

**NCHRP**  
**National Cooperative Highway Research Program**  
**LEGAL RESEARCH DIGEST**

March 2002—Number 47

---

Subject Areas: IC Transportation Law, IV Operations and Safety

## **Judicial Enforcement of Variable Speed Limits**

*This report was prepared under NCHRP Project 20-6, "Legal Problems Arising out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Margaret Hines. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.*

### **THE PROBLEM AND ITS SOLUTION**

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report is a new paper, which continues NCHRP's policy of keeping departments up-to-date on laws that will affect their operations.

### **APPLICATION**

The Federal Highway Administration and the National Highway Traffic Safety Administration have developed a speed management program. The purpose of this program is to manage speed, which in turn will result in reducing vehicular crashes and fatalities. However, implementation of new speed management systems, techniques, and technology in the United States generally meets with stiff resistance from highway users and the legal community.

The concept of variable speed limits—based on time of day, traffic conditions, weather pavement conditions, and construction or maintenance activities—has been tested in a number of foreign countries, most notably the Netherlands, Germany, Sweden, and Australia. Variable speed limits have been used in the United States but only in very limited circumstances. The most notable use is at school zones, such as the zone being 25 mph when the light is flashing, whereas otherwise it would be 40 mph.

The NCHRP has under way a study to assess the impact of and the implementation issues associated with deployment of variable speed limits for a limited number of driving situations and to develop operational test plans for the most promising applications.

This report examines the impact of judicial decisions and judicial enforcement on the likely success of enforcing an expanded variable speed limit program. It should be useful to administrators, attorneys, traffic enforcement officials, planners, officials involved in agency rulemaking, and motorists.

# CONTENTS

<b>I. INTRODUCTION—SCOPE OF REPORT .....</b>	<b>3</b>
A. Description of Variable Speed Limit .....	3
1. Variable Speed Limits Currently in Use in Other Countries .....	3
2. Use of Variable Speed Limits in the United States—Survey Results.....	4
3. Scope of Report.....	6
B. Existing State Laws Creating Speed Limits .....	6
1. Prima Facie Laws .....	6
2. Unspecified Maximum Limits .....	7
3. Laws Authorizing a Governmental Body Other than the State Legislature to Change the Statutory Limit.....	7
<b>II. ELEMENTS OF A VIOLATION OF SPEEDING LAW AND SUCCESSFUL PROSECUTION OF VIOLATION .....</b>	<b>8</b>
A. Governmental Creation of a Speed Limit—Necessary Elements .....	8
1. Governmental Authority to Set the Limit .....	8
2. Authority to Set the Limit Within Certain Parameters.....	9
3. Necessity to Post .....	10
B. Prosecution of a Speeding Violation—Proving the Case .....	11
1. Criminal or Civil Proceeding.....	11
2. Proof of the Limit Where the Violation Occurred, and Proof that the Limit was Posted .....	12
a. Proof of Limit. ....	12
b. Limit was Posted .....	13
c. Proof that Posting Signs Were Visible to the Driver .....	13
3. Proof of "Special Circumstances" Necessary to Create an Offense or Justify a Decreased Speed Limit .....	13
4. Proof of Speed in Excess of Limit.....	14
C. Proof of Speed of Defendant Driver's Vehicle—Technology .....	15
1. Scientific Methods of Proof Generally .....	15
2. Radar Enforcement.....	15
3. Laser.....	16
4. Photo Enforcement.....	16
<b>III. GOVERNMENTAL LIABILITY IN CONNECTION WITH VARIABLE SPEED LIMITS.....</b>	<b>17</b>
A. General Principles of Governmental Liability.....	17
1. Governmental Liability in the Absence of Statute .....	17
2. Statutory Liability: State Tort Claims Acts and Other Statutory Bases for Liability or Immunity .....	17
3. Liability for Power Failure Resulting in "Dead" Signals.....	18
B. Problems of Liability for Establishment and Enforcement of a Variable Speed Limit.....	19
<b>IV. PROPOSALS FOR LEGAL IMPLEMENTATION OF A SYSTEM OF VARIABLE SPEED LIMITS THAT WILL MEET JUDICIAL CHALLENGES.....</b>	<b>20</b>
A. The Need for Statutory Authority .....	20
B. Proposed or Suggested Form of Laws—What is Needed.....	20
C. Suggested Language.....	21
<b>IV. CONCLUSION .....</b>	<b>22</b>
<b>APPENDIX A SURVEY ON USE AND ENFORCEMENT OF VARIABLE SPEED LIMITS .....</b>	<b>23</b>

## JUDICIAL ENFORCEMENT OF VARIABLE SPEED LIMITS

By Margaret Hines  
Attorney, Washington, DC

### I. INTRODUCTION—SCOPE OF REPORT

The Federal Highway Administration (FHWA) and the National Highway Traffic Safety Administration (NHTSA) have created a "Speed Management Program" to develop a wide range of strategies to control or manage speeding of motor vehicles on the nation's highways. Motorists who exceed posted speed limits or drive too fast for road conditions are responsible for injuries, deaths, and massive property damage. A part of the Speed Management Program is to assess the effectiveness of "variable" speed limits in reducing crashes and fatalities. To that end, the National Cooperative Highway Research Program (NCHRP), managed by the Transportation Research Board, has a study underway to assess the impact of, and issues associated with implementation of, variable speed limits and to develop operational test plans for the most promising applications. In conjunction with that study, an examination of the legal issues that may arise from implementation and enforcement of variable speed limits is desirable.

#### A. Description of Variable Speed Limit

This report will address itself to legal considerations of the implementation and enforcement of speed limits that 1) are definite and posted, and 2) may be varied according to location, time of day, weather, and road and traffic conditions. Except for school zones and construction or work zones, variable speed limits are not much in use in the United States today, although many state transportation agencies have expressed interest in them. It is anticipated that variable speed limits would "allow reasonable and realistic speeds based on time of day, traffic conditions, construction or maintenance activities, or other factors."<sup>1</sup> This is because some static speed limits have low levels of compliance, which may be improved by implementing limits that are more responsive to the situation and therefore are more credible. In some other situations, the static speed limit may become too high for changing conditions, and a variable limit provides information and safety to motorists.<sup>2</sup>

In sum, a "variable speed limit" for purposes of this report is a definite limit that is posted and enforceable, but one that may change for a particular location along a roadway or highway according to conditions, events, or time of day. The purpose of changing the limit (or "varying" it) is to provide a safer environment for those, such as workers or children, who may be in the vicinity

of the roadway, and a safer environment for motorists by providing warning of dangers such as weather or traffic conditions and by encouraging compliance with the speed limits by a greater number of drivers.

#### 1. Variable Speed Limits Currently in Use in Other Countries

Although variable limits have not been used much in the United States, they have been used successfully in several other countries. The variable speed limits systems discussed in this section may be described as those that "utilize traffic speed and volume detection, weather information, and road surface condition technology to determine appropriate speed at which drivers should be traveling."<sup>3</sup> The speeds are usually displayed on overhead or roadside "variable message signs," and usually are varied or changed from a remote location. Such systems are in use in Australia, Great Britain, Germany, Finland, France, and the Netherlands, to control speed, promote safety, and reduce congestion.<sup>4</sup> For example, in Germany, a system of variable speed limits is used on the Autobahn between Salzburg and Munich, between Sieburg and Cologne, and near Karlsruhe, to stabilize traffic flow in congestion and thereby lessen the probability of crashes. Such limits have been in use since the 1970s. Another example of use to deal with congestion occurs in London, England, where speed limits are lowered according to vehicle volumes detected by using loop detectors and closed circuit television. The system also "monitors traffic speeds and stationary traffic to slow vehicles down approaching a queue, and has additional logic to stop speed limit settings fluctuation too often."<sup>5</sup> In Australia, advisory speed limits are in force near Sydney in times of heavy fog on the highway. The objective of avoiding rear-end collisions is fostered by a system of variable speed signs connected to road loops and a visibility detector. The advisory speed is based on the visibility distance and the speed of the preceding vehicle.<sup>6</sup> The

<sup>3</sup> See *Examples of Variable Speed Limit Applications*, prepared by Mark D. Robinson, P. Eng. of SAIC for FHWA, for presentation at the Speed Management Workshop, TRB Annual Meeting, Jan. 9, 2000, Washington, DC; U.S. DEPARTMENT OF TRANSPORTATION, FHWA STUDY TOUR FOR SPEED MANAGEMENT AND ENFORCEMENT TECHNOLOGY (1996).

<sup>4</sup> Robinson, *supra* note 3. See also, generally, M. Zarean et al., *Variable Speed Limit Systems: The State of the Practice*, PROCEEDINGS OF THE 1999 RURAL ADVANCED TECHNOLOGY & TRANSPORTATION SYSTEMS CONFERENCE, FLAGSTAFF AZ (1999).

<sup>5</sup> Robinson, *supra* note 3, at 20.

<sup>6</sup> Robinson, *supra* note 3, at 16; FHWA STUDY, *supra* note 3, at 45–46.

<sup>1</sup> *Assessment of Variable Speed Limit Implementation Issues*, NCHRP RESEARCH PROJECT STATEMENT PROJECT, Project 3-59, FY 2000 (1999).

<sup>2</sup> *Id.*

Netherlands also uses variable speed limits to aid drivers in fog. According to one commentator, the use of variable speed limits in the countries enumerated above is remarked on favorably by drivers and law enforcement personnel, and has reduced crashes in most cases.<sup>7</sup>

## 2. Use of Variable Speed Limits in the United States—Survey Results

Examples of variable speed limits in the United States, used in ways similar to those described above for other countries and fitting generally within the description given, were described in a presentation at the 2000 Annual Meeting of the Transportation Research Board.<sup>8</sup> According to that presentation, the states of Arizona, Colorado, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, and Washington have now or have had some program that used such variable speed limits displayed on variable message signs. Most of the programs were advisory rather than enforceable; that is, signs would show a speed that was advisory rather than a new speed limit that would be enforced by issuance of citations or traffic stops. Those programs that were in use in 2000 where limits were enforced were in New Jersey and Washington.<sup>9</sup>

What may be called variable speed limits, but which would not necessarily fit within the above description of using variable message signs remotely controlled, are used in the United States primarily for control of speed in school zones and construction zones. As part of the information gathering for this report, a survey was prepared and sent to the Attorneys General of the 50 states and Puerto Rico (A copy of the survey is attached to this report). The survey elicited information about the existence of statutory or regulatory variable speed limits in each state, and the enforcement of those limits, with particular regard to photo enforcement. Survey questions asked specifically about use of variable speed limits for 1) school zones, 2) construction zones, 3) congestion control, and 4) weather conditions.

In response to the initial inquiry, 36 surveys were returned. Some had been referred by the State Attorney General to the State Department of Transportation (DOT) or the State Department of Public Safety or State Police, and had been answered and returned by that agency.<sup>10</sup> I then telephoned the State Police or

DOT in several states from which I thought information could be gathered that might add substantially to the report, and sent a survey directly to those agencies. In response, surveys were returned by agencies in an additional four states, giving a total of 40 states that returned the survey.<sup>11</sup> According to responses on the returned surveys and my own examination of state traffic laws, generally states have a speed limit for school zones that is in effect when children are likely to be present around the school, and which varies from the limit otherwise in effect in such a location. The school zones are generally marked by fixed signs that show the decreased speed limit and may have flashing lights or hours to designate when the limit is in effect.

The school zone limit, although "variable" depending on whether school is in session, is often set out in a statute or regulation as a specific figure. For example, the law or regulation might provide that the speed limit is 20 mph "on a school day when school children are present," and the school day "shall begin at seven ante meridian and shall conclude at four post meridian,"<sup>12</sup> or that the speed limit is "[t]wenty miles per hour in school zones during school recess and while children are going to or leaving school during the opening or closing hours."<sup>13</sup> In some cases, where the authority to establish a school zone speed limit is delegated to local officials, the minimum mph at which the limit may be set is specified in the statute.<sup>14</sup> In other words, although the speed limit that a driver must observe when passing through a school zone may vary according to the

---

Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Montana, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Puerto Rico, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

<sup>11</sup> Telephone calls were made to Delaware, Massachusetts, New Jersey, Pennsylvania, and Tennessee. I also called the California Highway Patrol for specific information about enforcement of the California laws, and the New Jersey Turnpike Authority for information about their regulations. All agencies returned a completed survey and furnished additional information except Massachusetts, which indicated that State agencies could not perform research for a private entity, and in their view, that would be required to respond to the survey.

<sup>12</sup> See, for example, 625 ILL. VEH. CODE 5/11-605 (West 1998). The Illinois Attorney General has issued an Opinion that the speed limit applies only when children are physically present on the street or are outside the school building in a school zone. 1974 Op. Atty. Gen. No. S-706. See also MICH. VEH. CODE § 257.627a(2). Both the Illinois and Michigan laws (as with many other states) require the posting of signs designating the school zone and the speed limit, in order to enforce the law.

<sup>13</sup> See § 4511.21, Ohio REV. CODE. The wording of N.J. VEH. CODE § 39:4-98(a) is similar. See also O.R.S.A. 811.105.

<sup>14</sup> See, for example, TENN. CODE ANN. 55-8-152(d) (2000 Supp).

<sup>7</sup> See Robinson, *id.*

<sup>8</sup> See, *Examples of Variable Speed Limit Applications*, prepared as a handout for the Speed Management Workshop, TRB 79th Annual Meeting, January 9, 2000, by Mark Robinson, SAIC for FHWA.

<sup>9</sup> The programs in operation in 2000 that were not "advisory" were on the New Jersey Turnpike and in the Snoqualmie Pass area of I-90 in Washington. The New Mexico program, which was designated "Regulatory and Enforceable" was described as "limited" in operation due to the unreliability of the visibility sensor. See *id.* at 10.

<sup>10</sup> Those states that initially responded were: Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii,

time of day and other circumstances, both the applicable limit and the times and other circumstances are determined by the legislature, rather than by a state executive branch or local agency or official. As the later discussion will make clear, this is an important distinction.

The other commonly employed variable speed limit used in the United States is that in a construction or work zone. Of the 40 surveys returned, 30 indicated that special construction or work zone speed limits are in use in that state. Some states, such as Nebraska and Michigan, have enacted laws that set the speed limit in a construction zone; both state laws require signs in advance of the area warning drivers and signs showing the designated speed limit.<sup>15</sup> In other states, such as Maine, a transportation official is delegated the authority to "restrict the speed limit on a public way under construction or during maintenance," but no statutory limit is named.<sup>16</sup> Many of the survey responses, however, referred to more broadly worded provisions for the authority to set construction zone limits. These laws allow state or local officials to decrease speed limits for intersections or portions of the highway if they determine, usually after a traffic and engineering investigation, "that the absolute speed permitted under [existing laws or regulations] is greater than is reasonable or safe under the conditions found to exist"<sup>17</sup> for that portion of the roadway. The DOT, Commissioner, town council, or other designated official may determine that the decreased limit is to be effective "at all times or at such times as are indicated upon signs, and differing limits may be established for different times of day, ...varying weather conditions, and other factors bearing on safe speeds."<sup>18</sup> These new limits "shall be effective when posted upon appropriate fixed or variable signs"<sup>19</sup> along the affected portion of the highway.<sup>20</sup> The great majority of these laws do not refer specifically to construction or work zones, and would allow reduction of speed limits for any number of reasons.<sup>21</sup>

In California and Colorado, a construction speed zone may be set by local or state officials after a traffic and engineering investigation, but a minimum speed limit is set out in the laws.<sup>22</sup> New York law is similar, but

<sup>15</sup> MICH. VEH. CODE § 257.627(9) and MICHIGAN MANUAL OF UNIFORM TRAFFIC DEVICES, 1994, at 6B-9; NE. REV. STAT. § 60-6,188(1) and (2).

<sup>16</sup> 29-A ME. REV. STAT. ANN. § 2075. *See also* O.R.S.A. 810.180(5) (1998 Supp.).

<sup>17</sup> 21 DE. CODE § 4170.

<sup>18</sup> WY. STAT. § 31-5-302.

<sup>19</sup> *Id.*

<sup>20</sup> Other examples are 625 ILCS 5/11-602; WASH. REV. CODE §§ 46.61.405, .410, and .415; TEX. TRANSP. CODE §§ 545.353, 545.354 (2001 Supp.).

<sup>21</sup> *See, for example,* WASH. REV. CODE §§ 46.61.405, 46.41.410, WYO. STAT. 31-5-302.

<sup>22</sup> CAL. VEH. CODE §§ 22362 and 22348; COLO. REV. STAT. § 42-4-1102 (2001 Supp.).

does not require a traffic and engineering investigation.<sup>23</sup> Kentucky's law provides that the Secretary of Transportation may decrease the speed limit on a portion of the highway when he or she determines after an investigation that it is greater than is "reasonable or safe under the conditions found to exist," but also gives authority to the Transportation Cabinet to "temporarily reduce established speed limits without an engineering and traffic investigation" in a highway work zone. The speed limit so established "shall become effective when and where posted."<sup>24</sup>

In answer to questions about variable speed limit use for congestion control or for weather conditions, the survey responses generally referred to the same laws described above in answer to the question about construction zones. That is, those laws that allow state or local officials to change absolute maximum speed limits that are found "unreasonable or unsafe" under existing conditions. Often, a distinction was made for congestion control by a reference to the delegation to local officials of the authority to change speed limits.

Some state's laws have special provisions for changes in speed limits due to weather conditions. For example, the Texas statutory scheme allows the Transportation Commission to declare, after an engineering and traffic investigation shows the need, a lower reasonable and safe *prima facie* speed limit and "another reasonable and safe speed because of wet or inclement weather."<sup>25</sup> The California Vehicle Code provides that state or local authorities may "determine and declare a *prima facie* speed limit of 40, 35, 30, or 25 miles per hour, whichever is found most appropriate and is reasonable and safe based on the prevailing snow and ice conditions upon such highway."<sup>26</sup>

The only statutory provision that was found in any state's laws specifically related to a "variable speed limit" was Section 22355 of the California Vehicle Code. This section allows the DOT, on the basis of an engineering and traffic study that shows that the "safe and orderly movement of traffic" will be facilitated, to "erect, regulate and control signs...so designed as to permit display of different speed limits at various times of the day and night." The speed limit on the freeway "at a particular time and place shall be that which is then and there displayed upon such sign."<sup>27</sup>

<sup>23</sup> N.Y. VEH. & TRAF. LAW § 1180(f).

<sup>24</sup> KY. REV. STAT. § 189.390. *See also* GA. CODE ANN. § 40-6-188.

<sup>25</sup> TEX. TRANSP. CODE § 545.353.

<sup>26</sup> CAL. VEH. CODE § 22363.

<sup>27</sup> The response of the California Chief Assistant Attorney General to the survey indicated that this section allows the DOT to "impose a variable speed limit upon a state highway depending whether it is day or night." She was unable to provide any information or data on enforcement of traffic laws. (Letter from Pamela Smith-Steward, Esq., dated January 23, 2001). As a result, I contacted the California Highway Patrol to determine if statistics exist on the enforcement (that is, citations issued) of this Code section and § 22363 (changes for

None of the respondents to the survey reported any known court challenges to enforcement of the existing "variable" speed laws in each state, including the school zone, construction or work zone, or other laws that were enumerated in response to the survey questions, except Montana. That response indicated that challenges have been made, but "if the proper speed and traffic surveys are completed and signs are in place," the challenges have been unsuccessful.<sup>28</sup> The only reported case in any jurisdiction that my research revealed involved a 1966 challenge to the establishment of speed limits by the New Jersey Turnpike Authority.<sup>29</sup>

### 3. Scope of Report

There are three major difficulties in the preparation of a report on judicial enforcement of "variable speed limits" in the United States. The first is that, as described above, there are very few examples of enforced variable speed limits using variable message signs that are changed from a remote location. The second difficulty is that there are 50 states, Puerto Rico, the District of Columbia, and many municipal and local jurisdictions, each with a separate set of laws, ordinances, or regulations that establish a system of traffic control. Within the parameters of this report, it would be impossible to discuss the law as it exists in each of those jurisdictions.

The third difficulty is that in almost all the states and local jurisdictions, traffic offenses are prosecuted or heard in a non-record court or in an administrative setting, where the results are not reported. Consequently, only those cases that have been appealed into a court of record can be researched and the results discussed. Although it might be possible to research more fully if only one or two jurisdictions were involved, when there are hundreds the task becomes impossible for a project such as this.

---

snow and ice). According to information provided, citations are issued reciting the "basic speed law" and therefore the requested statistics are not available. (Letter from California Highway Patrol, dated June 22, 2001). There are no reported cases on challenges to this section of the California Vehicle Code, based on my own research and a telephone interview with John Dunnigan, Esq., Staff Counsel, California Highway Patrol (telephone interview, June 8, 2001).

<sup>28</sup> The quoted language is from the response prepared by Colonel Bert J. Obert of the Montana Highway Patrol. In a telephone interview, Col. Obert told me that the challenges were in the local county courts, which are not record courts, and to his knowledge, none of the cases has been successfully appealed (telephone interview, May 14, 2001).

<sup>29</sup> *State v. Imperatore*, 223 A.2d 498 (N.J. 1966). In a subsequent telephone interview, Mark Schneider, Esq., of the Legal Department of the New Jersey Transit Authority (NJTA) indicated that his office was unaware of any other subsequent case that challenged the authority of the NJTA to establish and have enforced varying speed limits on the Turnpike. (Telephone interview with Mark Schneider, May 4, 2001).

This report therefore, is intended to address judicial enforcement of speed laws in a general way, and is not meant to be a comprehensive treatment of the law in any state. Reported cases that support a point of argument or conclusion in the report will be discussed, but the reader is cautioned that not all reported cases on a particular point, in all the states, will be referenced, and not all the existing laws in all the states will be specifically mentioned. With regard to the discussion of criminal versus civil enforcement of traffic laws, and in the section on governmental immunity or liability for the creation and implementation of a system of variable speed limits, this is specifically mentioned. The reader should bear this in mind throughout the report, and should examine traffic laws in his or her particular state.

## B. Existing State Laws Creating Speed Limits

### 1. Prima Facie Laws

The single most common form of existing excess speed law in the states prohibits driving over a speed that is "reasonable and proper"<sup>30</sup> or "reasonable and prudent"<sup>31</sup> for conditions in existence and also provides that driving over a specified maximum for a particular location is a prima facie violation of the law. For instance, the first section of the law provides that every person must travel at a speed that is reasonable and prudent, and a following section provides an absolute maximum speed for a highway, a city street, a school zone, etc., and also provides that driving at a speed "in excess of such limits...shall be prima facie evidence that such speed is not reasonable."<sup>32</sup> No special circumstances need to be shown to prove a violation of these laws, only evidence that the limit existed and that the driver was traveling at a speed in excess of the limit, usually including evidence of the exact speed being traveled.<sup>33</sup> There have been cases in which the court found a violation even though the exact speed was not shown by the evidence, so long as the evidence showed that the limit had been exceeded.<sup>34</sup> No cases were found that challenged the validity of these laws as such. Fur-

---

<sup>30</sup> See, for example, OHIO REV. CODE § 4511.21; 29-A ME. REV. STAT. § 2074.

<sup>31</sup> For example, TEX. TRANSP. CODE § 545.351; OR. REV. STAT. § 811-100; ARK. CODE 27-51-201; GA. CODE ANN. 40-6-180.

<sup>32</sup> CONN. GEN. STAT. ANN. § 14-218a, among other state laws. Wisconsin, on the other hand, is an example of those states that do not provide that exceeding a stated maximum speed is prima facie evidence of driving at an unreasonable or unsafe speed, WIS. CODE § 346.57.

<sup>33</sup> For example, *Cincinnati v. Cramer*, 63 Ohio. App. 526, 27 N.E.2d 406 (1940); *Hirsch v. N.Y. State Dept. of Motor Vehicles* 182 A.2d 761, (1992); *People v. Knight*, 530 N.E.2d 1273 (1988).

<sup>34</sup> See, for example, *State v. Bookbinder*, 184 A.2d 869 (1962), *affd.* 197 A.2d 35.

ther, these laws have generally not been subject to challenge in the courts as unconstitutionally vague, so long as they contain or are read to reference specific maximum speed limits. In some instances, cases were found that contested whether speed limits were properly posted, or whether local officials had authority to enact certain speed limits. There are also cases contesting whether evidence of speed measurements by radar or other means was properly admitted. These cases will be discussed in later sections of this report.

## 2. Unspecified Maximum Limits

In some instances, challenges have been made to sections of statutes that provided only that no driver shall exceed a speed that is "reasonable and prudent" (or similar language) depending on traffic, condition of the roadway, or other circumstances, but contain no stated absolute maximum. Some such challenges have resulted in courts finding these laws unconstitutionally vague, especially in states where a violation of traffic laws is treated as a criminal offense.<sup>35</sup> Where the law contains both a requirement for maintaining a "reasonable and prudent" speed where there is a "special hazard," and statutory maximums where there is no special hazard, courts will read the two sections together and find the law constitutional. In *State v. Pilcher*,<sup>36</sup> the court found that, to be constitutional, a law "need only be as definite and certain as the subject matter permits," and that the Utah statute met this test. The court then cited cases in 11 other states upholding similar laws,<sup>37</sup> and quoted from a New York case, *People v. Puppillo*,<sup>38</sup> to the effect that the law

...requires that the operator of a car shall not proceed at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. This test can be applied in evaluating the act or acts or omission to act under conditions that are actual and potential hazards at certain speeds.... Every person knows that under certain conditions the speed of a car can be dangerous and hazardous to the occupant and others using the public highway or property adjoining the same.

Since the statute "as worded is an adequate standard by which a driver's conduct can be tested," it is constitutional.<sup>39</sup>

A 1986 Georgia case, *Blackwell v. State*,<sup>40</sup> considered and found constitutional a driver's conviction of driving too fast for conditions. The court, citing to *Bilbrey v.*

<sup>35</sup> *People v. Firth*, 168 N.Y.S.2d 949, 146 N.E.2d 682, (1957); *State v. Campbell*, 196 A.2d 131 (R.I. 1963); see cases cited in ANN. 6 A.L.R. 3d 1326, § 5[c].

<sup>36</sup> 636 P.2d 470 (Utah 1981).

<sup>37</sup> Cases from Arizona, California, Illinois, Indiana, Iowa, Maryland, Minnesota, Ohio, Pennsylvania, Texas, and Wisconsin are listed at 636 P.2d 471.

<sup>38</sup> 235 N.Y.S.2d 522, 525 (1962).

<sup>39</sup> 636 P.2d at 471, quoting from *Puppillo*, 235 N.Y.S.2d at 525.

<sup>40</sup> 349 S.E.2d 13 (Ga. App. 1986).

*State*,<sup>41</sup> found that the statute,<sup>42</sup> when read in conjunction with the statute prescribing numerical maximum speed limits, "gives sufficient warning of what conduct is unlawful." Where the evidence showed that the defendant had an automobile accident on a rainy, foggy night on a dangerous curve, he could be convicted of driving too fast for conditions.

The significance of these cases to an examination of variable speed limits is in the establishment of the principle that drivers may be required to reduce speed below absolute maximum limits based on the existence of "special hazards" such as weather conditions, traffic conditions, and the presence of others adjacent to the roadway.

## 3. Laws Authorizing a Governmental Body Other than the State Legislature to Change the Statutory Limit

States may control traffic, including enactment of any constitutional limit on the speed of driving, under the police power (See Section II.A.1 of this report). Most state legislatures have delegated, by statute, some of this power to a state DOT, a transportation commissioner, or other executive branch department or official, or to municipal or other local authorities. In some states, the authority to control traffic on a particular roadway or turnpike, including the authority to establish speed limits, has been delegated by statute to a turnpike authority.

In many states, as noted above in Section IA(2), although numerical maximum speed limits are enacted by the state legislature, the state or local officials may alter those limits under some circumstances and for certain locations, usually after a study to determine an appropriate new limit. For example, Texas Transportation Code Section 545.353 provides that if the Texas Transportation Commission determines from the results of an engineering and traffic investigation "that a prima facie speed limit...is unreasonable or unsafe on a part of the highway system," it may, by order recorded in its minutes, determine and declare a reasonable and safe prima facie speed limit, and "another reasonable and safe speed because of wet or inclement weather."<sup>43</sup> The commission "shall consider the width and condition of the pavement, the usual traffic at the affected areas, and other circumstances" in setting the new limit, which may be effective at all times or "at other times as determined"; the limit becomes effective when the commission erects signs giving notice.<sup>44</sup> The commission is to follow its established procedures in conducting the

<sup>41</sup> 254 Ga. 629, 331 S.E.2d 551 (1985).

<sup>42</sup> OCGA 40-6-180, read together by the court in this case with OCGA 40-6-181.

<sup>43</sup> § 545.353(a).

<sup>44</sup> § 545.353 (b) and (c). There are some limits on the Commission's authority under 545.353(d): it may not increase the speed limit for school buses or heavy trucks, for example, or establish a speed limit over 70 mph.

investigation, but may revise the procedure "to accommodate technological advancement in traffic operation, the design and construction of highways and motor vehicles, and the safety of the motoring public."<sup>45</sup> The Texas Turnpike Authority and Regional Tollway Authorities are given similar powers to alter prima facie speed limits on highways under their jurisdiction.<sup>46</sup>

Illinois, New Jersey, Oregon, Colorado, Kentucky, and Wyoming, among other states, have enacted similar statutes.<sup>47</sup> As noted earlier, these laws were frequently cited in responses to the survey as authority to establish a speed limit in a construction or work zone, or because of weather conditions or traffic congestion. On that basis, it may be said that the states take these statutes to confer authority on state or local officials to establish a temporary change in the prima facie speed limits within their jurisdictions.

There were very few cases found that raise issues about the validity of this delegation of authority from the legislature to another entity to establish or change a speed limit. These cases will be discussed in the next section.

## II. ELEMENTS OF A VIOLATION OF SPEEDING LAW AND SUCCESSFUL PROSECUTION OF VIOLATION

### A. Governmental Creation of a Speed Limit—Necessary Elements

#### 1. Governmental Authority to Set the Limit

A state's authority to regulate traffic on public highways within the state has long been recognized as a valid exercise of the police power, a safety measure to protect the public.<sup>48</sup> In *Jacobson v. Carlson*,<sup>49</sup> the court noted, "the use of automobiles and other vehicles...on public highways is subject to regulation under the police power and a large discretion is vested in the legislature in its exercise." In determining whether any particular legislative act by a state is a valid exercise of its police power, courts generally apply the test of whether the law has a "reasonable and substantial relationship" to the accomplishment of some purpose fairly within

<sup>45</sup> § 545.353(e).

<sup>46</sup> TEX. TRANSP. CODE § 545.354 (2001 Supp.).

<sup>47</sup> 625 I.L.C.S. 5/11-602 & 604; N.J.R.S. § 39:4-98; O.R.S. 810-180; C.R.S. § 42-4-1102 (2001 Supp.); K.R.S. § 189-390(4)(a); WYO. STAT. 31-5-302 and 31-5-303. The Wyoming Superintendent of Transportation has broad powers, but is not granted the power to "declare statewide or countywide maximum speed limits." *Id.*

<sup>48</sup> The term "police power" is used here to refer to the states' authority to act to protect the public health, safety, morals, or welfare by enacting laws. *See State v. Audley*, 894 P.2d 1359 (Wash. App. Div. 1 1995); *State v. Luttrell*, 68 N.W.2d 332 (Neb. 1955); *Jacobson v. Carlson*, 4 N.W.2d 721 (Mich. 1943); *State v. Smith*, 276 A.2d 369, 58 N.J. 202 (1971).

<sup>49</sup> *Id.* at 723.

the scope of the police power.<sup>50</sup> Only if the challenger to such a law shows an infringement of some constitutionally protected right will a more stringent test be applied.<sup>51</sup> It seems clear that laws regulating the speed of motorists on the highways, as an exercise of the police power to protect public safety, can meet these challenges.<sup>52</sup>

The more complex issue arises where the authority to set speed limits or to change existing speed limits has been delegated, by statute, from the state legislature to some other entity. In an Illinois case, *City of Creve Coeur v. Pelletier*,<sup>53</sup> the court found that the City ordinance reducing the speed limit in a construction zone was a lawful exercise of the authority delegated under Illinois law. The particular section in question "empowers local authorities to declare by ordinance a reasonable and safe maximum speed limit which is greater or less than that prescribed in the Code when warranted by considerations of public safety."<sup>54</sup>

In a 1979 Texas case, the statute delegating to the State Highway and Public Transportation Commission the authority to set temporary speed limits was challenged as unconstitutional.<sup>55</sup> The court found that the statute enabling the commission to set maximum temporary speed limits is not an unconstitutional delegation of the State Legislature's authority, since

...a legislative body, after declaring a policy and fixing a primary standard, may delegate to...[an agency] power to prescribe details, [citations omitted] such as to establish rules, regulations or minimum standards reasonably necessary to carry out the expressed purpose of the act. [Citations omitted]. Thus, the existence of an area for exercise of discretion [by the agency]...does not render delegation unlawful where standards formulated for guidance and limited discretion, though general, are capable of reasonable application. [citation omitted] So long as the statute is sufficiently complete to accomplish the regulation of the particular matters falling within the Legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly dele-

<sup>50</sup> *See*, for example, *Markham Advertising Co. v. State*, 439 P.2d 248 (Wash. 1968).

<sup>51</sup> In upholding an "anti-cruising" law against an attack on the grounds that it was an unconstitutional infringement of the right to intrastate travel, a Wisconsin court stated, "...state and local governments must enjoy some degree of flexibility to regulate access to, and use of, the publicly held instrumentalities of travel." The court characterized its test as an "intermediate level of scrutiny." *Brandmiller v. Arreola*, 544 N.W.2d 894 (1996). *See also State v. Balzer*, 954 P.2d 931 (1998).

<sup>52</sup> *See* 544 N.W.2d. at 899.

<sup>53</sup> 358 N.E.2d 1355, 45 Ill. App. 3d 59 (1977).

<sup>54</sup> *Id.* at 1356. The section in question is § 11-604 of the Illinois Vehicle Code.

<sup>55</sup> *Masquelette v. State*, 579 S.W.2d 478, (*reh'g denied*, 1979).



gated to the authority charged with the administration of the statute. [citation omitted]<sup>56</sup>

A similar challenge to the Texas law was rejected in *Lamm v. State*,<sup>57</sup> where the court cited the *Masquelette* case but more succinctly held that the law was "not an unconstitutional delegation of the Legislature's authority since it contained standards limiting the discretion of the...Commission; these standards were considered necessary to effect the Legislature's purpose, and were capable of reasonable application."<sup>58</sup> The court pointed out, in particular, that a maximum speed limit may be altered "only upon an engineering and traffic investigation;" that the Commission must follow certain procedures in conducting the investigation; and that there are other limitations on the authority to alter the limit.<sup>59</sup>

In *State v. Imperatore*,<sup>60</sup> a motorist who was convicted of driving 60 mph in a 45 mph construction zone on the New Jersey Turnpike challenged the Turnpike Authority's power, under New Jersey law and Turnpike regulations, to temporarily lower the speed limit and to delegate this power to lower the limit to an agent. Under N.J.S.A. 27-23-5 the Turnpike Authority has been granted by the legislature the power to "establish rules and regulations for the use" of the Turnpike, and to "do all acts and things necessary and convenient to carry out the powers expressly granted" to the Authority. N.J.S.A. 27-23-39 requires that all persons operating vehicles on the Turnpike must comply with any and all regulations adopted by the Authority "to control traffic and prohibit acts hazardous in their nature or tending to block the normal and reasonable flow of traffic." Further, "prior to adoption of any regulation,...including the designation of any speed limits, the Authority shall investigate and consider the need for" such a regulation for the safety of persons and property; notice is to be given to drivers by posting of appropriate signs. The Authority had adopted Regulation 2(C), which provides that

Where appropriate signs prescribing a lesser speed [than the 50 and 60 m.p.h. limits established by regulation] are posted or erected by a person or persons authorized by the...Authority to post or erect such signs, no vehicle within the area...where such signs are posted or erected shall be operated in excess of the speed prescribed by said signs. All vehicles consistent with the requirements of this Section shall be operated at an appropriate reduced speed when specific hazards exist with respect to traffic, road, weather or other conditions.<sup>61</sup>

The defendant did not question whether the Turnpike Authority could, under the law and regulations, set the speed limit itself; he argued that the Legislature

never authorized the Authority to redelegate to an agent the power to designate speed limits. The court characterized the question as whether the power to redelegate may be implied from the statute as a whole, as it is not explicitly given. In examining this question, the court pointed out that the "grant of an express power is always attended by such incidental authority as is fairly and reasonably necessary or appropriate to make it effective." The court noted the "uniqueness of the subject matter to be regulated," which is the speed of traffic in the face of "special conditions [that] are by nature emergent and transient. Often they arise suddenly, as in the case of a fast-drifting fog or an icy road. It would be impossible for the Authority, by regulation or resolution, to meet these specific and varied hazards as they arise." The vital goal of protecting the safety and security of people and property can "only be realized if the Authority may act through authorized agents...who are at the scene and who can ascertain what any given set of conditions may require." The court went on to say that the legislature has recognized that "under certain circumstances traffic control must vary according to the conditions present, and this is best accomplished by on-the-spot regulation rather than by general rules prospectively formulated."<sup>62</sup> Where the public is protected from arbitrary agency action by adequate warning signs and there is an opportunity for judicial review in the case of a person charged with a violation, the court found an implied power for the Authority to redelegate.

The defendant also raised the issue of whether there are adequate standards to govern the exercise of the power delegated under Regulation 2(C). The court stated that "standards need not always be explicit," and that the four corners of the statute should be examined to find the "policies and objectives which are to guide the agency and hence to circumscribe its discretion." The court then referred to the "nature of the determination involved and the official or body to whom the power is delegated," and decided that the standards were sufficient and that a "more specific standard cannot be asked for in the circumstances."<sup>63</sup>

## 2. Authority to Set the Limit Within Certain Parameters

Where the legislature delegates to an agency or official power to establish or change a speed limit, this power is often circumscribed by certain requirements that must be met for the new limit to be effective, or limited to within certain parameters. For example, under the Code of Virginia, the Commonwealth Transportation Commissioner may alter statutory speed limits under certain circumstances; these altered limits are only effective "when prescribed after a traffic engineering investigation and when indicated on the highway by signs."<sup>64</sup> Under the California law, the DOT may

<sup>56</sup> 579 S.W.2d at 480, quoting from *Ex Parte Granviel*, 561 S.W.2d 503.

<sup>57</sup> 653 S.W.2d 495 (Tex. App. 13 Dist. 1983).

<sup>58</sup> *Id.* at 498.

<sup>59</sup> *Id.*

<sup>60</sup> 223 A.2d 498, 92 N.J. Super. 347 (1966).

<sup>61</sup> *See* 223 A.2d at 499.

<sup>62</sup> 233 A.2d at 501.

<sup>63</sup> 223 A.2d at 502.

<sup>64</sup> VA. CODE § 46.2-878.

establish a lowered speed limit in construction zones, but that limit "shall not be less than 25 miles per hour."<sup>65</sup> Where such limitations are placed by the legislatures, courts have found that speed limits could not be enforced unless the limiting requirements were strictly met. For example, in the *Village of Oakwood Hills v. Diamond*,<sup>66</sup> the defendant was charged with violating a 25 mph speed limit set by Oakwood Hills by municipal ordinance. The defendant successfully challenged the validity of the ordinance, since it failed to comply with a statutory requirement that the "difference in limit between altered zones shall not be more than 10 miles per hour."<sup>67</sup> Similarly, in *In re C.*,<sup>68</sup> an Ohio court found that a city ordinance that set a speed limit lower than what was allowed by state statute was impermissible, and the effective speed limit was that stated in the statute.<sup>69</sup> In *State v. Pierce*,<sup>70</sup> the Washington State Highway Commission attempted to reduce a 70 mph speed limit to 50 mph for the stated purpose of "conserving fuel." The enabling statutes (RCW 46.61-400 to 46.61-425) provided that the Commission had authority to lower the speed limit if it determined "upon the basis of an engineering and traffic investigation" that the existing maximum speed limit was "greater than is reasonable or safe" for existing conditions. The court held that the 50 mph speed limit was invalid as beyond the power of the Commission to declare, and that the Commission could only exercise "those powers conferred either expressly or by necessary implication."<sup>71</sup>

A number of cases that construe local speed-limit-setting ordinances are of the "speed trap" variety. See, for example, *People v. Stone*<sup>72</sup> and *Rose v. Village of Peninsula*<sup>73</sup> Again, these cases hold that, to effectively change the speed limit, all special requirements of the delegation of authority must be met.

### 3. Necessity to Post

State laws that establish or allow for the establishment of special speed limits other than a general "statewide" limit require that these different limits be posted in order to be effective. For example, the New

<sup>65</sup> CAL. VEH. CODE § 22362.

<sup>66</sup> 465 N.E.2d 662, 125 Ill. App. 3d 58 (1984).

<sup>67</sup> 465 N.E.2d at 665. Ill. REV. STAT. 1983, ch. 95 1/2, para. 11-604.

<sup>68</sup> 334 N.E.2d 545 (1975).

<sup>69</sup> There is an opinion of the Attorney General of Texas on this issue, Opinion No. JC-0079, July 14, 1999. This opinion interprets Texas Transportation Code § 545.355, providing in relevant part that a commissioners' court may "declare a lower speed limit [than the statutory limit] of not less than 30 miles per hour on a county road or highway," if the commissioners determine that the existing limit is unreasonable or unsafe.

<sup>70</sup> 523 P.2d 1201 (Wash. App. 1974).

<sup>71</sup> *Id.* at 1203.

<sup>72</sup> 524 N.Y.S.2d 1001 (1988).

<sup>73</sup> 839 F. Supp. 517 (N.D. Ohio 1993).

Jersey Code provides that, with respect to state highways, if the Commissioner of Transportation determines on the basis of a traffic and engineering investigation that the general statewide limit is too high or low for a particular location, the limit may be changed by regulation. The newly designated limit "shall be prima facie lawful at all times or at such times as may be determined, when appropriate signs giving notice thereof are erected..."<sup>74</sup> The Texas Transportation Commission may declare an altered prima facie speed limit based on the results of an investigation, and this altered limit "is effective when the commission erects signs giving notice of the new limit."<sup>75</sup>

Likewise, when a local government unit sets a speed limit for highways or streets under its jurisdiction, such a limit must be posted to be effective,<sup>76</sup> and at least posted where the driving public may encounter the signs. Wisconsin law requires erection of signs showing lower limits in villages, cities, and on "rustic roads" at points "necessary to give adequate warning to users of the highway in question." However, "an alleged failure to post" as required is not a defense to a charge of speeding, if official signs giving notice have been erected at those points "where a person traversing such highway would enter it from an area where a different speed limit is in effect."<sup>77</sup>

The case law overwhelmingly upholds the posting requirement. There are a few cases that hold that a motorist is in violation of speeding laws where evidence shows that he exceeded a general statewide limit, even in the absence of evidence that the limit was posted in the immediate vicinity of the offense.<sup>78</sup> Generally, however, the cases reenforce this requirement for posting of speed limits before they can be enforced. The following are some of the cases, in some of the states, where the posting requirement has been considered by the courts: in New York, *People v. Praete*<sup>79</sup> and *People v. Fox*;<sup>80</sup> in Ohio, *Village of Kirkland Hills v. McGrath*;<sup>81</sup> in California, *Reynolds v. Filomeo*;<sup>82</sup> in New Jersey, *State v. Hubschman*;<sup>83</sup> in Pennsylvania, *Commonwealth v. Cogan*.<sup>84</sup>

In the *Cogan* case, the appellant had been cited for driving 42 mph in a 25 mph zone within the municipality of Latrobe. At trial, the evidence showed that the

<sup>74</sup> N.J.S.A. 39:4-98.

<sup>75</sup> TEX. TRANSP. CODE § 545.353. All the state laws that I examined required posting of an altered speed limit when the limit was changed on the basis of a traffic engineering investigation.

<sup>76</sup> See, for example, N.Y. VEH. & TRAF. LAW § 1683; OHIO REV. CODE § 4511.21(K).

<sup>77</sup> WIS. STAT. ANN. § 346.57(6).

<sup>78</sup> For example, *People v. Kane*, 243 N.Y.S.2d 809 (1963).

<sup>79</sup> 545 N.Y.S.2d 499 (1989).

<sup>80</sup> 596 N.Y.S.2d 984 (1993).

<sup>81</sup> 624 N.E.2d 255 (Ohio App. 11 Dist. 1993).

<sup>82</sup> 236 P.2d 801 (1951).

<sup>83</sup> 195 A.2d 913 (1963).

<sup>84</sup> 492 A.2d 1388 (1985).

DOT had, based on a traffic and engineering investigation, established a speed limit of 40 mph for the portion of highway in question; however, that limit had never been posted on the highway. The municipality of Latrobe had established and posted a 25 mph speed limit on the highway in 1958 and had maintained and enforced it since that time. The court found that the 25 mph speed limit was valid and enforceable, since the 40 mph limit, although set by the Department, had never been posted as required by 75 Pa. C.S.A. Section 3362(b), providing that "no maximum speed limit...shall be effective unless posted on fixed or variable official traffic-control devices erected in accordance with" Department regulations, and therefore was never in effect. Under Pennsylvania law, a local government unit could alter maximum speed limits,<sup>85</sup> and the court found that in the absence of "a due exercise of the Department's power," the municipality could establish the speed limit.<sup>86</sup>

## B. Prosecution of a Speeding Violation—Proving the Case

This section will address the elements of the offense of speeding in violation of law, enforcement differences in a civil or criminal proceeding, and sufficiency of the evidence to sustain a conviction or finding of a violation. Details of civil and criminal proceedings in each state, or whether a particular state provides for criminal or civil penalties, will not be addressed, except by way of example. Issues involving proof of identity of the driver will only be addressed in the later discussion of photo enforcement. Those elements of the offense or proof that would be most relevant to variable speed limits will be discussed.

### 1. Criminal or Civil Proceeding

Many states have, by statute, instituted a civil hearing process for the adjudication of minor traffic offenses. For example, Washington in 1981 "decriminalized" some traffic offenses, including speeding offenses.<sup>87</sup> Other States, such as Alabama,<sup>88</sup> South Dakota,<sup>89</sup> and South Carolina,<sup>90</sup> continue to treat the traffic offense of speeding as a criminal misdemeanor offense. In both civil and criminal proceedings, as well as in an administrative process such as provided for by District of Columbia law,<sup>91</sup> the person alleged to have violated a speed limit is entitled to notice and the right to be

heard before any penalty is assessed.<sup>92</sup> The notice, whether it is a citation or summons and complaint, must clearly advise the motorist of the charge, but does not generally need to follow particular language, *U.S. v. LeHouillier*.<sup>93</sup>

In neither quasi-criminal, criminal, nor civil proceedings is the motorist entitled to a jury trial or court appointed counsel for the simple offense of speeding,<sup>94</sup> and it is not a denial of equal protection to decriminalize minor offenses.<sup>95</sup>

The burden of proof in all cases is on the charging jurisdiction, whether that is the state or a local government. There are numerous cases holding that the burden of proof lies with the state or local jurisdiction, as is the case in any criminal prosecution, such as *People v. Behjat*,<sup>96</sup> *State v. Green*,<sup>97</sup> and *People v. Henig*.<sup>98</sup> In cases where state statutory law provides for a civil proceeding, the law also requires that the charging jurisdiction bears the burden of proof. For example, the Oregon statute provides that the "state, municipality or political subdivision shall have the burden of proving the alleged traffic infraction."<sup>99</sup>

The most important difference in civil or criminal proceedings is the standard of proof. In civil or administrative proceedings, the standard of proof may be a preponderance of the evidence,<sup>100</sup> or clear and convincing evidence.<sup>101</sup> The standard of "clear and convincing evidence" is something more than a preponderance, but less than proof beyond a reasonable doubt; it is the kind

<sup>92</sup> See, for example, WASH. REV. STAT. 46-63.070(3); Colorado Rules for Traffic Infractions, 7B C.R.S. For a discussion of the process that is due a motorist generally, see *U.S. ex Rel Verdone v. Circuit Court for Taylor County*, 851 F. Supp. 345 (W.D. Wis. 1993), to the effect that notice and a hearing are required whenever protected liberty or property interests are at stake. See also *Depiero v. City of Macedonia*, 180 F.3d 770 (6th Cir. 1999) at 787.

<sup>93</sup> 935 F. Supp. 1146 (1996).

<sup>94</sup> See *People v. Oppenheimer*, 116 Cal. Rptr. 795, at 798, 799; *Duncan v. La.*, 391 U.S. 145 (1968). For the proposition that jury trials are not afforded for minor traffic offenses generally, see *State v. Bennion*, 730 P.2d 952 (Idaho 1986). Several states' laws provide that no jury trial is available, *i.e.*, OR. REV. STAT. 153.575.

<sup>95</sup> See *inter alia*, *People v. Lewis*, 745 P.2d 668 (Colo. 1987).

<sup>96</sup> 101 Cal. Rptr. 2d 193 (Cal. Super. 2000).

<sup>97</sup> 743 A.2d 357 (2000).

<sup>98</sup> 505 N.Y.S.2d 174 (1986).

<sup>99</sup> O.R.S. 153.575; to the same effect, see WASH. REV. CODE 46.63-090(3).

<sup>100</sup> The standard of proof generally applied in civil proceedings is the preponderance of the evidence standard. *Hansen v. Hansen*, 958 P.2d 931 (Utah 1998). For a discussion of the use of preponderance of the evidence or clear and convincing evidence in administrative proceedings, see 2 Fed. Proc., L. Ed. § 2:197, "Standard of Proof" (Administrative Procedure).

<sup>101</sup> *Iddings v. Mee-Lee*, 919 P.2d 263 (Hawaii 1996); *In re C.R.B.*, 814 P.2d 1197 (Wash. App. Div. 1 1991).

<sup>85</sup> 75 PA. CONS. STAT. ANN. § 3363 and § 6109.

<sup>86</sup> 492 A.2d at 1390.

<sup>87</sup> WASH. REV. CODE § 43.63. See also 29-A ME. REV. STAT. ANN. § 103: "A traffic infraction is not a crime."

<sup>88</sup> AL. CODE § 32-5A-171; 32-5A-3.

<sup>89</sup> S.C.D.L. § 32-25-3.

<sup>90</sup> Section 56-5-1520(G) of the South Carolina Code provides that any violation of speed limits set by § 56-5-1520 (relating to prima facie maximums) is a misdemeanor.

<sup>91</sup> Traffic Adjudication Act of 1978, D.C. CODE § 40-601 through 40-642.

of proof that would persuade a trier of fact that the truth of the contention is highly probable.<sup>102</sup> Most of the state statutory schemes that "decriminalize" minor traffic offenses adopted a preponderance of the evidence standard;<sup>103</sup> the District of Columbia Traffic Adjudication Act provides for a standard of clear and convincing evidence.<sup>104</sup>

In criminal proceedings, the standard of proof is "beyond a reasonable doubt," which is, of course, the most difficult standard to meet.<sup>105</sup> In those jurisdictions where speeding is treated as a misdemeanor offense, this is the standard that would apply.<sup>106</sup> In *People v. Sperbeck*,<sup>107</sup> the court said of such a prosecution, whether or not it's called a crime in the statute or ordinance, "criminal law rules of presumption of innocence and the necessity of proof beyond a reasonable doubt should apply," citing to *People v. Hildebrandt*.<sup>108</sup>

Because of the different standard of proof in criminal and administrative proceedings, a defendant may be found "not guilty" in a criminal trial, but still be subjected to administrative sanctions (such as having his or her driver's license revoked) for traffic offenses.<sup>109</sup>

"Whether an offense defined by statute is civil or criminal is primarily a matter of statutory construction," the court held in *State v. Anton*,<sup>110</sup> a case considering the revision of Maine traffic laws that reclassified certain offenses from criminal to civil. In the *Anton* case, the violations at issue were exceeding the speed limit.<sup>111</sup> The court held that, although the primary consideration may be the statutory construction and expressed legislative intent, the purpose of making a minor traffic offense into a civil infraction "may not be achieved by a mere change in the label of the offense."<sup>112</sup> Rather, the court held, several factors must be considered, including the severity of the penalty imposed, whether the penalty may be imprisonment, whether a fine is so large that it may be considered punitive, and whether enforcement is characterized by arrest and

detention, citing *Kennedy v. Mendoza-Martinez*<sup>113</sup> and *Brown v. Multnomah County District Court*.<sup>114</sup> In the *Brown* case, the court considered whether the Oregon legislature could revise the Vehicle Code to place the first offense of driving a motor vehicle under the influence of intoxicants into a statutory category of "traffic infractions" and thereby make it a civil offense rather than a criminal offense. The court held that the State legislature had the power to "devis[e] a system of traffic laws," so long as it did not "depart from a constitutional standard."<sup>115</sup> "There is no easy test for when the imposition of a sanction is a 'criminal prosecution' within the meaning of constitutional guarantees," the court stated, but there are a number of indicia that have been used.<sup>116</sup> The court then adopted a test that uses five criteria: 1) Type of offense, 2) Penalty, 3) Collateral consequences, 4) Punitive significance, and 5) Arrest and detention. Applying this test, the court concluded that under Oregon's law, the offense of driving under the influence "and its enforcement and punishment retain too many penal characteristics not to be a 'criminal prosecution'".<sup>117</sup> The court was careful to point out that its decision affected the status only of the offense of driving under the influence, and not other, less serious, traffic offenses.<sup>118</sup> In sum, although the statutory language is important in determining whether a traffic offense is civil or criminal, courts may look beyond the language to make a final determination.<sup>119</sup> In the case of speeding offenses, the determination has been that violation of speed laws, as opposed to more "serious" offenses, may be a civil offense.

## 2. Proof of the Limit Where the Violation Occurred, and Proof that the Limit was Posted

*a. Proof of Limit.*—Many states' laws prohibiting driving at excessive speed provide that the charging instrument or summons and complaint must state the particulars of the offense, including the speed at which it is alleged the motorist was traveling and the speed limit in effect at the place where the violation occurred. This is the case whether a violation is considered to be either a civil or a criminal offense.<sup>120</sup> Evidence of the applicable limit at the place of the alleged violation is a required part of the case that the state must make, especially where a state or local agency has altered a statutory speed limit.<sup>121</sup>

<sup>102</sup> *Bando v. Clure Bros. Furniture*, 980 P.2d 323 (Wyo. 1999); *Kruse v. Horlamus Industries, Inc.*, 387 N.W.2d 64 (Wis. 1986).

<sup>103</sup> For example, WASH. REV. CODE § 46.63-090(3); O.R.S. 153.575 (2); see also *State v. Brown*, 318 N.W.2d 370 (Wis. 1982).

<sup>104</sup> D.C. Code § 40-616.

<sup>105</sup> See, for example, *Kirtland Hills v. McGrath*, 624 N.E.2d 255 (Ohio App. 11 Dist. 1993), at 258; see also cases at note 102, *infra*.

<sup>106</sup> See, for example, *State v. Lomack*, 476 N.W.2d 237 (Neb. 1991).

<sup>107</sup> 165 N.Y.S.2d 958, 959 (1957).

<sup>108</sup> 126 N.E.2d 377.

<sup>109</sup> See discussion at 2 Fed. Proc., L. Ed. § 2:197, "Standard of Proof" (Administrative Procedure).

<sup>110</sup> 463 A.2d 703 (Me. 1983) at 705, citing to *United States v. Ward*, 448 U.S. 242.

<sup>111</sup> 29 M.R.S.A. § 1251.

<sup>112</sup> 463 A.2d at 706.

<sup>113</sup> 372 U.S. 144 (1963).

<sup>114</sup> 570 P.2d 52, 280 Or. 95 (1977).

<sup>115</sup> 570 P.2d at 57.

<sup>116</sup> *Id.*

<sup>117</sup> 570 P.2d at 60.

<sup>118</sup> *Id.* at 61.

<sup>119</sup> See also *Nickelson v. People*, 607 P.2d 904 (Wyo. 1980); *State v. Bennion*, 730 P.2d 952 (Idaho 1986); *State v. Freeman*, 487 A.2d 1175 (Me. 1985).

<sup>120</sup> NEB. REV. STAT. § 60-6,194; OR. REV. STAT. § 153-530; COLO. REV. STAT. § 42-4-1101(5); ARK. CODE § 27-51-201; DEL. CODE ANN. § 21-4174.

<sup>121</sup> *Id.*

The case law also requires that, where the speed limit has been changed from a "statewide" generally applicable limit, evidence must be produced that proves what speed limit was in effect at the place of the violation.<sup>122</sup> For example, where a motorist was charged with exceeding the speed limit in a school zone, the state had the burden of showing that the 25 mph limit for a school zone was actually in effect at the time.<sup>123</sup>

The only cases that were found that did not require proof of the existing speed limit were those where the court could take judicial notice of the existing limit, as it was a statewide statutory limit that had not been altered because of existing circumstances.<sup>124</sup> Clearly, this would not be the case where variable speed limits are being enforced.

*b. Limit was Posted.*—The posting requirement would be an essential element of the civil adjudication or prosecution of a "variable" speed limit violation. Most of the laws that allow for changes in speed limits require posting for the altered limit to be effective.<sup>125</sup> In the case law also, speed limits must be posted for a violation to be proved, and the burden of proof is on the charging authority to show that the limit was posted.<sup>126</sup> In most cases, this means that evidence of signs along the highway or roadway must be shown; however, in *State v. Hubschman*,<sup>127</sup> the court found that the posting requirement was met by handing out regulations that applied on the Garden State Parkway at toll booths where motorists entered the Parkway. In *People v. Silcox*,<sup>128</sup> the court held that the proof must show that the signs were posted at the time of the offense, not at the time of the hearing. As the court stated in *Mitchell v. Wilkerson*,<sup>129</sup> the "obvious purpose of [the provision requiring the display of signs] is to notify or warn the operator of an automobile of the speed restriction in that zone or area." Therefore, in enforcement of variable speed limits, where a motorist would pass from a zone of one speed limit to another zone with a different limit, the evidence would need to show that posting signs, warnings, or other notification were observable by the motorist before a citation was issued.<sup>130</sup> For ex-

ample, in the *Hubschman* case, the court found that copies of the regulations were passed out where motorists were entering the Parkway—so they would be most likely to receive a copy. In *People v. Praete*,<sup>131</sup> the court found that where the motorist had driven past the signs stating the changed speed limit, he could be prosecuted for speeding since he had "actual" notice.

*c. Proof that Posting Signs Were Visible to the Driver.*—Beyond proof of posting, there must be evidence that the speed limit signs could be seen by the driver. Proof that the signs were in existence at a place where passing motorists could see them should be sufficient for this purpose.<sup>132</sup> When there is evidence that a sign was not legible or visible, the charges will be dismissed. In *People v. Fox*,<sup>133</sup> the court held that, where foliage had obliterated a speed sign, the posted limit could not be enforced against an alleged violator, stating that, "Signs must be properly posted and readable." In this case "the sign was obliterated and therefore did not comply with either statutory or regulatory law."<sup>134</sup>

### 3. Proof of "Special Circumstances" Necessary to Create an Offense or Justify a Decreased Speed Limit

The rationale for use of a "variable" speed limit is that changing circumstances may warrant a lower limit than is usually applicable for a particular area or section of highway. This is the case for special limits for school zones and construction zones, as well as lower speeds for inclement weather, that are in use today. It

---

where he is observing traffic; that is, the officer sets up a radar unit *between* electronic signs. In telephone interviews with state police officers in Washington, where a variable speed limit for weather conditions is enforced on I-90, and in New Jersey, where variable speed limits have been in use on the Turnpike for years, I was told, essentially, that this is not a problem. In both instances, radio contact is maintained with DOT or Turnpike officials who set the speed limits, and the officer is informed of the limit being posted. While the "mechanics" of enforcement of variable speed limits is clearly beyond the scope of this report, I can see no reason, based on case law, that either testimony from the officials setting the limit, or an affidavit, could not be used to prove the speed limit, if the law enforcement officer could not see a posting at the time of issuing a citation. In the Snoqualmie Pass area of Washington, where variable limits are enforced on I-90, the computer software used by Washington DOT archives the changes that are made to the speed limit. If a police officer requests the record when a citation is challenged in court, the computer log "print-out" is provided, showing the speed limit for each section of the variable speed zone for the day and time in question (Interview with Mike Gousse and Lynn Cooke, Washington State DOT, July 17, 2001).

<sup>131</sup> 545 N.Y.S.2d 499 (1989).

<sup>132</sup> *Id.*

<sup>133</sup> 596 N.Y.S.2d 984 (Just. Ct. 1993).

<sup>134</sup> 596 N.Y.S.2d at 988. *See, generally*, N.Y. VEH. & TRAF. LAW § 1110(b), (McKinney 1996).

<sup>122</sup> *See, for example*, *People v. Praete*, 575 N.Y.S.2d 623 (1989).

<sup>123</sup> *State v. Green*, 743 A.2d 357 (A.D. 2000); *State v. Beierle*, 325 N.J. Super. 395, 739 A.2d 465 (A.D. 1999).

<sup>124</sup> *See People v. Kane*, note 78 *supra*; *People v. Fox*, 596 N.Y.S.2d 984 (1993).

<sup>125</sup> For example, KY. REV. STAT. § 189.390; ILL. VEH. CODE 625 ILCS 5/11-605; OHIO VEH. CODE § 4511.21.

<sup>126</sup> *See, for example*, *Daniels v. City and County of San Francisco*, 255 P.2d 785, at 792, where the court stated, "[T]he signposting of a highway is absolutely essential for the application of the lower prima facie speed limits."

<sup>127</sup> 195 A.2d 913 (1963).

<sup>128</sup> 228 N.Y.S.2d 634 (1962).

<sup>129</sup> 193 Va. 121, 67 S.E.2d 912 (1952).

<sup>130</sup> A question that may arise in enforcement of variable speed limits is, what will happen if the law enforcement officer issuing the citation cannot see the posting signs from the spot

can be anticipated that, in a challenge to a variable speed limit enforcement, proof would be required as to what circumstances justified a lower speed limit at the place of the alleged violation, just as challenges have been raised in some cases involving school zones and construction zones. In *State v. Roberts*,<sup>135</sup> the court held that the prosecution must prove that the motorist exceeded the school zone limit during recess or opening or closing hours of school; proof of activation of the flashing light was not enough. A similar challenge was upheld in *State v. Beierle*,<sup>136</sup> where the state had to show that the school zone law was in effect at the time of the alleged violation.

This kind of evidence of special circumstances will be required for enforcement of variable speed limits, and most likely challenges will also be made that will require a showing that the agency that changed the limit followed any required procedures, such as conducting a traffic and engineering investigation, before a determination to lower the speed limit was made. For example, in *State v. Pierce*,<sup>137</sup> where the Washington State Highway Commission had decreased speed limits on some highways and posted the new limits, citations of motorists for violations were challenged. Although the Commission had authority to decrease the speed limit for safety reasons "under the conditions found to exist" on the affected part of the highway, the evidence showed that the limit had been reduced as a means to conserve fuel. Further, the court found that there was "no showing in this instance that any 'engineering and traffic investigation' was conducted as a basis for the action of the commission," and the charges of exceeding the speed limit were dismissed.<sup>138</sup>

The considerations and issues here are somewhat analogous to those raised in a series of California cases, construing the "anti-speed trap" law in that state. Under provisions of the California Vehicle Code, the use of a speed trap is prohibited,<sup>139</sup> and a speed trap is defined as enforcement by use of radar of a speed limit on a highway with a prima facie speed limit that is not justified by a traffic and engineering study conducted within the past 5 years.<sup>140</sup> The result is that, in any enforcement action where the prosecuting authority wants to introduce evidence of defendant's speed as measured by radar, a certified copy or the original of a traffic and engineering survey that justifies the speed limit must be produced in evidence. The survey must have been conducted less than 5 years before the offense.<sup>141</sup> The

courts have held that the survey must be physically in the court,<sup>142</sup> that a summary of the survey would not suffice,<sup>143</sup> and that the survey must show that the speed limit is justified.<sup>144</sup> These cases are worth examining in a consideration of enforcement of a variable speed limit that is presumably also to be justified by traffic and engineering surveys and investigations. However, there should be a substantial difference in the court's consideration and interpretation of a law that is adopted specifically to prohibit "speed traps," as the California law clearly is,<sup>145</sup> and a law that is designed to provide for creation of valid variable speed limits. On this point, it may be noted that those cases such as *State v. Imperatore*<sup>146</sup> would provide the basis for an argument that the traffic and engineering study need only show the need for a variable speed limit for those special circumstances occurring at a particular location, and not that a particular speed limit must be displayed and enforced at any given time.

Other cases on the point of introducing evidence of traffic and engineering investigations are discussed in Section II.A.2, above.

#### 4. Proof of Speed in Excess of Limit

It goes without saying that, where the state has the burden of proof, the evidence must show that the motorist in question was exceeding the applicable speed limit. In adjudication of a variable speed limit offense, the same kind of evidence of speed that would be adduced in any speeding case would be used. That is, the testimony of a police officer, based on his visual observations, usually in combination with testimony about measurements of speed by radar, a "pacing vehicle" speedometer, laser, or perhaps photo-enforcement technology. There are numerous cases raising issues about when such evidence is sufficient to support a finding of a violation. A few examples are *Howe v. Ad- duci*,<sup>147</sup> where the police officer testified to his training in visual estimates of speed as well as the use of radar devices; *Commissioner v. Hunt*,<sup>148</sup> related to timing by aircraft; *Ochoa v. State*,<sup>149</sup> where the court upheld a conviction based on the police officer's visual observation, but excluded evidence based on a radar reading; and *Commissioner v. Kittleberger*,<sup>150</sup> which outlines the evidence required to sustain a conviction for speeding. These issues are not unique to a situation involving variable speed limits, however, and no lengthy discussion of these cases is required. Responses to the survey show that, where variable speed limits are now in force,

<sup>135</sup> No. C-960373, (1st Dist.) 1996 Ohio App., LEXIS 5886.

<sup>136</sup> 739 A.2d 465 (N.J. 2000).

<sup>137</sup> 523 P.2d 1201 (Wash. App. 1974).

<sup>138</sup> 523 P.2d 1203.

<sup>139</sup> CAL. VEH. CODE § 40801.

<sup>140</sup> CAL. VEH. CODE § 40802(b).

<sup>141</sup> *People v. Goulet*, 17 Cal. Rptr. 2d 801 (1992); *People v. Goodrich*, 39 Cal. Rptr. 2d 154 (1994); *People v. Earnest*, 40 Cal. Rptr. 2d 304 (1995); *People v. Ellis*, 40 Cal. Rptr. 2d 111 (1995); *People v. Smith*, 173 Cal. Rptr. 659 (1981) and cases cited therein at p. 660.

<sup>142</sup> *People v. Earnest*, *id.*

<sup>143</sup> *People v. Ellis*, *supra*.

<sup>144</sup> *People v. Smith*, *supra*.

<sup>145</sup> See, for example, language in *People v. Goulet*, 17 Cal. Rptr. 2d at 803. See cases cited at note 141, *supra*.

<sup>146</sup> 223 A.2d 498 (1966).

<sup>147</sup> 640 N.Y.S.2d 225 (1996).

<sup>148</sup> 5 Pa. D. & C 4th 220 (1989).

<sup>149</sup> 994 S.W.2d 283 (Tex. App., El Paso 1999).

<sup>150</sup> 616 A.2d 1 (1992).

the methods of enforcement are the same as are used for enforcement of other kinds of speed limits.

The requirement, to the extent that it exists, that the speed of the vehicle be stated in the information or summons was discussed in Section B.2(a) above.

### C. Proof of Speed of Defendant Drivers' Vehicle—Technology

#### 1. Scientific Methods of Proof Generally

The general rule for acceptance of scientific evidence in a court hearing or administrative hearing under the traditional evidentiary test for relevancy is that evidence will be admitted if the "chosen expert is qualified and the expert's opinion is relevant, if the evidence will help the fact finder, and if the evidence is not so unduly prejudicial as to outweigh its probative value."<sup>151</sup> A more stringent test is applied by those courts that rely on the standard of *Frye v. United States*.<sup>152</sup> This standard for admission of scientific evidence "requires that the theory underlying the technique or device, as well as the technique or device be 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'"<sup>153</sup> The courts have generally applied one of these tests in determining whether measurements of speed by radar, laser, or other electronic means will be admitted in evidence.<sup>154</sup>

Some states have enacted statutes that provide, for example, that measurements by such means must be accepted as "prima facie evidence of the speed of a motor vehicle in a criminal or traffic infraction proceeding."<sup>155</sup>

A Texas court, on the other hand, recently adopted a standard for admission of scientific evidence that required a showing that (a) the underlying scientific theory is valid, (b) the technique applying the theory is valid, and (c) the technique must have been properly applied on the occasion in question.<sup>156</sup> Relying on *Kelly*

*v. State*, a 1992 Texas case,<sup>157</sup> the court rejected what it characterized as the *Frye* "general acceptance" test, and also rejected the opportunity to take judicial notice of the scientific techniques and principles of radar. The arresting officer testified as to his qualifications to operate the radar unit and that he calibrated and tested the unit. However, he was unable to explain the calculation the radar made, or the theory underlying the calculation; on that basis the court would not admit evidence as to the radar measurement of speed.<sup>158</sup>

#### 2. Radar Enforcement

Even in the absence of statutory presumptions for admission, most courts have admitted evidence of measurement of vehicle speed made by radar units, so long as certain criteria were met. These generally accepted criteria are set out in the Connecticut Statute:

...testimony by a competent police officer that: (1) the police officer operating the radar...has adequate training and experience in its operation; (2) the radar...was in proper working condition at the time of the arrest, established by proof that suggested methods of testing the proper functioning of the device were followed; (3) the radar was used in an area where road conditions provide a minimum possibility of distortion; (4) if moving radar was used, the speed of the patrol car was verified; and (5) the radar was expertly tested within a reasonable time following the arrest and such testing was done by means which do not rely on the internal calibrations of such radar...<sup>159</sup>

The following are a few of the cases that apply some or all of these criteria: *People v. Knight* (New York);<sup>160</sup> *Commissioner v. Kittleberger* (Pennsylvania);<sup>161</sup> *Nam Hoi Le v. State* (Texas);<sup>162</sup> and *State, City of St. Louis Park v. Bogren* (Minnesota).<sup>163</sup> It may be stated that, generally, evidence of speed as measured by radar will be admitted without expert testimony as to the underlying scientific principles.

The only issue that might arise in enforcement of variable speed limits by radar is in those cases where speed measurement by radar or other electronic means is prohibited within a certain distance of the beginning of a speed zone. For example, Illinois law prohibits the use of "electronic speed-detecting devices" within 500 feet beyond the beginning of a construction zone.<sup>164</sup> Where variable speed limits are in use, this would be an important consideration. The difficulties that may arise under California's "anti-speed trap" law were discussed above in Section B.

<sup>151</sup> DANIEL T. GILBERT ET AL, PHOTOGRAPHIC TRAFFIC LAW ENFORCEMENT (NCHRP Legal Research Digest No. 36, 1996) at 4, citing to *U.S. v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *U.S. v. Brown*, 557 F.2d 541 (6th Cir. 1977); *State v. Brown*, 687 P.2d 751 (Or. Sup. Ct. 1984); and other cases.

<sup>152</sup> 293 F. 1013 (D.C. Cir. 1923).

<sup>153</sup> GILBERT ET AL, *supra* note 150. Much of the discussion in this report about photographic traffic enforcement is summarized from this report, as there is no point in repeating what Mr. Gilbert et al have done an excellent job of reporting.

<sup>154</sup> See, generally, Anno., *Proof of Speeding Violation by RADAR or Other Mechanical or Electronic Means*, 47 A.L.R. 3d 822.

<sup>155</sup> 29-A ME. REV. STAT. ANN. § 2075(4). Connecticut law establishes a prima facie presumption of accuracy sufficient to support a speeding conviction for any "speed-monitoring device approved by the commissioner of public safety." CONN. REV. STAT. § 14-219(c).

<sup>156</sup> *Ochoa v. State*, 994 S.W.2d 283 (Tex. App., El Paso 1999).

<sup>157</sup> 824 S.W.2d 568 (1992).

<sup>158</sup> 994 S.W.2d at 284, 285.

<sup>159</sup> CONN. REV. STAT. § 14-219c.

<sup>160</sup> 530 N.E.2d 1273 (1988).

<sup>161</sup> 616 A.2d 1 (1992).

<sup>162</sup> 963 S.W.2d 838 (1998).

<sup>163</sup> 410 N.W.2d 383.

<sup>164</sup> 625 ILCS 5/11-604.

### 3. Laser

In the absence of statutory provisions, such as those in Maine and Connecticut, speed measurement by laser is not as widely accepted and admitted in hearings to enforce speed laws. Perhaps the "leading" case (or series of cases) is from New Jersey.<sup>165</sup> In these cases, the court took extensive evidence bearing on the accuracy and reliability of the LTI Marksman Laser device, and concluded that the "general concept of using lasers to measure speed is widely accepted in the relevant scientific community and is valid,"<sup>166</sup> and also found that "the laser speed detector produces reasonably uniform and reasonably reliable measurements of the speed of motor vehicles."<sup>167</sup> Based on its findings, the court determined that evidence of speed measured under any weather conditions except heavy rain could be admitted without expert testimony. As is the case with radar, however, there must be a showing that the police officer operating the device received appropriate training and that relevant preoperational checking of the device took place.<sup>168</sup>

The result reached in the New Jersey cases has not been accepted by all other courts, however. In *Izer v. State*,<sup>169</sup> a Georgia court, stating that "only a few courts in other jurisdictions have published opinions discussing the acceptability or reliability of laser-based speed detection devices," rejected the evidence based on laser measurements, even in the face of a Georgia statute that included "laser" in its definition of acceptable methods of detecting speed.<sup>170</sup> This case includes a brief discussion of those other jurisdictions that in 1999 had issued opinions on the admission of laser speed measurement.<sup>171</sup>

The use of laser devices to measure speeds for the enforcement of variable speed limits would not raise any issues different from those issues of acceptability in any speed enforcement case.

### 4. Photo Enforcement

The issues arising from photo-radar enforcement of traffic laws have been thoroughly explored and discussed in a *Legal Research Digest* published by the Transportation Research Board in 1996.<sup>172</sup> As this report makes clear, there are some problematic legal issues with photo-radar enforcement of traffic offenses, especially in those jurisdictions where enforcement

hearings are treated as criminal proceedings.<sup>173</sup> Assuming the technology is accepted by the court under principles of admission of scientific evidence, the major problem is the requirement that in a criminal proceeding, the accused must be identified; that is not always possible with photo-enforcement technology, especially where an "unmanned" unit is in use.<sup>174</sup> The report, *Photographic Law Enforcement*, points out that, for an efficient system of photo-radar enforcement to be used, those states that do not now have such laws would need to enact laws that impose liability on the owner (rather than the driver) of a vehicle for minor traffic law violations such as speeding.<sup>175</sup>

The technology of photo-enforcement has not been accepted in all states; New Jersey and Mississippi,<sup>176</sup> among others, have statutes that prohibit or limit the possible use of photo-radar for speed enforcement. Among the states responding to the survey, only three (Arizona, Colorado, and Oregon) reported that they use photo-enforcement for variable speed laws (including construction zones and school zones). None of these states reported any known legal challenges to the enforcement of variable speed laws.

The legal issues that may be anticipated from the use of photo-enforcement for variable speed laws are the same as the legal issues that are arising from its present use for enforcement of other speed laws and traffic ordinances and laws. Essentially, the same evidentiary showing that is now required for enforcement of any speed limit would be required, and the same standard of proof would apply, whether in a particular state traffic offenses are treated as criminal matters or in a civil or administrative proceeding. The evidentiary requirement of showing the posted speed limit in a proceeding to enforce a variable speed limit, discussed earlier in this report, may present the greatest difficulty from a technological standpoint in the use of photographic enforcement.<sup>177</sup> Consideration of the required technology is clearly beyond the scope of this report. I anticipate, however, that devices that presently record simultaneously that the light at an intersection is red and the license plate number of a vehicle traveling through the light, can be used to record simultaneously a particular posted speed limit, the license plate number of a car, and its speed.

<sup>165</sup> In the Matter of the Admissibility of Motor Vehicle Speed Readings Produced by the LTI Marksman 20-20 Laser Speed Detection System, 714 A.2d 370 (1998); *Id.*, 714 A.2d 381. (1998); *State v. Abeskaron*, 740 A.2d 690 (1999).

<sup>166</sup> 714 A.2d at 382.

<sup>167</sup> 714 A.2d at 391.

<sup>168</sup> *Id.*

<sup>169</sup> 511 S.E.2d 625 (Ga. App. 1999).

<sup>170</sup> O.C.G.A. § 40-14-1(4). 511 S.E.2d at 628.

<sup>171</sup> *Id.*, at 627.

<sup>172</sup> GILBERT ET AL, *supra* note 150.

<sup>173</sup> See, for example of discussion of these issues, Informal Opinion No. I-92-003, "Motor Vehicles: Use of Photo Radar for Speed Control," issued January 24, 1992, by the Attorney General of Illinois.

<sup>174</sup> GILBERT ET AL, *supra* note 150, at 8.

<sup>175</sup> See discussion at pp. 6 and 7 and Appendix A and Appendix B, *id.*

<sup>176</sup> N.J.S.A. 39:4-103(a), 1992; M.C.A. 63-3-519, as interpreted by AG Op. II 94-0013, Mar. 9, 1994.

<sup>177</sup> The technology that will be used has not been made known to me at this time.



### III. GOVERNMENTAL LIABILITY IN CONNECTION WITH VARIABLE SPEED LIMITS

#### A. General Principles of Governmental Liability<sup>178</sup>

##### 1. Governmental Liability in the Absence of Statute

Historically, in the absence of statutes giving parties the right to sue, state governments have been immune from lawsuits under the doctrine of "sovereign immunity." This right of states to not be sued without their consent was recognized in a line of early Supreme Court cases.<sup>179</sup> Under the sovereign immunity doctrine, a distinction was drawn by courts as to whether a particular function of a governmental unit was "proprietary" or "governmental" in nature.

The general rule is that in the absence of statutory provisions to the contrary, there can be no recovery against a state or municipal corporation for injuries caused by its negligence or nonfeasance in the exercise of functions essentially governmental in character, but there can be recovery insofar as the state or municipal corporation acts in its private or propriety capacity.<sup>180</sup>

Under the sovereign immunity doctrine, the state's protection from suit may be extended to local government units on the theory that they are acting as an agency of the state in performing a governmental function.<sup>181</sup> The difficulty arises in distinguishing a "governmental" from a "proprietary" function, and the cases are usually fact driven. Courts have generally referred to governmental functions as those that involve "discretionary" or "judgmental" powers, while proprietary functions have been characterized as "mandatory" or "operational."<sup>182</sup> The difficulty in making the distinction is shown by the decision in *Virginia Beach v. Carmichael Development*,<sup>183</sup> where the court stated, "while

the principle of law is clear and well-established, the application of it to various...activities is sometimes difficult. This is particularly so in cases where the activity in question has aspects of both governmental and proprietary functions." In that case, the court characterized governmental functions as those "to be performed exclusively for the public welfare," such as the regulation of traffic, while the "routine maintenance of a municipality's streets" is a proprietary function, since it is performed primarily for the benefit of the municipality.<sup>184</sup> Insofar as traffic regulation and highway and street maintenance is concerned, this is the line that has usually been drawn by courts in determining governmental liability. That is, the decision to regulate traffic by a certain plan, or the decision to make or not make certain improvements, is discretionary and therefore a governmental function; once the plan is being carried out, or the need for maintenance arises, the governmental unit is acting in an "operational," "ministerial," or proprietary function.<sup>185</sup>

##### 2. Statutory Liability: State Tort Claims Acts and Other Statutory Bases for Liability or Immunity

In recent years, most of the states have enacted legislation that allows parties to sue a governmental entity for injuries and damages caused by its operation of transportation facilities, including construction of roadways and regulation of traffic. Many of these laws are state tort claims acts,<sup>186</sup> which generally follow the pattern and intent of the Federal Tort Claims Act. Some states have a more narrowly drawn highway defect statute that may not require a showing of negligence for award of damages caused by defects in a highway.<sup>187</sup> A third type of law that defines governmental liability for damages or injuries arising from transportation projects is a design immunity statute, such as California's law.<sup>188</sup> The statutes generally follow the case law in that immunity is provided for those functions or activities that involve planning or design, and liability is imposed when there are "dangerous conditions" or defects in public facilities or public roadways

<sup>178</sup> For a thorough exploration of the issues of governmental liability in tort for transportation-related programs and projects, see *Public Transportation Tort Liability*, by Larry Thomas, to be published as Chapter 4 of the SELECTED STUDIES IN TRANSPORTATION LAW, by the Transportation Research Board.

<sup>179</sup> See, for example, *Cohen v. Va.*, 6 Wheat 264 (U.S. 1821); *Hans v. La.*, 134 U.S. 1 (1890); see cases cited at Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction* 2d; Vockell Comment, *State Sovereign Immunity in State Court Admiralty Suits*, 75 TEX. L. REV. 631 (1997).

<sup>180</sup> Anno., *Traffic Light Failure—Liability*, 34 A.L.R. 3d 1008, 1015, § 2(a).

<sup>181</sup> *Id.*; see also, discussion in *Va. Beach v. Carmichael Development*, 527 S.E.2d 778, 781–82 (Va. 2000).

<sup>182</sup> *Id.*; see also *A.L. Lewis Elementary School v. Metro. Dade County*, 376 So. 2d 32 (1979); *Dept. of Transp. v. Neilson*, 419 So. 2d 1071 (1982); *Lawton v. City of Pocatello*, 886 P.2d 330, 336 (Idaho 1994).

<sup>183</sup> 527 S.E.2d at 782 (Va. 2000). In its decision, the court stated, "The doctrine of sovereign immunity is 'alive and well' in Virginia," quoting from *Messina v. Burden*, 321 S.E.2d 657 (1984).

<sup>184</sup> 527 S.E.2d at 782.

<sup>185</sup> See generally note 180, and *inter alia*, *Herman v. Will Township*, 671 N.E.2d 1141 (Ill. App. 3 Dist. 1996). To the contrary, see, for example, *Potes v. Dept. of State Highways*, 341 N.W.2d 210 (1983). An interesting case is *Taylor v. City of Charlottesville*, 397 S.E.2d 832 (Va. 1990), in which the court held that a city was immune from liability for claims of negligence in its planning of street construction, because it was acting in a discretionary, governmental capacity; however, it could be held liable on a theory that it created and maintained a nuisance in the poorly designed street.

<sup>186</sup> For example, Georgia Tort Claims Act, O.C.G.A. § 32-1-3(6); North Carolina Tort Claims Act, G.S. 143-291 *et seq.*; Nebraska Tort Claims Act, N.R.S. 81-8, 209 *et seq.*; Colorado Governmental Immunity Act, C.R.S.A. 24-10-103, *et seq.*

<sup>187</sup> For example, 13a Connecticut G.S. § 144.

<sup>188</sup> CAL. GOV'T CODE § 830.6.

generally caused by failure to operate and maintain properly.<sup>189</sup>

In the great majority of cases applying these laws, courts have interpreted them narrowly and required that all conditions be met strictly before liability will be imposed.<sup>190</sup> These laws are "in derogation of the common law action against governmental entities and specif[y] certain limitations on the liability of such bodies,"<sup>191</sup> and these limitations must be strictly observed.<sup>192</sup> For example, in *Swieckowski v. City of Fort Collins*,<sup>193</sup> the court found that the creation of a ditch that caused the plaintiff's injuries was the result of the design of the roadway and not the result of negligent construction or maintenance; therefore, it was not a "dangerous condition" as defined by Colorado's Governmental Immunity Act and the plaintiff could not recover. Plaintiff's attempts to characterize the ditch as resulting from negligent construction or maintenance failed.

Where the State defended a claim involving alleged improper timing of traffic signals on the basis of a design immunity statute, the court held that the State must show, "(1) A causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; and (3) substantial evidence supporting the reasonableness of the design."<sup>194</sup> The court also held that when design immunity is raised as a defense, the trial court must "rule [as a matter of law] on whether the evidence is sufficient to support it," and therefore, "it is error to submit a design immunity defense to the jury."<sup>195</sup>

Another aspect of common law governmental liability that has been incorporated into some tort claims or governmental immunity statutes is the measure of duty the government owes to those using the public highways and streets and the notice that the government must have of defects or dangerous conditions before liability will be imposed. For example, the Illinois Local Governmental and Governmental Employees Tort Immunity Act<sup>196</sup> provides in pertinent part:

...a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condi-

<sup>189</sup> For example, 745 ILCS 10/3-103, 104; TENN. CODE ANN. § 29-20-203; COLO. REV. STAT. 24-10-106; CAL. GOV'T CODE § 830.

<sup>190</sup> See, for example, *Davis v. City of Pasadena*, 50 Cal. Rptr. 2d 8, 42 Cal. App. 4th 701 (1996); *Harrington v. Chicago and Northwestern Transp. Co.*, 452 N.W.2d 614 (1989); *Moody v. Lane County*, 584 P.2d 335 (1978).

<sup>191</sup> *Curtis v. County of Cook*, 456 N.E.2d 116, at 119 (Ill. 1983).

<sup>192</sup> *Reed v. Medlin*, 328 S.E.2d. 115 (S.C. 1985).

<sup>193</sup> 923 P.2d 208 (Colo. 1997), *reh'g denied, cert. granted, aff'd*. 934 P.2d 1380.

<sup>194</sup> *Uyeno v. State*, 286 Cal. Rptr. 328, 331, 234 Cal. App. 3d 1371 (1991); see also *Higgins v. State of Cal.*, 62 Cal. Rptr. 2d 459, 54 Cal. App. 4th 177 (1997).

<sup>195</sup> 286 Cal. Rptr. at 331.

<sup>196</sup> 745 ICLS 3-102 (a).

tion for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used, and shall not be liable...unless it is proven that it has actual or constructive notice of the existence [of the unsafe condition] in sufficient time prior to an injury to have taken measures to remedy or protect against such condition.

In *Herman v. Will Township*,<sup>197</sup> the court said that this section "codifies the common law duty of a local public body to maintain its property, including roads, in a reasonably safe condition," and while there is no common law duty to make improvements, once they are undertaken, they must be made in a reasonably safe manner.<sup>198</sup> In *Curtis v. County of Cook*,<sup>199</sup> the court found that, because of this statutory provision, there is "a duty of care only to those persons by whom the local government intended the property to be used," and that no duty was owed to the plaintiff, who was a passenger in a speed-clocking vehicle.<sup>200</sup>

On the issue of notice, the Colorado Governmental Immunity Act bars claims against the government for "inadequate design." However the Act waives sovereign immunity for a "dangerous condition of a public highway, road or street," if it is "known to exist or which in the exercise of reasonable care should have been known to exist" by the governmental unit in question.<sup>201</sup>

### 3. Liability for Power Failure Resulting in "Dead" Signals

Since the two systems presently in use in the United States that employ and enforce variable speed limits are both dependent on electronically controlled signs, it is relevant to examine those few cases that deal with tort liability of a governmental entity when there is a power outage causing failure of traffic signals. In a number of cases, courts have held that installation and maintenance of traffic control devices in a reasonably safe manner is part of the government's duty to maintain its public highways in a reasonably safe condition for public use.<sup>202</sup>

Generally, courts will look to the same issues of notice, duty of care, and applicable statutory provisions that would be applied in any other tort claim in deciding cases where a power failure has caused traffic control devices to fail. There seems to be different treatment by the courts for situations where there is a general failure of electrical power in an area and those cases where a single intersectional traffic light is out.

<sup>197</sup> 671 N.E.2d 1141 (Ill. App. 3 Dist. 1996).

<sup>198</sup> 671 N.E.2d at 1145.

<sup>199</sup> 456 N.E.2d 116 (Ill. 1983).

<sup>200</sup> 456 N.E.2d at 119, 120.

<sup>201</sup> C.R.S.A. § 24-10-103(1).

<sup>202</sup> *Quintana v. City of Chicago*, 596 N.E.2d 128 (Ill. 1992); *Johnson v. Strouse*, 697 F. Supp. 535 (D.D.C. 1988); *Wagshal v. D.C.*, 216 A.2d 172 (1966); *Thorpe v. Denver*, 494 P.2d 129 (1972).

For example, in *Chowdhury v. City of Los Angeles*,<sup>203</sup> when an area-wide power outage caused an intersectional traffic signal to go out, liability was not imposed on the city for an intersectional accident. The court found that the obvious general power failure did not create a "dangerous condition" under state statutes, and there was a "statutory conversion" of the intersection into one controlled by presumed four-way stop signs, which the motorist should have observed. Similarly, in *Quirke v. City of Harvey*,<sup>204</sup> the court affirmed a grant of the city's motion for summary judgment where city officials had turned off the power in a general area to prevent someone from electrocuting himself, and a motorist was injured in an intersectional collision where the light was out.

In both cases, the court noted that the general area power outage was clear to the driver before he arrived at and entered the intersection where the accident occurred. Also in both cases, the court found that the "proximate cause" of the plaintiff's injuries was the driver's failure to obey the statutory directive that inoperative signals are to be treated as stop signs. The Illinois case result may also depend on the Illinois case law, which allows for an intervening act (the driver's negligence) to supersede the city's act in allowing the light to be out.<sup>205</sup>

On the other hand, in a District of Columbia case where the lights were inoperative at a single intersection, rather than in a broader area, the court found that the city was liable. In *Johnson v. Strouse*,<sup>206</sup> the court found that the city had ample prior notice of a malfunction of the lights, and that a city employee whose job it was to check for such problems was at the intersection immediately before the accident and took no action. There is no tort claims act in the District of Columbia for the court to interpret. Similarly, in *Thorpe v. Denver*,<sup>207</sup> a case that arose before the Governmental Immunity Act was enacted, the court found the city liable for an intersectional collision where the city had notice of the defect and was not timely in correcting it. The court stated that the city is "under a duty to maintain its streets in a reasonably safe condition for travel," including maintenance of traffic signals, and where it "knows or in the exercise of reasonable care should know" of a defect, it must remedy it or give adequate warning to motorists.<sup>208</sup>

It should be noted, however, that in the *Chowdhury* case referred to above, the city had prior notice of the traffic light failure, and the city was not found liable.<sup>209</sup>

## B. Problems of Liability for Establishment and Enforcement of a Variable Speed Limit

As the above discussion indicates, the issues that would arise in any case involving the design, construction, and maintenance of public works such as transportation projects would apply in the case of the design and implementation of a system of variable speed limits. Further, as this report as a whole demonstrates, the issues of liability should not be different, or result in different outcomes, than cases involving implementation and enforcement of speed limits generally. As an examination of the cases makes clear, any liability that may attach is most likely to arise because of problems in the implementation of plans or design and the degree of discretion that the governmental agency has in making decisions about implementation.

For example, the examination of those cases involving finding of governmental liability, or nonliability where intersectional traffic lights are inoperative, sheds some light on how a court might rule in a case where electronic signs in a variable speed zone are inoperative. Clearly, however, the chance for automobile collisions is much greater at uncontrolled intersections than along a road or highway where all traffic is traveling in the same direction. Further, if no speed limit were shown by signs in the zone, it seems most probable that a court would rule that the limit would default to the statutory maximum, and that drivers would be held to the duty to observe a "reasonable and prudent" speed under existing conditions.<sup>210</sup>

The issue of whether governments are liable because the setting of speed limits is "discretionary" or "operational" is undecided, under the case law that was found in research for this report. In *Szymanski v. Department of Highways*,<sup>211</sup> the court found that setting an allegedly excessive speed limit and a decision not to post signs were allegations of negligent design of an intersection, rather than claims of negligent construction or maintenance; therefore they could not be a basis for liability. On the other hand, in *Bingham v. Idaho Department of Transportation*,<sup>212</sup> the court found there was no discretionary immunity for the determination of speed limits since the decisions were implementations of policy that had been adopted earlier.

<sup>203</sup> 38 Cal. App. 4th 1187, 45 Cal. Rptr. 2d 657 (1995), *reh'g denied*, 95 CDOS 7709.

<sup>204</sup> 639 N.E.2d 1355 (Ill. 1994).

<sup>205</sup> See also *Quintana v. City of Chicago*, 596 N.E.2d 128 (Ill. 1992), where the city was not found liable for a pedestrian's injuries at an intersection where the light was out, but there was no general power failure.

<sup>206</sup> 697 F. Supp. 535 (D.D.C. 1988).

<sup>207</sup> 494 P.2d 129 (1972).

<sup>208</sup> *Id.* at 130.

<sup>209</sup> 45 Cal. Rptr. 2d. at 662.

<sup>210</sup> See cases in Section I.B.2 and II.A.3 above.

<sup>211</sup> 776 P.2d 1124 (Colo. 1989).

<sup>212</sup> 786 P.2d 538, at 541-42 (1989). See also *Lawton v. City of Pocatello*, 886 P.2d 330 (Idaho 1994) and *Roberts v. Reed*, 827 P.2d 1178 (Idaho 1991). The rulings in these cases turn on the court's reading of the Idaho Tort Claims Act, but they are instructive nonetheless.

#### IV. PROPOSALS FOR LEGAL IMPLEMENTATION OF A SYSTEM OF VARIABLE SPEED LIMITS THAT WILL MEET JUDICIAL CHALLENGES

##### A. The Need for Statutory Authority

As may be seen from the above examination of challenges to existing speed laws, in order for a state to use a system of variable speed limits and enforce those limits, the authority must be delegated by statute from the legislature to an administrative agency. The reason for this is simply that, although the legislature itself clearly has authority to regulate traffic under its police power,<sup>213</sup> the legislative process moves too slowly and the legislature is too removed from the scene to make such decisions on an effective basis. As the court recognized in *State v. Imperatore*,<sup>214</sup> where changing conditions are the basis for the need for changing speed limits, the decisions must be made by "authorized agents who are at the scene and who can ascertain what any given set of conditions may require."

Courts have recognized that motorists are not "entitled to drive on whatever terms [they] think best,"<sup>215</sup> and that "state and local governments must enjoy some degree of flexibility" in their regulation of traffic.<sup>216</sup> However, as the case law shows, when a delegation of authority from the legislature to an administrative agency is examined for constitutionality, the courts will look for standards limiting the discretion of the agency, which standards must relate to the legislature's purpose and be capable of reasonable application.<sup>217</sup>

Therefore, statutes delegating to administrative agencies the authority to establish variable speed limits must meet these requirements. At the same time, the statutes must not be so detailed in their requirements that the agency cannot be as flexible as needed in changing speed limits. The New Jersey statute involved in the *Imperatore* case is quite broad in its delegation of authority to the New Jersey Turnpike Authority, and the Authority's regulation 2(c) is also broadly worded.<sup>218</sup>

<sup>213</sup> See Section II.A.1. above.

<sup>214</sup> 223 A.2d 498 (1966).

<sup>215</sup> *United States ex rel Verdone v. Cir. Court for Taylor Cty.*, 851 F. Supp. at 351.

<sup>216</sup> *Brandmiller v. Arreola*, 544 N.W.2d 894 (1996).

<sup>217</sup> *Masquelette v. State*, *supra* note 55; *Lamm v. State*, 653 S.W. 2d 495 (1983).

<sup>218</sup> N.J.S.A. 27:23-29 provides in part that the Authority is empowered to make, adopt, and promulgate regulations to "control traffic and prohibit acts hazardous in their nature or tending to impede...the flow of traffic...[and] prior to the adoption of any regulation for the control of traffic...including the designation of any speed limits, the Authority shall investigate and consider the need for...such regulation." The regulation provides that "where appropriate signs prescribing a lesser speed are posted or erected by a person or persons authorized by the...Authority...no vehicle...shall be operated in excess of the speed prescribed by said signs." The regulation also requires that vehicle speed shall be reduced "when spe-

The particular difficulty that should be avoided is to enact a law that does not allow delegation down to the level that permits "on-the-spot regulation rather than...general rules prospectively formulated."<sup>219</sup>

##### B. Proposed or Suggested Form of Laws—What is Needed

This section will address the suggested elements of a variable speed law that would meet requirements for enforcement and survive possible challenges. As noted, the New Jersey statutes creating the Turnpike Authority and delegating to it power to regulate traffic were found to be constitutional, and have not been challenged since 1966. The Texas statute delegating authority to alter speed limits to the Transportation Commission was found to be constitutional.<sup>220</sup> In both cases, however, the courts looked for appropriate limitations on the discretion of the agency to which authority was delegated. In view of the case law cited in this report, the task will be to create a statutory scheme that contains sufficient limitations to pass constitutional challenges, but that allows sufficient discretion to avoid tort liability.

The following suggestions would apply for a system as I believe it would be implemented, which would consist of lower speed limits, posted by changeable signs (electronically controlled), and based on changes in the traffic conditions (to control congestion or because of an accident) or the weather, for example. The changes could be similar to many school zones, where the maximum is fixed by statute and imposed for particular periods of time each day. This might be the case if the aim were to control speed during "rush hour," for example. It is my understanding, however, that the changed speed limits could be imposed at different times of the day, or not at all, as needed.

1. *The statutory purpose should be stated as allowing changes in the speed limit to protect the public safety.*<sup>221</sup> This would be directed toward the court's standard, as stated in *Masquelette*, that the legislature, "after declaring a policy and fixing a primary standard, may delegate" to an agency power to prescribe the details.<sup>222</sup> The suggested language also makes clear that the legislature is acting within its police power to protect the public safety, in enacting a maximum speed limit but delegating authority to an administrative agency to change the limit.

2. *The law should require that alteration of a speed limit must be based upon engineering and traffic investigations that show the need for a variable speed limit due to particular circumstances.* This requirement would be designed to meet the court's concern with ap-

cific hazards exist with respect to traffic, road, weather, or other conditions."

<sup>219</sup> *Imperatore*, *supra* at 501.

<sup>220</sup> 579 S.W.2d at 481.

<sup>221</sup> Language as to the purpose for enacting legislation is usually stated in the preamble or a separate opening section of an act.

<sup>222</sup> 579 S.W.2d at 480.

appropriate limitations on the agency's discretion to establish rules, regulations, or minimum standards to carry out the delegated power. The use of engineering and traffic surveys is clearly a "standard necessary to effect the legislature's purpose, and capable of reasonable application."<sup>223</sup> The statute could also provide that "the study should be conducted in accordance with Department of Transportation procedures," or similar language.<sup>224</sup>

3. *The statute must require posting for the new limit to be effective.* As noted, in almost all instances where speed enforcement actions have been challenged in the courts, posting of the existing limit (if a numerical maximum were involved) has been required for successful prosecution or adjudication. Further, where variable speed limits are at issue, posting is the only way for the public to be informed of what the limit is (a due process requirement). In view of the case law cited above, it is clear that no limit could be enforced unless drivers were given notice.

4. *The statute should require posting of advance warning that the legal speed limit is changing ahead.* This suggestion serves several purposes. First, it would give drivers notice and prevent accidents. This would also prevent the "speed trap" defense. See, for example, *People v. Miller*.<sup>225</sup> Advance warning would also serve a "political" purpose, in that drivers would not feel surprised or tricked by a sudden change in the speed limit.

5. *The law would require that any information, summons, or other charging documents include both the existing speed limit and the speed at which it is alleged the charged driver's vehicle was traveling.* The particular circumstances that led to lowering the speed limit at the time and place of the violation should also be included.<sup>226</sup> This gives the driver notice as to what offense is charged, as required by due process principles.

6. *The law might include a prohibition on set up of radar, photo-enforcement technology, or other electronic detection enforcement within a specific distance of the posting of the new limit.* This would avoid challenges to enforcement based on a claim of "speed traps." This provision would be more dependent on state laws and state policy on the use of electronic speed measurement than on legal considerations. See Section II.B.4, above.

7. *The law should provide broad discretion to the administrative agency for enactment of regulations and for subdelegation of decision-making power.* This is a practical consideration. Clearly, where present state law requires that a change in speed limits be approved by the governor's office, or that changes may only be made by regulations or ordinances, the system can not respond to changing conditions such as traffic congestion or the weather. Enough flexibility must be in the system that persons who are "on-the-spot" can make needed decisions and post changed speed limits. For example, the authority of the Maine Commissioner of Transportation to "make an adjustment of maximum rates of speed" under Section 29-A, Sec. 2073 is "exempt from the provisions of the Maine Administrative Procedure Act."<sup>227</sup>

8. *Either the laws or regulations should provide for the admission of certain evidence by affidavit.* Where the speed limit is decreased temporarily because of hazards such as weather, traffic, or other conditions, evidence of these reasons and of the specific limit on the portion of the highway where the offense was allegedly committed will need to be shown in an adjudication of the violation. If this evidence could be presented by affidavit, this would be a much more efficient method than having the live testimony of a DOT employee.

### C. Suggested Language

The following is suggested language for a statutory provision that would meet the requirements that appear from the examination of case law in this report. Several states' laws appear to already meet the requirements insofar as general authority of an administrative agency to change existing speed limits is concerned, but may be an impractical basis for a system of variable speed limits because they require time-consuming steps such as issuance of formal orders, regulations, or approvals.

The statutory scheme in the State of Washington<sup>228</sup> appears to meet the requirements, and in this case, the delegation has been made by the legislature to the Secretary of Transportation for the authority to increase or decrease speed limits under some circumstances and on the basis of a traffic and engineering investigation. There is no requirement for approval by the governor, and the authority has been delegated by the Secretary

<sup>223</sup> Lamm, *supra* at 498.

<sup>224</sup> See, for example, CONN. GEN. STAT. ANN. 810-180(8), which provides that, "The department shall use procedures established by rule to establish speed limits under this section." TEX. TRANSP. CODE 545-353(e) provides that, "The commission, in conducting the engineering and traffic investigation specified...shall follow the 'Procedures for Establishing Speed Zones' adopted by the commission. The commission may revise the procedure to accommodate technological advancement in traffic operation, the design and construction of highways and motor vehicles, and the safety of the motoring public."

Inclusion of such language might be helpful in those jurisdictions where officials anticipate challenges to variable speed enforcement based on arguments that any traffic engineering study must demonstrate the exact speed that must be displayed and enforced at any given time.

<sup>225</sup> 153 Cal. Rptr. 192 (1979).

<sup>226</sup> See, for example, OR. REV. STAT. ANN. 810.180(4)(c), which requires that any order imposing a reduced speed limit specify "the hazard or damage and is effective only for a specified time that corresponds to the hazard or damage identified."

<sup>227</sup> 29-A M.S.A. § 2073(c). The authority to adjust the speed limit requires "the approval of the Chief of the State Police."

<sup>228</sup> R.C.W. 46.61.400, 405, 410, 415.

to the State Traffic Engineer.<sup>229</sup> For the variable speed zone on I-90 in the Snoqualmie Pass area, the authority has been delegated to the DOT employee who is in charge of that region.<sup>230</sup> There is no record that this system has ever been challenged in court.

The following is suggested language:

1. A first section would establish prima facie speed limits.

2. Whenever the State DOT determines upon the basis of an engineering and traffic investigation that the safe and orderly movement of traffic upon any highway under its jurisdiction will be facilitated by the establishment of a variable speed limit, the department may establish a temporary speed limit that is different than the existing speed limit on that highway. The temporary limit may be effective for all of the highway or for a designated portion of the highway, and may be effective for all times of the day and night or such times as the department shall determine. The authority to establish such a variable speed limit is subject to all of the following:

(a). A speed limit established under this section is effective only when fixed or variable signs giving notice thereof are displayed on any portion of the highway where the limit applies.

(b). For any highway or portion of a highway where such a speed limit is established, signs shall be posted 500 feet ahead of any change in the speed limit, giving warning to motorists of the speed zone ahead.

(c). In any enforcement of a traffic infraction for a violation of a speed limit established according to this section, the citation shall state the existing speed limit in force at the time and the alleged speed of the vehicle that was cited.

(d). In an adjudication of an alleged violation of a speed limit established under this section, evidence shall be presented by the state showing the circumstances that provided the basis for the changed speed limit. Notwithstanding any other provision of law, such evidence may be presented by affidavit.

#### IV. CONCLUSION

Courts, in adjudicating challenges to speeding violations, have long recognized that "under certain conditions the speed of a car can be dangerous and hazardous to the occupant and others using the public highway or property adjoining the same."<sup>231</sup> For that reason, the courts have also recognized that in exercising its police power to protect the public, broad leeway or flexibility is appropriately given to state agencies in setting speed limits and otherwise regulating traffic.

The motoring public also recognizes this authority. As the above discussion and examination of case law shows, over the years there have been very few challenges to a state agency's power to enact and enforce speed limits that have reached the level of a court of record.

In those instances where a challenge was made, courts have found delegations of authority from the legislature would meet constitutional requirements, and that state agencies acted within their delegated authority in almost all cases. In those few instances where a state or local agency was found not to have legally enacted a speed limit, there was a clear lack of observance of required limitations on the delegation of authority.

We can conclude from this examination that, where there is a delegation of authority to an administrative agency with appropriate limitations, and the agency acts within those limitations, speed limits that are established may be enforced without fear that they will be subject to challenge.

Further, this examination has shown that, as to creation and enforcement of proposed "variable speed limits," the legal issues that will arise should be no different from the legal issues that have been considered by courts in adjudicating alleged violations of prima facie speed limits and other fixed maximum speed limits.

<sup>229</sup> Interview with James Mahugh, Washington State DOT (July 17, 2001).

<sup>230</sup> Washington State memoranda entitled, *Delegation of Authority to Operate Variable Speed Limit System*, most recently dated Sept. 9, 2000; interview with James Mahugh, Washington State DOT (July 17, 2001).

<sup>231</sup> See note 39 and text.

NATIONAL RESEARCH COUNCIL  
TRANSPORTATION RESEARCH BOARD

Mail Address  
2101 Constitution Avenue, N.W.  
Washington, D.C. 20418

Office Location  
2001 Wisconsin Avenue, N.W.  
Washington, D.C. 20007

Telephone (202) 334-2934  
Fax (202) 334-2003  
Internet <http://www.nas.edu/trb>

SURVEY ON USE AND ENFORCEMENT OF  
VARIABLE SPEED LIMITS

The term "variable speed limit" is used to mean a posted speed limit that may change to a different posted limit according to conditions at a particular location on a street or highway. Examples are: changing speed limits for areas around schools during hours when children may be entering and leaving; changing speed limits in construction zones; changing speed limits to prevent or alleviate traffic congestion; and changing speed limits due to severe weather conditions.

The results of this survey will be incorporated into a report on the use and enforcement of variable speed limits that will appear in a forthcoming edition of Legal Digest, published by the Transportation Research Board, which will be available to transportation lawyers and other interested parties.

Your cooperation in completing the following survey is appreciated. Please return your responses by December 4, 2000 to:

James B. McDaniel, Esq.  
Counsel for Legal Research Projects  
Transportation Research Board  
2101 Constitution Avenue, NW  
Washington, D.C. 20418

Please respond to all questions that apply in your State. If you do not have state-wide variable speed limits, but you are aware of particular locations or jurisdictions within your State where variable speed limits are used, please provide that information.

1. Agency name \_\_\_\_\_
2. Agency address \_\_\_\_\_
3. Name, title, telephone and FAX numbers of person responding to the survey \_\_\_\_\_

4. Are variable speed limits currently in use in your State? If so, please state the statutory or regulatory authority for those speed limits for the following situations:

A. School zones \_\_\_\_\_ Legal authority \_\_\_\_\_

B. Construction zones \_\_\_\_\_ Legal authority \_\_\_\_\_

C. Congestion control \_\_\_\_\_ Legal authority \_\_\_\_\_

D. Weather conditions \_\_\_\_\_ Legal authority \_\_\_\_\_

E. Other \_\_\_\_\_ Legal authority \_\_\_\_\_

F. Not State-wide, but in the following place(s) for

A. \_\_\_\_\_

B. \_\_\_\_\_

C. \_\_\_\_\_

D. \_\_\_\_\_

E. \_\_\_\_\_

5. If variable speed limits are in use in your jurisdiction, are they enforced any differently than other posted speed limits (i.e., by radar, photo-enforcement, or law enforcement vehicle pacing)?

5A. If variable speed limits are used in your State, as indicated in answer to question 4, what advance warning is given drivers of the variable speed limit and of enforcement techniques?

\_\_\_\_\_

\_\_\_\_\_

6. Are variable speed limits enforced by photo-enforcement in your jurisdiction? \_\_\_\_\_

7. Are you aware of any legal challenges that have been raised to the enforcement of variable speed limits in your State, and if so, what challenge was made. If there is any case law, please provide a citation or other means of identifying the case.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



8. Was the challenge successful? \_\_\_\_\_

Other comments

---

---

---

---

Please direct questions about this survey to:

Margaret L. Hines  
3758 W Street, N.W.  
Washington, DC 20007-1786  
Tele: (202) 337-2294  
FAX: (202) 337-2294\*51

Please return the survey responses to:

James B. McDaniel, Esq.  
Counsel for Legal Research Projects  
Transportation Research Board  
2101 Constitution Avenue, N.W.  
Washington, DC 20418

Response Requested by December 4, 2000

## ACKNOWLEDGMENTS

This legal study was performed under the overall guidance of NCHRP Project Panel SP20-6. The Panel is chaired by Delbert W. Johnson (formally with Office of the Attorney General of Washington). Members are Grady Click, Texas Attorney General's Office; Donald L. Corlew, Office of the Attorney General of Tennessee; Lawrence A. Durant, Louisiana Department of Transportation and Development; Brelend C. Gowan, California Department of Transportation; Michael E. Libonati, Temple University School of Law; Marilyn Newman, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, Boston, Massachusetts; Lynn B. Obernyer, Duncan, Ostrander and Dingess, Denver, Colorado; Julia L. Perry, Federal Highway Administration; James S. Thiel, Wisconsin Department of Transportation; Richard L. Tiemeyer, Missouri Highway and Transportation Commission; Richard L. Walton, Office of the Attorney General of the Commonwealth of Virginia; Steven E. Wermcrantz, Wermcrantz Law Office, Springfield, Illinois; and Robert L. Wilson, Arkansas Highway and Transportation Department. Edward V.A. Kussy provides liaison with the Federal Highway Administration, and Crawford F. Jencks represents the NCHRP staff.

### **TRANSPORTATION RESEARCH BOARD**

National Research Council  
2101 Constitution Avenue, N.W.  
Washington, DC 20418

NON-PROFIT  
U.S. POSTAGE  
PAID  
WASHINGTON, DC  
PERMIT NO. 8970