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Highway to the Danger Drone: Reconciling First Amendment Rights of Drone Owners and Privacy Rights of Individuals in Creating a Comprehensive Statutory Scheme in Rhode Island

David M. Remillard*

I. INTRODUCTION

Drones, the product of a burgeoning \$200 million industry that has “more than tripled” in value since 2015, are the latest example of the maxim that the creation of new technology breeds new legal challenges.¹ Drones are becoming ubiquitous, and sales are flourishing with no end in sight, especially in the “hobbyist” sector, where industry leaders predict sales to jump from \$1.9 million in 2016 to roughly \$4.3 million by 2020.² However, despite the innocuous term of “hobbyist,” private ownership of drones presents significant legal difficulties, especially in light of the

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1. Lucinda Shen, *Drone Sales Have Tripled in the Last Year*, FORTUNE, (May 25, 2016), <http://fortune.com/2016/05/25/drones-ndp-revenue/>; see Jonathan Vanian, *Drone Sales Are About To Go Crazy*, FORTUNE, (Mar. 25, 2016), <http://fortune.com/2016/03/25/federal-governmen-drone-sales-soar/>; see also Chris Schlag, Comment, *The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights*, 13 U. PITT. J. TECH. L. POL'Y 13, 23 (2013).

2. Vanian, *supra* note 1.

privacy concerns they raise.³ Citizens are wary and skeptical of the private use of drones; of those responding to a 2015 Reuters poll, most said they would not want their neighbor to own one.⁴

One could argue Rhode Island is in dire need of a workable statutory scheme to deal specifically with private drone ownership, one that will account for disparate interests of its citizens.⁵ Currently, Rhode Island's privacy law is purely statutory with a "lack of case law interpreting the text."⁶ This means that it would be difficult for Rhode Island courts to adjudicate the merits of suits claiming invasions of privacy arising from the use of high-tech drones;⁷ however, the Rhode Island Legislature should not be too hasty as too much regulation of drones could begin to raise concerns over encroachment into people's freedom of speech.⁸ Courts have not yet decided whether privacy or freedom of speech should prevail in this context anywhere in the country, let alone in Rhode Island.⁹

This leads to a catch twenty-two: underregulating drones creates risk of erosion of individual rights of privacy,¹⁰ while

3. Arthur Holland Michel, Op-Ed, *The Drones Will Have Their Day*, U.S. NEWS (Aug. 6, 2014, 12:01 AM), <http://www.usnews.com/opinion/articles/2014/08/06/the-drone-regulation-debate-needs-to-be-better> (expressing concern that "[a]s the technology develops more quickly and the price drops further, the safety and privacy concerns will become more pressing"); RICHARD M. THOMPSON II, CONG. RESEARCH SERV., DOMESTIC DRONES AND PRIVACY: A PRIMER 6–8 (2015) [hereinafter CRS Report] (listing multiple different privacy concerns such as surveillance, personal control, and anonymity).

4. IPSOS, IPSOS POLL CONDUCTED FOR REUTERS, DRONES 01.29.15 (2015), <https://www.ipsos-na.com/download/pr.aspx?id=14209>. When polled, sixty-four percent of people polled agreed that "I wouldn't want my next-door neighbor to own a drone." *Id.* Furthermore, seventy-two percent disagreed that "drones should be allowed to operate over other people's private property." *Id.*

5. See Daniel Suarez, Opinion, *Drones over America? Time for debate*, CNN (Nov. 12, 2013, 3:24 PM), <http://www.cnn.com/2013/11/12/opinion/suarez-civilian-drones/>.

6. *Russell v. Salve Regina Coll.*, 890 F.2d 484, 488 (1st Cir. 1989), *rev'd on other grounds*, *Salve Regina Coll. v. Russell*, 499 U.S. 225 (1991); see 9 R.I. GEN. LAWS ANN. § 9-1-28.1(a) (West, Westlaw through 2016 Reg. Sess.).

7. *Russell*, 890 F.2d at 488.

8. Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CAL. L. REV. CIRCUIT, 57, 60 (2013).

9. See *id.* at 61.

10. See AMANDA ESSEX, NAT'L CONFERENCE OF STATE LEGISLATURES, TAKING OFF: STATE UNMANNED AIRCRAFT SYSTEMS POLICIES 14–15 (2016),

overregulation would stifle the rights of people to own drones, which may have further ramifications on the advancement of technology and information gathering.¹¹ Thus, any attempt to regulate drones must necessarily fall within these strict boundaries;¹² however, Rhode Island legislators are not ill equipped to deal with this problem, as they may follow the plan developed by the Rhode Island Drone Commission.¹³ Other states have also proposed and enacted potential solutions to the privacy implications of privately owned drones, solutions that may be illuminating to the Rhode Island General Assembly.¹⁴

To varying degrees, states have addressed citizens' concerns about drones.¹⁵ Drone owners may be able to use their drones not only for expressive purposes, but also to film certain police misconduct;¹⁶ however, drones have the potential to pose public safety problems as they may be equipped with dangerous weaponry.¹⁷ Inexperienced drone pilots may also be prone to crashes, which could endanger the public, especially where drones are flown in heavily populated areas.¹⁸ Despite the potential

http://www.ncsl.org/Portals/1/Documents/transportation/TAKING_OFF-STATE_%20UNMANNED_%20AIRCRAFT_SYSTEMS_%20POLICIES_%20%28004%29.pdf.

11. Kaminski, *supra* note 8, at 61.

12. *See id.* at 61–62.

13. STATE OF RHODE ISLAND REPORT OF THE SPECIAL LEGISLATIVE COMM'N TO STUDY AND REVIEW REGULATION OF DRONES AND UNMANNED AERIAL VEHICLES at 7–8 (2016), <http://www.rilin.state.ri.us/commissions/drone/commdocs/Drones%20Report%20updated%20and%20revised.pdf> [hereinafter RI Drone Report].

14. *See e.g.*, TEX. GOV'T CODE ANN. § 423.003 (West, Westlaw through 2016 Reg. Sess.); H.R. 5274, 2016 Leg., Feb. Sess. (Conn. 2016).

15. *Current Unmanned Aircraft State Law Landscape*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 5, 2017), <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-lawlandscape.aspx> [hereinafter *Current UAS Landscape*] (providing a comprehensive compilation of proposed and enacted state drone legislation).

16. Kaminski, *supra* note 8, at 61.

17. *See* Brian Lufkin, *This Flamethrower-Equipped Drone Looks Like a Legal Nightmare*, GIZMODO (Dec. 9, 2015, 11:00 AM), <http://gizmodo.com/this-flamethrower-equipped-drone-looks-like-a-legal-nig-1747066479> (describing how a teenage hobbyist was able to attach a flamethrower to his drone and providing a video of his demonstration).

18. For example, the infamous drone crash at the Whitehouse in 2015 showed that people may pilot and crash drones even in restricted areas. Bart Jansen, *Small drone crashes near White House despite ban against flights in D.C.*, USA TODAY (Oct. 9, 2015, 8:36 AM) <http://www.usatoday.com>

danger that drones pose to the public, as a matter of policy, state legislatures should not foreclose all private drone use if for no other reason than to protect freedom of speech.¹⁹ As to privacy rights, certain states have been unduly harsh, regulating and restricting drone use in a manner that borders on prohibition.²⁰ Other states are unduly lax, arguably eroding the right of privacy because of the data that private owners can collect with drones.²¹

This Comment contains six parts. Following this Introduction, Part II will briefly describe the state of drone technology as it existed at the end of 2016. In Part III, this Comment will widen its lens to describe the development of federal drone regulation since 2012, and then focus on the State of Rhode Island. Part IV will address how other states have dealt with the dueling concerns of drone regulation through proposed and enacted legislation. Part V of this Comment will evaluate Rhode Island law in search of language that will permit effective and even-handed administration of drones. Lastly, Part VI proposes a statutory scheme that considers the rights of drone owners and the rights of private citizens.

II. DRONE TECHNOLOGY: A PRIMER

Until a few years ago, the word “drone” most likely conjured up images of military technology flying over warzones in Iraq and Afghanistan;²² however, these drones, formally known as unmanned aerial vehicles (UAVs),²³ have adapted to uses far beyond the battlefield, in line with the rapid advances of technology in society.²⁴ Although one may instantly think of the

/story/news/2015/10/09/drone-crash-white-house-ellipse-us-park-police-federal-aviation-administration/73641812/.

19. “Laws governing civilian drone use risk restricting the ability of civilians to engage in legitimate and even essential information gathering.” Kaminski, *supra* note 8, at 61.

20. See IDAHO CODE ANN. § 21-213 (West, Westlaw through Ch. 213 of the 2016 Reg. Sess.) (discussed *infra*, Part IV.B).

21. See OR. REV. STAT. ANN. § 837.380 (West, Westlaw through Ch. 9 of 2017 Reg. Sess.) (discussed *infra*, Part IV.C).

22. Michel, *supra* note 3.

23. This Comment uses the terms “UAV,” “Drone,” and “UAS” (unmanned aerial system) interchangeably, as the terms are generally used interchangeably in the common vernacular.

24. Margaret Rouse, *Definition: drone (unmanned aerial vehicle, UAV)*, INTERNET OF THINGS AGENDA, TECH TARGET (Oct. 2016),

large “predator” drones, UAVs “can be the size of a Boeing 737 or as small as a magazine.”²⁵ On the most basic level, a drone “is a flying computer with a camera attached,” but this technology is more sophisticated and more nuanced than this simple description lets on.²⁶

Drones are piloted remotely through the use of a remote control system; certain drones may even be fully controlled via smartphone apps available in the Google Play or Apple stores.²⁷ Drones are equipped with intelligent flight systems, gyro stabilizers,²⁸ global positioning system (GPS) tracking, radar positioning, first person view technology, as well as other features designed to ensure both the safety and longevity of drone flight.²⁹ Some drones, especially those employed by photographers, are equipped with advanced cameras capable of taking twelve megapixel stills with a 7x optical zoom lens, while others are capable of shooting “HD video at 1080p/30 frames per second.”³⁰ One of the more recent top of the line drones on the market, the “DJI Phantom 4,” is touted for its “[v]ision collision avoidance technology,” and is marketed as a “[m]ulti purpose drone including aerial filming, photography and photogrammetry.”³¹

Use of drone technology in the United States generally comes in three varieties: governmental, commercial, and private.³²

<http://internetofthingsagenda.techtarget.com/definition/drone>.

25. “Magazine” refers to the periodical. Larisa Epatko, *How Are Drones Used in the U.S.?*, PBS NEWSHOUR (Apr. 18, 2013, 9:00 AM), <http://www.pbs.org/newshour/rundown/how-are-drones-used-in-us/>.

26. Fintan Corrigan, *How Do Drones Work And What Is Drone Technology*, DRONEZON (Mar. 30, 2016), <https://www.dronezon.com/learn-about-drones-quadcopters/what-is-drone-technology-or-how-does-drone-technology-work/>.

27. *Id.*

28. “Gyro stabilization technology is one of the components which gives the drone it’s smooth flight capabilities. The gyroscope needs to work almost instantly to the forces moving against the drone. The gyroscope provides essential navigational information to the central flight controller.” *Id.*

29. *Id.*

30. *Id.* By comparison, the latest edition of the iPhone, iPhone 7 Plus, comes standard with twelve megapixels and a 2x optical zoom and is capable of recording video in either 4K at 30 frames per second, or in 1080p HD at 30 or 60 frames per second. See *iPhone 7 Plus*, APPLE, <https://www.apple.com/iphone-7/specs/> (last visited Apr. 24, 2017).

31. Corrigan, *supra* note 26.

32. Brandon Ward, *Commercial drones in the U.S.: Privacy, ethics,*

Governmental uses typically center on police surveillance,³³ but there are also more innocuous administrative uses.³⁴ Drone technology has a wide range of commercial-sector applicability that may be of benefit to society.³⁵ Because one of the most oft-cited potential uses is for farmers to check on their crops, this area may not raise as many privacy concerns as other uses because of its utilitarian function, and also because “corn doesn’t mind if you watch it.”³⁶ Private drone use, meanwhile, does not have this same utilitarian aspect to it and, “[j]ust because pretty much anybody can fly a drone doesn’t mean that everybody should.”³⁷ Although private drone use has a variety of applications, many drones are used for recreational activity and may present a danger if they are flown too high or too close to areas where they do not belong.³⁸ Because only safety concerns of drone technology have been addressed thus far, the privacy concerns are the next logical issue to tackle.³⁹

economics—and journalism, JOURNALIST’S RESOURCE (June 22, 2015), <http://journalistsresource.org/studies/economics/business/commercial-drones-united-states-privacy-ethics-economics>.

33. The ACLU has focused its efforts on law enforcement’s use of drones as a potential violation of civil liberties; this is certainly an area of concern on which other states have also focused. Allie Bohm, *Status of Domestic Drone Legislation in the States*, ACLU (Feb. 15, 2013, 12:15 PM), <https://www.aclu.org/blog/status-domestic-drone-legislation-states?redirect=blog/technology-and-liberty/status-domestic-drone-legislation-states> (describing the ACLU’s commitment to the passage of laws regulating drone surveillance and providing a comprehensive list of proposed and enacted statutes for that purpose).

34. In 2015, President Obama noted that “[t]he Federal Government currently operates UAS in the United States for several purposes, including to manage Federal lands, monitor wildfires, conduct scientific research, [and] monitor our borders. . . .” Memorandum on Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems, 2015 DAILY COMP. PRES. DOC. 00103 (Feb. 15, 2015).

35. Epatko, *supra* note 25.

36. Suarez, *supra* note 5.

37. Michel, *supra* note 3.

38. *See id.* (noting that the California Department of Forestry and Fire Protection (Cal Fire) “almost had to suspend operations over the Plymouth wildfires because an amateur videographer was flying a drone in the area”).

39. Press Release, Federal Aviation Administration, DOT and FAA Finalize Rules for Small Unmanned Aircraft Systems (June 21, 2016), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=20515 [hereinafter FAA Finalization] (“Although the new rule does not specifically

III. REGULATORY HISTORY IN THE COUNTRY AND STATE

In 2012, Congress enacted the Federal Aviation Administration (FAA) Modernization and Reform Act (Modernization Act), which, among other things, called upon the FAA to promulgate regulations to control the proliferation of drones in the skies above the country by September 2015.⁴⁰ Major changes to the federal regulatory framework did not come until December 21, 2015, when the FAA issued an interim final rule regarding registration for small, private drones.⁴¹ Before this point, many private owners of drones did not need to register them if their UAVs qualified as model aircraft under Section 336 of the Modernization Act.⁴² The December 21st rule streamlined registration through an online process and waived the five-dollar registration fee for the thousands of new drone owners over the holiday season—provided they registered by January 20, 2016.⁴³ According to the FAA, nearly 300,000 drone owners registered in the first thirty days after the interim rule was promulgated.⁴⁴ The FAA believed the new regulation would best aid the agency in its twin goals of innovation and safety.⁴⁵

Following the interim final rule on private drones, the FAA, along with the Department of Transportation (DOT), promulgated

deal with privacy issues in the use of drones, and the FAA does not regulate how UAS gather data on people or property, the FAA is acting to address privacy considerations in this area.”).

40. CRS Report, *supra* note 3, at 1.

41. Press Release, Federal Aviation Administration, FAA Announces Small UAS Registration Rule (Dec. 14, 2015), http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19856 [hereinafter FAA Announcement].

42. CRS Report, *supra* note 3, at 5–6.

43. FAA Announcement, *supra* note 41.

44. Press Release, Federal Aviation Administration, FAA Registered Nearly 300,000 Unmanned Aircraft Owners (Jan. 22, 2016), https://www.faa.gov/news/press_releases/news_story.cfm?newsId=19914&cid=TW393.

45. FAA Announcement, *supra* note 41. US transportation secretary Anthony Fox stated:

Make no mistake: unmanned aircraft enthusiasts are aviators, and with that title comes a great deal of responsibility. Registration gives us an opportunity to work with these users to operate their unmanned aircraft safely. I'm excited to welcome these new aviators into the culture of safety and responsibility that defines American innovation.

Id.

a final rule regulating commercial drones.⁴⁶ The rules, which amended parts 101 and 107 of the Federal Aviation regulations, set forth certain safety restrictions that operators must comply with to pilot a drone weighing less than fifty-five pounds.⁴⁷ Under Section 107, pilots are required to complete an aeronautical test approved by the FAA and obtain a “remote pilot certificate with a small UAS [(unmanned aircraft systems)] rating”⁴⁸ or be supervised by someone with a certificate.⁴⁹ Additionally, pilots must keep the drones within visual line of sight⁵⁰ and may only pilot “during daylight and during twilight if the drone has anti-collision lights.”⁵¹ Eschewing official inspections, the FAA instead requires “the remote pilot . . . to perform a pre-flight visual and operational check of the small UAS to ensure that safety-pertinent systems are functioning properly.”⁵²

The most dramatic change came not to the regulation of commercial UAVs, but to the status of many privately-owned drones.⁵³ When the regulations went into effect in August 2016, private drone pilots then fell under the auspices of Section 101 for model aircrafts.⁵⁴ Section 101 sets forth five specific requirements for these private users,⁵⁵ and, for those who meet all of the

46. See FAA Finalization, *supra* note 39.

47. *Id.*

48. *Id.* The FAA created the “remote pilot certificate with a small UAS rating” as the first airman certificate that specifically applies to small UAS. *Guide to Remote Pilot Certification*, AIRCRAFT OWNERS & PILOTS ASS’N, <https://www.aopa.org/go-fly/aircraft-and-ownership/drones/guide-to-remote-pilot-certification> (last visited Feb. 17, 2017). “A small UAS includes a small unmanned aircraft, weighing less than 55 pounds on takeoff, including everything that is on board or otherwise attached to the aircraft.” *Id.*

49. FAA Finalization, *supra* note 39.

50. *Id.* “VLOS, or Visual Line of Sight, refers to operating a UAS within range of the observer without any optical enhancements.” *Visual Line of Sight*, KITTYHAWK, <https://kittyhawk.io/glossary/visual-line-of-sight-vlos> (last visited Oct. 21, 2016).

51. FAA Finalization, *supra* note 39.

52. *Id.*

53. See Loretta Alkalay, *New Rulemaking Creates Uncertainty for Model Aircraft Flyers*, DRONE LAW JOURNAL (June 28, 2016), <http://dronelawjournal.com/new-rulemaking-creates-uncertainty-for-model-aircraft-flyers/>.

54. *Id.* (“The FAA has added model aircraft flying requirements to Part 101 of the Federal Aviation Regulations, adding recreational drone flying to already existing rules for moored balloons, kites and so on.”).

55. *Id.* These requirements being:

requirements, no pilot certificate is necessary.⁵⁶ However, those pilots that fail to meet any one of the requirements under Section 101 then must comply with the Section 107 rules for commercial UAVs.⁵⁷ This requirement is automatic for drones that implement first person view cameras; any pilot owning this type of drone must obtain a remote pilot certificate or face a fine for non-compliance.⁵⁸ The most significant point of this provision is that it converts the status of many privately-owned, non-commercial drones into commercial drones, even if used for purely recreational purposes.⁵⁹

The rule, however, did not address the privacy parameters of commercial drone use, instead recommending that pilots check local state law before gathering data.⁶⁰ The FAA provides limited privacy-specific education to new drone users upon registration of the aircraft and issue new guidelines for states to follow.⁶¹ These

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- (1) the aircraft is flown strictly for hobby or recreational use;
 - (2) the aircraft is operated in accordance with a community based set of safety guidelines and within the programming of a nationwide community-based organization;
 - (3) the aircraft is limited to not more than 55 pounds unless otherwise certified through a design, construction, inspection, flight test, and operational safety program administered by a community-based organization;
 - (4) the aircraft is operated in a manner that does not interfere with and gives way to any manned aircraft; and
 - (5) when flown within 5 miles of an airport, the operator of the aircraft provides the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport) with prior notice of the operation (model aircraft operators flying from a permanent location within 5 miles of an airport should establish a mutually-agreed upon operating procedure with the airport operator and the airport air traffic control tower (when an air traffic facility is located at the airport)).

Id.

56. *Id.*

57. John Goglia, *Attention, Hobby Flyers: Come Monday Some Of You May Need An FAA Drone Pilot Certificate. Yes, Really*, *FORBES* (Aug. 24, 2016, 5:15 PM), <http://www.forbes.com/sites/johngoglia/2016/08/24/attention-hobby-flyers-come-monday-you-may-need-an-faa-drone-pilot-certificate-to-fly-yes-really/#2d9e28256743>.

58. *Id.*

59. *Id.*

60. See FAA Finalization, *supra* note 39.

61. *Id.*

guidelines are included in the National Telecommunications and Information Administration's (NTIA) publication on voluntary best practices for UAS privacy, transparency, and accountability.⁶² These "best practices" include limiting flying over private property and contingencies for minimization of data that the drones collect and store in their systems.⁶³ The collection of personally identifiable data by private drones is featured prominently in the publication; the NTIA recommends consent whenever a drone operator wishes to operate near a place where a person has a reasonable expectation of privacy.⁶⁴ Even as the NTIA forewarns that the dangers posed by data collection is on par with safety hazards, the NTIA admits that its recommendations are non-binding, voluntary guidelines for operation, so drone users will have to weigh their right to operate against the privacy rights of others.⁶⁵

Meanwhile, in Rhode Island, the Rhode Island Airport Corporation (RIAC) tried its hand at crafting rules regarding the safe flight of drones.⁶⁶ In 2014, the RIAC promulgated new aeronautics regulation, but did not include drones within its definition for "aircraft."⁶⁷ This omission created problems when, the same month that the regulations went into effect, the RIAC issued a statement claiming that any use of a drone in the vicinity of a public, open air event would constitute a misdemeanor.⁶⁸

62. See NAT'L TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, VOLUNTARY BEST PRACTICES FOR UAS PRIVACY, TRANSPARENCY, AND ACCOUNTABILITY 1 (2016), https://www.ntia.doc.gov/files/ntia/publications/uas_privacy_best_practices_6-21-16.pdf.

63. *Id.* at 8.

64. *Id.* at 5–6. For example, the NTIA recommends that "[i]n the absence of a compelling need to do otherwise, or consent of the data subjects, UAS operators should avoid using UAS for the specific purpose of persistent and continuous collection of covered data about individuals." *Id.* at 6.

65. *Id.* at 1–2 ("These Best Practices are also not intended to serve as a template for future statutory or regulatory obligations, in part because doing so would raise First Amendment issues.").

66. See generally RHODE ISLAND AIRPORT CORPORATION, AERONAUTICS REGULATIONS (2014).

67. Peter Sachs, Esq., *Rhode Island's RIAC and its Drone "Ban"*, DRONE RSS (June 20, 2014), <http://drone-rss.com/2014/06/rhode-islands-riac-and-its-drone-ban/#ZClptfPoBOb3msQ.99>.

68. *RIAC issues notification related to drones*, GREEN AIRPORT, <http://www.pvdairport.com/corporate/news/05-03-2015-riac-issues-notification-related-to-drones> (last visited Oct. 12, 2016).

Through the statement, the RIAC hoped to ensure a greater level of safety at many of Rhode Island's outdoor summer events;⁶⁹ however, the RIAC corrected its statement to clarify that drones that fly over these open air events would be in violation of FAA regulations as it did not have the authority to regulate where drones could and could not fly.⁷⁰

Rhode Island was at the forefront of suggesting drone registration, and in mid-2015 the Legislature formed a commission to study the issues of privacy and safety in drones.⁷¹ After a brief delay, the commission put forth recommendations on May 12, 2016.⁷² The commission's recommendations focused on increased oversight of drone use and creating increased penalties for invasion of privacy;⁷³ however, just as important, the commission also recommended that the Legislature "create designated areas for hobbyists and recreational drone and UAS/UAV operators to use their devices without fear of arrest or prosecution."⁷⁴

During the 2016 legislative session, the Rhode Island Legislature considered a few bills that would have far-reaching effects in the arena of drone regulation within the state.⁷⁵ The first bill, which purported to give exclusive authority for the regulation of drones within the state to the RIAC, passed in June 2016.⁷⁶ The second pertinent bill would have allowed the

69. *Id.*

70. Sachs, *supra* note 67.

71. Miriam McNabb, *RI State House Forms Drone Commission*, DRONELIFE.COM (Oct. 23, 2015), <http://dronelife.com/2015/10/23/ri-state-house-forms-drone-commission/>; H.R. 5293, 2015 Leg., Jan. Sess. (R.I. 2015).

72. RI Drone Report, *supra* note 13, at 7–8. While the commission mentioned nothing specific, it recommended certain changes to the Uniform Aeronautical Regulatory Act including: expansion of the definition of drones, expansion of areas above which drones are not allowed to fly, increased penalties for violations under the act, and creation of jurisdiction in the Rhode Island Traffic Tribunal for "certain specified offenses" under the Act. *Id.*

73. *Id.*

74. *Id.* at 8.

75. See An Act Relating to Aeronautics—Unpiloted Aerial Vehicle Regulation, H.R. 7511, 2016 Leg., Jan. Sess. § 1-8-1, ch. 16-261 (R.I. 2016) (giving exclusive jurisdiction to the RIAC to regulate drones) [hereinafter An Act Relating to Aeronautics]; H.B. 8066, 2015 Leg., Jan. Sess. (R.I. 2016) (proposing certain protections against the use of drones in the criminal procedure context).

76. See H.R. Res. 7511.

Legislature to create operational restrictions, registration requirements, and the crime of invasion of privacy in the use of drones.⁷⁷ This bill focused mostly on registration and operational restrictions, while only giving a scant four lines to explaining the crime of invasion of privacy, which hardly gives an accused advance notice of the intricacies of the prohibited acts.⁷⁸ The third bill considered the regulation of the use of drones and any information they may gather; it was proposed but not enacted in the 2016 legislative session.⁷⁹ While this third bill dealt mostly with procedures for the Attorney General to direct drone use for law enforcement, it would also have created a private cause of action for individuals who were the subject of illicit surveillance by other private individuals through the use of drones.⁸⁰

Given that all Rhode Island has at this moment its recommendations and proposed laws, it behooves the Legislature to act quickly to ensure that both drone owners' and private individuals' rights are protected. While the Rhode Island Drone Commission's recommendations are a good starting point, the Rhode Island Legislature could learn a great deal from what other laws states have considered and enacted.⁸¹ This is not to say that Rhode Island must enact similar statutes, but proposed and enacted statutes from other states may provide a rough guideline

77. H.B. 7334, 2015 Leg., Jan. Sess. (R.I. 2016). The bill made it to committee in April 2016, but was held for further study. *Legislative Status Report on House Bill No. 7334*, STATE OF RHODE ISLAND GENERAL ASSEMBLY, <http://status.rilin.state.ri.us/> (last visited Apr. 24, 2017).

78. See H.B. 7334, 2015 Leg., Jan. Sess. (R.I. 2016). The statute states, in pertinent part:

- (a) No person shall use a drone, as defined in § 1-8-2, equipped with a device capable of capturing, recording, storing, or transmitting visual images, to look into an occupied dwelling house or other building.
- (b) A person found guilty of the crime of invasion of privacy by drone shall be imprisoned for not more than three (3) years and/or fined not more than five thousand dollars (\$5,000).

Id.

79. H.B. 8066, 2015 Leg., Jan. Sess. (R.I. 2016).

80. *Id.* ("Any person who is surveilled or whose location or other information or data are intercepted, disclosed, or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses, or uses the communications, and shall be entitled to recover from that person.")

81. See RI Drone Report, *supra* note 13, at 7–8; *Current UAS Landscape*, *supra* note 15.

of how to take differing interests into account.

IV. A SHORT SURVEY OF PROPOSED AND ENACTED STATUTES FROM OTHER STATES

“Beginning in the 2013 legislative session, state lawmakers have frequently considered pieces of legislation addressing UAS.”⁸² Since this time, roughly thirty-five states have enacted laws pertaining to drones, and a further four have enacted resolutions regarding drone regulation.⁸³ In 2015 alone, forty-five states considered 168 pieces of legislation, while twenty of those states passed twenty-six bills and five additional states adopted resolutions.⁸⁴ The number of enacted pieces of legislation has risen, as eighteen states enacted thirty-two statutes related to the use of drones in 2016.⁸⁵ While some states, including Louisiana, have adopted statutes protecting the privacy of people, even outside of their homes,⁸⁶ other states, such as Alaska, have considered setting aside land specifically for the advancement of UAS technology.⁸⁷

There is some dispute, however, about whether states may pass statutes regulating drones at all, given that FAA regulations could in fact preempt any state action in this area.⁸⁸ Courts have generally deferred to the FAA’s rulemaking and interpreting powers “in order to insure the safety of aircraft and the efficient utilization of such airspace’ . . . and ‘for the protection of persons

82. *Current UAS Landscape*, *supra* note 15.

83. *Id.*

84. *State Unmanned Aircraft Systems (UAS) 2015 Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 30, 2016), <http://www.ncsl.org/research/transportation/state-unmanned-aircraft-systems-uas-2015-legislation.aspx> [hereinafter 2015 UAS Legislation].

85. *Current UAS Landscape*, *supra* note 15.

86. *Id.*

87. *Id.*

88. See Jol A. Silversmith, *You Can’t Regulate This: State Regulation of the Private Use of Unmanned Aircraft*, 1 *AIR & SPACE LAW* 22, 23 (2013).

Neither the FAA nor the courts have had [specific] occasion to address whether state and local laws regarding UAVs are preempted by the Federal Aviation Act of 1958. But there is considerable reason to doubt that the Idaho, Oregon, and Texas mandates (and any similar statutes adopted in the future elsewhere) are within the authority of a state legislature.

Id.

and property on the ground.”⁸⁹ Additionally, the FAA already regulates aerial surveillance from manned aircrafts, and it would be a short bridge for the FAA to also regulate unmanned aerial surveillance.⁹⁰ The FAA is not finished regulating in this area, and may decide to pre-empt state law regarding privacy;⁹¹ however, given that the FAA *just* released regulations pertaining to the safety parameters of drone use, and because the FAA has stated that it does not have any immediate plans to regulate in the area of privacy, it is important for state law to bridge the gap to protect competing civilian interests with regards to drones.⁹²

Privacy is tricky to quantify, as it is “an ambiguous term that can mean different things in different contexts, which becomes apparent when attempting to apply traditional privacy concepts to drone surveillance.”⁹³ While traditional privacy concerns of surveillance, personal control, and secrecy abound with respect to drone use, there may be other concerns like aggregation, which may be even more pressing.⁹⁴ Moreover, private citizens should be concerned about the retention of any data that a drone may collect as it infringes on a person’s privacy interests.⁹⁵ Data that a drone collects with its high-powered camera may identify particular individuals, whether they are out in public or in their own back yard.⁹⁶ Even more troubling, there is nothing stopping the drone owner from keeping this data, which is relatively inexpensive and easy to store.⁹⁷

89. *Id.* at 24 (citing *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 627 (1973) (quoting statute subsequently re-codified at 49 U.S.C. § 40103(b)).

90. *See id.*

91. *See id.*

92. *See* FAA Finalization, *supra* note 39.

93. CRS Report, *supra* note 3, at 3.

94. *Id.* at 6–7, 9. “In the context of UAS operations, aggregation may mean the surveillance of an individual for an extended time, or the combination of drone-obtained data with other independent information.” *Id.* at 9.

95. *See id.* at 10.

96. Hillary B. Farber, *Eyes in the Sky and Privacy Concerns on the Ground*, 41 HUM. RTS. 23 (2016). “Moreover, the breadth and scope of the data a UAV can capture is far greater than traditional surveillance tools, setting these devices apart from planes and helicopters or even closed circuit television and satellite surveillance.” *Id.*

97. CRS Report, *supra* note 3, at 10. The advanced pace of data retention has led Europe to pass “right to be forgotten” laws, which allow

Respecting the First Amendment rights of drone owners may be even more difficult, as a person's right to acquire information related to what one wishes to speak about is not absolutely guaranteed under the First Amendment.⁹⁸ The government may constitutionally limit access to certain information when it determines that collection would pose a threat to public safety.⁹⁹ Drone surveillance, with all its attendant dangers, seems to fit the description of collection activity that would pose a significant risk to public safety.¹⁰⁰ Because the government would be regulating drones without regard to the message that is being recorded or transmitted, this could be seen as a "time, place, or manner" regulation of free speech.¹⁰¹ Although public safety is a

retention only "for no longer than is necessary for the purposes for which it was collected." *Id.*

98. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939); *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 591 (7th Cir. 2012); *Potts v. City of Lafayette, Ind.*, 121 F.3d 1106, 1111 (7th Cir. 1997). However, courts have indeed recognized that, "[n]ews-gathering, for example, is entitled to first amendment protection, for without some protection for seeking out the news, freedom of the press could be eviscerated . . ." *Turner v. Lieutenant Driver*, No. 16-10312, 2017 WL 650186, at *5 (5th Cir. Feb. 16, 2017) (internal citations omitted) (internal quotations omitted).

99. *Hague*, 307 U.S. at 515–16 ("The privilege of a citizen of the United States to use the streets and parks for communication of views of national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in the subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.")

100. For example, the FAA received 582 reports throughout the country of incidents involving drones and manned aircraft between August 21, 2015 and January 31, 2016. *FAA Releases Updated UAS Sighting Reports*, FEDERAL AVIATION ADMINISTRATION (Mar. 25, 2016), <https://www.faa.gov/news/updates/?newsId=85229>. Among those incidents, 331 were sightings (defined as "incidents in which drones are within aircraft flight paths but do not pose any immediate potential threat"), while 188 were close encounters (defined as "incidents where a drone comes within 500 feet of a manned aircraft, when a pilot declares a 'Near MidAir Collision,' when a pilot takes evasive action to avoid a potential collision, or when the pilot uses descriptive language that indicates the drone as being dangerously close"). Arthur Holland Michel and Dan Gettinger, *Analysis of New Drone Incident Reports*, CENTER FOR THE STUDY OF THE DRONE (Mar. 28, 2016), <http://dronecenter.bard.edu/analysis-3-25-faa-incidents/>.

101. *Potts*, 121 F.3d at 1111.

To sustain a time, place, or manner restriction on First Amendment activities, the government must show that the restriction (1) is justified without reference to the content of the regulated speech; (2) is narrowly tailored to serve a significant governmental interest; and

significant governmental interest that would support a restriction of free speech, the real question is whether banning drone use would be narrowly tailored to serving this interest.¹⁰² Just as there are alternate ways to practice First Amendment rights apart from drones, states may be able to find alternate ways to regulate drone safety that are not as restrictive on the First Amendment.

Despite all its shortcomings and concerns, drone technology is still new and exciting and many people seemingly have caught “drone fever.”¹⁰³ While innovation may lead to more beneficial uses, especially in the commercial sphere,¹⁰⁴ private use of drones may spur more interest in the advance of technology in general and may help to uncover illegal activity.¹⁰⁵ Banning the use of private drones altogether would also raise First Amendment concerns where the “right to record” police conduct is concerned, as prohibition of private drone use would eliminate a safe method to surveil police activity.¹⁰⁶ Moreover, many privacy-centric laws do not take into account that “public acts sometimes occur in private spaces; and private acts sometimes occur in public spaces.”¹⁰⁷ Thus, in the interest of protecting the rights of the private drone owners to video record, states should look to preserve some room for drones to roam in the skies provided the Legislature deems them sufficiently safe.¹⁰⁸ Although most statutes stand in isolation, Texas, Idaho, and Oregon have passed comprehensive statutes in order to regulate civilian use of drones.¹⁰⁹

(3) leaves open ample alternative channels for communication of the information.

Id. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

102. *Id.*

103. Michel, *supra* note 3.

104. *E.g.*, *Amazon Prime Air*, AMAZON, <https://www.amazon.com/Amazon-Prime-Air/b?ie=UTF8&node=8037720011> (last visited Jan. 10, 2017) (describing “a delivery system from Amazon designed to safely get packages to customers in 30 minutes or less using unmanned aerial vehicles . . .”).

105. Kaminski, *supra* note 8, at 60.

106. *Id.* at 63. Every circuit that has decided this issue has held that the First Amendment protects the right to record police conduct. *See Turner v. Lieutenant Driver*, No. 16-10312, 2017 WL 650186, at *6 (5th Cir. Feb. 16, 2017).

107. *Id.* at 62.

108. *See id.* at 63.

109. *See* TEX. GOV'T. CODE ANN. § 423 (West, Westlaw through 2016 Reg.

A. *Texas Drone Law*

While many states have sought to curb law enforcement use of drones while allowing certain private uses, Texas flips this script.¹¹⁰ The Texas statute creates both criminal and civil penalties for the capturing of unlawful images by private drone owners.¹¹¹ The Texas Legislature created built-in exceptions for certain classes of people, precluding them from liability.¹¹² The statute strikes balance by allowing for some inadvertent gathering of data,¹¹³ while allowing drone use for purposes of education, and where the drone owner has the consent of the person under surveillance.¹¹⁴ However, almost all of the uses described in this provision refer to governmental, institutional, or commercial use, so it is unclear whether Texas really makes a true allowance for freedom of hobbyists to fly drones.¹¹⁵ Thus, because “Texas’ bill has a host of prohibitions on the private-actor use of UAVs and very few prohibitions on law enforcement’s use,”¹¹⁶ Texas may run afoul of the First Amendment right to film in certain places, especially where the drone owner does not have the requisite *mens rea* to be guilty of the crime of illegally capturing an image.¹¹⁷ Furthermore, although the civil cause of action embodied in the Texas statute may help prevent the aggregation of data, it only

Sess.); IDAHO CODE ANN. § 21-213 (West, Westlaw through 2016 Reg. Sess.). OR. REV. STAT. ANN. § 837.300 (West, Westlaw through 2016 Reg. Sess.).

110. Dan Soloman, *Texas’s Drone Law Is Pretty Much The Opposite Of Every Other State’s Drone Law*, TEXAS MONTHLY (Sept. 16, 2013), <http://www.texasmonthly.com/the-daily-post/texas-drone-law-is-pretty-much-the-opposite-of-every-other-states-drone-law/>.

111. TEX. GOV’T. CODE ANN. § 423.003-.004, .006 (West, Westlaw through 2016 Reg. Sess.).

112. Law Enforcement use is singled out in the statute for such preclusion. *Id.* § 423.002 (Westlaw).

113. *Id.* § 423.004(d) (Westlaw) (“It is a defense to prosecution under this section for the possession of an image that the person destroyed the image as soon as the person had knowledge that the image was captured in violation of Section 423.003.”).

114. *Id.* § 423.002 (Westlaw). However, it is unimpressive that Texas allows private drone filming on land that the FAA has designated “for the purpose of integrating unmanned aircraft systems into the national airspace” as state law would likely be pre-empted anyway. *Id.*

115. *Id.*

116. Iva Todorova, *The Sky Is the Limit: Uavs by Private Actors and the Implications to Common-Law Privacy*, 10 FIU L. REV. 803, 828 (2015).

117. See § 423.003(d) (Westlaw).

applies to images captured on private property.¹¹⁸

B. Idaho Drone Law

Idaho's statute also leans toward the side of privacy, and has the potential to "run afoul of the First Amendment."¹¹⁹ This statute creates a civil cause of action for private citizens who are the subject of drone-related surveillance, but it is broad in scope.¹²⁰ No private drone owner may fly over or take pictures of any private property or agricultural industry without the express, written consent of the property owner.¹²¹ Far from just applying strictly to private personal interests, filming the land itself will lead to civil liability for the private drone operator.¹²² The counter-intuitive result of this law is that private drone owners flying where they are legally allowed may be subject to liability if they "intentionally"¹²³ film people on private property, or the private property itself.¹²⁴ Where the statute really runs afoul of the First Amendment is that in its quest to ensure that privacy interests are protected,¹²⁵ it does not allow filming of "constitutionally-protected speech activity, such as protests, speeches, or rallies."¹²⁶

C. Oregon Drone Law

On the other end of the privacy-free-speech-regulation spectrum is an Oregon statute, which may not do enough to protect privacy rights.¹²⁷ Like the Texas and Idaho statutes,

118. *Id.* § 423.006. The statute provides separate causes of action for each instance of capturing an image. *Id.* § 423.006(a)(2)(B) (Westlaw).

119. Todorova, *supra* note 116, at 828.

120. See IDAHO CODE ANN. § 21-213(2)–(3) (West, Westlaw through 2016 Reg. Sess.).

121. *Id.*

122. *Id.*

123. *Id.* § 21-213(2)(a) (Westlaw).

124. Arthur B. Macomber, *Trespass, Privacy, and Drones in Idaho: No Snooping Allowed!*, 58 ADVOCATE 45, 47 (2015).

125. See *id.* ("Idaho law may over-protect privacy, whether privacy is defined as the privacy of persons, or the privacy of their activities, whether such activities are on private property or not.")

126. *Id.* (quoting Jeremiah Hudson and Nick Warden, *Narrowing the Drone Zone: The Constitutionality of Idaho Code § 21-213*, 57 ADVOCATE 23, 25 (2014)).

127. See OR. REV. STAT. ANN. § 837.380 (West, Westlaw through 2016 Reg.

Oregon's law creates a private cause of action for any citizen who is the subject of some surveillance;¹²⁸ however, Oregon's provision places the affirmative duty on the subject of the surveillance to assert her right to privacy.¹²⁹ This requirement may cause problems where an individual does not know about the surveillance, and the private drone owner keeps coming back in order to aggregate and store the individual's data.¹³⁰ Furthermore, the statute addresses flying a drone over a person's property, but there is no separate provision to protect against the collection and retention of data.¹³¹ Therefore, Oregon has seen fit to allow its citizens to have some leeway in private drone operation, and it is quite likely that privacy rights could suffer as a result.¹³²

As stated above, there have been multiple states that have proposed statutes regarding the regulation of drones just in the past few years.¹³³ However, not all the proposed statutes are created equal, as some do not strike the proper balance between privacy concerns and rights of private drone owners.¹³⁴

Sess.).

128. *Id.* § 837.380 (Westlaw).

129. *See id.* § 837.380(1)(a)–(b) (Westlaw).

(1) Except as provided in subsections (2) and (3) of this section, a person who owns or lawfully occupies real property in this state may bring an action against any person or public body that operates an unmanned aircraft system that is flown over the property if:

(a) The operator of the unmanned aircraft system has flown the unmanned aircraft system over the property on at least one previous occasion; and

(b) The person notified the owner or operator of the unmanned aircraft system that the person did not want the unmanned aircraft system flown over the property.

Id.

130. *See* CRS Report, *supra* note 3, at 9.

131. *See* OR. REV. STAT. ANN. § 837.380(1) (West, Westlaw through 2016 Reg. Sess.); CRS Report, *supra* note 3, at 6, 10.

132. Schlag, *supra* note 1, at 17 (“Left unrestrained, drone technology will develop faster than a sufficiently controlling framework can effectively manage, and take advantage of unsuspecting individuals.”).

133. *E.g.*, H.B. 5274, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016); H.B. 22, 2016 Leg., Reg. Sess. (Ky. 2016); H.B. 637, 28th Leg., Reg. Sess. (Haw. 2015); S.B. 44, 99th Gen. Assemb., 1st Reg. Sess. (Ill. 2015); S.B. 155, 2015 Leg., 2015–2016 Leg. Sess. (Vt.).

134. *See, e.g.*, Joseph M. Hanna, *The Drones Are Coming! Is New York Ready? New York's Proposed Regulation of Unmanned Aerial Vehicles*, N.Y.

V. RHODE ISLAND LAW MAY (NOT) BE APPLICABLE TO DRONES

A. *Right of Privacy*

Considering the competing interests involved, it is unlikely that Rhode Island law, as it currently exists, is equipped to deal with drones. The tort invasion of privacy in Rhode Island is “purely statutory”; there is no common law right to privacy in the state.¹³⁵ Invasion of privacy is exclusively statutory¹³⁶ and, because there is a relative “lack of case law”¹³⁷ interpreting the statute, it may, therefore, be difficult to update the interpretation of the statute to meet the unique challenges posed by drones.¹³⁸

Under the statute, the “right to be secure from unreasonable intrusion upon one’s physical solitude or seclusion,” is of paramount importance.¹³⁹ However, because the Rhode Island Supreme Court has determined that this language is unambiguous, courts merely apply the plain meaning of the language of the statute.¹⁴⁰ A cause of action is stated when there

ST. B.J. 10, 17 (Sept. 2014) (describing the infirmities of N.Y. Bill 7639, which lacked built-in First Amendment protections for journalists and students).

135. *Russell v. Salve Regina Coll.*, 890 F.2d 484, 488 (1st Cir. 1989), *rev’d on other grounds*, 499 U.S. 225 (1991).

136. *See* 9 R.I. GEN. LAWS ANN. § 9-1-28.1 (West, Westlaw through 2016 Reg. Sess.). The statutory right to privacy is further divided into intrusion upon seclusion, misappropriation of likeness, unreasonable publicity, and false light. *Id.* The relevant provisions will be discussed in turn below.

137. *Russell*, 890 F.2d at 488. Although this decision was written in 1989, there is still a lack of case law interpreting the right of privacy in Rhode Island, which is troubling if only for the purposes of protecting citizens against drones.

138. *See id.* Giving the statute a strict interpretation, the court was reluctant to extend the right past physical invasion. *Id.* Thus, any a drone filming a person from outside the bounds of private property likely would not fit the literal language of the statute. *See id.*

139. § 9-1-28.1(a)(1) (Westlaw). This is not only because this right is listed first in the statute, but also because it is the most frequently litigated. *See e.g.*, *Lisnoff v. Stein*, 925 F. Supp. 2d 233, 239 (D.R.I. 2013); *Liu v. Striuli*, 36 F. Supp. 2d 452, 479 (D.R.I. 1999); *DaPonte v. Ocean State Job Lot, Inc.*, 21 A.3d 248, 252 (R.I. 2011); *Swerdlick v. Koch*, 721 A.2d 849, 857 (R.I. 1998).

140. *See Swerdlick*, 721 A.2d at 857. Perhaps if the statute was ambiguous the court could look at the legislative history and come to a more liberal interpretation based on the purpose or intention of the Legislature in passing the statute. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 160–77 (2009) (finding through empirical analysis that use of legislative history in statutory interpretation generally leads to more liberal interpretations).

is “an invasion of something that is entitled to be private or would be expected to be private,” and “[t]he invasion was or is offensive or objectionable to a reasonable man.”¹⁴¹ The operative phrase in the statute is “one’s physical solitude or seclusion,” which does not extend to places that are in view of the public, even if they be on a person’s private property outside of their residence.¹⁴² In fact,

“[O]nce the person leaves the seclusion of the home and enters the public domain, the burden is upon the party alleging an unreasonable intrusion upon his or her physical solitude or seclusion to establish that ‘thrown about his [or her] person or affairs’ is an affirmative seclusion sufficient to merit an objective expectation of privacy.”¹⁴³

Thus, proving the existence of a reasonable expectation of privacy may be a bridge too far, especially where there are dozens of drones buzzing about overhead in places within view of the public.¹⁴⁴

Unlike the tort of intrusion upon seclusion, unreasonable publicity given to one’s private life turns on what an individual expected to keep private, along with whether society as a whole would see that expectation as reasonable.¹⁴⁵ Additionally, there must be some sort of publication to a third party; the person disclosing the purported private fact need not benefit from the disclosure.¹⁴⁶ Moreover, a plaintiff asserting this cause of action would have to prove “who disclosed the information, when [and] where it happened, how she knows about it, [and] how it caused

141. *Liu*, 36 F. Supp. 2d at 479 (internal quotations omitted).

142. *Swerdlick*, 721 A.2d at 857. The defendant in *Swerdlick* “took photographs and recorded events that were taking place outside of plaintiffs’ house, all of which were in full view of their neighbors and of any other member of the public who may have been present.” *Id.* However, the court determined that this was not intrusion upon seclusion because all the events occurred in view of the public. *Id.*

143. *DaPonte*, 21 A.3d at 252 (quoting *Swerdlick*, 721 A.2d at 857).

144. Patrick Anderson, *As Drone Flights in R.I., Elsewhere Mount, Rule Makers Struggle to Keep Up*, PROVIDENCE J. (Aug. 15, 2015), <http://www.providencejournal.com/article/20150830/NEWS/150839917> (describing a situation in which a man who had just moved to a neighborhood in Warwick was being watched by a drone of unknown origin).

145. *Lisnoff v. Stein*, 925 F. Supp. 2d 233, 240 (D.R.I. 2013).

146. 9 R.I. GEN. LAWS ANN. § 9-1-28.1(3) (West, Westlaw through 2016 Reg. Sess.).

her damages.”¹⁴⁷ This would cause several problems for a person who is the subject to any kind of drone related surveillance. For example, publicly observable facts or information would not be protected because society would not reasonably recognize this information as private.¹⁴⁸ Furthermore, nothing precludes the owner of a drone, even if he does capture a person’s private information from retaining such data *ad infinitum*, as the statute only applies once there has been publication of the information.¹⁴⁹ Moreover, the private citizen would have to prove who disclosed the information, when and where they disclosed it, how the citizen knows about that disclosure, and how it caused him damages. These issues are complex—if not impossible—when there are a number of unobservable and unidentifiable drones milling about.¹⁵⁰

B. *Strict Liability*

One way that the Rhode Island courts could seek to deal with the activity of flying drones over people’s property is through the application of strict liability to the use of drones over private property.¹⁵¹ Strict liability regimes generally regulate

147. *Doe v. Brown University*, No. CV 15-239-M-PAS 2016 WL 3570606, at *14 (D.R.I. June 27, 2016). Here, the plaintiff’s claim that, “[u]pon information and belief, Brown disclosed information about Jane Doe’s academic status, academic record and eligibility for graduation to at least one other student,” was not enough to “nudge her claim over the line from possible to probable.” *Id.*

148. “In all three cases, the Supreme Court found no reasonable expectation of privacy because the observations were made from public, navigable airspace. The Court reasoned that navigable airspace is the equivalent of a public thoroughfare, open to anyone who abides by the regulations governing air travel.” Farber, *supra* note 96, at 25 (citing *Florida v. Riley*, 488 U.S. 445 (1989); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207 (1986)).

149. See § 9-1-28.1(3) (Westlaw).

150. See *Doe*, 2016 WL 3570606, at *14.

151. RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 1977).

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm. (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Id.

“ultrahazardous” activities through the court system; ultrahazardous activities are those that are dangerous for the area in which they are carried out.¹⁵² Courts rely on several factors, tailored to fit the facts of the case before them. Some of these factors, such as inability to eliminate the risk by exercise of reasonable care may not apply, while others, such as extent to which the activity is not a matter of common usage may change as more people use drones.¹⁵³ Regardless, the applicability of the strict liability factors may be difficult because it is also difficult to quantify the exact damage that arises from the activity.¹⁵⁴ Of course, a person may exercise “reasonable care” to avoid flying a drone over another’s property, but it is far more difficult for a person to avoid actually capturing pictures or video of private property when flying in public unless the Legislature or the RIAC were to specify certain safe zones for the drones to fly.¹⁵⁵

However, whatever positives exist in allowing private citizens to fly drones, these are inapplicable when a drone operator consciously chooses to spy on a person in their own yard; the activity is clearly inappropriate for these spaces.¹⁵⁶ Thus, courts, more so than with privacy law, could seek to use strict liability law to limit the use of drones over private property.¹⁵⁷ However, plaintiffs would need to prove some tangible form of damage in order for courts to apply strict liability, and it must be the specific kind of damage that would normally attach to the flying of drones over another’s property.¹⁵⁸

152. See RESTATEMENT (SECOND) OF TORTS § 519 cmt. e. (AM. LAW INST. 1977). Ultrahazardous activities include “[b]lasting in the midst of a city,” “[d]rilling oil wells or operating refineries in thickly settled communities,” and “[w]ater collected in quantities in unsuitable or dangerous places.” *Id.*

153. See *Splendorio v. Bilray Demolition Co.*, 682 A.2d 461, 466 (R.I. 1996).

154. See *id.* As noted above, drones pose both physical and intangible harms to the privacy and enjoyment of property.

155. See *id.* As of this moment, the RIAC has the exclusive ability to regulate drones in Rhode Island, but it would still have to regulate in the interstices of the law where it would not be preempted. See *An Act Relating to Aeronautics*, *supra* note 75.

156. *Splendorio*, 682 A.2d at 466.

157. Benjamin D. Mathews, Comment, *Potential Tort Liability for Personal Use of Drone Aircraft*, 46 ST. MARY’S L.J. 573, 594–97 (2015) (connecting judicially created law of private nuisance and strict liability to find solutions for torts committed by drones).

158. *But see Splendorio*, 682 A.2d at 466 (refusing to apply strict

VI. PROPOSED STATUTORY SCHEME

It has been said, “[t]hose who cannot remember the past are condemned to repeat it.”¹⁵⁹ The focus of Rhode Island’s effort to create a statutory scheme for the regulation of drones should, then, be on learning from and avoiding the problems inherent other states’ statutes.¹⁶⁰ First and foremost is the protection of citizens’ reasonable expectation of privacy; however, the right of citizens to own and operate drones for lawful purposes should not take a back seat as this could serve to stifle the exercise of First Amendment rights.¹⁶¹

A. *Privacy Rights*

States have handled the act of flying a personal drone over another’s property in different ways.¹⁶² The Rhode Island Drone Commission’s report suggested new privacy laws specifically concerning drones in addition to increased penalties for violations of Rhode Island’s Uniform Aeronautical Regulatory Act.¹⁶³

Considering that drones may be used to stalk people when they are outside the privacy of their homes, Rhode Island should consider adopting some counter-measure against this kind of invasion of privacy. In 2016, the Kansas Legislature amended the state’s anti-stalking statute to specifically include acts of stalking committed using drones.¹⁶⁴ The statute requires a “course of

liability).

159. This quote, which is more commonly phrased as “those who do not learn history are doomed to repeat it,” has been attributed to multiple sources, but most likely had its origin in philosopher George Santayana. Nicholas Clairmont, *Those Who Do Not Learn History Are Doomed to Repeat It.* *Really?* BIG THINK, <http://bigthink.com/the-proverbial-skeptic/those-who-do-not-learn-history-doomed-to-repeat-it-really> (last visited Jan. 10, 2017).

160. See *supra* Part IV.

161. For example, Rhode Island should protect the First Amendment rights of journalists and students. See Hanna, *supra* note 134, at 17.

162. As stated before, especially in Oregon, the landowner is required to warn the drone user before bringing an action under the statute; in Idaho, an action can be brought regardless of whether or not the drone was actually flown over a person’s private property. See *supra* Parts IV.B.–C.

163. RI Drone Report, *supra* note 13, at 7–8. While the Commission recommended these changes, it did not offer any specific guidance to the Legislature. See *id.*

164. S. 319, 86th Leg., Reg. Sess. (Kan. 2016). In pertinent part, the revision reads: “Harassment’ shall include any course of conduct carried out

conduct” which is defined as “two or more separate acts over a period of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress.”¹⁶⁵ Although there are problems of proof inherent in this statute, it would certainly solve some of the problems in Rhode Island’s privacy law along with those in the Oregon and Idaho statutes.¹⁶⁶ Additionally, the Kansas Legislature specifically exempted “constitutionally protected activity” from liability, which would ensure that the rights of the drone owners would be respected at the same time.¹⁶⁷

Rhode Island could also protect privacy by creating drone-specific voyeurism and “Peeping-Tom” laws as Louisiana did in 2016.¹⁶⁸ In creating these types of laws, the Rhode Island General Assembly should take a lesson from a deficiency in the Louisiana statute, which does not seem to provide for images that are captured accidentally but are later retained for lewd reasons.¹⁶⁹ Because data retention is an important aspect of drone privacy law, efforts to minimize the use of this data should be made at every opportunity, especially if it can fit into the category of socially unacceptable behavior.¹⁷⁰ Moreover, the “Peeping Tom” law seems to be a potentially potent solution to one aspect of Rhode Island privacy law as it applies to images captured outside of the target property.¹⁷¹ Although this law merely applies to

through the use of an unmanned aerial system over or near any dwelling, occupied vehicle or other place where one may reasonably expect to be safe from uninvited intrusion or surveillance.” *Id.*

165. *Id.*

166. That is, filming from a place visible to the public would be considered stalking if done two or more times; the person would not have to warn the drone owner before bringing an action; the Kansas statute ensures that accidental capturing on one occasion likely will not be punished.

167. Kan. S. 319.

168. H.R. 635, 2016 Leg., 42nd Reg. Sess. (La. 2016). These laws all require capturing images of another for a specific purpose, that is they all require some sort of mens rea. *See id.*

169. *See id.*

170. CRS Report, *supra* note 3, at 10–11. For example, providing a defense for destruction of the image or data as soon as the drone owner has knowledge that an illicit image was captured might be sufficient to ensure that more images are destroyed before they are exposed to others while also protecting the rights of drone operators. *See* TEX. GOV’T CODE ANN. § 423.003 (West, Westlaw through 2016 Reg. Sess.).

171. La. H.R. 635.

peeping through windows or doors into the house of another, the Rhode Island Legislature would be remiss if it missed the opportunity to update Rhode Island's privacy law to apply to peeping into a person's yard, which is a space not technically in the view of the public.¹⁷²

In order to fully remedy any privacy concerns, the Legislature could decide to enact a statute akin to the invasion of privacy statute California amended in 2015.¹⁷³ The California statute contains two different actions: (1) invasion of privacy and (2) constructive invasion of privacy; the second of which created a cause of action against off-site video capturing through use of a drone.¹⁷⁴ Of course, California may be much more concerned about privacy rights considering the problems of paparazzi which Rhode Island does not share, but no matter which state one lives in, it is still important to protect the reasonable expectation of privacy of ordinary citizens.¹⁷⁵ An amendment adding constructive invasion of privacy to Rhode Island's privacy statute would seemingly cover up the problems in Rhode Island law where persons were allowed to film and photograph private property in view of the public because there is no "reasonable expectation of privacy."¹⁷⁶

In addition to tort causes of action, the Rhode Island Legislature could decide to create criminal sanctions as another

172. *Id.*; *Swerdlick v. Koch*, 721 A.2d 849, 857 (R.I. 1998). That is, the Legislature could add wording to the statute which would differentiate places on private property in view of the public, which would not lead to a cause of action, from those in view of the camera on a drone, which would lead to a cause of action. *See id.*

173. Assemb. B. 856, 2015 Leg., 2015–2016 Reg. Sess. (Cal. 2015).

174. *Id.* In pertinent part the bill reads:

(b) A person is liable for constructive invasion of privacy when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.

Id.

175. ESSEX, *supra* note 10, at 15.

176. *See Swerdlick*, 721 A.2d at 857.

form of deterrence against unreasonable invasions of privacy.¹⁷⁷ At the same time as the Louisiana Legislature passed its voyeurism laws, it also passed a statute criminalizing certain trespasses perpetrated using drones in the airspace of a person's private property.¹⁷⁸ This statute would require permission before entering, and would make it a crime for anyone to enter on to the property of another "with the intent to conduct surveillance of the property or of any individual lawfully on the property."¹⁷⁹ However, the statute also makes an express exemption for those drone owners who operate "in compliance with FAA regulations or authorization."¹⁸⁰

B. Rights of Drone Operators

There is little debate that drones can become a hazard when operated improperly, but the question is whether they are so dangerous to public safety and privacy that the Legislature should create a statutory scheme akin to those in Texas and Idaho to protect Rhode Island citizens.¹⁸¹ As noted above, the newly-enacted FAA regulations on safety in commercial drones do apply to a significant number of privately owned drones, which may take safety regulation wholly out of the hands of the Rhode Island Legislature.¹⁸² The Legislature, however, could still decide that it needs to ban the use of drones completely, to serve the compelling governmental interest of protecting the public from the dangers of drones; this would be a grave mistake and would stifle innovation and expression within the state.¹⁸³ Consider that the citizens of Rhode Island approved a bond for a new engineering center at the University of Rhode Island (URI) on November 8, 2016, which would be a perfect place to create new and exciting drone technology.¹⁸⁴ The Legislature could decide to appropriate funds

177. Or, as the RI Drone Commission mentioned, expanded prohibitions and increased penalties for offenses under the Uniform Aeronautical Regulatory Act. RI Drone Report, *supra* note 13, at 7–8.

178. S. 141, 2016 Leg., 42nd Reg. Sess. (La. 2016).

179. *Id.*

180. *Id.*

181. See *supra* Parts IV.A.–B.

182. Alkalay, *supra* note 53.

183. RI Drone Report, *supra* note 13, at 8.

184. The Univ. of R.I., *30 R.I. towns, cities say 'Yes on 4' to benefit URI's College of Engineering, Innovation Campus*, URI TODAY (Nov. 9, 2016),

for research into drone technology as Kansas has already done, which may lead to the creation of safer, more reliable, and better equipped drones.¹⁸⁵

The Rhode Island Drone Commission recommended that the Legislature should create certain spaces where people can fly drones without fear of prosecution.¹⁸⁶ That is, instead of listing all the many places in which a drone could not fly, the Legislature should create specific places in which drone operators may fly without requiring permission from others.¹⁸⁷ This would create restrictive lists akin to the Texas statute,¹⁸⁸ but may be more appropriate for Rhode Island, which has a much higher population density than Texas.¹⁸⁹ Creation of specific zones where drone operators can fly their drones legally would surely limit their ability to use the drones for constitutionally-protected free speech reasons akin to “free speech zones” in colleges and universities.¹⁹⁰ However, allowing unfettered drone use does pose a risk of safety in densely populated areas and the area surrounding T.F. Green Airport.¹⁹¹

Perhaps a better solution, one that would take the rights of drone operators and the safety of the population into account, would be to allow drone operation on the state’s many public lands

<https://today.uri.edu/news/every-r-i-town-city-votes-yes-on-4-to-benefit-uris-college-of-engineering-innovation-campus/>.

185. See S. 249, 86th Leg., Reg. Sess. (Kan. 2016) (appropriating funds to the Kansas Department of Transportation conditioned on the development of partnerships with educational institutions for research on UAVs).

186. RI Drone Report, *supra* note 13, at 8.

187. See *id.*

188. See TEX. GOV'T CODE ANN. § 423.002 (West, Westlaw through 2016 Reg. Sess.).

189. *List of States by Population Density*, 1KEYDATA.COM, <http://state.1keydata.com/state-population-density.php> (last visited Jan. 4, 2017). Rhode Island is ranked number two in the nation for population density, while Texas falls at number twenty-six on the list. *Id.* It goes without saying that there is much more space in Texas as well.

190. Samantha Harris, *Free Speech Zones, Then and Now*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 27, 2016), <https://www.thefire.org/free-speech-zones-then-and-now/>. These zones have been criticized and, in some cases ruled unconstitutional because they limit students’ ability to exercise their First Amendment right of free speech. See *Free Speech Zones on Campus*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., (Sept. 19, 2013), <https://www.thefire.org/infographic-free-speech-zones-on-americas-campuses-2/>.

191. RI Drone Report, *supra* note 13, at 6.

and parks.¹⁹² This would make the exercise of certain protected free speech more difficult, but certainly not impossible, while allowing Rhode Island to avoid creating statutes with such technical violations as in Idaho because the drones would be less likely to capture images of private property, either accidentally or by design.¹⁹³ Photography and filming of demonstrations and possible illicit police activity via drone cameras could still take place in public areas, while other means of capturing these events could still be used where drones would pose a threat to the safety and privacy of other citizens.¹⁹⁴

Finally, in order to balance First Amendment concerns with citizen safety, Rhode Island should undertake regulation of weaponized drones in some way.¹⁹⁵ A proposed bill in Oregon would make operating a weaponized drone a class A misdemeanor, which is a solution that the Legislature should seriously consider in order to safeguard public safety while also respecting the rights of drone owners.¹⁹⁶

CONCLUSION

The Rhode Island Legislature is now at an interesting

192. *Home*, STATE OF RHODE ISLAND DIV. OF PARKS & RECREATION, <http://www.riparks.com/#> (last visited Jan. 5, 2017). The Rhode Island Parks and recreation department lists no less than thirteen different state parks all over the state, as well as six other areas listed in the “other state lands” tab. *Id.*

193. *See* IDAHO CODE ANN. § 21-213 (West, Westlaw through 2016 Reg. Sess.). However, some parks, like World War II Veterans Memorial Park in Woonsocket, are located in the middle of densely populated areas where drones would be more likely to capture images of private property surrounding the park. *See World War II Veterans Memorial State Park*, STATE OF RHODE ISLAND DIV. OF PARKS & RECREATION, <http://www.riparks.com/Locations/LocationWorldWarII.html> (last visited Jan. 5, 2017).

194. For example, these areas include densely populated cities, T.F. Green Airport, and other critical infrastructure around the state. *See* RI Drone Report, *supra* note 13, at 6.

195. The R.I. Drone Commission expressed concern over the “disturbing trend” of weaponized drones. *Id.*

196. H.R. 4066, 86th Leg., 2016 Reg. Sess. (Or. 2016) (“A person commits a Class A misdemeanor if the person intentionally, knowingly or recklessly operates an unmanned aircraft system that is capable of firing a bullet or projectile or otherwise operates an unmanned aircraft system in a manner that causes the system to function as a dangerous weapon as defined in ORS 161.015.”).

technological crossroads. Because of the proliferation of drones in both the country and the state, and the unique problems they present, the Legislature must choose how best to deal with this issue. Drones have the potential to create problems of safety and privacy for citizens within the area in which the drones operate. However, drones have many beneficial aspects and uses such as recreation, technological advancement, and First Amendment practice, which should not so quickly be dismissed. Due to the complex nature of the drone issue, creating a legal framework may well involve both statutory solutions from the Legislature as well as regulations from the RIAC.

Viewing the laws which other states have enacted can be helpful in finding the right “fit” for the people of Rhode Island, but one must still realize that what works in one state may not work in another due to the diverse needs of the citizenry. Along the way, the Rhode Island Legislature should act as a “laboratory of Democracy”¹⁹⁷ in reconciling First Amendment rights of drone owners and privacy rights of individuals in creating a comprehensive statutory scheme in Rhode Island.

197. This term was coined by Justice Brandeis, who stated, “[i]t is one of the happy incidents of the federal system, that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting); see also Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, AMERICAN ENTERPRISE INSTITUTE (Mar. 31, 2001), <http://www.aei.org/publication/laboratories-of-democracy/>.