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LEGAL ISSUES RAISED BY ORBIS, A MOTOR VEHICLE SPEED DETECTION DEVICE TAKING PHOTOS OF SPEEDERS

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16. Abstract

This report reviews the legal basis for certain potential challenges to the use of unmanned mechanical devices which (a) detect motor vehicles exceeding predetermined speed limits, and (b) photograph both the front portion of these vehicles and the faces of their drivers and passengers. In particular, the report is focused on the operation of Orbis, a member of this class of speed-detection devices manufactured by the Boeing Corporation. Three aspects of the device's legality are discussed: (1) the question of whether its operation violates individuals' right of "privacy" as protected by the Federal Constitution, State statues, and common-law precedents; (2) the issue to unlawful inequities in traffic-law enforcement, resulting from the device's operational limitations, which permit some speeders to pass by undetected; and (3) the admissibility into evidence in speeding prosecutions of photographs taken by the device.

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Summary

This report reviews the legal basis for certain potential challenges to the use of unmanned mechanical devices which detect motor vehicles exceeding predetermined speed limits and which photograph both the front portion of these vehicles and the faces of their drivers and passengers. In particular, the report is focused on the operation of Orbis, a member of this class of speed detection devices manufactured by the Boeing Corporation. Three aspects of the device's legality are discussed: (1) the question of whether its operation violates individuals' right of "privacy" as protected by the Federal Constitution, State statutes, and common law precedents; (2) the issue of unlawful inequities in traffic law enforcement, resulting from the device's operational limitations, which permit some speeders to pass by undetected; (3) the admissibility into evidence in speeding prosecutions of photographs taken by the device.

The operation of the particular speed detection device under review is described in an introduction, followed by Part I which reviews various constitutional and statutory right-of-privacy theories which could be invoked to challenge the device's use. It is concluded that the device does not interfere with legally protected privacy rights.

Part II of the report discusses possible defenses available to photographed persons based on the device's systematic failure to detect certain violators. It concludes that such defenses are without merit, and that the device's failure to detect some violators does not legally bar prosecution of speeders who are detected.

Part III of the report discusses issues which arise in the course of prosecutions of speeders when it is attempted to introduce the device's photographs into evidence. It concludes that progressive courts may be willing to accept such photographs as legal evidence pursuant to a relatively new justification for the admission of photographic evidence. Because of the lack of widespread judicial acceptance of this theory, however, the admissibility of these photos cannot be predicted with certainty. The alternative of seeking legislation to direct courts to admit the device's photographs is also discussed.

Introduction:

What is Orbis?

Orbis is a speed detection and recording device which is capable of detecting a speeding motor vehicle and

photographing in a single picture the front portion of the vehicle, including its front registration plate, and the faces of its operator and its passengers. The device detects speeding vehicles by measuring the time elapsed between a vehicle's entry and exit through a defined zone in a lane of a roadway. The length of this zone is precisely fixed by trip wires encased in rubber tubing which are laid across the lane. When Orbis' self-contained computer indicates that a vehicle has passed through the zone so quickly that it must have exceeded a predetermined maximum speed, the computer signals a two-lens camera component to snap a picture of Orbis' meter readings (showing date, time of day, vehicle speed) and a picture of the front of the speeding vehicle. The latter photograph is clear enough to permit easy reading of the vehicle's front registration plate and to produce a clear representation of persons occupying the vehicle.[1] Pictures are taken using an infra-red flash unit which produces a dull red glow. The picture-taking ability of the flash unit is not affected by headlight

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1 The Orbis camera is equipped with a telephoto lens with a depth of field of approximately twelve feet. This limited depth of field results in a sharp image only of the vehicle triggering the device, not preceeding or following vehicles. Myers, Ritt, and Ottman, Millard F., Jr., Orbis III: Description and Legal Aspects 5.

The author has viewed samples of photos taken by Orbis. They clearly portray all occupants of a vehicle's front seat. The samples did not include pictures of cars with occupants stationed in the rear seat. Photos appeared clear enough, however, reasonably to expect that persons occupying the rear seat of a photographed vehicle could be identified from the photo.

glare or darkness.[2] After a photograph is taken, the device requires four seconds for its flash unit to be recharged by its self-contained battery and for its film to advance to the next frame. It is then ready to record another speeding violation.

It may well be asked at this point why it is necessary to photograph the operator of the speeding vehicle -- why a photographic record of the speeding vehicle's registration plate number, for example, would not suffice to obtain a speeding conviction. This issue was raised in People v. Hildebrandt, 308 N.Y. 397, 126 N.E. 2d 377, 49 A.L.R. 2d 449 (1955), a case involving a criminal prosecution for speeding brought against the registered owner of the speeding vehicle. Because the car was not stopped at the time of the offense, or the driver otherwise identified, the prosecution could not produce direct evidence at trial as to who was in fact driving the speeding auto. The court refused to create a "rebuttable presumption" or inference that the owner of the vehicle was the operator at the time the offense took place.

> "Speeding in an automobile is personal, individual wrongdoing, which can subject the wrongdoer to serious penalties.... Such 'traffic infractions' are of the grade of 'offenses,' not felonies or misdemeanors, but they are tried like misdemeanors,...

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2 Id.

> and to them...there should be applicable the criminal-law rules of presumption of innocence and necessity of proof of guilt beyond a reasonable doubt."
>
> 126 N.E. 2d at 378.

The court went on to find no basis to assume that autos are always driven by their owners.

> "...it follows, we think, that it is hardly a normal or ready inference that an automobile which speeds along a highway is being driven by its owner, and by no other person."
>
> 126 N.E. 2d at 379.

The court reversed the owner's conviction. This case clearly establishes the requirement for identification of a speeding vehicle's operator in order to prosecute for speeding. It is for this reason that a photograph of the driver of the speeding vehicle is required.

Throughout this report it is assumed that the Orbis device is used only to detect vehicles exceeding lawful speed limits, and that its photographic products are used only to obtain convictions of drivers of such vehicles through traditional judicial processes.[3]

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[3] It is beyond the scope of this report to hypothesize as to the possible misuses of photographs taken by Orbis, and to describe the potential liability of the various actors involved in each situation. Thus, it is assumed that photos will not be used to blackmail drivers, will not be published in local newspapers to shame them, will not be shown to spouses or employers of photographed drivers, etc.

PART I

Orbis and Privacy

Whenever the spectre of government photographic surveillance of citizen activities is raised, concern is promptly voiced over the loss of personal rights of privacy which would result from such activities.[4] Orbis has engendered just such a reaction. Federal officials reviewing the device's operation have reported receiving informal complaints about the Orwellian nature of the device from automobile owners' associations and from civil liberties groups. (The device's manufacturer states in its descriptive literature that Orbis is available with a bullet-resistant housing, apparently to prevent sabotage.) While no specific Federal constitutional provision explicitly protects an individual's right to privacy,[5] several United States Supreme Court and lower federal court cases can be used to delineate the extent of such a right and the impact of Orbis on it. In general, these cases indicate that only a limited right of privacy is protected by the United States Constitution and that Orbis' use as a law enforcement device is not inconsistent with this right.

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4 See, for example, Belair, Robert R., and Bock, Charles D., "Police Use of Remote Camera Systems for Surveillance of Public Streets," 4 Col. Human Rights L. Rev. 143 (1972).

5 Beaney, William M., "The Constitutional Right to Privacy in the Supreme Court," 1962 Supreme Court Review 212, 214.

A. Constitutional Protection of Privacy

The first explicit discussion of a right to privacy by the Supreme Court appears in the Court's opinion in Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), in which defendants challenged their convictions under a Connecticut statute prohibiting distribution of birth control information to married persons. The Court, in an opinion by Justice Douglas, held that the Connecticut law unnecessarily invaded a "zone of privacy" surrounding the marital relationship, 381 U.S. at 485, and was therefore unconstitutional. This zone of privacy is not specifically enumerated in the Constitution, but is instead generated by implication from various constitutional provisions. The Court noted that:

> ...specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." 381 U.S. at 484 (citations omitted).

The opinion in Griswold appears to be based on two determinations made by the Court; first, that the marital relationship belongs within a class of fundamental rights deserving of special protection; and, second, that, on balance, the Connecticut statute intruded unnecessarily far into that relationship:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 381 U.S. at 485 (emphasis in original; citations omitted).

Lower Federal courts and state courts have hesitated to find these two preconditions in cases arguably involving incidents of invasion of privacy.[6] Examples of cases involving photographs which courts have held to fall both within and outside of the Griswold reasoning provide further insight into the nature of privacy rights protected by that

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> "...courts have consistently refused to extend the holdings of Griswold beyond its own facts. The Supreme Court itself has been reluctant to cite Griswold in its subsequent decisions." (The footnotes summarizing cases in support of these statements have been omitted.) Comment, "Constitutional Law - A Right of Privacy in Photographs and Fingerprints," 17 N.Y. Law Forum 1126 at 1128-29 (1972). But see, Roe v. Wade, __ U.S. __, 41 U.S. L. Week 4213 (Jan. 22, 1973), in which plaintiff, citing, inter alia, Griswold, successfully challenged the constitutionality of a Texas anti-abortion statute as an unlawful invasion of personal privacy.

that case's rationale. In York v. Story, 324 F.2d 450 (9th cir., 1963), a case decided prior to the Griswold decision, plaintiff brought a civil rights action against several municipal police officers, claiming that her constitutionally protected right of privacy was violated when one officer ordered her to pose for photographs in the nude after she went to the city police department to report an assault upon her.[7] Other defendant officers duplicated the photographs and circulated them among department personnel. The court, developing the concept of penumbral constitutional rights later articulated in Griswold, 324 F.2d at 454-56, held that plaintiff's allegations constituted "an arbitrary intrusion upon the security of her privacy, as guaranteed to her by the Due Process Clause of the Fourteenth Amendment." 324 F.2d at 456.

In Travers v. Paton, 261 F. Supp. 110 (D. Conn. 1966), again a civil rights action, plaintiff, a state prison inmate, sought damage from members of the Connecticut Parole Board,

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[7] Plaintiff's action was based on a federal statute permitting suits to be brought in federal courts against state officials acting in their official capacity who deny constitutionally protected rights.

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,or other proper proceeding for redress. 42 U.S.C. § 1983.

the prison's board of directors, and the prison warden who collectively approved the filming of his parole hearing by defendant television station as part of a documentary series on Connecticut's prison system. Plaintiff claimed that the filming and subsequent broadcasting of his hearing without his knowledge and consent violated his right to privacy. The court observed that:

> Since no "laws" of the United States are involved, the plaintiff's case rests solely on the proposition that the Constitution contains a so-called "right of privacy." This contention begins and ends with Griswold v. Connecticut... for there is no other case support for the argument. 261 F. Supp. at 112-113 (Footnotes omitted).

After summarizing the facts and holdings of Griswold, the district court cited York v. Story, supra, and distinguished it from the case before it:

> The York case is distinguishable. There, the photographic intrusions were so shocking that "our polity will not endure it..." and revelations were so unwarranted in view of the victim's situation as a complainant as to outrage the community's notions of decency. Furthermore, the court pointed to the fact that the plaintiff had been ordered by the police to pose in the nude for photographs over her objection and without any legitimate purpose. This was held to be an infringement of her constitutionally guaranteed liberty. 261 F.Supp. at 115 (citations omitted).

The court decided that the inmate's right to privacy had not been violated. 261 F. Supp. at 116.

Given the Griswold decision and these photographic invasion-of-privacy cases applying Griswold rationale, it seems clear that Orbis' use as a law enforcement device does not constitute an unconstitutional invasion

of privacy. Applying the first prong of the Griswold test, namely, whether an especially fundamental right or zone of privacy is pierced by Orbis, it cannot be said that the right to drive one's automobile is anywhere near so fundamental as the rights implicit in the marital relationship (Griswold) or the right not to have one's body publicly exposed (York).[8] The driving activity is already heavily regulated by states through periodic licensing procedures which include test of visual acuity, driving skills, and knowledge of basic driving rules and regulations.[9] Further, the exercise of the right to drive is accomplished on public roads, and is therefore not so private in nature as for example, the exercise of marital rights protected in Griswold.

Orbis does not come close to violating the second test applied in Griswold, namely, whether the invasion was unreasonable. First, Orbis will photograph only those vehicles which trigger its mechanism by exceeding the prearranged speed for which the device is set, and will not photograph all vehicles passing it. In this respect it arguably constitutes a lesser intrusion than would a police officer assigned to apprehend speeders, who would

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8 Or the right to terminate an unwanted pregnancy, c.f. Roe v. Wade, __ U.S. __, 41 U.S.L. Week 4213 (Jan. 22, 1973) (supra note 6).

9 See, e.g. Mass. Gen. Laws c. 90 § 8; N.Y. Vehicles and Traffic Law § 502 (1972 supp.).

observe all vehicles passing before him. Photographs produced by Orbis do not appear to differ materially from the observations a police officer could legitimately record in his notes after stopping a vehicle exceeding the speed limit. The photographic intrusion caused by Orbis would seem even less significant than the filming of the parole hearing permitted in Travers v. Paton, supra. For these reasons, it seems quite clear that Orbis' use in traffic law enforcement does not invade constitutional rights of privacy.

B. Prohibition Against Unreasonable Searches

An alleged speeder challenging the introduction into evidence of an Orbis photograph taken without a proper search warrant may seek to rely explicitly on the Fourth Amendment right to be free from unreasonable searches. In Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), the Supreme Court barred the introduction into evidence of a conversation overheard by FBI agents who electronically bugged the outside of Katz's glass-enclosed telephone booth without first securing a search warrant. In their arguments to the Court, both petitioner and respondent stressed the physical construction of the telephone booth - its clear glass walls making visual intrusions easily accomplished, its relatively sound-proof construction limiting intrusions into callers' conversations. But the proper inquiry, according to the Court, is whether the

government surveillance invades an area which may reasonably be expected to be free from public exposure.

> The Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
>
> 389 U.S. at 351-2 (citations omitted).

Applying this test, the Court found that the government's eavesdropping "violated the privacy upon which he (Katz) justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." 389 U.S. at 353.[10]

This language could be adopted by a speeding defendant and applied literally to support his objection to a photograph taken of him in his glass-enclosed automobile, an area arguably equivalent to a telephone booth and one in which a driver has an expectation of privacy. While facile, this argument slurs over the crucial distinction between visual intrusion by Orbis and the aural eavesdropping present in Katz. What the Court protected in Katz was the defendant's interest in the privacy of his oral telephone conversations, not a general right to be free from all types of surveillance. It was only sound communications which Katz could reasonably expect to be private in his glass booth. Oral conversations

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[10] For a more complete discussion of this case in the context of photographic surveillance, see Belair, Robert R., and Bock, Charles D., "Police use of Remote Camera Systems for Surveillance of Public Streets," 4 Col. Human Rights L. Rev. 143 at 170 ff.

being held in an automobile should likewise be protected from government eavesdropping by the Katz decision. But, as to those aspects of himself which a person knowingly exposes to the public while operating an automobile, the decision in Katz directs that no Fourth Amendment protection obtains. Mere visual observation of a person's face, whether through a glass-enclosed telephone booth or a glass-enclosed automobile, is therefore not constitutionally proscribed.[11]

C. Impacts on Freedom of Association

A challenge to Orbis' employment as a speed detection and recording device may come from persons who on first analysis do not appear to be immediately affected by the device's use. These persons, passengers in vehicles traveling roads patrolled by Orbis, may complain that the use of any photographic surveillance device by the State "chills," or inhibits, exercise of constitutionally protected rights of association guaranteed by the First Amendment.[12] This

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[11] There is another distinction between Katz and the facts in a typical Orbis speeding prosecution. When a speeding violation occurs, there is no time for a police officer to obtain a search or arrest warrant and still apprehend the speeder. For this reason, state statutes generally authorize the immediate arrest of speeders. See, e.g,. Mass. Gen. Laws c. 85 § 11. If arrest may be made in such circumstances, it seems proper to permit the lesser intrusion of an Orbis photograph of the alleged violator.

[12] See, e.g., N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), discussing freedom of association as an aspect of First Amendment rights made applicable to the States by the Fourteenth Amendment.

limitation on freedom of association, their argument would run, results from an unwillingness to be officially observed and recorded as "fellow travelers" in autos photographed by Orbis. Rather than risk a permanent photographic record of their trip, the argument goes, these persons will stop associating together as drivers and passengers in automobiles using Orbis-patrolled roads. Orbis' use thus potentially inhibits them from riding with persons with whom they would otherwise associate.[13]

This argument draws support from two cases which have received considerable publicity:[14] Tatum v. Laird, 444 F.2d 947 (D.C. Cir. 1971), rev'd., 408 U.S. 1 (1972); and Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (1969), rev'd., 56 N.J. 210 (1970). Both cases involved surveillance by government agents of plaintiffs' lawful group political activity. In both cases, this surveillance was justified as necessary to gather information on potential civil disturbances. In Tatum v. Laird, plaintiffs objected to surveillance carried

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13 It may be possible to eliminate portions of an Orbis photograph showing other passengers in the photographed vehicle before the photo is admitted into evidence. See 3 Scott, Photographic Evidence § 1454 at 274 (2d ed. 1969). Expungement does not answer the argument made here, because it is the existence of the permanent unedited photographic record in the State's hands which chills exercise of First Amendment rights.

14 See, for example, Spritzer, Ralph, "Electronic Surveillance By Leave of the Magistrate: The Case in Opposition," 118 U. Pa. L. Rev. 169 at 196 (1969); Belair, Robert R., and Bock, Charles D., "Police Use of Remote Camera Systems for Surveillance of Public Streets," 4 Col. Human Rights L. Rev. 143 at 158 (1972).

on by U.S. Army observers allegedly in support of the Army's role in the supression of civil disorders; in Anderson, objection was made to a directive issued by the New Jersey Attorney General requiring local law enforcement officials to report on certain political activity within their jurisdictions.

> "...(A)ppellants [in Tatum] contend that the present existence of this system of gathering and distributing information, allegedly far beyond the mission requirements of the Army, constitutes an impermissible burden on appellants and other persons similarly situated which exercises a present inhibiting effect on their full expression and utilization of their First Amendment rights of free speech, etc." 444 F.2d at 954 (emphasis in original).

And, in Anderson,

> "Generally plaintiffs submit that the intelligence system urged by the Attorney General is so broad and sweeping that any gathering or event could qualify for a write-up, entry of a report into central State files, evaluation and dissemination. Broadly, they urge that this system, considering its scope, can only have a deterring effect on the exercise of First Amendment rights not only by them but also by all citizens." 106 N.J. Super at 549.

In Tatum, the Court of Appeals held that plaintiffs had presented sufficient facts to state a claim for relief, and remanded the case to the district court for a determination of this claim. 444 F.2d at 958. In Anderson, the court likewise found that plaintiffs' cases contained meritorious claims and granted the relief requested (rescission of the surveillance order and destruction of all data files accumulated pursuant to it). 106 N.J. Super. at 557-58.

But, on appeal, these decisions were reversed. In Tatum (now Laird v. Tatum, 408 U.S. 1 (1972)) the U.S. Supreme Court stated that the plaintiff's "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," 408 U.S. 1 at 13-14. When such actual harm occurs, the Court stated in dicta, federal courts will then be available to provide appropriate remedies. 408 U.S. at 16. In Anderson, the New Jersey Supreme Court found plaintiffs' claim to be based on a "hypothetical exposition of what could happen," 56 N.J. 210 at 225 (1970), and in a lengthy opinion unanimously reversed the court below.

Given the appellate court treatment of these First Amendment "chilling" challenges to government surveillance, it is clear that a similar challenge to Orbis would not succeed. Further, Orbis' operation is clearly distinguishable from the surveillance in the cited cases in that Orbis does not involve observations of arguably protected political speech and association. No nexus is present between Orbis' surveillance and First Amendment rights. The possibility that Orbis might photograph a particular speeding vehicle does not, under almost any conceivable circumstance, pose a tangible present or future threat of interference with First Amendment rights to provide a realistic basis for anticipatory judicial relief.

D. Common Law Rights of Privacy

Objection to Orbis' use may be based on state common law rights of privacy[15] which may, as a matter of public policy, circumscribe States' actions. While it is beyond the scope of this report to explore the extent and nature of particular States' liability for violation of common law rights of privacy or the availability of injunctive relief in such situations,[16] persons photographed by Orbis could claim they are victims of the tort of invasion of privacy committed by a State and so are entitled to injunctive and/or financial relief.

The common law right of privacy has been characterized as protecting four basic interests:

> "The right of privacy is invaded when there is:
>
> > "(a) Unreasonable intrusion upon the seclusion of another,...
> >
> > "(b) Appropriation of the other's name or likeness,...

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15 The common law right of privacy is recognized in 31 States, and has been explicitly rejected by courts in only four States: Rhode Island, Nebraska, Texas, and Wisconsin. William L. Prosser, Law of Torts 831-32 (3d ed., 1964)

16 See note, "Administration of Claims Against the Sovereign-A Survey of State Techniques," 68 Harv. L. Rev. 506, 513 (1955).

> "(c) Unreasonable publicity given to the other's private life,...
>
> "(d) Publicity which unreasonably places the other in a false light before the public...."[17]

A quick review of Orbis' proposed operation[18] indicates that Orbis may at most result in interference with the first privacy interest. Continuing the assumption that Orbis will be used only for proper traffic law enforcement purposes,[19] Orbis operation should result in neither improper use of photographed drivers' pictures, nor in publicity focused on drivers' private affairs, nor in false publicity about particular drivers.

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17 American Law Institute, Restatement of the Law, Second Torts § 652A (Tent. Draft No. 13, 1967). See also, Prosser, William L., Law of Torts 829 ff. (3d ed. 1964), and, by the same author, "Privacy," 48 Calif. L. Rev. 383 (1960), where an extensive analysis of the cases is made which supports the four-fold division of privacy interests. But see, Bloustein, Edward, "Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser," 39 N.Y.U. L. Rev. 962 (1964), presenting cases which challenge Prosser's analysis.

18 See text at pages 2-4, supra.

19 The possibilities for abuse of Orbis and its photographic products may be endless. See note 3, supra. It is beyond the scope of this report to explore potential liability of various actors using Orbis photographs other than as described in this report.

The "intrusion upon seclusion" invasion of privacy has been further explained as follows:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another, or his private affairs or concern, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable man.[20]

This statement of the tort casts the required inquiry along lines similar to those involved in the Katz case, supra, where the issue was the reasonableness of one's expectation of privacy. Here, as there, Orbis' visual intrusion cannot reasonably be considered an offensive invasion of a driver's solitude or seclusion. Nor can operation of an automobile on a public road or highway, with its attendant licensing and extensive regulations, be considered a "private affair." The activity itself takes place in a glass-enclosed vehicle, which permits easy visual observation, and which could hardly be considered a place of "solitude" or "seclusion." The public nature of the driving activity is analogous to the activity photographed and publicized in Gill v. Hearst Publishing Co., 40 Cal. 2d 224, 253 P. 2d 441 (1953). In that case, plaintiffs, a husband and wife, sought damages for

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[20] American Law Institute, Restatement of the Law, Second, Torts § 652B (Tent. Draft No. 13, 1967).

invasion of privacy after defendant published a photograph of them as they embraced in their retail shop. The court rejected plaintiffs' complaint stating:

> Here plaintiffs, photographed at their concession... had voluntarily exposed themselves to public gaze in a pose open to the view of any persons who might then be at or near their place of business. By their own voluntary action plaintiffs waived their right of privacy so far as this particular public pose was assumed, for "there can be no privacy in that which is already public." The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiff's place of business at the time it was taken to see them as they had voluntarily exhibited themselves. 40 Cal. 2d at 230. (citations omitted).

It is submitted that a court would also reject a suit brought against the State seeking damages and/or an injunction against Orbis as an invader of privacy.

E. Statutory Rights of Privacy

State statutes dealing with the right of privacy generally protect against interference with only the second of the four privacy interests listed above,[21] namely, the appropriation of another person's likeness for gain.[22] New York, for example, makes criminal the use, "for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any living person without having first obtained the written consent of such person...." N.Y. Civil Rights Law

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21 See text at note 17, supra.

22 See, William L. Prosser, Law of Torts 840 (3d ed., 1964).

§ 50.[23] Persons whose pictures are so used may also recover from the person who appropriated the picture. N.Y. Civil Right Law § 51.[24] Assuming no unauthorized use of Orbis photos for advertising or business purposes, there does not appear to be any possibility that Orbis' use will contravene such statutes and give rise to civil and/or criminal liability.

PART II

Equal Protection Aspects of the Use of Orbis

Due to its design characteristics, Orbis cannot photograph every speeder passing it by. The device can monitor only one lane of traffic at a time, and requires four seconds after taking a photograph to recycle itself for the next picture. Some violators will therefore not be detected. A defendant who is being prosecuted for a speeding violation may cite these limitations and assert that the use of Orbis denies him equal protection of the law because he is being prosecuted while other violators have escaped detection. It seems unlikely, however, that a defendant will be successful in challenging Orbis on this ground: Orbis' limitations do not result in the

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23 Utah and Virginia have similar provisions. Utah Code Ann. § 76-4-8 (1953); Va. Code § 8-650 (1950).

24 See also, Utah Code Ann. § 76-4-9 (1953); Va. Code § 8-650 (1950).

intentional discrimination proscribed by the Fourteenth Amendment's Equal Protection Clause.[25]

The common-sense response to this objection follows easily when Orbis' operation is compared to the operation of a single police officer assigned to apprehend speeders on a highway. During the time interval in which the policeman detects a speeder, flags him down and issues a summons, other speeders may whiz by unscathed. Clearly a violator who has been caught should not be able to bar his conviction because the policeman cannot do two things at the same time. Similarly, the mere fact that Orbis cannot photograph every violator should not prevent its use as a traffic control device.

In the landmark case dealing with discriminatory enforcement of state laws, the U.S. Supreme Court has stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution." Yick Wo v. Hopkins, 118 U.S. 356 at 373-74, 30 L. Ed. 220 (1886).

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25 "Nor shall any State...deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Fourteenth Amendment.

See, comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws," 61 Col. L. Rev. 1103 (1961); note, "Discriminatory Law Enforcement and Equal Protection From the Law," 59 Yale L.J. 354 (1950).

In Yick Wo, petitioner had been convicted of violating an ordinance that made it a misdemeanor to maintain a laundry in certain structures without first obtaining the consent of the municipal board of supervisors. While the Court criticized the ordinance, it did not hold it invalid. Instead, the Court reversed petitioner's conviction because the municipal board had discriminated against persons of Chinese ancestry by denying their applications for permits while granting permits to white persons.

A more recent case has expanded on Yick Wo to indicate the type of discriminatory conduct which the Equal Protection Clause prohibits. Snowden v. Hughes, 321 U.S. 1, 88 L. Ed. 497 (1944). There petitioner brought a civil rights action against state election officials who refused to certify his candidacy for the Illinois legislature. The Court stated:

> The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class of person, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself. But a discriminatory purpose is not presumed; there must be a showing of "clear and intentional discrimination." 321 U.S. at 8 (citations omitted).

The holdings of Yick Wo and Snowden v. Hughes do not apply directly to the use of Orbis because these cases involved the enforcement of civil statutes, not a criminal statute. No defendant has ever persuaded the U.S. Supreme Court to reverse his conviction because it resulted from discriminatory enforcement of a criminal law.[26] In Oyler v. Boles, 368 U.S. 448, 82 S.Ct. 501, 7 L. Ed. 2d 446 (1962), a criminal appeal, the defendant contended that his conviction under a West Virginia recidivist statute violated the Equal Protection Clause. He maintained that the statute was being selectively enforced by the prosecution with the result that many persons who could have been sentenced as repeat offenders were not subjected to the recidivist statute's harsher penalties. In dicta, the Court stated, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." 368 U.S. at 456.[27]

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[26] See comment, "The Right to Nondiscriminatory Enforcement of State Penal Laws," 61 Col. L. Rev. 1103 at 1108 (1961).

[27] See also, Edelman v. California, 344 U.S. 357, 359 (1953) (dicta).

State and lower federal court opinions confirm the view that mere failure to prosecute some violators does not bar the prosecution of one who is prosecuted. In People v. Friedman, 302 N.Y. 75, 96 N.E. 2d 184 (1950), appeal dismissed, 341 U.S. 907 (1951), the court rejected defendant's defense that New York's Sunday closing laws ("Blue Laws") were discriminatorily applied to him. The court stated: "The offer of proof was not an offer to show a pattern of discrimination consciously practiced, as in Yick Wo. v. Hopkins, (118 U.S. 356); it merely indicated some nonenforcement as to certain other businesses...." 302 N.Y. at 81. In Oregon v. Hicks, 213 Ore. 619, 325 P. 2d 794 (1958), cert, denied, 359 U.S. 917 (1959), defendant was sentenced under the Oregon habitual offenders (recidivist) law while others eligible for such treatment were not. The court affirmed the conviction: "We do find that there has been laxity in the enforcement of the habitual criminal law but mere laxity is not and cannot be held to be a denial of the equal protection of the law." 213 Ore. at 637.[28]

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28 To the same effect, see Sherman v. State, 234 Miss. 775, 108 So. 2d 205 (1958) (in a prosecution for embezzlement of a client's funds, defense was rejected that "many a lawyer" had done what defendant did); People v. Oreck, 74 Cal. App. 2d 215, 168 P. 2d 186 (Dist. Ct. App. 1946) (defendant, a bookie, alleged that other forms of gambling not involving horse racing were permitted; "It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not." 74 Cal. App. 2d at 222).

In a recent case, however, a defendant was successful in establishing the unequal enforcement defense on a unique set of facts. United States v. Steele, 461 F. 2d 1148 (9th Cir., 1972). The defendant, active in an anti-federal census movement, was convicted of refusing to answer a census questionnaire. He claimed that while others in Hawaii had not completed the forms, only he and other anti-census activists had been singled out for prosecution. The court stated that defendant was entitled to an acquittal if the government's decision to prosecute purposefully discriminated against those who chose to exercise their First Amendment rights of free expression. "The government offered no explanation for its selection of defendants, other than prosecutorial discretion. That answer simply will not suffice in the circumstances of this case. Since Steele had presented evidence which created a strong inference of discriminatory prosecution, the government was required to explain it away, if possible, by showing the selection process actually rested upon some valid ground. Mere random selection would suffice, since the government is not obligated to prosecute all offenders...." 461 F.2d at 1152 (emphasis added).

It seems clear that Orbis' "misses" of certain speeders do not qualify as the specific, intentional discrimination against an individual or class which violates the Equal Protection Clause. The chance that one speeder will pass Orbis as it recycles while another speeder will trigger

the ready device and be photographed does not appear to rise to the level of unlawful discrimination against the photographed driver. At most, Orbis' operation appears to fall within the random selection principle deemed permissible by the court in Steele, supra.

PART III

Admissibility Into Evidence of Orbis Photographs

When Orbis operates in the unmanned mode, its photographs will contain the only available evidence that a speeding violation has been committed. These photographs must therefore be introduced into evidence in trial proceedings in order to obtain speeding convictions.[29] To obtain admission of photographs into evidence in trial, the proponent seeking admission must demonstrate that the content of the photograph is relevant and material to issues raised at trial and must also show that the photograph is an

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29 It is likely that many drivers photographed by Orbis will plead guilty to speeding charges once confronted by the Orbis photograph, without demanding a trial on the charges. This decision to plead guilty without a trial would be induced in part by defendant's belief that he would be convicted at trial on the basis of the Orbis photo, that the punishment meted out after trial might be more severe than on a guilty plea, and that preparation of a trial defense could be expensive. If Orbis photos were not admissible at trial, however, the likelihood of convictions at trial would be reduced or eliminated, and the incentive to voluntarily plead guilty also would be reduced. To maintain Orbis credibility as a speed control device, it is therefore essential that its photographs be legally admissible as evidence in speeding trials.

accurate, authentic representation of the scene it contains. The purpose of the first requirement is to exclude pictures which are irrelevant to the issues at trial. The objective of the second is to insure that "doctored," distorted, or otherwise inaccurate pictures are not introduced to mislead judge and jury.[30]

It is obvious that the content of an Orbis photograph is relevant to a particular speeding prosecution. The photo is, in fact, the only evidence available to establish that a speeding offense has occurred. Demonstrating the accuracy of an Orbis photograph presents a greater challenge. To avoid charges that a particular photo has been physically tampered with or "doctored"[31] the proponent of the photograph should introduce evidence of the chain of custody of the particular picture from the time the negative film is removed from the camera through the development and printing process up to the time of

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30 2 Scott, Photographic Evidence § 1022 (2d ed. 1969); 3 Wigmore, Evidence 237 (Chadbourn rev. 1970).

31 An example of such tampering might be the overlay of a photo of one vehicle's Orbis meter readings on a second vehicle's photograph.

introduction in court.[32] Each person having custody of the film during this chain should be available to testify that no tampering occurred while it was in his possession.

Proving that an Orbis photograph is an authentic representation of that which it portrays - that it is in fact an accurate version of a particular driving fact situation - poses the major legal obstacle to admission of the Orbis photograph. To obtain admission requires use of a relatively new legal justification for admission of photographs into evidence which has been tested in few court cases. Traditionally, photographic evidence is not introduced into evidence on its own, apart from a witness' testimony; instead, photographs are introduced only to explain, illustrate or buttress the oral testimony of a witness at trial. Before referring to the photographs, this witness would authenticate the photograph by testifying to its accuracy from his own personal knowledge of its content.[33] In contrast, under the more recently developed theoretical basis for the admission of photographic evidence, no witness is relied upon to directly authenticate the photograph based on his own knowledge of the scene portrayed. Instead, the photograph is buttressed by "an adequate foundation assuring the accuracy of the process

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32 See, by way of analogy to X-ray photographs, 3 Wigmore, Evidence 244 (Chadbourn rev. 1970).

33 3 Wigmore, Evidence at 218 (Chadbourn rev. 1970).

producing it," so that it may stand on its own and "speak for itself," "even though no human is capable of swearing that he personally perceived what a photograph purports to portray...."[34] In order to employ this alternative rationale for admission, the proponent of the Orbis photograph must first persuade the court to accept in theory this alternative approach to authentication of photographs. He must then assure the court that the process which produced the photograph is sufficiently reliable to justify admission of the particular photo into evidence.[35]

No American cases have been found in which photographs taken by unmanned, automated devices (like Orbis) have been admitted into evidence in reliance on this alternative

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34 This basis for admission of photographic evidence was recognized in the most recent (1970 Chadbourne rev.) edition of Wigmore, Evidence. "Thus, even though no human is capable of swearing that he personally perceived what a photograph purports to portray...there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the adequacy of the process producing it, the photograph should then be received as a so-called silent witness or a witness which 'speaks for itself'." (emphasis added; citation omitted). 3 Wigmore, Evidence 220 (Chadbourn rev. 1970). (The earlier edition of this treatise does not mention this alternative.) See also, 2 Scott, Photographic Evidence at 352 (passing) (2d ed., 1969).

35 Id. (Wigmore).

justification.[36] However, a line of cases involving prosecutions for fraudulent check-cashing employs this alternative evidentiary theory and does develop useful precedent for obtaining admission of Orbis photos. State v. Tatum, 58 Wash. 2d 73, 360 P. 2d 754 (1961); Sisk v. State, 236 Md. 589, 204 A. 2d 684 (1964). In these cases prosecutions were based, in whole or in part, on photographs admitted into evidence of the defendant check-cashers taken by a Regiscope machine. This machine, which is manually operated, uses two separate lenses to photograph both the check being cashed and the person facing the machine who is cashing the check. (Except that it is manually controlled, the Regiscope's two-lens operation is similar to Orbis' use of two lenses to photograph both meter readings and the speeding vehicle.) In each case, operators of the Regiscope device testified that, while they could recognize the backgrounds present in the respective Regiscope photos, 58 Wash. 2d at 75, 236 Md. at 595, they could not recall taking the photograph of the specific transaction involved in the respective court proceedings. State v. Tatum, 58 Wash. 2d at 74; Sisk v. State, 236 Md. at 595. This lack of a witness who from his own knowledge could authenticate the specific Regiscope photos made the matter of their introduction quite similar to problems involved in introduction of Orbis photographs. To get around the absence of a witness who could provide direct testimonial authentication,

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See pages 33 and 34 for footnote 36.

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See People v. Bowley 59 Cal. 2d 855 at 861 (1963), where the court in dicta criticizes a rule which would exclude "pictures taken by a camera set to go off when a building's door is opened at night." And see an English case, The Statute of Liberty, (1968) 2 All. E.R. 195, admitting into evidence photographs of a radar screen taken at periodic intervals by an automatic device.

> "It would be an absurd distinction that a photograph should be admissible if the camera were operated manually by a photographer, but not if it were operated by a trip or clock mechansim. Similarly, if evidence of weather conditions were relevant, the law would affront common sense if it were to say that those could be proved by a person who looked at a barometer from time to time, but not by producing a barograph record. So, too, with other types of dial recordings. Again, cards from clocking-in-and-out machines are frequently admitted in accident cases. The law is now bound to take cognizance of the fact that mechanical means replace human effort."
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> (1968) 2 All E.R. at 196

People v. Pett, 178 N.Y.S. 2d 550 (Police Justice's Court, Nassau County, 1958), a prosecution for speeding involved the use of "Foto-Patrol," a speed detection and photographic recording device whose operation is similar to Orbis'. The facts of that case, however, are quite different from the likely fact pattern which would emerge from a routine Orbis speeding prosecution. Most significant is the fact that the "Foto-Patrol" device was manned by two police officers at the time the speeding offense took place. While the court found the defendant guilty of speeding, there is no indication in the opinion that it relied on the Foto-Patrol photograph for any information other than the speed at which defendant was traveling. In fact, nowhere in the court's opinion is it stated whether the "Foto-Patrol" photograph of the defendant's vehicle registration plate was offered or admitted into evidence. (Unlike Orbis, Foto Patrol photographs only the license plate of the speeding vehicle.) Further, the court explicitly stated in its opinion that it relied on at least one officer's expert testimony as to defendant's speeding in reaching its decision. The case is thus sufficiently distinguishable from

Orbis' operation to making it of little precedential value in support of the admissibility of Orbis photos taken in the unmanned mode of operation.

proponents of the Regiscope photograph in each case presented detailed evidence of "the accuracy of the process" by which the photos were taken and developed. As described in the cases, this process involved the systematic and simultaneous photographing by the Regiscope of each person seeking to cash a check and the check to be cashed. Testimony describing camera unloading, film handling, and film processing and printing was also presented. Based on the cumulative effect of this evidence, the Regiscope photo was admitted in each case. 58 Wash. 2d at 76; 236 Md. at 596-97.

A similar showing could be made in a speeding prosecution in arguing for the admission of an Orbis photo under this alternative rationale. This evidence should contain a description of the automatic, systematic process by which the Orbis device is triggered, a photograph taken, and then film developed and printed.[37] Further, the official who loaded film into Orbis should be called upon to testify that he recognizes the background in a particular photo as the background he focused upon in setting up Orbis, and that the vehicle depicted in the photo stands in a reasonable relationship to background trees, signs, and other landmarks.

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37 This evidence will also be required in order to establish the scientific validity and reliability of the machine. A detailed description of this qualification procedure is beyond the scope of this report. See, e.g., Anno., Proof, By Radar or Other Mechanical or Electronic Devices, of Violation of Speed Regulations, 47 A.L.R. 3d 822 (1973).

(It is not apparent from the Regiscope cases how important this latter "familiar background" testimony is in authenticating the photographs, because the courts in those cases relied on the cumulative impact of all the evidence presented, without singling out specific pieces for emphasis. If "familiar background" testimony should become a necessary supporting element, it would seem impossible to authenticate night-time Orbis photos, in which background landmarks are lost in darkness.[38]) The impact of the totality of this supporting evidence, coupled with adequate legal argument, should suffice to persuade progressive courts to recognize this new alternative for authenticating photographs and to admit Orbis photos into evidence. Because of the newness and lack of precedent in support of this alternative basis for authenticating photographs, however, no firm prediction of its acceptance by courts in a particular jurisdiction can be made with certainty.

Rather than rely on courts' somewhat unpredictable reactions to admission of Orbis photographs, officials in jurisdictions where Orbis is to be used may prefer to seek legislation from the State legislature authorizing the

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38 It may be technologically feasible to "plant" background objects in the Orbis camera's field of view to facilitate authentication of night-time photos. These objects - glowing posts, neon signs, etc. - should be capable of being recorded in photographs taken by Orbis at night.

admission of Orbis photos in speeding prosecutions.[39] Such a statute would direct trial courts to admit Orbis photographs into evidence in speeding prosecutions upon a satisfactory showing that: (1) the Orbis device was operating properly at the time the particular photograph was taken; and, (2) that nothing had occurred to the photo to render it inaccurate. The effect of such a statute would be to eliminate the need to authenticate the photograph using the procedure described above. Proponents of the photographs would still be required to prove that Orbis was functioning satisfactorily, with its meters properly calibrated, at the time photos were taken.

The decision to seek legislation is not without its possible drawbacks. The decision itself could be interpreted as an indication that proponents of the Orbis device do not believe that its photographs are admissible without a change in existing law. If the proposed statute is rejected, it may become more difficult to persuade courts to admit Orbis photographs under present law. And, intense pressure exerted on legislators by automobile and motorist interest groups (and legislators probably speed on occasion, too!) could jeopardize passage of such a statute. The legislative route to obtain admission of Orbis photos thus cannot be guaranteed to obtain that result.

See page 38 for footnote 39.

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Instead of a statute which merely authorizes admission of photographs taken by Orbis, a statute could be drafted which would resolve this evidentiary issue and also eliminate the potential invasion-of-privacy problem explored eariler. Such a statute would overrule the Hildebrandt case (People v. Hildebrandt, 308 N.Y. 397 (1955), supra page 4), and create a rebuttable presumption that the owner of a speeding vehicle was its operator at the time of the offense. With such a presumption, there would be no need to photograph any more of a speeding vehicle than its registration plate. This registration data could then be used to identify the vehicle's owner. At trial, the owner would be permitted to establish as a defense that he was not operating the vehicle at the time the alleged offense took place. As touched upon in Hildebrandt, however, such a presumption could face a constitutional due process challenge if speeding were continued to be viewed as a criminal offense. Application of the presumption is also complicated by the fact of joint ownership of automobiles, corporate ownership, etc.

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