Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 26 *Volume XXVI*
Number 3 *Volume XXVI Book 3*

Article 1

2016

Newsgathering Takes Flight in Choppy Skies: Legal Obstacles Affecting Journalistic Drone Use

Clay Calvert
University of Florida, Gainesville, Florida

Charles D. Tobin
Holland & Knight LLP

Matthew D. Bunker
The University of Alabama

Newsgathering Takes Flight in Choppy Skies: Legal Obstacles Affecting Journalistic Drone Use

Cover Page Footnote

[Clay Calvert] Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Florida. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. † [Charles D. Tobin] Partner and Chair of National Media Practice Team, Holland & Knight LLP, Washington, D.C. B.S., 1984, Journalism (High Honors), University of Florida; J.D., 1989, University of Florida. ‡ [Matthew D. Bunker] Reese Phifer Professor of Journalism, College of Communication and Information Sciences, The University of Alabama. Ph.D., 1993, University of Florida; J.D., 1985, University of Kansas.

Newsgathering Takes Flight in Choppy Skies: Legal Obstacles Affecting Journalistic Drone Use

Clay Calvert,* Charles D. Tobin,† & Matthew D. Bunker‡

This Article examines legal challenges confronting journalists who use drones to gather images. Initially, it traces the history of drones and the Federal Aviation Administration's efforts to regulate them, as well as new state legislation that aims to restrict drones. This Article then illustrates that a wide array of legal remedies already exist for individuals harmed by journalistic drone usage, and it argues that calls for additional, piecemeal state laws to regulate drones are unnecessary and unduly hinder First Amendment interests in newsgathering and the public's right to know. Furthermore, this Article asserts that the reasonable-expectation-of-privacy jurisprudence developed in aerial Fourth Amendment cases should be brought to bear in drone intrusion cases.

* Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Florida. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University.

† Partner and Chair of National Media Practice Team, Holland & Knight LLP, Washington, D.C. B.S., 1984, Journalism (High Honors), University of Florida; J.D., 1989, University of Florida.

‡ Reese Phifer Professor of Journalism, College of Communication and Information Sciences, The University of Alabama. Ph.D., 1993, University of Florida; J.D., 1985, University of Kansas.

INTRODUCTION

On February 1, 2014, journalist Pedro Rivera used his own drone to record images from a traffic accident in Hartford, Connecticut.[1] He flew it about 150 feet above a marked crime scene area while standing on public land.[2] In a subsequent federal lawsuit,

---

[1] Susan Campbell, *Hartford Drone Case Journalist Still Grounded*, HARTFORD COURANT, Apr. 26, 2015, at C3.

[2] *Id.*; *see* Patrik Jonsson, *Groundbreaking Drone Coverage of Tornado Damage Piques Ire of FAA*, CHRISTIAN SCI. MON. (Apr. 30, 2014), http://www.csmonitor.com/USA/2014/0430/Groundbreaking-drone-coverage-of-tornado-damage-piques-ire-of-FAA-video [http://perma.cc/GBP8-7CZD] ("Connecticut photographer Pedro Rivera flew a drone over a fatal traffic accident on Feb. 1, and he now alleges in a federal lawsuit that two Hartford, Conn., police officers demanded that his employer punish him for doing so.").

Rivera alleged that police ordered him to stop the drone and leave the scene, and that the officers later complained to his employer that he had interfered with a police investigation.[3]

In March 2015, however, U.S. District Court Judge Vanessa Bryant held in *Rivera v. Foley*[4] that Pedro Rivera failed to state a claim against the police for forcing him to bring down the drone. Specifically, she concluded the officers were entitled to qualified immunity[5] against that aspect of Rivera's First Amendment[6] claim because there was no clearly established right in that jurisdiction—the U.S. Court of Appeals for the Second Circuit—to record police activity.[7] The court further found that even if there were such a clearly established right to record police conduct, it applies only to handheld recording devices wielded by journalists on *terra firma*.[8] Rivera, on the other hand, "directed a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, effectively trespassing onto an active crime scene."[9]

Rivera may well be the first reported decision involving the legal rights of broadcast reporters flying drones, but it certainly won't be the last. And despite the discouraging result for news or-

---

[3] Rivera v. Foley, No. 3:14-cv-00196 (VLB), 2015 U.S. Dist. LEXIS 35639, at *4–5 (D. Conn. Mar. 23, 2015).

[4] *Id.*

[5] *See id.* at *26; *see generally* Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (finding that "[a] government official sued under § 1983 is entitled to qualified immunity unless the official violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct") (emphasis added); Pearson v. Callahan, 555 U.S. 223, 232 (2009) (observing that "[q]ualified immunity is applicable unless the official's conduct violated a clearly established constitutional right").

[6] The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety years ago through the Fourteenth Amendment's Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

[7] *Rivera*, 2015 U.S. Dist. LEXIS 35639, at *25–26.

[8] *See id*. at *24–25 (noting that "in cases where the right to record police activity has been recognized by our sister circuits, it appears that the protected conduct has typically involved using a *handheld device* to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue") (emphasis added).

[9] *Id.* at *25.

ganizations, it seems unlikely that future courts will be quite as dismissive of drone use by reporters as the *Rivera* court.

Drones (technically referred to as "unmanned aircraft systems," or "UAS")[10] are on the cusp of becoming major drivers of technological and economic change. Initially known for their role in warfare and antiterrorism,[11] drones carry the potential to generate innovation in numerous domains beyond newsgathering, including law enforcement, utility maintenance, scientific research, and business.[12] Many people became aware of the economic promise of drones when Amazon chief executive officer Jeff Bezos appeared on *60 Minutes* to demonstrate their potential for rapid order delivery.[13]

For news operations, drones have enormous advantages. Not only are drones often vastly less expensive for the media to operate than manned aircraft, but, as one Congressional Research Service report put it: "they can operate in dangerous areas without putting a human operator at risk of danger; can carry sophisticated surveillance technology; can fly in areas not currently accessible to traditional aircraft; and can stay in flight for long durations."[14] Already, despite Federal Aviation Administration ("FAA") limitations,

---

[10] ALISA M. DOLAN & RICHARD M. THOMPSON II, CONG. RES. SERV., INTEGRATION OF DRONES INTO DOMESTIC AIRSPACE: SELECTED LEGAL ISSUES 1 n.1 (2013), https://www.fas.org/sgp/crs/natsec/R42940.pdf [http://perma.cc/76ME-KEHK].

[11] *See generally* Doyle McManus, *Are We Winning the Drone War?*, PITT. POST-GAZETTE, May 1, 2015, at A-8 (noting that "the drone wars began" eight years ago in 2008, and arguing that the Obama administration needs "a top-to-bottom review of its drone policies—focused not only on targeting rules, but also on costs and benefits"); Scott Shane, *Ghosts in the Cross Hairs*, N.Y. TIMES, Apr. 24, 2015, at A1 (describing the use of drones by the United States under President Barack Obama to target terrorists, and noting that the "drone's vaunted capability for pinpoint killing appealed to a president intrigued by a new technology and determined to try to keep the United States out of new quagmires").

[12] *See infra* Part I (describing the history of drone use).

[13] *See* Doug Gross, *Amazon's Drone Delivery: How Would it Work?*, CNN (Dec. 2, 2013), http://www.cnn.com/2013/12/02/tech/innovation/amazon-drones-questions/ [http://perma.cc/PWZ4-6WWX]; Alexis C. Madrigal, *A Drone Scholar Answers the Big Questions About Amazon's Plans*, ATLANTIC (Dec. 3, 2013), http://www.theatlantic.com/technology/archive/2013/12/a-drone-scholar-answers-the-big-questions-about-amazons-plans/282009/ [http://perma.cc/NZZ8-B8K7].

[14] DOLAN & THOMPSON, *supra* note 10, at 17.

dramatic video footage has demonstrated the power of drone journalism.[15]

The current legal landscape of drone journalism, however, is chaotically confused. Although the FAA asserts that commercial-media use of drones must be expressly authorized by the FAA,[16] there are some signs the agency may yet relax that regulatory stance,[17] including a recent agreement by the FAA with news organizations to test drones in partnership with Virginia Polytechnic Institute and State University ("Virginia Tech").[18] An added layer of complexity arises from state statutory regulation of drone use, with forty-five states considering more than 160 bills in 2015 alone.[19]

This Article clarifies the most important legal issues surrounding media use of drones today. It also argues that existing legal principles governing newsgathering and privacy are sufficient to resolve concerns about media drone use. Scant legal literature on

---

[15] *See, e.g.*, *Fire Rips Through Brooklyn Recycling Plant: Drone Captures Flames on Video,* NBC N.Y. (Mar. 19, 2014), http://www.nbcnewyork.com/news/local/Brooklyn-Warehouse-Fire-Greenpoint-250886721.html [http://perma.cc/RJ9K-UVSE].

[16] *See* Memorandum from Mark W. Bury, Assistant Chief Counsel for Regulations, Fed. Aviation Admin., to James H. Williams, Manager, Unmanned Aircraft Integration Office, Fed. Aviation Admin. (May 5, 2015), https://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc200/interpretations/data/interps/2015/williams-afs-80%20-%20(2015)%20legal%20interpretation.pdf [http://perma.cc/4H9P-GVMY].

[17] *See* Al Tompkins, *What the FAA's Newly Proposed Drone Rules Mean to Journalists*, POYNTER (Feb. 16, 2015), http://www.poynter.org/news/mediawire/320079/what-the-faas-newly-proposed-drone-rules-mean-to-journalists [http://perma.cc/FD2Z-TSNK]; Mark Waite, *New Rules Governing Drone Journalism Are on the Way—and There's Reason to Be Optimistic*, NIEMAN LAB (Feb. 15, 2015), http://www.niemanlab.org/2015/02/new-rules-governing-drone-journalism-are-on-the-way-and-theres-reason-to-be-optimistic [http://perma.cc/ZC8F-Z6LJ].

[18] Ravi Somaiya, *Times and Other News Organizations to Test Use of Drones*, N.Y. TIMES (Jan. 15, 2015), http://www.nytimes.com/2015/01/16/business/media/10-companies-join-effort-to-test-drones-for-newsgathering.html [http://perma.cc/HJ4V-RSTS]. The FAA also has granted an exemption to CNN for drone flights for photography, with severe restrictions on who may operate the drones and under what conditions. David Goldman, *CNN Cleared to Test Drones for Reporting*, CNN (Jan. 12, 2015), http://money.cnn.com/2015/01/12/technology/cnn-drone/ [http://perma.cc/A4PY-RDBD].

[19] *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. ST. LEGISLATURES (Sept. 14, 2015), http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx [http://perma.cc/UG5P-9XP5].

drones and newsgathering now exists,[20] and the authors of this Article believe it provides significant original analysis of tort-based drone issues that advances scholarship on this important topic.

Part I provides an account of the legal background of media drone use, including the current status of FAA regulation and state statutory law. Part II explores three key newsgathering challenges that almost certainly will arise as drone use for newsgathering proliferates. Those challenges are: (1) legal limits on photographing police activities; (2) restrictions imposed by the tort of intrusion into seclusion; and (3) limits created through trespass law, anti-paparazzi statutes, and similar legal doctrines. Finally, this Article concludes by arguing that existing doctrines, tailored to fit specific news-drone uses, already provide sufficient mechanisms to balance the public and media's First Amendment newsgathering interests with individual interests in property, privacy, and safety.

I. EVOLVING GOVERNMENTAL REGULATION OF DRONE OPERATIONS

This Part has four sections. Initially, Section A provides a brief history of drones and aerial photography, while Section B then traces FAA efforts to regulate drone usage. Next, Section C analyzes the FAA's case against a drone enthusiast named Raphael "Trappy" Pirker. Finally, Section D explores current efforts to regulate drones.

A. History of Drones and Photography

Unmanned aircraft systems—"UAS" in government jargon or "drones" in common parlance—have existed in one form or

---

[20] *See, e.g.*, Donna A. Dulo, *Drones and the Media: First and Fourth Amendment Issues in Technological Framework*, 5 J. INT'L MEDIA & ENT. L. 217 (2014); Benjamin D. Mathews, *Potential Tort Liability for Personal Use of Drone Aircraft*, 46 ST. MARY'S L.J. 573 (2015); Mickey H. Osterreicher, *Charting the Course for Use of Small Unmanned Aerial Systems in Newsgathering*, 2014 PEPP. L. REV. 101 (2014); Nabiha Syed & Michael Berry, *Journo-Drones: A Flight over the Legal Landscape*, 30-JUN COMM. LAW. 1 (2014). There is also growing literature on Fourth Amendment issues in drone use, a topic this Article does not address. *See, e.g.*, Taly Matiteyahu, *Drone Regulations and Fourth Amendment Rights: The Interaction of State Drone Statutes and the Reasonable Expectation of Privacy*, 48 COLUM. J.L. & SOC. PROBS. 265 (2015).

another since pre-Civil War days, mostly as vehicles of warfare. The Habsburg Austrian Empire used ordnance-laden balloons to quell the Venetian uprising in 1849.[21] Airplane co-inventor Orville Wright and business partner Charles Kettering developed the "Kettering Bug," denominated the world's first "self-flying aerial torpedo," during World War I in a secret U.S. government laboratory.[22] The Cold War brought jet-powered drones,[23] and with the 1960 downing over the Soviet Union of a U-2 spy plane and the capture of U.S. serviceman Gary Powers, the American military stepped up development of drones to lower risk to human pilots.[24] The Obama Administration has increased its use of drones from that of its predecessors' to target terrorists in the Middle East and Africa.[25]

Paralleling the rise in military development, recreational drone operators have enjoyed flights of radio-controlled aircraft for several generations. The community of hobbyists who spent their spare time building and flying radio-controlled aircraft came together in 1936 to form the Academy of Model Aeronautics ("AMA").[26] The AMA began developing community-based safety and flight training programs and other standards for recreationalists.[27] The organization currently boasts more than 175,000 members.[28]

---

[21] Brian Holman, *The First Air Bomb: Venice, 15 July 1849*, AIRMINDED BLOG (Aug. 22, 2009), http://airminded.org/2009/08/22/the-first-air-bomb-venice-15-july-1849/ [http://perma.cc/UR27-439K].

[22] Jimmy Stamp, *World War I: 100 Years Later*, SMITHSONIAN MAG. (Feb. 12, 2013), http://www.smithsonianmag.com/arts-culture/unmanned-drones-have-been-around-since-world-war-i-16055939/?no-ist [http://perma.cc/2N3E-N33G].

[23] JOHN DAVID BLOM, CSI OCCASIONAL PAPER 37, UNMANNED AERIAL SYSTEMS: A HISTORICAL PERSPECTIVE 51 (2010), http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/OP37.pdf [http://perma.cc/7T89-6AX4].

[24] *See id.* at 56.

[25] *See* Jack Serie, *Almost 2,500 Now Killed by Covert U.S. Drone Strikes Since Obama Inauguration Six Years Ago: The Bureau's Report for January 2015*, BUREAU INVESTIGATIVE JOURNALISM (Feb. 2, 2015), https://www.thebureauinvestigates.com/2015/02/02/almost-2500-killed-covert-us-drone-strikes-obama-inauguration/ [http://perma.cc/UY8Y-G3VM].

[26] ACAD. MODEL AERONAUTICS, http://www.modelaircraft.org/ [http://perma.cc/JAF4-4QUL] (last visited Feb. 10, 2016).

[27] *Id.*

[28] *Id.*

Progress in mobile technology for photography has tracked that of government and civilian drone technology. In 1858, French photographer Gaspar Felix Tournachon used a tethered balloon to capture the first known aerial photographs, over the village of Petit-Becetre Paris.[29] In 1906, George R. Lawrence deployed a system of seventeen kites to lift heavy camera equipment for panoramic photography of the devastation wrought by the San Francisco earthquake and fire.[30]

But it was the Eastman Kodak Company's 1888 introduction of the Brownie camera—the first mass-produced, easily portable model—that launched more than a century of debate over privacy and the press. As the Brownie quickly became popular, many decried the rise of "camera fiends" who brought their Brownies to all manner of public gatherings.[31] Municipal beaches, and even the Washington Monument, began to ban their use.[32] And the advent of the Brownie, in part, led Samuel Warren and Louis Brandeis two years later to worry that "modern devices afford abundant opportunities for the perpetration" of invasive wrongs, and to wonder "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual."[33] Today, nearly every court ruling on privacy and the press finds its origins in Warren and Brandeis' seminal article,[34] which was largely prompted as a fearful backlash to the emerging hobbyists' and professional photographers' communities.

---

[29] *History of Aerial Photography*, PROF. AERIAL PHOTOGRAPHERS ASS'N, http://professionalaerialphotographers.com/content.aspx?page_id=22&club_id=808138&module_id=158950 [http://perma.cc/PK8U-EPYK] (last visited Feb. 10, 2016).

[30] *Id.*

[31] *See* David Lindsay, *The Kodak Camera Starts a Craze*, PUB. BROAD. SERV., http://www.pbs.org/wgbh/amex/eastman/peopleevents/pande13.html [http://perma.cc/B2SM-36M4] (last visited Feb. 10, 2016).

[32] *See id.*

[33] Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[34] For a few recent examples that demonstrate the continuing impact of the Warren and Brandeis article on modern privacy law, see Peckham v. New England Newspapers, Inc., 865 F. Supp. 2d 127, 129–30 (D. Mass. 2012); Experience Hendrix, L.L.C. v. HendrixLicensing.com, Ltd., 766 F. Supp. 2d 1122, 1137 n.13 (W.D. Wash. 2011); Curran v. Amazon.com, Inc., No. 2:07-0354, 2008 WL 472433, at *3 (W.D. W. Va. Feb. 19, 2008).

B. The Federal Government Regulates Model Aircraft Hobbyists

The public and news media remain understandably confused as to the state of regulation when it comes to the right to fly drones. Indeed, for years the government gave little guidance, likely because it did not want to impede recreational use of radio-controlled hobby aircraft. Imagine the embarrassing headlines that might result from the government slapping a twelve-year-old with a hefty fine for flying his or her birthday present too close to people in the local park.

For this reason, until recent years, the FAA—the subagency within the U.S. Department of Transportation charged with policing safety in the national airspace—took a fairly gentle approach. In 1981, for example, the FAA released a set of guidelines, developed in cooperation with the AMA, that made clear no FAA approval was required to fly a hobby drone if the operator observed certain parameters.[35] These included a flight ceiling of 400 feet above the ground and holding off on flights near spectators until the drone had been tested and proven airworthy.[36] The guidelines did not discuss any business use for drones.

Then, in 2007, recognizing that drone use was "a quickly growing and important industry," the FAA issued a policy advisory.[37] The policy advisory stated that the FAA's previous guidance on drone operations "only applies to modelers, and thus specifically excludes its use by persons or companies for business purposes."[38] Businesses using drones, according the this pronouncement, labored under the "mistaken understand-

---

[35] FED. AVIATION ADMIN., ADVISORY CIRCULAR 91-57, MODEL AIRCRAFT OPERATING STANDARDS (1981), http://www.faa.gov/documentLibrary/media/Advisory_Circular/91-57.pdf [http://perma.cc/J82P-LNNQ]. In recently tightening-up drone regulation, the FAA rescinded these guidelines on September 2, 2015 and supplanted them with a new set of "Model Aircraft Operating Standards." FED. AVIATION ADMIN., ADVISORY CIRCULAR 91-57A, MODEL AIRCRAFT OPERATION STANDARDS (2015), http://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_91-57A.pdf [http://perma.cc/DH63-ELLY] [hereinafter ADVISORY CIRCULAR 91-57A].

[36] *See* ADVISORY CIRCULAR 91-57A, *supra* note 35.

[37] Unmanned Aircraft Operations in the National Airspace System, 72 Fed. Reg. 6689 (Feb. 13, 2007).

[38] *Id.* at 6690.

ing that they are legally operating."[39] The advisory failed to provide a definition of "business purposes" or any guidance for civilian use of drones by most businesses.

No path to the lawful commercial use of drones would emerge for another five years, when, at the urging of the Obama Administration, Congress passed the FAA Modernization and Reform Act of 2012.[40] The Act mandated the FAA to "provide for the safe integration of civil unmanned aircraft systems into the national airspace system as soon as practicable, but not later than September 30, 2015."[41] Congress, not wanting to force the industry to be entirely grounded for three more years, included an all-important provision into the Act. Section 333 required the Secretary of Transportation to "determine if certain unmanned aircraft systems may operate safely in the national airspace system before completion" of final plans to integrate commercial drones.[42]

Since the Act, and through the end of 2015, the FAA has granted more than three thousand section 333 exemptions for commercial drone operations, ranging from pipeline inspections to closed-set filmmaking.[43] The exemptions contain stringent limitations, such as restricting the person operating the drones' controls to licensed pilots who have received an FAA medical certificate, bans on nighttime flights, and bans on flights over crowds of people.[44]

---

[39] *Id*.

[40] FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (Feb. 14, 2012).

[41] *Id.* § 332(a)(3).

[42] *Id.* § 333.

[43] *Authorizations Granted Via Section 333 Exemptions*, FED. AVIATION ADMIN., https://www.faa.gov/uas/legislative_programs/section_333/333_authorizations/ [http://perma.cc/5E5H-J4CA] (last visited Feb. 10, 2016).

[44] *See Section 333 Frequently Asked Questions (FAQ)*, FED. AVIATION ADMIN., https://www.faa.gov/uas/legislative_programs/section_333/333_faqs/ [http://perma.cc/3QMT-NMPA] (last visited Feb. 10, 2016).

C. The Pirker *Case: The FAA Wins Challenge by Commercial Drone Photographer*

The incident that awakened the news media to the drone regulatory environment was a legal challenge brought by freelance photographer Raphael "Trappy" Pirker.[45] A cult hero of sorts to model pilots and photographers, Pirker in 2011 flew a camera-equipped, fixed-wing, styrofoam-constructed Ritewing Zephyr drone around the grounds of the University of Virginia, on an assignment from an advertising company.[46] Pirker's breathtaking video, posted on YouTube,[47] caught the attention of the FAA, which issued a $10,000 civil penalty alleging that he conducted a "careless or reckless operation of an unmanned aircraft" in violation of FAA safety regulations.[48]

Pirker, relying on the murky state of the FAA's regulatory scheme, initially won dismissal of the fine in an administrative hearing on grounds that what he flew was a model, not an "aircraft" under federal regulations, and that the government had no authority to regulate model flights.[49] On November 18, 2014, however, the National Transportation Safety Board ("NTSB"), which acts as the appellate body for FAA administrative rulings, sided with the government. It broadly held that the FAA possessed authority to regulate any "aircraft"—model or commercial.[50] Pirker settled with the FAA shortly after the ruling.[51]

---

[45] *See* Julianne Chiaet, *Drone Pilot Challenges FAA on Commercial Flying Ban*, SCI. AM. (Nov. 1, 2013), http://www.scientificamerican.com/article/drone-pilot-challenges-faa-commercial-flying-ban/ [http://perma.cc/ANZ5-KJFQ].

[46] *Id.*

[47] sUAS News, *Stunt Sheep Don't Try This at Home: Trappys $10k Fine UVA Video*, YOUTUBE (Oct. 15, 2013), https://www.youtube.com/watch?v=OZnJeuAja-4 [http://perma.cc/3C9K-NCB3].

[48] Opinion and Order at 1–2, Huerta v. Pirker, No. CP-217 (N.T.S.B. 2014), http://www.ntsb.gov/legal/alj/Documents/5730.pdf [http://perma.cc/9HXS-ZUYN]. Specifically, the FAA charged Pirker with violating 14 C.F.R. § 91.13(a), which prohibits operation of "an aircraft in a careless or reckless manner so as to endanger the life or property of another." *Id.* at 2 n.2.

[49] *Id.* at 2.

[50] *See id.* at 4–7.

[51] Jack Nicas, *U.S. Federal Aviation Administration Settles with Videographer over Drones*, WALL ST. J. (Jan. 22, 2015), http://www.wsj.com/articles/u-s-federal-aviation-administration-settles-with-videographer-over-drones-1421960972 [http://perma.cc/T4AC-VDWG].

Pirker's case, as it involved photographers' rights, galvanized the media community. Briefs supporting his cause were filed by a number of photography and news media interests, including a coalition of twenty-two cable and broadcast networks and ownership groups.[52] These briefs argued that the news media's and public's First Amendment interest in newsgathering required the government to take special care only to enact narrowly tailored restrictions that accomplish compelling safety goals.[53] Unfortunately, in its ruling in the government's favor, the NTSB sidestepped that issue entirely.

Nonetheless, the ruling led to the continued collaboration among the news media to press the government for narrow restrictions that will preserve maximum opportunities to gather news with drones. Many news companies that participated in the coalition, for example, have joined a program under an FAA license to Virginia Tech to test drones under real-life news scenarios.[54]

D. Current Developments in Drone Regulation

1. Federal Regulatory Efforts & Media Organizations' Input

The FAA in February 2015, as Congress had required, released a proposed regulation for commercial drone use, including a weight limit on the aircraft of fifty-five pounds.[55] The proposed regulation contains many of the same restrictions as the section 333 exemptions: licensed pilots, no nighttime flights, and very limited ability to fly in populated areas.[56]

---

[52] Brief of News Media as Amici Curiae Supporting Respondent, *Pirker*, No. CP-217, https://app.ntsb.gov/legal/pirker/AmicusBriefNewsMedia.pdf [http://perma.cc/YME6-JQC3] [hereinafter News Media Brief].

[53] *See generally id.*

[54] *See* Brian Stelter, *Major Media Companies Unite to Test 'News Drones,'* CNNMONEY (June 16, 2015), http://money.cnn.com/2015/06/16/media/media-coalition-news-drones/ [http://perma.cc/4D8D-LPB8].

[55] Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015).

[56] *See Overview of Small UAS Notice of Proposed Rulemaking*, FED. AVIATION ADMIN., https://www.faa.gov/regulations_policies/rulemaking/media/021515_sUAS_Summary.pdf [http://perma.cc/J59T-WLGV] (last visited Feb. 10, 2016).

The proposal also contains, however, a suggestion that the FAA may enact a separate rule for "micro" drones weighing 4.4 pounds or less, which would include most of the less expensive models that newsrooms seek to use.[57] While the ban on nighttime flights and other restrictions would apply, the FAA's proposed rule contemplates that a proficiency test, but no pilot's license or medical certification, would be required—a far more practical and helpful criterion for most broadcasters.[58]

The FAA is not expected to enact this final rule until 2017.[59] More than 4,500 people and organizations filed comments to the proposed rule.[60] The same news media coalition that supported Pirker's battle with the FAA filed comments that were largely supportive of the proposed regulation, but encouraged further regulatory relaxation to maximize opportunities to use drones in daily newsgathering.[61]

On the same day as the FAA released the proposed rule, President Obama issued an executive memorandum requiring the National Telecommunications Infrastructure Agency ("NTIA"), a component of the Department of Commerce, to convene a "multi-stakeholder engagement process to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use."[62] The NTIA is currently holding open meetings with var-

---

[57] Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. at 9556–58.

[58] *See id.*

[59] Brian Fung, *The FAA Won't Make Up Its Mind on Drone Rules Until 2017—at the Earliest*, WASH. POST (Dec. 10, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/10/the-faa-wont-make-up-its-mind-on-drone-rules-until-2017-at-the-earliest/ [http://perma.cc/3W3K-7EB8].

[60] *Docket Folder Summary—Operation and Certification of Small Unmanned Aircraft Systems*, REGULATIONS.GOV, http://www.regulations.gov/#!docketDetail;D=FAA-2015-0150 [http://perma.cc/CY9U-D93S] (last visited Feb. 10, 2016).

[61] *See* News Media Coalition, Comment Letter on Operation and Certification of Small Unmanned Aircraft Systems (Apr. 24, 2015), http://www.medialaw.org/images/medialawdaily/05.04.15faacomment.pdf [http://perma.cc/8ED2-49RX].

[62] *Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems*, WHITE HOUSE (Feb. 15, 2015), https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua [http://perma.cc/FP82-CEYZ].

ious industries interested in the use of drone technology.[63] The news media is participating in the meetings, and has filed written comments urging that the federal government look to existing state law and not enact any new federal drone regulations for civilian use.[64]

In one significant regulatory development, the news media secured a crucial concession from the FAA's lawyers. In 2013, an FAA spokesperson had warned a Dayton, Ohio journalist against posting hobbyist-filmed drone video of a fire, which had been offered to the newspaper; the newspaper had no involvement in the flight, but cautiously called the FAA to ask about the legality of using the video.[65] First Amendment law would strongly counsel that, absent any involvement by journalists in unlawfully flying a drone, receiving footage would constitute "lawfully obtaining" the material, and a constitutional right to publish the footage, if newsworthy, would attach.[66] The news media complained that the FAA's arbitrary warning to the Dayton newspaper was unconstitutional.[67]

At the urging of the news media, the FAA in May 2015 published a legal opinion sharply drawing the distinction between the unlawful operation of a drone itself and the lawful publication of newsworthy, drone-captured images.[68] The opinion made clear that, if a news outlet does not operate or control the drone, the FAA cannot punish it for accepting drone images:

---

[63] *See Multistakeholder Process: Unmanned Aircraft Systems*, NAT'L TELECOMM. & INFO. ADMIN. (Feb. 1, 2016), http://www.ntia.doc.gov/other-publication/2015/multistakeholder-process-unmanned-aircraft-systems [http://perma.cc/Q8Y2-FJGH].

[64] *See* Letter from Charles D. Tobin, Attorney for Cox Media Grp., LLC, to Nat'l Telecomm. & Info. Admin. (Apr. 20, 2015), http://www.ntia.doc.gov/files/ntia/cox_media_group_llc_04_20_2015.pdf [http://perma.cc/3G45-GQZX].

[65] *See* Tristan Navera, *Why You Won't See Drone Footage from Downtown Fire on Our Site*, DAYTON BUS. J. (Apr. 4, 2014), http://www.bizjournals.com/dayton/blog/2014/04/why-you-won-t-see-drone-footage-from-downtown-fire.html [http://perma.cc/X3AM-X9A7].

[66] In *Bartnicki v. Vopper*, the Supreme Court held that a journalist who received a recording of an illegally taped telephone conversation, with no involvement in or notice of the illegal taping, had "lawfully obtained" the recording. 532 U.S. 514, 514–15 (2001). The Court further held that, as the tape contained newsworthy information, the First Amendment precluded punishment when the journalist broadcast it on the radio. *Id.*

[67] *See* News Media Brief, *supra* note 52, at 9–10.

[68] Memorandum from Mark W. Bury to James H. Williams, *supra* note 16.

"A media entity that does not have operational control of the UAS and is otherwise not involved in its operation falls outside of the FAA's oversight."[69] The opinion even authorizes payment after-the-fact: "Whether the media entity pays for or obtains the pictures, videos, or other information for free would not affect this analysis."[70]

The opinion makes crystal clear, however, that in the FAA's view, freelancers or employees of media companies must obtain FAA clearance to fly newsgathering drone missions: "A person who wishes to operate a UAS to take pictures or videos or gather other information that then would be sold to media outlets would need an FAA authorization for the operation."[71]

2. State and Local Governments Create Stormy Skies for Drone Journalism

As the federal government tries to bring predictability to drone regulation, a number of states[72]—and even some municipalities[73]—have enacted drone regulations of their own. Some of these laws pose few problems for journalists. Maine's law, for example, is aimed solely at law enforcement, providing detailed requirements for issuance of warrants for drone surveillance, a ban on police use of biometric technology, and a right for citi-

---

69 *Id.* at 2.

70 *Id.*

71 *Id.*

72 A collection of the current state drone laws is found at the National Conference of State Legislatures' website. *See Current Unmanned Aircraft State Law Landscape*, *supra* note 19.

73 In March 2015, the city council of Berkeley, California enacted a one-year moratorium on police use of drones, even though its police chief said acquiring a drone is "not on our radar." Emilie Raguso, *Council: No Drones for Berkeley Police for 1 Year,* BERKELEYSIDE (Mar. 2, 2015), http://www.berkeleyside.com/2015/03/02/council-no-drones-for-berkeley-police-for-1-year/ [http://perma.cc/P4PM-VPMA]. The Augusta-Richmond County (Georgia) Commission, in the run-up to the 2015 Masters Tournament at the Augusta National Golf Club, enacted an ordinance banning all drone flights during April 2–13, 2015. *See* Alex Miceli, *PGA Tour: Drones Banned over Augusta During Masters*, GOLFWEEK (Mar. 20, 2015), http://golfweek.com/news/2015/mar/20/masters-2015-augusta-national-drones-banned/ [http://perma.cc/H34D-KFYY].

zens to sue an police agency for violations.[74] Michigan's drone laws simply prohibit using drones to interfere with hunting.[75]

Other states' laws, however, are fraught with significant First Amendment problems that will cloud the skies for broadcasters who want to use drones. Florida's new statute, for example, provides a private right of action against a drone operator who, "with the intent to conduct surveillance," captures images of private property—even unoccupied property—"in violation of such person's reasonable expectation of privacy without his or her written consent."[76] That leaves a lot of reporters covering hurricane damage, an unfortunately common occurrence in Florida, to wonder whether drone news photography exposes them to significant legal risk.[77]

Texas has perhaps the most hostile statute for drone journalism, with the potential jailing of broadcasters for violations. Texas' drone statute makes it a misdemeanor for any person to use "an unmanned aircraft to capture an image of an individual or privately owned real property in this state with the intent to conduct surveillance on the individual or property captured in the image."[78] The statute goes even further, providing for misdemeanor punishment, not only for the unlawful operation of a drone, but additionally for the "disclosure, display, distribution, or other use of an image" captured during a prohibited drone flight.[79] Texas also permits the "owner or tenant of privately owned" property to sue the drone operator for civil damages for capturing "an image of the property or the owner or tenant."[80] North Carolina, by contrast, sensibly included an exception in

---

74 ME. STAT. tit. 25, § 4501 (2015).

75 MICH. COMP. LAWS § 324.40111c(2) (2016) (prohibiting hunting via drone); MICH. COMP. LAWS § 324.40112(2)(c) (2015) (prohibiting interfering with hunting via drone).

76 FLA. STAT. § 934.50(3)(b) (2015).

77 Jensen Werley, *Florida's New Drone Laws Could Create Big Problems for One Major Industry*, JACKSONVILLE BUS. J. (May 18, 2015), http://www.bizjournals.com/jacksonville/news/2015/05/18/floridas-new-drone-laws-could-create-big-problems.html [http://perma.cc/QV28-RBDP].

78 TEX. GOV'T CODE ANN. § 423.003(a) (West 2015).

79 *Id.* § 423.003(b).

80 *Id.* § 423.006(a).

its drone law for "news gathering, newsworthy events, or places to which the general public is invited."[81]

II. NAVIGATING NEWSGATHERING CHALLENGES AND OBSTACLES: THE COMPLEX LANDSCAPE CONFRONTING DRONE USAGE

This Part explores the potential liabilities facing broadcast journalists who hope to use drones to gather news. Specifically, Section A returns to the *Rivera* case noted in the Introduction and examines in greater detail the contested terrain of the nascent, qualified First Amendment right to record police performing duties in public places. Section B then explores potential civil liability for drone usage under the tort theory of intrusion into seclusion. Finally, Section C delves into a range of extant statutes and common-law theories, stretching from anti-paparazzi statutes to the traditional torts of trespass and infliction of emotional distress, courts may come to apply when confronted with cases involving drone journalism. Ultimately, this Part demonstrates that the law already furnishes multiple legal limitations on drone use by journalists, as well as numerous potential remedies for aggrieved plaintiffs. Adding even more new statutory liability, as some states have been eager to do, thus amounts to legislative overkill and chills First Amendment freedoms.

A. Using Drones to Film Police Performing Duties in Public Places: The Unsettled State of the Law and a Troubling Decision

The U.S. Supreme Court has not squarely addressed whether the First Amendment provides the right to capture images of law enforcement personnel carrying out their duties in public venues.[82] Establishing this right, however, would seem to flow logically from several well-established principles.

---

[81] N.C. GEN. STAT. § 15A-300.1(b)(2) (2015).

[82] *See* Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002, 1057 (D.N.M. 2014) ("Neither the Tenth Circuit *nor the Supreme Court* has directly addressed a right—constitutional or otherwise—to record police or law enforcement activity in public." (emphasis added)).

Specifically, the Supreme Court recognizes that images, not merely spoken and written words,[83] are protected by the First Amendment.[84] Additionally, courts are clear that people—in this case, police officers—do not possess reasonable expectations of privacy when they are situated in public places, such as streets and sidewalks where much police work occurs.[85] Furthermore, the conduct of police, as government officials, is a matter of public concern, and speech regarding matters of public concern is, as the Supreme Court reiterated in 2011, at the heart of the First Amendment.[86]

Despite this trio of indubitable propositions, and in the absence of any guidance from the nation's high court, U.S. District Judge Vanessa Bryant of Connecticut found a split of authority in March 2015 among the federal appellate circuits when it comes to the right to record police.[87] She observed in *Rivera v. Foley*—the drone journalism-based case addressed above in the Introduction—that "[t]he First Circuit, Seventh Circuit, Eleventh Circuit, and Ninth Circuit all recognize that the First Amendment protects the photography and recording of police officers engaged in their official duties . . . . The Third Circuit and the Fourth Circuit take the contrary approach."[88]

Most recently, the First Circuit, with its 2014 ruling in *Gericke v. Begin*,[89] squarely recognized a First Amendment right to

---

[83] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995) (observing that "the Constitution looks beyond written or spoken words as mediums of expression").

[84] *See* Kaplan v. California, 413 U.S. 115, 119–20 (1973); *see also* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952) (concluding that "expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments").

[85] *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) (reasoning that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"); Jackson v. Playboy Enter., Inc., 574 F. Supp. 10, 13 (S.D. Ohio 1983) (finding no expectation of privacy in a tort case where the plaintiffs "were on a city sidewalk in plain view of the public eye").

[86] *See* Snyder v. Phelps, 562 U.S. 443, 451–52 (2011).

[87] Rivera v. Foley, No. 3:14-cv-00196 (VLB), 2015 U.S. Dist. LEXIS 35639, at *24 (D. Conn. Mar. 23, 2015).

[88] *Id.* Judge Bryant noted that, outside of the Second Circuit, "[o]ther circuits are split on this issue." *Id.*

[89] *See* Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014).

film government officials, including police officers, performing their duties in public places.[90] The court observed that First Amendment principles regarding gathering information about government officials "apply equally to the filming of a traffic stop and the filming of an arrest in a public park."[91] It emphasized that "[a] traffic stop, no matter the additional circumstances, is inescapably a police duty carried out in public. Hence, a traffic stop does not extinguish an individual's right to film."[92]

The federal circuits recognizing a First Amendment right to record police, however, all have made it clear that this right is qualified, not absolute, and must be balanced against the reasonable needs of law enforcement. For instance, the First Circuit in *Gericke* wrote that "*[r]easonable restrictions* on the exercise of the right to film may be imposed when the circumstances justify them."[93] It added that "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can *reasonably conclude* that the filming itself is interfering, or is about to interfere, with his duties."[94] A vast problem for broadcast journalists, regardless of whether they use drones or other technologies, is the nebulousness of this reasonableness standard, especially when courts are likely to grant vast deference to police when evaluating if a restriction on the right to record is reasonable.

The drone-based decision of *Rivera v. Foley*[95]—the only case of its kind as of late 2015—occurred at the district court level within the Second Circuit, which has yet to directly address the right-to-record-police issue. *Rivera*, however, suggests that some judges are reticent to recognize a First Amendment right to record police using drones, especially when they fly above where police are working.[96]

---

90 *See id.* at 7–10.

91 *Id.* at 7.

92 *See id.*

93 *Id.* (emphasis added).

94 *Id.* at 8 (emphasis added).

95 No. 3:14-cv-00196 (VLB), 2015 U.S. Dist. LEXIS 35639 (D. Conn. Mar. 23, 2015).

96 *See id.* at *24. Moreover, the FAA is enlisting the assistance of local law enforcement to spot civil infractions of federal drone-safety regulations. *See Law Enforcement Guidance for Suspected Unauthorized UAS Operations*, FED. AVIATION ADMIN.,

As noted in the Introduction, Pedro Rivera used a drone during daylight hours to record a vehicular accident scene.[97] Importantly, he stood outside of the crime-scene area and flew the drone about 150 feet directly above it.[98] Were the images important, powerful, and newsworthy? As succinctly noted in the *Columbia Journalism Review*, Rivera's images "gave an unsettling panorama of the crash scene, including the car's wrinkled steel frame compressed into a brick wall as police worked the scene. Rivera's tape had a vivid, eyewitness feel that far surpassed the quality of shots from cameramen behind yellow police tape."[99]

Rather than embracing this enhanced public perspective into the issue of highway safety and police responsiveness, when Judge Bryant watched the video she saw only an alleged incursion into a controlled crime scene. She was reluctant to acknowledge a First Amendment right to record based on these facts, instead reasoning that Pedro Rivera:

> [D]irected a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, *effectively trespassing* onto an active crime scene . . . . Even if recording police activity were a clearly established right in the Second Circuit, Plaintiff's conduct is beyond the scope of that right as it has been articulated by other circuits.[100]

She added that in those cases "where the right to record police activity has been recognized by our sister circuits, it appears that the protected conduct has typically involved using a handheld device to photograph or videotape at a certain distance from, and without interfering with, the police activity at issue."[101] In brief,

---

http://www.faa.gov/uas/regulations_policies/media/FAA_UAS-PO_LEA_Guidance.pdf [http://perma.cc/C583-NPPU] (last visited Feb. 11, 2016). This may encourage police agencies to more vigorously restrict drone journalism than their police powers ordinarily would permit.

97 *Rivera*, 2015 U.S. Dist. LEXIS 35639, at *3.

98 *See id.*

99 Louise Roug, *Eye in the Sky*, COLUM. JOURNALISM REV. (May 1, 2014), http://www.cjr.org/cover_story/eye_in_the_sky.php [http://perma.cc/2QGU-73D8].

100 *Rivera*, 2015 U.S. Dist. LEXIS 35639, at *26 (emphasis added).

101 *Id.* at *24–25.

Judge Bryant found that cases involving handheld devices were distinguishable from drones and, in turn, she held a drone flying about fifty yards—half of a football field—above a crime scene constitutes an aerial trespass.

Perhaps most troubling here is the deference Judge Bryant gave police in restricting drone use. She opined that Pedro Rivera's "operation of an *unusual and likely unidentified device* into a cordoned-off area at the scene of a major motor vehicle accident and ongoing police investigation provides arguable reasonable suspicion that Plaintiff was interfering with police activity."[102]

Additionally, Jude Bryant created a problematic dichotomy between vertical and horizontal distances. As Professor Eugene Volokh asserted:

> [I]t's not clear to me why video recording a scene from 150 feet above is any more of an intrusion into a police investigation than video recording it from 150 feet away horizontally or diagonally (if the drone had been off to the side but looking down at angle), at least unless a police helicopter was nearby or was likely to be nearby.[103]

Indeed, it is the same knotty horizontal-versus-vertical dichotomy that Matthew Shroyer, president of the Professional Society of Drone Journalists, echoed regarding *Rivera*. He noted: "Other photographers who arrived documented the scene with telephoto lenses, which were much more intrusive than Rivera's drone. Yet those journalists were never questioned, let alone expelled from the scene, pursued, and suspended."[104]

---

[102] *Id.* at *20 (emphasis added). Query whether the operation of drones today (Rivera used his in 2014) is really so "unusual" that an officer can reasonably deem a drone's mere presence—some 150 feet above a crime scene—sufficient to constitute, in and of itself, an interference with police activity. As drone use by broadcast journalists proliferates, surely this line of logic must eventually fail.

[103] Eugene Volokh, *No Drone Surveillance of Crime Scene (Even From 150 Feet Above), Police Say*, WASH. POST: VOLOKH CONSPIRACY (Mar. 30, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/no-drone-surveillance-of-crime-scene-even-from-150-feet-above-police-say [http://perma.cc/8AF9-3R9X].

[104] Matthew Shroyer et al., *Statement in Support of Pedro Rivera from the Professional Society of Drone Journalists*, PROF. SOC'Y DRONE JOURNALISTS (Feb. 24, 2014),

In fact—and clearly militating in favor of Pedro Rivera—the FAA investigated the incident and concluded "there was *no evidence* of careless or reckless operation or commercial operation of the drone in question."[105] All of this calls into question the outcome in *Rivera*. An image captured by Pedro Rivera remains online today, and the authors recommend that readers review it to see the clarity and benefit provided by the use of drone journalism in this case.[106]

B. Intrusion Upon Seclusion

Of the four privacy torts, intrusion is the claim a plaintiff's lawyer most likely would deploy to attack a journalist's allegedly injurious use of a camera-equipped drone. According to the Restatement (Second) of Torts' majority formulation, intrusion requires an intentional intrusion, "physically or otherwise, upon the solitude or seclusion of another or his private affairs . . . if the intrusion would be highly offensive to a reasonable person."[107] In determining if a defendant intrudes on a plaintiff's "solitude or seclusion," the tort mandates that a plaintiff possess a "reasonable expectation of privacy."[108] This typically limits the tort to places such as the inside of a plaintiff's home, a clothing fitting room, and analogous venues—a "private hotel room, ship cabin, house trailer, and hospital room"[109]—where a plaintiff possesses an expectation of seclusion.

Intrusion, however, is not coextensive with trespass law (addressed below in Section C). That's because some trespasses are not tortious for intrusion purposes, while numerous successful in-

---

http://www.dronejournalism.org/news/2014/2/statement-in-support-of-pedro-rivera-from-the-professional-society-of-drone-journalists [http://perma.cc/LBA9-GMPN].

[105] *FAA Releases Report on Hartford Drone Incident*, FOX 61 (Jan. 7, 2015, 2:54 PM), http://foxct.com/2015/01/07/faa-releases-report-on-hartford-drone-incident [http://perma.cc/QX69-EBMC] (emphasis added).

[106] To view the image, see Matthew Schroyer, *FAA Investigation Finds Connecticut Journalist Was Flying Safely and Legally*, PROF. SOC'Y DRONE JOURNALISTS (Jan. 7, 2015), http://www.dronejournalism.org/news/2015/1/faa-investigation-finds-connecticut-drone-journalist-was-flying-safely-and-legally [http://perma.cc/H6BX-86U9].

[107] RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

[108] Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA. L. REV. 289, 314 (2002).

[109] DAVID A. ELDER, THE LAW OF PRIVACY 37 (1991).

trusion claims do not involve physical trespasses.[110] As noted above, the intrusion can be physical "or otherwise," with the "otherwise" sweeping up electronic surveillance technologies—high-powered cameras, for example—and, importantly now, drones.

As mentioned, a reasonable expectation of privacy frequently arises when the plaintiff has a justifiable sense she is in a private zone of interest. As one commentator put it: "Incorporating implicitly or explicitly the standard used by the Supreme Court in Fourth Amendment[111] cases, the courts have emphasized that the common law was and is 'intended to protect people, not places.'"[112] Thus, in a drone-based scenario, technical questions of curtilage and the like are certainly not dispositive of an intrusion claim.

The fact that most jurisdictions require the intrusion to be intentional diminishes the tort's impact in some newsgathering situations. For example, as one commentator observes, "[i]f a newsgathering drone is covering an apartment fire, and, while it does so, the operator pans the camera lens or yaws the drone so as to capture a momentary image through a bedroom window, the intentionality element is not met."[113] Nonetheless, where newsgathering drones are purposefully used to gather images from a private location—imagine, for instance, a drone hovering over a walled-in

---

[110] *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (AM. LAW INST. 1977).

[111] The Fourth Amendment to the U.S. Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fourth Amendment has been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding, with regard to the exclusionary rule adopted in *Weeks v. United States*, 232 U.S. 383 (1924), that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court"); Wolf v. Colorado, 338 U.S. 25, 28 (1949) ("[W]e have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourth Amendment.").

[112] ELDER, *supra* note 109, at 41 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

[113] Henry H. Perritt, Jr. & Eliot O. Sprague, *Law Abiding Drones*, 16 COLUM. SCI. & TECH. L. REV. 385, 442 (2015).

backyard otherwise not visible to surrounding neighbors or from the street or sidewalk—the act may be tortious.

There are, as yet, no reported intrusion-by-drone decisions. Indeed, there are almost no cases dealing with tortious intrusion by any aerial technology. One of the very few is *Streisand v. Adelman*,[114] an unreported California trial court decision in which singer Barbra Streisand sued a photographer who took aerial photos of her Malibu home as part of an ecological history initiative. The photographer shot from a helicopter flying off the coast—rather than directly over Streisand's property—at altitudes of 150 to 2,000 feet.[115] Streisand advanced a variety of privacy theories, including intrusion.

The California court, ruling on an anti-SLAPP motion[116] by the photographer, held that Streisand had no reasonable expectation of privacy, in part because "occasional overflights are among those ordinary incidents of community life of which plaintiff is a part."[117] The court also reasoned that aerial photography along the picturesque Pacific coast was a "routine activity."[118] It further noted that although Streisand's property was not visible from the street, she had "taken no steps to preclude persons passing by in airplanes from seeing into her backyard."[119]

The defendant's own actions also played a key role in the "no reasonable expectation" finding. That's because the defendant did not hover over Streisand's yard to take pictures of her or of some social gathering at her house. Nor did operating the helicopter create a nuisance—facts the court implied might have changed the

---

[114] Statement of Decision, Streisand v. Adelman, No. SC 077 257 (Cal. Super. Ct. Dec. 31, 2003), http://www.californiacoastline.org/streisand/slapp-ruling.pdf [http://perma.cc/6S4K-BWDQ].

[115] *See id.* at 4.

[116] California's anti-SLAPP law protects individuals from a "Strategic Lawsuit Against Public Participation" ("SLAPP") and allows them to file a motion to dismiss complaints that were intended to censor or silence free speech. *See* CAL. CIV. PROC. CODE § 425.16 (West 2015); *Calif. Case Law Is an Excellent Anti-SLAPP Resource*, LAW360 (Feb. 28, 2014, 5:33 PM), http://www.law360.com/articles/512540/calif-case-law-is-an-excellent-anti-slapp-resource [https://perma.cc/CL98-TZQ6].

[117] Statement of Decision, *supra* note 114, at 32.

[118] *Id.*

[119] *Id.*

analysis. As it reasoned, "any intrusion on these facts is de minimis."[120]

The court also analogized to Fourth Amendment cases holding that aerial overflight and photography by the government do not violate a person's reasonable expectation of privacy. For example, the *Streisand* court cited *California v. Ciraolo*,[121] a U.S. Supreme Court decision finding that a warrantless law enforcement plane overflight and photography of the defendant's backyard at an altitude of 1,000 feet was constitutional, even though the yard was surrounded by a ten-foot high fence. Despite that fence, which made it impossible for ground-level passersby to peer into the yard, the high court reasoned: "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet."[122]

Moreover, the *Streisand* court held that the singer could not prove the "highly offensive to a reasonable person" element of intrusion. In particular, the court noted that the defendant "was engaged in his avocation of photographing the California coastline for an ecological history project and did not take [the photo] with any other purpose in mind."[123] It is not entirely clear that the defendant's *purpose* is ordinarily determinative as to the "highly offensive" element,[124] but there is precedent suggesting that it is an important factor. The California Supreme Court in *Shulman v. Group W Productions, Inc.*[125] observed that "all the circumstances of an intrusion, including the motives or justification of the intruder, are

---

120 *Id*. at 37.

121 California v. Ciraolo, 476 U.S. 207 (1986).

122 *Id*. at 215.

123 Statement of Decision, *supra* note 114, at 35.

124 The Restatement of Torts discussion suggests that the "highly offensive" element derives more from the actual conduct of the defendant rather than the ultimate purpose of the intrusion. RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (AM. LAW INST. 1977). One noted treatise opines that the determination of what is highly offensive in a newsgathering context turns on "the location of the subject, the nature of any invitation to approach the subject, the presence or absence of electronic devices, and the intensity of the approach." BRUCE SANFORD, LIBEL AND PRIVACY § 11.2 (1991).

125 Shulman v. Group W Prods., Inc., 955 P.2d 469 (Cal. 1998).

pertinent to the offensiveness element."[126] Thus, a journalist using a drone might assert that a First Amendment motive in informing the public with images captured of a newsworthy event makes the action, per se, not offensive.[127] Indeed, in other news tort contexts, courts have taken a "news" motive into account to find that the journalist's conduct was lawful.[128]

Although *Streisand* generally seems well reasoned under traditional intrusion principles, importantly, it is an unreported trial court decision with no precedential importance. Still, it likely represents—at least in a big picture sense—the sort of contextual, fact-intensive reasoning other courts might employ in intrusion-by-drone scenarios.

Another aerial intrusion case held that flying model airplanes near—and sometimes directly over—the plaintiffs' property did not support a claim of intrusion. In *Kaiser v. Western R/C Flyers, Inc.*,[129] the defendants operated a nonprofit organization that promoted radio-controlled model airplanes. They rented a field near

---

[126] *Id.* at 493.

[127] Indeed, the California high court wrote in *Shulman* that "the constitutional protection of the press does reflect the strong societal interest in effective and complete reporting of events, an interest that may—as a matter of tort law—justify an intrusion that would otherwise be considered offensive." *Id.* Yet this noble-motive factor in offensiveness is anything but airtight. The *Shulman* court stressed that "[e]quipment such as hidden cameras and miniature cordless and directional microphones are powerful investigative tools for newsgathering, *but may also be used in ways that severely threaten personal privacy*. California tort law provides no bright line on this question; each case must be taken on its facts." *Id.* at 494 (emphasis added). More than fifteen years after that language from *Shulman*, drones now constitute "powerful investigative tools for newsgathering," and the journalists who operate them must be mindful of the case-by-case nature of the offensiveness inquiry.

[128] *See* Seminole Tribe of Fla. v. Times Pub. Co., 780 So. 2d 310, 318 (Fla. Dist. Ct. App. 2001) (dismissing claims of tortious interference against media defendant where "public interest in the free flow of information," the "routine newsgathering techniques used by the reporter," and the information obtained that was of public concern militated against a finding that reporter had improper motives in newsgathering); Dulgarian v. Stone, 652 N.E.2d 603, 609 (Mass. 1995) (granting summary judgment in favor of media defendants on tortious interference claims where there was no indication that the allegedly defamatory conversation was "carried on for any purpose other than journalism"); *see also* Dukas v. D.H. Sawyer & Assocs., Ltd., 520 N.Y.S.2d 306, 309 (Sup. Ct. 1987) (rejecting tortious interference claims where "[i]t is clear that if any interference occurred it was merely incidental to defendants' exercise of their constitutional rights").

[129] Kaiser v. Western R/C Flyers, Inc., 477 N.W.2d 557 (1991).

the plaintiffs' property and regularly flew the planes—which made what the plaintiffs described as an irritating sound—in the vicinity of the plaintiffs, including some instances in which the planes actually flew over the plaintiffs' property or crash landed on it.[130]

The Nebraska Supreme Court, applying that state's statutory intrusion doctrine, cited examples from the Restatement that included a reporter entering a hospital room to take photographs and persons engaging in wiretapping and window peeking.[131] The court reasoned from these examples that the Nebraska intrusion statute was not "designed to protect persons from the type of intrusion involved in this case."[132] Although not stating so explicitly, the high court seemed to suggest that the model plane flying was de minimis compared to the paradigm intrusion cases discussed by the Restatement's authors. Moreover, the court held that the model plane activities did not "rise to the level of being 'highly offensive to a reasonable person.'"[133] The opinion provided little explanation, however, for this conclusion, although a reasonable assumption is that any offensiveness was relatively minor.

Kaiser is somewhat analogous to a drone case because modern drones, especially the smaller models many news media outlets contemplate using, are often roughly the same size as model airplanes. Unfortunately, the case does not provide an estimate of the altitude at which the model planes flew. Unlike the facts that might generate a potential media drone intrusion case, of course, the planes were not being intentionally flown over the plaintiffs' property and there was no allegation of still or video photography taking place. As suggested by the *Streisand* court, Fourth Amendment doctrine features established case law analyzing what precisely constitutes a "reasonable expectation of privacy."[134] Importantly, this might further guide doctrinal development in the intrusion-by-drone context.

---

130 *Id*. at 559.

131 *See id.* at 562.

132 *Id*.

133 *Id.*

134 The Court's reasonable expectation jurisprudence requires a two-part inquiry that asks whether the defendant has "an actual (subjective) expectation of privacy," and whether that expectation is "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

Yet, there is no complete agreement as to whether the Fourth Amendment "reasonable expectation" standard is identical to or coextensive with the "reasonable expectation" rubric used in intrusion doctrine. In his leading privacy treatise, J. Thomas McCarthy suggests the two are the same,[135] while the California Supreme Court has opined that, at least in an employment context, because of "special considerations involved in defining the private citizen's protection against intrusion by the government and the government's unique interest in investigating and suppressing criminal activity, decisions discussing employees' expectations of privacy against government searches *are not directly applicable* to the common law privacy tort context."[136]

Regardless of the outcome of this technical conundrum, which is beyond the scope of this work to resolve, Fourth Amendment jurisprudence on the "reasonable expectation of privacy" already has provided useful and persuasive analogies to courts looking for guidance in intrusion cases. This is particularly true given the paucity of tort cases involving aerial intrusion that might be applied to drone scenarios; Fourth Amendment law is much more robust in this area.

In Fourth Amendment case law, courts have reached differing conclusions regarding a criminal defendant's reasonable expectation of privacy based on factors such as the altitude of the aerial observer, the legality of the aircraft's position in public airspace, the speed of the aircraft, the use of special surveillance equipment, and the intensity of the surveillance.[137] The U.S. Supreme Court has decided three aerial surveillance cases, including *Ciraolo*, discussed earlier, in which the defendant was found to have no reasonable expectation of privacy in his fenced backyard when police photographed it from a plane at 1,000 feet. There was no reasonable expectation *despite* the fact that the Court considered the backyard to be within the "curtilage" area of the defendant's home.[138]

---

[135] J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY 657–59 (2d ed. 2015).

[136] Sanders v. Am. Broad. Co., 978 P.2d 67, 74 n.3 (Cal. 1999) (emphasis added).

[137] *See* Annotation, Aerial Observation or Surveillance as Violative of Fourth Amendment Guaranty Against Unreasonable Search and Seizure, 56 A.L.R. Fed. 772 (1982) (listing relevant cases).

[138] *See* California v. Ciraolo, 476 U.S. 207, 215 (1986).

Curtilage is the legal term for surrounding land and buildings closely associated with a house that also merit some level of privacy protection.[139]

The Court, in a sharply divided decision, also found no reasonable expectation of privacy in *Florida v. Riley* in 1989.[140] *Riley* involved warrantless police surveillance of a greenhouse behind the defendant's mobile home in a remote area. Police circled twice over the property in a helicopter at an altitude of 400 feet and observed marijuana plants (there was no still or video photography).[141] The Supreme Court, in a plurality opinion by Justice Byron White, reasoned that, while the defendant had taken precautions to prevent surveillance from ground level, the sides and roof of the greenhouse were allowed to remain open.[142] Nor was the Court moved by the fact that the helicopter was flying at an altitude of 400 feet—that altitude, unlike the 1,000-foot limit for fixed-wing aircraft, was a lawful one for a helicopter and, more relevant now than ever, is the FAA-mandated ceiling for drone flights.[143] The Court observed that "there is nothing in the record or before us to suggest that helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude."[144] The quoted statement suggests that the fact that a technology is common can tend to diminish the reasonableness of an expectation of privacy; to the extent that drones become commonplace, that very fact may well alter the average person's reasonable expectation.

The final case in this Supreme Court aerial trio is *Dow Chemical Co. v. United States*.[145] It arose when the U.S. Environmental Protection Agency hired an aerial photographer to take warrantless pictures from altitudes of 12,000, 3,000, and 1,200 feet above a

---

139 *See id.* at 212–13.

140 Florida v. Riley, 488 U.S. 445 (1989).

141 *See id.* at 448.

142 *Id.* at 450.

143 The 400-foot ceiling for drone operations is contained in all authorizations granted by the FAA pursuant to section 333. *See Authorizations Granted Via Section 333 Exemptions*, *supra* note 43.

144 *Riley*, 488 U.S. at 451.

145 Dow Chem. Co. v. United States, 476 U.S. 227 (1986).

Dow plant inaccessible from the ground and that the agency was investigating.[146] Part of Dow's plant was indoors, but some of its machinery and operations were outside and not covered in a way that precluded aerial surveillance, despite the presence of a nearby airport and frequent overflights by planes. The Supreme Court majority concluded that Dow had no reasonable expectation of privacy because:

> [T]he open areas of an industrial plant complex with numerous structures spread over an area of 2,000 acres are not analogous to the "curtilage" of a dwelling for purposes of aerial surveillance, such an industrial complex is more comparable to an open field and as such it is open to the view and observation of persons in aircraft lawfully in the public airspace immediately above or sufficiently near the area for the reach of cameras.[147]

Among state and lower federal courts, there are dozens, if not hundreds, of cases exploring the reasonableness of a Fourth Amendment expectation of privacy under various fact patterns. Consider, for example, *State v. Bryant*,[148] a 2008 decision by the Vermont Supreme Court, in which police used a helicopter to surveil the defendant's marijuana crop near his home. The state high court found that there was indeed a reasonable expectation of privacy by the defendant because witnesses described the helicopter's observation as "so long and so low and so loud."[149] The court found the flight (apparently made without cameras) to be "fifteen to thirty minutes of hovering over defendant's property at altitudes of as low as 100 feet."[150]

These decisions, collectively, make clear that a rich body of law already exists that will help guide a principled approach to drone intrusion cases. Far from being an indeterminate question, Fourth Amendment law can provide resources—with necessary doctrinal

---

146 *See id*. at 229–30.
147 *Id.* at 239.
148 State v. Bryant, 950 A.2d 467 (Vt. 2008).
149 *Id.* at 481.
150 *Id*. at 475.

tweaks for tort purposes—to make sense of and provide predictability for the intrusion-by-drone context.

One of the strong facets of intrusion as applied to drone-based newsgathering is that it carries the potential to strike the right balance from a First Amendment perspective. "Reasonable expectation" is an administrable standard that provides sufficient certainty, while maintaining some flexibility, to provide the media with sensible guidance and notice regarding what conduct might be actionable. Furthermore, it does not overprotect privacy interests as some drone-specific legislation might—the "highly offensive to a reasonable person" element, while somewhat ambiguous, provides enough of a thumb placed down squarely on the First Amendment scale to safeguard a great deal of newsgathering conduct that is not strikingly unorthodox or outrageous. As the next Section reveals, however, intrusion is not the only legal theory of which broadcast journalists who deploy drones must be aware.

C. Other Existing Legal Restrictions Facing Broadcast Drone Journalists

In addition to the intrusion tort addressed above, several other legal landmines lurk for broadcast journalists who deploy drones. This Section provides a brief overview of them, with a primary focus on the common-law theory of aerial trespass.

1. Trespass

To prevail on a claim for trespass, a plaintiff typically must prove the defendant made an intentional, unauthorized entry onto property owned or controlled by the plaintiff.[151] The notion of an aerial trespass has early roots in a seventy year-old U.S. Supreme Court decision, in which the Court remarked that "if the landowner is to have full enjoyment of the land, he must have exclusive control of *the immediate reaches* of the enveloping atmosphere."[152] Thus, the danger for drone journalists is that trespass principles may apply to aerial entries immediately above a person's property.

---

[151] *See* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 677 (Ct. App. 1986).

[152] United States v. Causby, 328 U.S. 256, 264 (1946) (emphasis added).

The 2002 case of *Bevers v. Gaylord Broadcasting Co., L.P.*,[153] although involving a helicopter rather than a drone, is illustrative in this area.

Bevers pivoted on the use of a television news helicopter flying over the residence of Gail Bevers to gather images for "a story about the poor condition of rental properties."[154] The Texas appellate court hearing the case reasoned that "one of the key facts in ascertaining whether a flight through airspace constitutes a trespass is the altitude of the aircraft."[155] Turning to the Restatement for additional guidance, the court found that an aerial trespass exists only if: (1) there is a "substantial interference"[156] with the plaintiff's use and enjoyment of the property; and (2) the aircraft travels within the "immediate reaches" of the land. On the case's facts, the court held that "a single ten-minute hover over [Bevers'] property at 300 to 400 feet does not, as a matter of law, rise to the level of 'substantial interference' with the use and enjoyment of the underlying land."[157] After ruling against Bevers, the court declined to address "whether a flight at 300–400 feet was within the 'immediate reaches' of the airspace."[158]

Broadcast journalists who use drones face the yet-unknown applications of aerial trespass law. Unfortunately, the law in this area remains unsettled and provides little guidance to journalists. Professor Troy Rule, writing in a 2015 law journal article, aptly dubs it "*the murky realm of aerial trespass* because the upper boundaries of landowners' airspace rights are largely undefined."[159] He explains that:

> In aerial trespass cases, courts must engage in subjective and unpredictable inquiries into whether the alleged aerial intrusion penetrated the amorphous "immediate reaches" of the plaintiff's airspace and

---

[153] Bevers v. Gaylord Broad. Co., L.P., 2002 Tex. App. LEXIS 5083 (App. July 18, 2002).

[154] *Id.* at *2.

[155] *Id.* at *8.

[156] *Id.* at *16.

[157] *Id.* at *17.

[158] *Id.* at *17 n.3.

[159] Troy A. Rule, *Airspace in the Age of Drones*, 95 B.U. L. REV. 155, 170 (2015) (emphasis added).

> whether such intrusion substantially interfered with the plaintiff's "use" of her land. And in the case of alleged trespasses involving drones, a court could even elect to apply an altogether different rule based on a finding that a drone was more like a projectile than an aircraft.[160]

Ultimately, the bottom line is that broadcast journalists today lack clear guidance about the rules regarding aerial trespass by drones. A very brief flight over property at 300 to 400 feet, however, could be safe if other courts adopt the logic of Texas appellate court in *Bevers*, absent a drone-specific statute to the contrary. That seems particularly true because a small-size drone appears less likely to substantially interfere with a landowner's use and enjoyment of property than a much larger news helicopter like that used in *Bevers*.

2. Intentional Infliction of Emotional Distress

Over the years, broadcast journalists' conduct has also been challenged under the legal theory of intentional infliction of emotional distress ("IIED").[161] The IIED tort requires a plaintiff to prove four elements: (1) the defendant engaged in extreme and outrageous conduct; (2) the defendant's intent when engaging in that conduct was to cause the plaintiff to suffer emotional distress or the defendant acted with reckless disregard of causing such distress; (3) the defendant's conduct was, in fact, the actual cause of the plaintiff's emotional distress; and (4) the plaintiff's emotional distress was severe, rather than minor or fleeting.[162]

---

[160] *Id.*; *see* City of Newark v. Eastern Airlines, Inc., 159 F. Supp. 750, 758 (D.N.J. 1958) (noting that to prevail for aerial trespass, a plaintiff must prove "an unlawful invasion of the immediate reaches of his land; in other words, there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above the surface").

[161] *See, e.g.*, KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr. 2d 431 (Ct. App. 1995); Armstrong v. H & C Commc'ns, Inc., 575 So. 2d 280 (Dist. Ct. App. 1991). The IIED tort is sometimes called the "tort of outrage," as it is in Florida. *See Armstrong*, 575 So. 2d 281.

[162] Karen Markin, *The Truth Hurts: Intentional Infliction of Emotional Distress as a Cause of Action Against the Media*, 5 COMM. L. & POL'Y 469, 476 (2000).

Although the authors could locate not locate an IIED drone case on point, a plaintiff's lawyer may argue that a news drone, hovering for a sustained and prolonged period of time at a very low altitude above a person's private home, could constitute extreme and outrageous behavior. For example, a paparazzo might use a low-hovering drone to record video of a celebrity swimming and sunbathing in her backyard. Or a drone journalist chasing a breaking-news story may capture aerial images of a hostage-taker's arrest inside a walled compound. In either case, if the backyard was surrounded by a high enough wall giving rise to an otherwise reasonable expectation of privacy, it then is conceivable that the owner of either property would have viable causes of action for: (1) intrusion (discussed in Section B above); (2) trespass; and (3) IIED. In fact, this trio of torts has been successfully bundled together against broadcast journalists in a single lawsuit, albeit in a context predating drone usage.[163]

3. Other Theories of Potential Liability for Drone Journalism

Other legal challenges for broadcast journalists gathering news via drones include the possible use of anti-paparazzi statutes. For example, California has on the books an anti-paparazzi law for a so-called "constructive invasion of privacy" that sweeps up drone use over private residences where people have a reasonable expectation of privacy.[164] Specifically, that statute holds civilly liable for treble damages a defendant who:

> [A]ttempts 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.[165]

---

[163] *See* Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668 (Ct. App. 1986) (involving liability for intrusion, trespass, and IIED stemming from a media ride-along scenario).

[164] CAL. CIV. CODE § 1708.8(b) (West 2016).

[165] *See id.*

In light of this language, media defense attorneys Nabiha Syed and Michael Berry stress that "in California, drone operators need to understand that particular state's anti-paparazzi law."[166]

Significantly, in October 2015, California Governor Jerry Brown signed into law Assembly Bill 856, which adds the words "airspace above the land of another" to California's anti-paparazzi statute in order to prohibit "the use of drones to cross over fences, bypass gates and travel into private sanctuaries in order to peer into windows, capture goings on and otherwise spy on the private lives of public persons."[167] As the *Los Angeles Times* reported, the new law "expand[s] privacy protections to prevent paparazzi from flying drones over private property."[168] In fact, some California-based celebrities have claimed that drones spied on them, including singer Miley Cyrus who reportedly "caught sight of a drone over her home [in 2014] . . . . She took video of the unmanned aircraft and posted it online."[169]

Some might wonder whether video voyeurism statutes apply when journalists use low-flying drones to capture images above a person's house or even to peer into windows. The answer, generally speaking, is no. That's because the typical video voyeurism statute only applies if the defendant recorded images for a sexual pur-

---

[166] Syed & Berry, *supra* note 20, at 30.

[167] *See Governor Brown Signs Calderon Legislation Prohibiting Use of Drones over Airspace of Private Property*, ASSEMBLY DEMOCRATIC CAUCUS (Oct. 6, 2015), http://asmdc.org/members/a57/news-room/press-releases/governor-brown-signs-calderon-legislation-prohibiting-use-of-drones-over-airspace-of-private-property [https://perma.cc/7LCY-T7JV]; *see also* A.B. 856, 2015–2016 Leg., Reg. Sess. (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB856 [https://perma.cc/994C-FWU4].

[168] Chris Megerian, *Gov. Jerry Brown Approves New Limits on Paparazzi Drones*, L.A. TIMES (Oct. 6, 2015, 4:30 PM), http://www.latimes.com/local/political/la-pol-sac-brown-drones-paparazzi-20151006-story.html [http://perma.cc/CL2H-ZAVG].

[169] Andrea Noble, *California Paparazzi Can No Longer Use Drones Over Private Property*, WASH. TIMES (Oct. 7, 2015), http://www.washingtontimes.com/news/2015/oct/7/california-paparazzi-no-longer-can-use-drones-over/ [https://perma.cc/3LVH-ZD2A]; *see also* Patrick Gomez, *Are Drones Spying on Miley Cyrus and Selena Gomez?*, PEOPLE MAG. (Aug. 7, 2014, 2:15 PM), http://www.people.com/article/miley-cyrus-selena-gomez-paparazzi-drones [http://perma.cc/KW8Y-8C7F] (providing more detail on the Cyrus incident and the use of drones by paparazzi).

pose, arousal, or amusement, not when the purpose is to gather newsworthy information.[170]

In summary, this Part illustrated that multiple theories of liability already exist for broadcast journalists who use drones to cover news. These doctrines are in addition to the new state laws and pending legislation specifically targeting drones addressed earlier in Part I.

CONCLUSION

The law of newsgathering via drones is clearly in flux. The FAA's highly restrictive stance at present is a major concern, but the authors believe that in the coming years news organizations will be given much freer rein to use the public airspace for their work. Once that occurs, the legal system will need to achieve some reasonable balance between the First Amendment protected work of news organizations and the privacy and property rights of citizens. It is also imperative that the law be sufficiently well-defined and determinate to allow broadcast journalists to go about their important work with a reasonable degree of certainty regarding what conduct may trigger legal consequences.

As the preceding Parts made clear, a considerable body of existing tort law already protects people who believe they are victims of unlawful journalism. Extant legal templates—particularly, perhaps, the reasonable expectation jurisprudence developed in aerial Fourth Amendment law that can be brought to bear in intrusion doctrine—can guide the process of explicating rights between media outlets and citizens in a way that is sensitive both to nuance in individual cases and to the compelling imperatives of the First Amendment. The authors hope that state legislatures, driven by fears of a new and unfamiliar technology, will avoid a rush to enact untested and possibly extreme legislative solutions to problems that already are susceptible to resolution under existing tort doctrine. The hasty enactment of drone-specific legislation may be well-intentioned, but it may also be hard to undo when the dust settles. Moreover, as one astute commentator put it, "rushing to enact

---

[170] *See, e.g.*, FLA. STAT. § 810.145 (2012); LA. STAT. ANN. § 14:283 (2015).

new laws could threaten to extinguish the nascent drone industry before it gets off the ground and before we fully understand drones' potential uses and benefits."[171] That point is particularly salient when the "uses and benefits" involve a constitutionally protected activity such as newsgathering.

California Governor Jerry Brown recently followed similar logic when he vetoed a bill that would have severely limited drone use in the California.[172] In September 2015, Brown vetoed Senate Bill 142, which would have made anyone flying a drone at an altitude lower than 350 feet over private property liable for damages for "wrongfully occupy[ing] property."[173] Brown stated that the proposed law "could expose the occasional hobbyist and the FAA-approved commercial user alike to burdensome litigation."[174] Indeed, the National Press Photographers Association, along with California newspapers such as the *Los Angeles Times* and *Sacramento Bee*, sent a letter to Governor Brown asserting that the regulations in Senate Bill 142 would be "impossible to comply with" and "impossible to enforce."[175]

Ultimately, drones will be used for gathering news. Some of those uses will be of high public significance, some less so. The authors believe the existing array of remedies—along with a healthy respect for First Amendment values—can provide the resources to resolve the inevitable disputes that will arise.

---

[171] Michael Berry, *The Drones Are Coming...and for Now We Should Get out of Their Way*, 36 PENN. LAW. 50, 54 (2014).

[172] Melanie Mason & Patrick McGreevy, *Bills on Police Conduct OKd*, L.A. TIMES, Sept. 10, 2015, at B4 (reporting that Brown "vetoed legislation to restrict the use of drones over private property. The legislation would have made flying a drone less than 350 feet above private property without consent a trespass violation").

[173] S.B. 142, 2015–2016 Leg., Reg. Sess. (Cal. 2015), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB142 [http://perma.cc/K4YV-HLVY].

[174] Elizabeth Weise, *California Governor Vetoes Drone Bill*, USA TODAY (Sept. 10, 2015), http://www.usatoday.com/story/tech/2015/09/10/california-drones-veto-governor-jerry-brown-news-photographers/71987132/ [http://perma.cc/SJ7U-LDGP].

[175] Phil Willon, *Brown Urged to Veto Drone Bill*, L.A. TIMES, Sept. 7, 2015, at B5.