a public thoroughfare "[the vehicle's] occupants, and its contents are in [the] plain view" of any surveillance vehicle legally parked in a public median. n290

In addition, "[t]he Court has recognized that the physical characteristics of an automobile and its use result in a lessened expectation of privacy therein" n291

Automobiles, unlike homes, are subject to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order. n292

Furthermore, because a driver is required by law to place the automobile's license plate in plain view, it is unreasonable to have an [*1241] expectation of privacy in such object. n293 Consequently, detractors must focus their Fourth Amendment challenges on the photograph identifying the driver as the culpable party.

A significant factor in analyzing a Fourth Amendment "search" is the intimacy of detail that a given surveillance technique reveals. If that technique is unduly invasive, providing intimate, personal detail, then a constitutional question may arise. n294 The picture from a photo radar or photo red-light camera is nothing more than a typical 35mm photograph. n295 This method of surveillance is actually "less offensive than surveillance cameras at convenience and grocery stores." n296 Additionally, which is more invasive: A clearly marked police vehicle that photographs drivers exceeding the speed limit by at least eleven miles per hour; or, an armed officer who can: (1) pull a driver over for even going only one mile per hour over the speed limit; (2) detain him during the issuance of the citation; and (3) search his person and his vehicle once stopped? n297 For these reasons, it is doubtful that photographing a vehicle and its driver with the photo radar technology used in Arizona today violates any legitimate right to privacy.

IV. Final Thoughts and Concluding Remarks

Since its introduction in 1987, photo radar has been the target of much controversy and debate. "Even the Arizona

Legislature has gotten involved, sponsoring three bills during the past six years to curtail or eliminate photo radar." n298 In 1997, "state lawmakers attempted to weaken photo radar's effectiveness by limiting fines to \$5." n299 This bill also prohibited insurers from considering a photo radar citation "as a moving violation against the person for the purpose of establishing rates of motor vehicle insurance charged by the insurer" n300 A violation and subsequent citation would [*1242] also not lead to points being assessed against a person's driving license. n301 This bill died in the House Transportation Committee in February, 1997. n302

The most recent bill, introduced on January 12, 1998, n303 would have required the majority of electors to vote on and approve photo radar before any "county, city, or town" could begin using such technology within its jurisdiction. n304 This proposal would have affected "only speed-enforcement [photo radar] cameras." n305 Cities would not need a public vote to use [photo red-light] cameras at intersections to catch drivers running red lights." n306 Many municipalities opposed this bill because of their heated dislike for mandates, particularly from the State and Federal government. n307 Consequently, this bill also died. n308

As a result of these smothered legislative efforts, several private companies have created their own solution to thwart the growing problem of photo radar-license plate covers. The covers cost between twenty and forty dollars and are basically a clear plastic shield which is bolted over a vehicle's rear license plate. n309 The covers' manufacturers claim that the covers work by reflecting the flash of a photo radar camera directly back at the camera, making the vehicle's license plate numbers unreadable. n310

[*1243]

The police contend that "the covers do not prevent the radar cameras from snapping a clear picture" n311 "What's wrong [with the covers] is that many of them obscure the license-plate numbers to the naked eye." n312 Arizona law requires that a vehicle's license plate be clearly visible at all times and shall be maintained so as to be clearly legible. n313 Accordingly, people with such license plate covers have been ticketed and their covers impounded for evidence in court. n314

As is evident from this Comment, photo radar is one of the most controversial issues facing Arizona cities today. This is primarily due to the fact that photo radar impacts the lives of many Arizona residents. n315 Everyone driving in the Phoenix metropolitan area faces the persistent danger of being caught on film whenever they venture out in their automobiles. No one is safe from the "ubiquitous eye."

Yet, each of the cities that have implemented this technology have had positive experiences. Accident rates have decreased significantly while public support for the programs continues to rise. Detractors argue that photo radar is "Big Brotherish" in nature, but there is no precedent or legitimate policy reason suggesting that photo radar falls outside the proscribed limitations of the State's Police Power. Even the controversial "rebuttable presumption" currently being employed in Paradise Valley passes constitutional muster. Thus, detractors must rely on the political process, rather than the legal system, to abolish these notorious programs.

The only cautionary flag that should be brought to the attention of those cities currently using this technology, as well as those considering its use, is not to over rely on photo radar for all of their traffic needs. Such hasty reliance will actually thwart the public safety objectives that have led to the technology's great success. n316

FOOTNOTES:

n1 What if you skip the mall but cheat on your spouse or pilfer some office supplies? What if you make fun of your boss with some lewd gesture or accept a bribe from that desperate client? Not one of these activities is safe from the wonders of modern technology. All of these activities could have been captured by a miniature camera, the size of a quarter, hidden in a wall clock or incorporated into a sprinkler head.

n2 "Video cameras are 'all over the place' . . . [and] '[a]s the quality of cameras improves, they become more of a useful tool.'" Susie Steckner, Smile: Wherever You Are, A Camera May Be Watching, Ariz. Republic, July 28, 1997, at A1 (quoting Rick Hill of Southwest Access and Video in Tempe, Arizona).

n3 Art Thomason, Our Rights 'Just Going and Going' Down Drain, Ariz. Republic, Jan. 13, 1998, Chandler Community, at EV1.

n4 Id.

n5 See id.

n6 Id.

n7 Mary Jo Pitzl, Backers Call It A Lifesaver, Critics Call It A Cash Cow; Either Way, Photo Radar is An Unblinking Eye 3 Cities Joining Hot Trend, Ariz. Republic, Feb. 16, 1997, at A1 (contributing to this article were Diana Balazs, Lori Baker, Chris Fiscus and Roberto Sanchez of The Arizona Republic).

n8 Id.

n9 See id.

n10 Long Live Photo Radar, Ariz. Republic, Mar. 28, 1997, at B16.

n11 John MacDonald, Just Slow Down Photo-Radar Detractors Simply Don't Want to Get Caught, Ariz. Republic, June 25, 1997, at EV8. MacDonald attacks the insincere reasoning of those against photo radar by revealing the hypocrisy behind their emotionally charged arguments: "Be tough on crime, but not on mine." Id.

n12 See id.

n13 Lisa S. Morris, Photo Radar: Friend or Foe?, *61 UMKC L. Rev.* 805, 805 (1993).

n14 Pitzl, *supra* note 7.

n15 Just Don't Speed, Ariz. Republic, Feb. 5, 1998, at EV6 ("Driving is a privilege, not a right.").

n16 Some even claim that "photo radar has wrecked marriages because the person in the photo wasn't with his or her spouse." It's Simple: Obey Traffic Laws, Ariz. Republic, Dec. 15, 1997, at B6.

n17 Pitzl, *supra* note 7.

n18 See Thomas J. Goger, Annotation, Proof, By Radar or Other Mechanical or Electronic Devices, of Violation of Speed Regulations, *47 A.L.R.3d* 822, 876-77 (1973).

n19 Id.

n20 See id.

n21 Id.

n22 Id.

n23 See id.

n24 Id. But cf. Philip J. Carosell & William C. Coombs, Radar Evidence In The Courts, 32 *Dicta* 323 (1955) (contending that "the Doppler or frequency radar ordinarily used [by police], unlike the pulse radar commonly used by the military, is subject to many limitations as to accuracy and by way of interference from objects or power sources other than the moving [vehicle being scanned]").

n25 See *Morris*, *supra* note 13, at 805; see also S.B. 1019, 43d Leg., 2d Reg. Sess. (Ariz. 1998) (defining photo radar as "a system that combines a photograph of a motor vehicle and its driver with a record of speed checked by radio microwaves or other electrical devices").

n26 See Jim Haynes, Photo Radar Dangerous to Freedom, Ariz. Republic, Mar. 9, 1997, at H3 ("Photo radar consists of a camera and radar gun hidden in the back of a van or station wagon parked innocently on the side of the road.").

n27 See *Morris*, *supra* note 13, at 805 (citing Holly O. Remy, Watch Out For Robo-Radar, *Press Enterprise*, Apr. 26,

1991, at E1).

n28 See Diana Balazs, Photo Radar Getting Day in Court Scottsdale Judge Hears First Cases, Ariz. Republic, Mar. 12, 1997, Scottsdale/Foothills Community, at 1 ("The speed of every car that goes by a photo-radar camera is recorded, whether it clicks off a ticket or not."). But cf. *Morris*, *supra* note 13, at 805 (stating that the speed of each passing vehicle is displayed on a large digital sign posted in front of the police unit). Few of the Arizona cities using photo radar have implemented similar signs. This raises due process concerns with respect to notice which will be more fully discussed in Part III. However, some cities have begun using "Radar Trailers" which don't snap pictures but forewarn motorists that they are speeding. This is more fully discussed in Part II.

n29 See Balazs, *supra* note 28. Because Arizona does not have a front license plate requirement, only a rear photo can adequately identify the car. States with front license plate requirements may have different methods for identifying offending vehicles.

n30 See *Morris*, *supra* note 13, at 806 (citing Traffic Monitoring Technologies, Photo Cop Info. Package (1990)).

n31 See *id.* (citing Remy, *supra* note 27).

n32 See Judi Villa, Photo Radar is for Real No More Warnings, Tickets on the Way, Ariz. Republic, Apr. 18, 1997, Tempe/Ahwatukee Foothills Community, at EV1.

n33 See Diana Balazs, Accidents Increase in '96 in Town but Burglaries, Thefts Fall, PV Police Report, Ariz. Republic, Apr. 4, 1997, Scottsdale/Foothills Community, at 1; see also Pitzl, *supra* note 7.

n34 91 N.E. 128 (Mass. 1910). Mr. Buxton was convicted for speeding in Boston on April 27, 1909. See *id.* at 128.

n35 *Id.* at 129 (internal quotation marks omitted).

n36 See *id.* at 128.

n37 See *id.*

n38 *Id.* at 129 ("[T]he result of the experiments did not depend upon the fluctuations of human agencies, nor on conditions whose relations to the result were uncertain . . .").

n39 See *id.*

n40 126 N.E.2d 377 (N.Y. 1955).

n41 *Id.* at 378.

n42 *Id.* As in Buxton, the distance traveled by the car during the time between the two photos was the basis for a mathematical computation which determined the vehicle's speed of travel. See *id.*

n43 See *id.*

n44 *Id.*

n45 *Id.*

n46 *Id.* at 379.

n47 *Id.* (explaining *People v. Rubin*, 31 N.E.2d 501 (N.Y. 1940)).

n48 *Id.* ("Speeding in an automobile is [a] personal, individual wrongdoing, which can subject the wrongdoer to serious penalties . . . [T]here should be applicable the criminal-law rules of presumption of innocence and necessity of proof of guilt beyond a reasonable doubt.") (citations omitted). The court identified the common occurrence that many people have more than one car in their own name (e.g. a husband may have two cars titled in his name even though his wife typically assumes sole possession and operation of one car). See *id.* In addition, people lend their cars to other drivers at various times. See *id.* (In the State of New York in 1955, "there [were] outstanding . . . at least one million more automobile operators' licenses than passenger automobile registrations.").

n49 *Id.* (citation omitted).

n50 See *Morris*, *supra* note 13, at 807.

n51 *178 N.Y.S.2d 550 (Police J. Ct. 1958)*.

n52 See *id. at 551*. The Foto-Patrol is a speed measuring device and operates on an electronic impulse principle which activates a strobe light and camera and when the setting of the machine is disturbed by a speed in excess of the setting, in this case 40 miles per hour, a light flashes and the camera then takes a photograph of the license plate number of the offender and provides through a code the alleged speed. *Id.*

n53 See *id. at 554*.

n54 *Id.* However, the court acknowledged the importance of the expert testimony regarding the accuracy and reliability of the "Foto-Patrol" in reaching its decision. See *id.*

n55 See *id.*

n56 See generally *Commonwealth v. Buxton, 91 N.E. 128 (Mass. 1910)*.

n57 See Goger, *supra* note 18, at 831-35.

n58 See Diana Balazs, Photo Radar A Perfect Eyewitness Is Used For 1st Time In Car-Accident Case, *Ariz. Republic*, June 25, 1997, Central Phoenix Community, at 4; see also *Morris, supra* note 13, at 807 (citing 3 Charles C. Scott, Photographic Evidence 1418 (1969)).

n59 See *People v. Hildebrandt, 126 N.E.2d 377, 379 (N.Y. 1955)*.

n60 See Speed Does Kill, *Ariz. Republic*, July 26, 1997, Chandler Community, at EV6; Photo Radar Truly Objective, Could Save Lives, *Ariz. Republic*, July 26, 1997, Chandler Community, at EV6; see also *infra*, Part II (explaining the decrease in accidents that Phoenix Metropolitan cities have experienced since the adoption of photo radar and photo red-light).

n61 Photo Radar Truly Objective, Could Save Lives, *supra* note 60.

n62 *Morris, supra* note 13, at 808 (citing Leslie Keesling, If You Speed, Say 'Cheese' and Expect A Ticket, *L.A. Times*, May 7, 1991).

n63 See Diana Balazs, New Police Tool Cutting Speeds, Accidents, Scottsdale Says, *Ariz. Republic*, Jan. 21, 1998, Scottsdale Community, at 1.

n64 See *Morris, supra* note 13, at 808.

n65 See John MacDonald, Just Slow Down; Photo-Radar Detractors Simply Don't Want to Get Caught, *Ariz. Republic*, June 25, 1997, Chandler Community, at EV8.

n66 *Morris, supra* note 13 at 808. Some commentators suggest that photo radar flirts with being entrapment when an unmarked photo radar vehicle is parked off the street near a tree, obscuring its visibility. See Diana Balazs, Photo Radar Forum Fails to Change Minds, *Ariz. Republic*, Feb. 11, 1998, (Scottsdale/Foothills Community), at 8.

n67 Villa, *supra* note 32.

n68 *Morris, supra* note 13, at 808.

n69 See Photo Radar = Revenue, *Ariz. Republic*, July 10, 1997, Chandler Community, at EV4. "[A] bona fide emergency explanation that might be accepted by an officer at the time of the violation may fall on deaf ears at a later court date." *Morris, supra* note 13, at 809 (citing Frederic Grab, Photo Radar: What's Wrong With This Picture?, *10 Glendale L. Rev. 51, 52 (1991)*).

n70 See Roberto Sanchez, Photo Radar Faces Fight in Scottsdale, June 10, 1997, at B1.

n71 See Photo Radar = Revenue, *supra* note 69.

n72 Pitzl, *supra* note 7.

n73 See *id.*

n74 See Orwellian Surveillance, *Ariz. Republic*, Aug. 20, 1997, Chandler Community, at EV10. Where will photo surveillance end-"photo turn signal" to punish those who don't use their turn signals, "photo lane change" to catch those

frequent lane changers, and "photo yellow-light" to catch those who accelerate through yellow lights. Id. If the supporters have their way, we may wake up one morning and we will have "photo-spitting on the sidewalk" cameras. Id.

n75 See *Morris*, *supra* note 13, at 809.

n76 See Pitzl, *supra* note 7.

n77 See *id.*

n78 Paradise Valley, Ariz., Code 11-2-18(A) (1989); cf. *People v. Hildebrandt*, 126 N.E.2d 377, 379 (N.Y. 1955) (holding that such rebuttable presumption was impermissible in the State of New York).

n79 See Paradise Valley, Ariz., Code 11-2-18(C). "The use of . . . [this] rebuttable presumption that the operator is the owner and the requirement that the owner identify the driver if known mirrors the photo radar ordinances in Riverside . . . and Pasadena, California . . ." *Morris*, *supra* note 13, at 820.

n80 "It's the single (most effective) thing that can be done to reduce traffic accidents." Pitzl, *supra* note 7 (quoting Paradise Valley Police Chief John Wintersteen).

n81 Balazs, *supra* note 33; see also Quit Whining, Speeders: Photo Radar Worth Price, Ariz. Republic, Apr. 11, 1997, Tempe/Ahwatukee Foothills Community, at EV8. This is important to note because one thing that motorists cannot contest is that most traffic accidents are due to speeding, running red lights, and failing to yield.

n82 See Diana Balazs, Crime Down in Paradise Valley, Ariz. Republic, Jan. 30, 1998, Scottsdale/Foothills Community, at 1.

n83 See *id.*

n84 See *id.* (In 1994, the number of traffic accidents increased to 285.); see also Balazs, *supra* note 33 ("In 1996, a total of 285 collisions were reported, 11 more than the 274 in 1995, a 4 percent rise.").

n85 See *id.*

n86 See *id.*

n87 See Balazs, *supra* note 82 (15,618 citations were issued in 1997, up from 15,125 in 1996.).

n88 See Pitzl, *supra* note 7. For purposes of this comment, the term "photo radar" will include its sister technology, "photo red-light."

n89 See *id.* Within the town of Paradise Valley, photo red-light cameras are "perched atop poles at the busy intersection of Tatum Boulevard and Lincoln Drive." Id.

n90 See Bob Petrie, Residents Favor Photo Radar, Poll Says 78% of Respondents Prefer Roving Pictures, Ariz. Republic, Feb. 4, 1998, Tempe/Ahwatukee Community, at EV1.

n91 Id. The sensors also record the speed at which cars are running red-lights. See *id.* In many cases, red-light runners are traveling at speeds of over 60 miles per hour. See *id.*

n92 See *id.*

n93 Villa, *supra* note 32.

n94 See Balazs, *supra* note 33 ("In September 1996, 885 [red-light] citations were issued; in October, 818; in November, 813; in December, 919; in January [1997], 491; in February, 576; and though March 24, [1997], 302.").

n95 Pitzl, *supra* note 7. "'Paradise Valley does not make the money everybody thinks they do,' said Elsa Lynch, the town's court administrator. 'I laugh when I hear that, which is about every day.'" Id.

n96 See *id.* (noting that American Traffic Systems is responsible for all of the administration and maintenance of the photo radar and photo red-light cameras in both Paradise Valley and Scottsdale).

n97 See *id.*

n98 Id.

n99 See *id.*

n100 See *id.* Nevertheless, it must also be noted that photo radar and photo red-light can issue a far greater number of citations than a patrolling officer which likely compensates for the greater administrative costs. See *id.*

n101 831 P.2d 448 (Ariz. Ct. App. 1992).

n102 See *id.* at 449.

n103 See *id.*

n104 *Id.*

n105 See *id.*

n106 See *id.*

n107 See *id.* A person charged with speeding in Arizona is issued a civil traffic complaint. See *Ariz. Rev. Stat. 28-701* (1998). Accordingly, the Arizona Rules of Civil Procedure apply. See *Morris, supra* note 13, at 820 n.160.

n108 See Ariz. R. Civ. P. 4.1(c)(1) and (2).

n109 See *Tonner, 831 P.2d at 449.*

n110 See *id.*

n111 See *id.*

n112 *Id.* at 450 (citations omitted).

n113 See *id.*

n114 See *id.*

n115 *Id.* (citing Ariz. R. Civ. P. 4.1(c)(3)).

n116 See *Morris, supra* note 13, at 821. This problem occurs because Arizona treats traffic violations as civil, not criminal, violations. See *id.* Nonetheless, the city can always obtain personal jurisdiction over a defendant by successfully serving that defendant by some other permissible manner, e.g. personal service, etc. See Ariz. R. Civ. P. 4.1(d).

n117 *Morris, supra* note 13, at 821.

n118 The holding in *Tonner* could have theoretically devastated the enforcement of photo radar citations in Paradise Valley and Arizona in general, considering the fact that an accused could successfully defeat any photo radar citation by refusing to send back the acknowledgment of receipt.

n119 See Balazs, *supra* note 63.

n120 *Id.*

n121 See *id.*

n122 See *id.*

n123 See *Targeting Speeding Drivers is Right*, Ariz. Republic, Dec. 30, 1997, Chandler Community, at EV6.

n124 See *id.* "There were 717 accidents recorded at locations where speed cameras were used in 1997, compared with 901 in 1996. Citywide there were 4,063 accidents [in 1997], compared with 4,209 in 1996." *Id.*

n125 See *Nabbing Red-Light Runners Install the Cameras*, Ariz. Republic, Dec. 29, 1997, at B6 (crediting much of this decrease to the implementation of photo red-light cameras).

n126 *Targeting Speeding Drivers is Right*, *supra* note 123.

n127 See *id.*

n128 *Id.* Many use these figures to support the program as an effective way to discourage speeding. *Id.* ("Obviously, the information indicates that photo radar is causing people to slow down and think about how they're driving We've

heard a lot of complaints and criticism this year, but if photo radar is causing fewer accidents and fewer injuries, then it's accomplishing its goal." Scottsdale Police Lt. Mike Keeley, manager of Scottsdale's photo radar program).

n129 See Diana Balazs, Support for Photo Radar Strong, Police Poll Finds, Ariz. Republic, Jan. 16, 1998, Scottsdale/Foothills Community, at 1; Scottsdale Drivers 'Green Light' Use of Photo Radar, Survey Says, Ariz. Republic, Jan. 13, 1998, at B1. The study by Behavior Research Center surveyed 417 Scottsdale licensed drivers from Dec. 10-13, 1997 and the margin of error was plus or minus 4.9 percentage points. See id.

n130 Balazs, supra note 129. This is a fifteen percent increase in approval rating since May 1996. See Photo Radar Gaining Favor, Poll Reports, Ariz. Daily Star, Jan. 14, 1998, Metro/Region, at 2B.

n131 See Balazs, supra note 129.

n132 See id.

n133 See Scottsdale Drivers 'Green Light' Use of Photo Radar, Survey Says, supra note 129; Balazs, supra note 129.

n134 See Balazs, supra note 66.

n135 Diana Balazs, Most Photo Radar Tickets Dismissed in Court, School, Ariz. Republic, Jan. 28, 1998, Northeast Phoenix Community, at 5.

n136 See id.

n137 See id.

n138 Id. Lt. Mike Keeley stated that "I think it makes it clear that we're not going to find people responsible if there's any doubt." Id.

n139 See id.

n140 Id.

n141 See Balazs, supra note 63.

n142 See id.

n143 See id.

n144 See id. American Traffic System charges the City of Scottsdale \$28 for each photo radar ticket issued and \$33 for each photo red-light citation. See id. "It does not receive those amounts if the ticket is voided or dismissed." Id.

n145 Id.

n146 See id.

n147 See id.

n148 Id.

n149 See Villa, supra note 32.

n150 See id. For the month of March, 1997, Tempe police used the cameras but violators were only mailed a friendly warning reminding them to drive responsibly. See id.

n151 See id. "'You're already starting to see speeds go down,' said John Wesley White, regional manager for U.S. Public Technologies, which operates the photo radar vans and red-light cameras [in Tempe]." Id.

n152 See id. In 1991, Tempe reported 5,609 accidents; in 1996, that number had increased to 6,740. See id.

n153 See id.

n154 See id. (stating that Tempe Police have photographed some people driving faster than 85 miles per hour on the city streets).

n155 Id.

n156 See Dropout Rate Dips Again Tempe Union Figure Half That in '90-91, Ariz. Republic, July 13, 1997, East

Valley Sunday Community, at EV5.

n157 See id.

n158 Petrie, supra note 90.

n159 See Mesa Photo Radar Getting Rave Reviews, Ariz. Republic, Nov. 28, 1997, Chandler Community, at EV6.

n160 See Dropout Rate Dips Again Tempe Union Figure Half That in '90-91, supra note 156; Petrie, supra note 90.

n161 See Pitzl, supra note 7.

n162 See id.; Pitzl, supra note 7. Scottsdale and Paradise Valley have not disclosed the exact speed at which their cameras are activated. See id.

n163 See Villa, supra note 32.

n164 See id.; see also Neighborhood Q&A, Ariz. Republic, Mar. 26, 1997, Tempe/Ahwatukee Community, at SE1; Pitzl, supra note 7.

n165 Petrie, supra note 90.

n166 See id.

n167 Chris Moeser, No Snap Decisions on Photo Radar; Mesa Cautious About Who Gets Ticket in Mail, Ariz. Republic, Mar. 28, 1997, Mesa/Apache Junction Community, at EV1. "If there's any question as to the identity of the driver, the ticket is thrown out," said Mike Zell, Mesa photo radar program coordinator. Id. The gender test eliminates hundreds of photo radar tickets. See id. Compare this program with that of Paradise Valley where drivers are required by law to identify the operator of the automobile if the owner was not the offending driver.

n168 See Mesa Photo Radar Getting Rave Reviews, supra note 159 (noting that Mesa has lost more than \$60,000 in start up costs.); see also Chris Moeser, After 2 Months, It's Love It or Hate It for Photo Radar, Ariz. Republic, Mar. 28, 1997, Central Phoenix Community, at 5. In Mesa, Arizona State cars are not ticketed by photo radar. This raises interesting equal protection issues and adds ammunition for those challenging photo radar as an unconstitutional tax. See Photo Radar is Easy Money, Ariz. Republic, Mar. 27, 1997, Chandler Community, at EV7. This is discussed more fully in Part III, *infra*.

n169 See Petrie, supra note 90.

n170 See id. Four hundred twenty-three randomly selected Tempe voters participated in the survey during the January 1998 study. See id. The survey was conducted by the Summit Group and had a margin of error of 4.5 percent. See id.

n171 See Mesa Photo Radar Getting Rave Reviews, supra note 159.

n172 Moeser, supra note 167. The Summit Group conducted this survey on Oct. 15-16, 1997. See id.

n173 See Diana Balazs, Radar Sign May Deter Speeders Police Hoping Display Causes Drivers to Slow, Ariz. Republic, Apr. 23, 1997, Northeast Phoenix Community, at 1.

n174 See Melody McDonald, Friendly Reminder: You're Speeding! Device Helps Police Zoom in on Drivers, Ariz. Republic, June 12, 1997, Gilbert Community, at EV1; see also Balazs, supra note 173.

n175 See Balazs, supra note 173. Scottsdale recently began using a similar device which it places on the roadway before its photo radar GMC Jimmys. See id.

n176 McDonald, supra note 174. The purpose of the speed trailer is simply to inform drivers that they are speeding and bring to their attention that they need to slow down—not to raise revenue through traffic citations. See id.

n177 Edythe Jensen, This Speed Gun for Information, Not Mailed Tickets, Ariz. Republic, Aug. 15, 1997, Mesa/Apache Junction Community, at EV1.

n178 See McDonald, supra note 174; see also Balazs, supra note 173.

n179 See Garbage Cans to Bear Speed-Reduction Slogans, Ariz. Republic, Feb. 18, 1998, Glendale Peoria Community, at 5. The city has had past success with other public education programs such as "don't drive drunk," "buckle up for safety"

and "strap in your baby." See Lori Baker, Driver Education Gets Nod Over Photo Radar, Ariz. Republic, June 25, 1997, North Phoenix Community, at 1. Each of these programs has substantially reduced the number of automobile related injuries and fatalities within the city limits. See id.

n180 See Garbage Cans to Bear Speed-Reduction Slogans, supra note 179.

n181 See id.

n182 Baker, supra note 179 (quoting Alberto Gutier of the Governor's Office of Community and Highway Safety).

n183 See Chris Fiscus, Phoenix Smiles at Red-Light Cameras Council 1 Step From Approval, Ariz. Republic, Jan. 29, 1998, at A1 ("[U]p to 67 percent of the collisions in the city's most dangerous intersections are caused by red-light violations.").

n184 See id.

n185 See id.

n186 See id. ("In Phoenix's plan, 10 pairs of 35mm cameras would be rotated among 20 city intersections.").

n187 Chris Fiscus, Radar May Nab Red-Light Runners Phoenix to Consider Intersection Cameras, Ariz. Republic, Dec. 2, 1997, at A1.

n188 "[D]riving is not a right. It's a privilege." Smile the Camera's Still On, Ariz. Republic, Feb. 2, 1998, at B6.

n189 Cf. Targeting Speeding Drivers Is Right, Ariz. Republic, Dec. 30, 1997, Chandler Community, at EV6 (proclaiming that "photo radar . . . has less to do with concerns about the Constitution than it does with personal pique at being caught breaking the law").

n190 Because there is no constitutional provision explicitly forbidding the use of photo radar or photo red-light, the following arguments examine the language of the Constitution itself, along with Supreme Court decisions, in hopes of finding some constitutional support for the detractors' position. As a result, some may find the arguments presented quite reaching.

n191 See U.S. Const. amend. V and XIV, 1; Ariz. Const. art. 2, 4.

n192 See U.S. Const. amend. VI; Ariz. Const. art. 2, 24.

n193 See U.S. Const. amend. XIV, 1; Ariz. Const. art. 2, 13.

n194 See U.S. Const. amend. IV; Ariz. Const. art. 2, 8.

n195 U.S. Const. amend. XIV, 1.

n196 Ariz. Const. art. 2, 4.

n197 *DeShaney v. Winnebago County*, 489 U.S. 189, 196 (1989) (citation omitted).

n198 *Hurtado v. People*, 110 U.S. 516, 536 (1884).

n199 *DeShaney*, 489 U.S. at 195.

n200 Id.

n201 *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895 (1961).

n202 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

n203 *Morris*, supra note 13, at 810 (citing Jerome A. Barron, et al., *Constitutional Law, Principles and Policy* 343 (1987)).

n204 See *Morris*, supra note 13, at 810.

n205 See id.

n206 *Gilbert v. Homar*, 117 S.Ct. 1807, 1812 (1997).

n207 *Morris*, supra note 13, at 810.

n208 Id.

n209 See *id.* Note that the recipient could always follow the approach taken in *Tonner* and simply ignore the ticket altogether. See *Tonner v. Paradise Valley Magistrate's Court*, 831 P.2d 448 (Ariz. Ct. App. 1992).

n210 *Morris*, *supra* note 13, at 810. Life interests have typically been reserved for those cases involving capital punishment, abortion and mercy killings. See *id.* at 810 n.54. Accordingly, they are not relevant to a discussion on photo radar. See *id.*

n211 402 U.S. 535 (1971).

n212 See *id.* at 539; see also *Mackey v. Montrym*, 443 U.S. 1, 10 n.7 (1979) (noting "[t]hat the Due Process Clause applies to a state's suspension or revocation of a driver's license. . .").

n213 See *Bell*, 402 U.S. at 539. There may also be a potential due process concern with respect to the property interest in the money used to satisfy the fine.

n214 Compare the current Arizona system with the photo radar ordinance drafted by Kansas City, Missouri which does not assess points against a driver receiving a photo radar ticket. See Kansas City, Mo., Ordinance 920906 (Oct. 7, 1992); see also H.B. 2484, 43d Leg., 1st Reg. Sess. (Ariz. 1997) (attempting to pass a similar "nopoints" provision in Arizona).

n215 Further implications may arise if a person is caught on photo radar four times in the same week—enough to have his licensed suspended—but because of the administrative delay, he does not receive notice of his violations until after his fate has been sealed. If this were to occur, the procedural due process argument would not be so quickly discounted.

n216 *Mackey v. Montrym*, 443 U.S. 1, 13 (1979).

n217 Id.

n218 *Walters v. National Assoc. of Radiation Survivors*, 473 U.S. 305, 320–21 (1985).

n219 See *supra* notes 78–79 and accompanying text.

n220 See *Morris*, *supra* note 13, at 814.

n221 Id. at 815 (citing *Ulster County Ct. v. Allen*, 442 U.S. 140, 165 n.27 (1979)). Note that speeding tickets are civil violations in Arizona. See *Ariz. Rev. Stat. 28-121(B)* (1998).

n222 See *Morris*, *supra* note 13, at 815. This presumption could be rebutted if the registered owner's car was stolen and a thief was the offending operator. See *id.* Another defense could be that the car was being offered for sale, and the person in the photograph was an interested buyer who was test-driving the car. Such explanations open the door for fraud and deceit among dishonest registered owners who do not want to be cited and will consciously fabricate such stories to escape punishment.

n223 Id.

n224 In Arizona, such a question loses some of its intrigue by the fact that minor traffic violations are only subject to civil sanctions.

n225 See the discussion in Part II on the Tempe and Mesa photo radar program.

n226 See *id.* Cf. Art Thomason, Something Missing in this Picture, Ariz. Republic, Nov. 20, 1997, Chandler Community, at EV1 ("The van was barely marked as a police vehicle, and there was no real police officer in sight to actually clock my speed.") (describing a recent complaint about the Mesa photo radar program). See also Balazs, *supra* note 66 (questioning why the photo radar vehicle in question was parked off the street near a tree seemingly as an intentional tactic to obscure its visibility).

n227 See Diana Balazs, Candidates Offer Take on Cameras Support for Program Varies Widely, Ariz. Republic, Jan. 21, 1998, Scottsdale Community, at 1; see also Police Report, Ariz. St. U. St. Press, Mar. 11, 1998, at 7 (listing the daily photo radar locations in Tempe).

n228 See *supra* Part II. It should be noted that if the cities uniformly incorporated speed trailers before their photo radar units, the notice requirement may be better satisfied.

n229 See supra notes 165–68 and accompanying text.

n230 See id.

n231 See id.

n232 See id.

n233 See *Morris*, supra note 13, at 812.

n234 *Mackey v. Montrym*, 443 U.S. 1, 19 (1979).

n235 341 U.S. 123 (1951).

n236 *Id.* at 162 (Frankfurter, J., concurring).

n237 See *Morris*, supra note 13, at 812.

n238 See *Morris*, supra note 13, at 813.

n239 See id.

n240 See id. ("[T]hose rights . . . that have been deemed fundamental [are the] protection of marriage and traditional families, procreation, contraception, and abortion.").

n241 *Id.*

n242 See id. (citing John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 11.4 at 379 (1991)).

n243 See supra note 82 and accompanying text.

n244 See supra note 86 and accompanying text.

n245 See generally supra Part II (discussing implementation of photo radar in Arizona).

n246 Quit Whining, Speeders: Photo Radar Worth Price, supra note 81; see also Photo Radar = Revenue, supra note 69.

n247 *Morris*, supra note 13, at 815.

n248 See Pitzl, supra note 7 ("[I]t's hard to reconstruct the circumstances, especially when the notice of their reputed violation arrives late.").

n249 See Laurie Roberts, Sometimes Photo Radar Doesn't Give Us the Whole Picture, *Ariz. Republic*, Aug. 27, 1997, Northeast Phoenix Community, at 1.

n250 See U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation . . . against him . . ."); see also Ariz. Const. art. 2, 24 ("In criminal prosecutions, the accused shall have the right to appear and defend in person . . . [and] to demand the nature and cause of the accusation against him . . .").

n251 912 F.2d 766 (5th Cir. 1990).

n252 *Id.* at 769 (citing *United States v. MacDonald*, 456 U.S. 1, 8 (1982)).

n253 See supra Part III.A. and previous discussion on the due process implications of photo radar.

n254 See *Delario*, 912 F.2d at 769.

n255 *Id.* (citing *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986)).

n256 *Id.* (finding that "this delay is not long enough to be 'presumptively prejudicial'").

n257 See Why No Photo Radar Signs?, *Ariz. Republic*, May 30, 1997, Scottsdale Community, at 2.

n258 *Morris*, supra note 13, at 816.

n259 *Id.* (quoting Frederick Grab, Photo Radar: What's Wrong With This Picture?, 10 *Glendale L. Rev.* 51, 64 (1991)).

n260 See *id.*

n261 Balazs, *supra* note 28.

n262 Haynes, *supra* note 26.

n263 *Morris*, *supra* note 13, at 818.

n264 See *supra* Part II n.168 and the discussion of the treatment of state cars in Mesa.

n265 See U.S. Const. amend. XIV, 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

n266 Ariz. Const. art. 2, 13.

n267 *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

n268 See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citations omitted).

n269 *Id.* (italics omitted) (suggesting that "even improvident decisions will eventually be rectified by the democratic processes").

n270 See *id.* at 440-41.

n271 *Id.* at 441 (citations omitted).

n272 See *id.* at 440.

n273 *Id.* (citations omitted).

n274 See *supra* note 242 and subsequent discussion on rational basis standard of review for due process challenges.

n275 See Ariz. Const. art. 2, 13.

n276 Smile the Camera's Still On, *supra* note 188 (emphasizing that driving is a privilege, not a right).

n277 Photo Radar Puts Our Freedom at Peril, Ariz. Republic, July 22, 1997, Chandler Community, at EV4; see also *MacDonald*, *supra* note 11 (noting that the "overriding idea is that citizens should be allowed to live free from excessive government intrusion into their private lives or livelihoods").

n278 Photo Radar Boundless, Ariz. Republic, Jan. 4, 1998, (East Valley Sunday Community), at EV6. But see *It's Simple: Obey Traffic Laws*, *supra* note 16.

n279 U.S. Const. amend. IV.

n280 See *United States v. Ford*, 34 F.3d 992, 995 (11th Cir. 1994).

n281 Ariz. Const. art. 2, 8.

n282 389 U.S. 347 (1967).

n283 See *id.* at 361 (Harlan, J., concurring) (repudiating the requisite physical invasion of the "trespass" doctrine).

n284 See *id.*

n285 See *id.*

n286 See *California v. Greenwood*, 486 U.S. 35, 37 (1988).

n287 390 U.S. 234 (1968).

n288 See *id.* at 236 (citations omitted).

n289 See *Morris*, *supra* note 13, at 818.

n290 *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974).

n291 *New York v. Class*, 475 U.S. 106, 112 (1986).

n292 *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976).

n293 See *Class*, 475 U.S. at 114.

n294 See *United States v. Ford*, 34 F.3d 992, 996 (11th Cir. 1994).

n295 See *Fiscus*, supra note 187.

n296 *Villa*, supra note 32 (noting that stores commonly use more advanced video surveillance techniques.).

n297 See *MacDonald*, supra note 11; see also *Balazs*, supra note 58 (commenting that if people don't want their picture taken, all they have to do is refrain from breaking the law).

n298 *Pitzl*, supra note 7.

n299 Hal Mattern, *Symington Says Photo Radar Should be Decided on Initiative*, Ariz. Republic, June 3, 1997, at A2 (contributing to this article were Mary Jo Pitzl and Pat Flannery of The Arizona Republic); see also H.B. 2484, 43d Leg., 1st Reg. Sess. (Ariz. 1997).

n300 H.B. 2484, 43d Leg., 1st Reg. Sess. (Ariz. 1997).

n301 See *id.* Such a provision would probably be viewed as conflicting with the Arizona statutory scheme requiring uniform traffic regulation. See *Robbie Sherwood, Councilman Targets Photo Radar Giles Seeks to Lessen Some Speeding Penalties*, Ariz. Republic, Jan. 8, 1998, Mesa/Apache Junction Community, at EV1.

n302 See *Pitzl*, supra note 7.

n303 See S.B. 1019, 43d Leg., 2d Reg. Sess. (Ariz. 1998).

n304 *Id.*; see also *Mattern*, supra note 299. "Let's put it to a vote. Let's put it on the ballot and see how many people in this state want photo radar." *Id.* However, this argument simply amounts to asking the electorate whether it wants to get tickets. In addition, because photo radar is a tool that police use to enforce traffic laws, using it is akin to the police's choice on which type of car or gun to use. Such decisions are not referable items. See *Chris Moeser, Photo Radar Likely to Be Extended Bid for Vote on Issue May Be Dealt Setback*, Ariz. Republic, Nov. 15, 1997, (Mesa/Apache Junction Community), at EV1.

n305 *Chris Moeser and Robbie Sherwood, Public Vote Pushed for Photo Radar Legislative Proposal Draws Fire from Cities*, Ariz. Republic, Jan. 8, 1998, at A1

n306 *Id.*

n307 See *Tom Freestone, Proposal Affecting Photo Radar Issue Is Getting Support*, Ariz. Republic, Feb. 1, 1998, East Valley Sunday Community, at EV5.

n308 See *id.*; see also *Chris Moeser, Bid Rejected to Force Vote on Photo Radar*, Ariz. Republic, Jan. 23, 1998, at B1.

n309 See *Bob Golfen and Diana Balazs, Scottsdale Police Yank Plastic License Shields*, Ariz. Republic, May 7, 1997, at B1 [hereinafter *Golfen & Balazs, Scottsdale Police*]; see also *Diana Balazs, Justice Isn't Blind: Driver Guilty of Hiding License Tag*, Ariz. Republic, June 25, 1997, Northeast Phoenix Community, at 6 [hereinafter *Balazs, Justice Isn't Blind*].

n310 See *Golfen & Balazs, Scottsdale Police*, supra note 309.

n311 *Balazs, Justice Isn't Blind*, supra note 309.

n312 See *Golfen & Balazs, Scottsdale Police*, supra note 309. Scottsdale police are not seizing the covers because of photo radar implications but simply because the covers make it difficult for an officer to clearly read the vehicle's license plate from a distance greater than 100 feet. See *Balazs, Justice Isn't Blind*, supra note 309.

n313 See *Ariz. Rev. Stat. 28-2354* (1997); see also *Balazs, Justice Isn't Blind*, supra note 309.

n314 See *Balazs, Justice Isn't Blind*, supra note 309. In the first three months of 1997, over 142 "illegible license plate" citations were issued by Scottsdale police. See *id.*

n315 Not everyone in Arizona has or drives a car.

n316 See supra text accompanying note 72, (discussing the potential loss to society had a camera been monitoring the Oklahoma freeway where Timothy McVeigh was apprehended).