

## Dron't Stop Me Now:<sup>1</sup> Prioritizing Drone Journalism in Commercial Drone Regulation

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### INTRODUCTION

New technologies that simplify lives and improve our understanding of the world around us inevitably pose new, difficult legal questions. This maxim is true for commercial drones.<sup>2</sup> The recent proliferation of these devices creates a multitude of opportunities for commercial use.<sup>3</sup> To borrow a phrase from Justice Robert H. Jackson, the ability of drones to navigate the sky like “vagrant clouds”<sup>4</sup> also means that these devices pose significant regulatory challenges for federal, state, and local governments. Governments attempting to address the safety, privacy, and region-specific concerns raised by increased commercial drone use must also consider the

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1. Unlike Mister Fahrenheit of Queen’s hit song “Don’t Stop Me Now,” drones are not capable of light-speed travel. See QUEEN, *Don’t Stop Me Now*, on JAZZ (Elektra Records 1978); see also 14 C.F.R. § 107.51(a) (2019) (capping maximum commercial drone speed at 100 miles per hour, subject to waiver by 14 C.F.R. § 107.205).

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2. This Note uses “drone” to refer to unmanned aircraft systems (UAS) rather than unmanned aircraft vehicles (UAV). At its most basic, a UAS is comprised of a UAV (what a lay viewer might refer to as a “drone”), an operator located on the ground, and a communication system that relays commands from the user to the vehicle. See, e.g., FAA Reauthorization Act of 2018 § 341, 49 U.S.C.A. § 44801(12) (Westlaw through Pub. L. No.116-65). Additionally, unless otherwise indicated, this Note uses “drone” to refer to “small” UAS, which Congress defines as UAS weighing “less than 55 pounds, including the weight of anything attached to or carried by the aircraft.” § 44801(9) (Westlaw). FAA’s commercial drone regulations do not currently apply to drones that weigh more than 55 pounds, and pilots wishing to fly those drones must apply for a specific exemption under the FAA Reauthorization Act of 2018. See § 44807 (Westlaw).

3. See *Gartner Says Almost 3 Million Personal and Commercial Drones Will Be Shipped in 2017*, GARTNER (Feb. 9, 2017), <https://perma.cc/6VJF-S5QD>. One projection set the global market opportunity for the drone industry at \$100 billion by 2020, with seventy percent for military use, seventeen percent for civil government and commercial use, and thirteen percent for consumer use. *Drones: Reporting for Work*, GOLDMAN SACHS (Oct. 24, 2016), <https://perma.cc/K6NY-X9GN>. Military, consumer (other than for journalism), and civil government uses are beyond the scope of this Note.

4. *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

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concomitant burdens placed on commercial drone use.

This Note proceeds in four parts. Part I highlights novel journalistic uses of drones for content production and investigative reporting and discusses the pitfalls of under- or overregulating commercial drones. Part II details the current state of federal, state, and local regulation of commercial drone use. Keeping in mind potential changes that may result to the FAA's Part 107 commercial drone regulations from the FAA Reauthorization Act of 2018, this Note considers the FAA's current regulations as a baseline for whether new regulations would help or hinder drone journalism. The state and local picture is more intricate, and this Note discusses those regulations in three parts: safety regulations, privacy regulations, and region-specific regulations. Part III discusses federal safety regulations and the First Amendment and proposes simplifying the regulatory picture by preempting most state and local safety regulations. Part IV examines whether the federal regulatory scheme preempts state and local privacy regulations and common law torts, the application of those common law torts, and First Amendment limitations on state and local privacy regulations. The Conclusion details how an aspiring drone journalist would experience the regulatory scheme proposed herein.

## I. DRONES FOR CONTENT PRODUCTION AND INVESTIGATIVE REPORTING

Cutting-edge journalists may use drones to investigate stories and to produce engaging content. In other words, drones enable journalists to see where they otherwise cannot and tell stories in new ways. Drones can be valuable newsgathering tools, facilitating safer and more cost-effective access to unique perspectives.<sup>5</sup> While even the most ardent boosters of drone journalism do not contend that drones will imminently take the place of comparable technologies like helicopters,<sup>6</sup> regulators with their eyes on the sky would be mistaken to ignore the implications for their favorite newspaper, smartphone app, or cable news channel.

News outlets and reporters already use commercial drones for investigation and content production. For example, journalists used drones as an investigatory tool to view migrant detention camps on the United States-Mexico border after the Trump administration restricted access to the facilities.<sup>7</sup> The footage, filmed by a freelance cameraman working for BBC News, depicted children being marched between a corridor of tents at a camp in Tornillo, Texas.<sup>8</sup> In another example, CNN used a drone to capture footage of the crumbling, desert ruins of the "ghost town" of

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5. Cynthia D. Love, Sean T. Lawson & Avery E. Holton, *News from Above: First Amendment Implications of the Federal Aviation Administration Ban on Commercial Drones*, 21 B.U. J. SCI. & TECH. L. 22, 28–33 (2015), <https://perma.cc/G4AK-ZYYJ>.

6. See #083 – CNN AIR with Greg Agvent, COMMERCIAL DRONES FM (Dec. 18, 2018), <https://perma.cc/97GS-HLVW>.

7. Matt Novak, *Journalists Start Using Drones to View Immigrant Detention Camps After Government Blocks Entry*, GIZMODO (June 22, 2018), <https://perma.cc/UBU5-HFUS>.

8. Aleem Maqbool (@AleemMaqbool), TWITTER (Jun. 22, 2018, 12:25 AM), <https://perma.cc/V8G8-AS94>; Aleem Maqbool (@AleemMaqbool), TWITTER (Jun. 21, 2018, 11:40 PM), <https://perma.cc/BPH6-V926>.

Metropolis, Nevada.<sup>9</sup> In that footage, a drone flies through an arch in what must have been Metropolis's city square while scanning the desert that surrounds the ruins.<sup>10</sup> Moreover, in an empirical study of drone uses supporting journalists, the only potential uses that ranked higher than investigative reporting were uses of drones to cover environmental stories (such as rising sea levels) and outdoor stories (like the best places to rock climb).<sup>11</sup>

In addition to these investigative uses, journalists use drones to produce compelling content. Many of these visuals depict environmental stories, such as slow transformations wrought by climate change or rapid impacts caused by disasters. The *New York Times* published photos and videos online of China's expanding deserts, shrinking oases, and displaced people.<sup>12</sup> The *Times* also depicted the second-largest lake in Bolivia drying up and the surrounding fishing villages reinventing themselves.<sup>13</sup> *60 Minutes* photographer Danny Cooke used a drone to explore the ruins of Chernobyl and the nearby Ukrainian city of Pripjat.<sup>14</sup> Closer to home, ProPublica and the *Charleston Gazette-Mail* documented the natural devastation that energy companies owning mineral rights caused to the homes above natural resources in West Virginia.<sup>15</sup> Journalists also used drones to capture images of recent wildfires in California.<sup>16</sup> Finally, journalists use drones to record protests, marches, and other forms of activism.<sup>17</sup> These content production and investigative reporting examples demonstrate the value of drone journalism.

The Federal Aviation Administration (FAA) projects at minimum a four-fold increase in registered commercial drones by the end of 2022 and estimates that currently forty-eight percent of commercial drones are primarily used for "aerial imaging and data collection, including real estate photography."<sup>18</sup> Goldman Sachs projects a \$480 million market for drones used for journalism.<sup>19</sup> With the expanding

9. Lilit Marcus & Effie Nidam, *See a Nevada Ghost Town from the Sky*, CNN TRAVEL (Jan. 3, 2019), <https://perma.cc/M33P-GHWN>.

10. *Id.*

11. Kathleen Bartzen Culver & Megan Duncan, *Drones in the News: Journalist Conceptions and Public Engagement*, CTR. FOR JOURNALISM ETHICS, UNIV. OF WIS.-MADISON 11 (July 16, 2018), <https://perma.cc/BHL6-PQLU>.

12. Josh Haner, Edward Wong, Derek Watkins & Jeremy White, *Living in China's Expanding Deserts*, N.Y. TIMES (Oct. 24, 2016), <https://perma.cc/E5JG-DJZ9>.

13. Nicholas Casey & Josh Haner, *Climate Change Claims a Lake, and an Identity*, N.Y. TIMES (July 7, 2016), <https://perma.cc/B4FS-2EK7>.

14. Emanuella Grinberg, *Drone Footage Shows Derelict Remains of Chernobyl and City of Pripjat*, CNN (Dec. 1, 2014), <https://perma.cc/9YEU-R55J>; see also Danny Cooke, *Postcards from Pripjat, Chernobyl*, VIMEO (Nov. 24, 2014, 4:11 AM), <https://perma.cc/9YEU-R55J>.

15. Ken Ward Jr., Al Shaw & Mayeta Clark, *Powerless: What It Looks and Sounds Like When a Gas Driller Overruns Your Land*, PROPUBLICA (Dec. 20, 2018), <https://perma.cc/3R6Q-Z4EP>.

16. See, e.g., Joseph Serna, *Devastating Drone Images Show Neighborhood Hit by Shasta County Fire*, L.A. TIMES (Aug. 6, 2018, 2:40 PM), <https://perma.cc/RK56-T3R2>.

17. See, e.g., CNN AIR (@CNN\_AIR), TWITTER (Jan. 19, 2019, 7:33 PM), <https://perma.cc/GR4A-QT3M>; CNN AIR (@CNN\_AIR), TWITTER (Dec. 31, 2018, 11:21 AM), <https://perma.cc/3VV3-4RM2>.

18. FAA projects an increase from the 110,604 registered commercial drones at the end of 2017 to a range of 451,800 to 717,895 by the end of 2022. *FAA Aerospace Forecast: Fiscal Years 2018–2038*, FEDERAL AVIATION ADMINISTRATION 42–43 (Mar. 15, 2018), <https://perma.cc/6GDN-GXKS>.

19. *Drones: Reporting for Work*, *supra* note 3. Of course, this pales in comparison to the \$100

use of commercial drones, federal, state, and local governments have legitimate regulatory interests in protecting the safety and privacy of their citizens. However, a drone journalist must currently contend with a conflicting mass of federal, state, and local laws that sometimes contradict each other and make drone journalism more expensive through increased compliance costs.<sup>20</sup> Aviation lawyer and former FAA official Loretta Alkalay has joked: “I’m a lawyer, and I can’t figure out what the laws are in a lot of places[.]”<sup>21</sup> Drone laws confuse even those tasked with enforcing them. After a deadly mass shooting in Las Vegas, state police arrested and charged with a misdemeanor a drone pilot who was taking pictures of the shooter’s home, only to drop the charges because the officers misinterpreted Nevada drone laws.<sup>22</sup> This Note proposes that simplifying the federal, state, and local regulatory patchwork would better accommodate journalists.

Additionally, this Note considers how to tailor regulations to avoid under- or overregulation of commercial drones, bearing in mind legitimate regulatory goals. Two examples of under- and overregulation of safety interests come to mind.

A recent incident at the United Kingdom’s Gatwick Airport illustrates underregulation in action. During the peak winter holiday travel week, a rogue pair of drones grounded all flights at Gatwick.<sup>23</sup> On December 20, 2018, the rogue drones shut down Gatwick for over twenty-four hours, causing disruptions to at least 800 flights and sending ripple effects throughout Europe, affecting “upward of 100,000 travelers[.]”<sup>24</sup> After all, drones can pose serious safety risks to airplanes.<sup>25</sup> While travelers were understandably chagrined about the extensive delays, the disruptions were likely justified given the potential harm. Although British law makes it a criminal violation, subject to five years in prison, to fly a drone within a kilometer of an airport, drone owners did not need to register with the United Kingdom’s Civil Aviation Authority at the time of the Gatwick incident.<sup>26</sup> A registration requirement may have mitigated some of the extended damage that the drones inflicted upon Gatwick’s travel schedule. Comparatively, the FAA requires registration of all drones and requires operators to display the registration number on the exterior of

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billion market opportunity for national security drones or to the total market for commercial and civil government use: \$13 billion. *Id.*

20. See Clay Calvert, Charles D. Tobin & Matthew D. Bunker, *Newsgathering Takes Flight in Choppy Skies: Legal Obstacles Affecting Journalistic Drone Use*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 535, 549–51 (2016). Cf. Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1296–99 (1981). For the purposes of this Note, I assume that costs of compliance with federal, state, and local commercial drone regulations are significant and may deter journalists from starting to use drones. Any empirical analysis of these costs is beyond the scope of this Note.

21. Travis Fox, *Drone Journalism’s Battle for Airspace*, COLUM. JOURNALISM REV. (Oct. 9, 2018), <https://perma.cc/WN59-RFUK>.

22. *Id.*

23. Benjamin Mueller & Amie Tsang, *Gatwick Airport Shut Down by ‘Deliberate’ Drone Incursions*, N.Y. TIMES (Dec. 20, 2018), <https://perma.cc/9DQG-PTUC>.

24. *Id.*

25. See Avery Thompson, *Here’s What a Drone Collision Would Do To an Airplane Wing*, POPULAR MECHANICS (Oct. 16, 2018), <https://perma.cc/KUQ5-HKPY>.

26. Mueller & Tsang, *supra* note 23.

the drone.<sup>27</sup> This display provides for ready identification, and the lack of anonymity might have deterred the Gatwick drone operators from flying in the first place. The drone problem was eventually resolved in the early hours of December 21, when the British Army reportedly brought military-grade equipment that could jam the drones' radio signals, thus grounding the drones.<sup>28</sup>

Regulators should also avoid overregulation, lest they criminalize drone journalism or run afoul of the First Amendment through deploying pretextual criminal sanctions. On October 27, 2017, Myanmar detained Lau Hon Meng and Mok Choy Lin, two reporters working on a documentary for the Turkish state broadcaster, TRT World, as well as their interpreter Aung Naing Soe and driver Hla Tin, for "attempting to fly a drone near parliament" in the Myanmar capital.<sup>29</sup> They were sentenced to two months' imprisonment for violating the 1934 Burma Aircraft Act, and they faced additional charges of violating an import-export rule for bringing the drone into the country, which carries a maximum three-year sentence.<sup>30</sup> After adding an additional immigration charge against the journalists that could have carried a six-month to five-year prison sentence,<sup>31</sup> Myanmar dropped the additional charges (the import-export and immigration charges) and released the journalists and their crew on December 28, 2017.<sup>32</sup> A Myanmar court also recently sentenced Arthur Desclaux, a French national, to one month in prison for flying a drone over the parliament.<sup>33</sup> Although Myanmar has an interest in regulating airspace above its parliament building, criminalizing drone flight and subjecting violators to a potentially lengthy prison sentence seems calculated to punish journalists in a country notoriously unfriendly to the press. Safety regulations are important, but at some point, they can become a pretext to prevent legitimate journalism. This Note proceeds with the goal of avoiding under- or overregulation of commercial drones in mind.

## II. THE FEDERAL, STATE, AND LOCAL REGULATORY PICTURE

A drone journalist must navigate an ever-evolving labyrinth of federal, state, and local regulations if she desires to keep her drone in the sky, her wallet full, and her

27. 14 C.F.R. § 48.205 (2019).

28. Andrew Liptak, *London's Heathrow and Gatwick Airports Have Purchased Their Own Anti-Drone Systems*, VERGE (Jan. 5, 2019, 2:53 PM), <https://perma.cc/CMB7-RDRX>.

29. *Myanmar Jails Foreign Journalists with Turkish Broadcaster for Two Months*, REUTERS (Nov. 10, 2017, 10:10 AM), <https://perma.cc/8PKR-FYCP>.

30. *Id.* News reports do not detail what the journalists were convicted of under the Aircraft Act, possibly because, as the journalists complained, "We have no idea what is going on, and we are not allowed to speak to our family . . . And the rules and procedures are not explained to us. We were asked to sign statements that are completely in Burmese that we cannot understand." *Id.* See also *The Burma Aircraft Act, India Act XXII of 1934 (as amended in 2004)*.

31. *Myanmar Adds Additional Charge Against 2 Foreign Journalists*, ASSOCIATED PRESS (Nov. 27, 2017), <https://perma.cc/P5PV-Q5Q5>.

32. Thu Thu Aung, *Myanmar Frees Journalists Working for Turkish Broadcaster*, REUTERS (Dec. 29, 2017, 5:53 AM), <https://perma.cc/8GGP-QA3M>.

33. *Myanmar Court Sentences Frenchman to Jail for Flying Drone*, ASSOCIATED PRESS (Feb. 27, 2019), <https://perma.cc/TA25-AY5R>.

person free. At the federal level, the FAA considers the complex problem of how to make rules that successfully integrate commercial drones into already crowded federally-controlled airspace. As the agency responsible for regulating the safety of civil aviation,<sup>34</sup> the FAA focuses on the safety aspects of commercial drone regulation and largely leaves privacy regulations to state and local governments.<sup>35</sup> State and local governments also enact regulations that purport to promote drone safety, in excess and sometimes in contradiction of FAA standards.<sup>36</sup> Accordingly, although safety and privacy are surely areas of legitimate commercial drone regulation,<sup>37</sup> the present system is too complex for an average journalist to understand it easily.<sup>38</sup>

#### A. THE FEDERAL REGULATORY SCHEME: INTEGRATING DRONES INTO NAVIGABLE AIRSPACE SAFELY

Presenting the first layer of complexity, the FAA's drone regulations impose registration requirements for commercial drones, set the rules of the sky when operating these drones, and prescribe permissible drone uses. The FAA also administers a waiver program for some rules.

While some of the FAA's regulations could be seen as a regulation of drones for privacy purposes, Congress emphasized that the FAA should focus on the safety of commercial drone operation, without detailed consideration of the privacy implications.<sup>39</sup> In formulating its 2016 rules, the FAA specifically said that it focused only on regulating the safe and efficient use of drones, and left the privacy implications to other agencies and stakeholders.<sup>40</sup> Following this trend, the drone provisions of the FAA Reauthorization Act of 2018 ("2018 Act") also focus on safety, with a slightly increased focus on privacy.<sup>41</sup> The 2018 Act directs much of

34. *What We Do*, FAA, <https://perma.cc/2R5S-RZUQ> (last visited March 20, 2019); *Safety: The Foundation of Everything We Do*, FAA, <https://perma.cc/RFK4-SFRY> (last visited March 20, 2019).

35. *See infra* Part II.B.

36. *See infra* Part II.B.1.

37. A group advocating for drone journalism agrees. *See* Al Tompkins, *Help Drone Journalism Grow Responsibly*, NAT'L PRESS PHOTOGRAPHERS ASS'N (Sep./Oct. 2017), <https://perma.cc/KX2E-EVVG> (stating that "safety is the first concern" and encouraging journalists to ask whether they would "do that" when capturing an image on the ground to account for privacy concerns).

38. *See* Fox, *supra* note 21.

39. FAA Modernization and Reform Act of 2012 § 332(a)(1), 49 U.S.C.A. § 44802(a)(1) (Westlaw through P.L. 116-66) (instructing the FAA to "develop a comprehensive plan to *safely* accelerate the integration of civil unmanned aircraft systems into the national airspace system" (emphasis added)). In defining the parameters of the plan, Congress called for the FAA to focus on the safe operation of drones in the national airspace system without specifically referencing protecting privacy. FAA Modernization and Reform Act of 2012 § 332(2). *See, e.g.*, 14 C.F.R. § 107.39 (2019) (prohibiting operation of a drone over a human being unless that human is "directly participating" in its operation or "[l]ocated under a covered structure or inside a stationary vehicle that can provide reasonable protection from a falling small unmanned aircraft"). The allowance for operating a drone over a human being if they are reasonably protected from a falling drone shows that this is a "safety" regulation rather than a "privacy" one.

40. *See* Operation and Certification of Small Unmanned Aircraft Systems, 81 Fed. Reg. 42,064, 42,190-91 (June 28, 2016), <https://perma.cc/PN25-GLSG>.

41. For one, the subtitle of the Act regarding drones falls under "Title III" of the Act, which is simply titled "Safety," *see* FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186.

its ink toward safety-related provisions, including: allowing drones to carry property for compensation or hire;<sup>42</sup> prohibiting outfitting drones with weapons;<sup>43</sup> and exempting underground mining drones from FAA regulations.<sup>44</sup> When the 2018 Act does discuss privacy in connection with drones, it does not grant the FAA any additional rulemaking power.<sup>45</sup> To the extent that Congress in the 2018 Act discusses the privacy concerns raised by the increasingly large flock of drones in the national airspace system, it does not charge the FAA with any responsibility to tackle or evaluate the problem. Therefore, the federal regulations are properly considered as regulations of drone safety, rather than privacy from drones.

### 1. The Pilot Certification and Drone Registration Process

As an initial step, the FAA requires commercial drone pilots to obtain a pilot's certification and register their drones. The FAA considers drones used for journalism to be commercial drones and, therefore, subject to its commercial drone rules.<sup>46</sup> Thus, journalists using drones must comply with the FAA's commercial use requirements.<sup>47</sup>

The FAA currently requires commercial drone pilots to obtain a remote pilot certification with a small drone rating.<sup>48</sup> To obtain a remote pilot certificate, a commercial drone pilot must: (a) be at least sixteen years old; (b) be able to speak,

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42. *Id.* § 348.

43. *Id.* § 363.

44. *Id.* § 354.

45. Congress simply expresses the policy that drone operation “shall be carried out in a manner that respects and protects personal privacy consistent with the United States Constitution and Federal, State, and local law[.]” *id.* § 357, and requires the Comptroller General to undergo a study of the “privacy issues and concerns associated with the operation of unmanned aircraft systems in the national airspace system,” *id.* § 358.

46. See Love, Lawson & Holton, *supra* note 5, at 40–45 (describing FAA crackdowns on First Amendment activity and implicit treatment of newsgathering via drone or publishing drone footage captured by a hobby user as commercial); see also Shelley Hepworth, *The New Drone Rules: What Journalists Need to Know*, COLUM. JOURNALISM REV. (Aug. 26, 2016), <https://perma.cc/4FBN-GUFV>; (taking as a given that journalism uses are commercial). The distinction between recreational and commercial drone use may be thin after the 2018 Act. The 2012 Act's “special rule for model aircraft” limited the regulations that the FAA could place on small recreational drones, provided that the drone did not interfere with manned aircraft and was flown within the operator's visual line of sight, and that the operator notified air traffic control if the drone would be within five miles of an airport. FAA Modernization and Reform Act of 2012 § 336, *repealed by* FAA Reauthorization Act of 2018 § 349(b)(2), 49 U.S.C.A. § 44809 (Westlaw through Pub. L. No. 116-65). The 2018 Act imposes additional restrictions on recreational flight, including a 400-foot ceiling if flown in Class G airspace (with authorization requirements for Class B, C, or D airspace) as well as pilot certification and drone registration requirements. FAA Reauthorization Act of 2018 § 349(a). It also allows FAA to make rules that are “generally applicable” to unmanned aircraft such as updates to recreational operating parameters and the registration and marking of drones. *Id.* § 349.

47. See 14 C.F.R. § 107.11–51 (2019) (prescribing safety restrictions on commercial operators including not operating the drone under the influence of alcohol or drugs, not carrying “hazardous material” with a drone, and not flying within 500 feet vertically or 2,000 feet horizontally of a cloud).

48. See *id.* § 107.12. Alternatively, a person without a license may operate a commercial drone if directly supervised by a small commercial drone pilot with the ability to take direct control of the aircraft. *Id.*

write, and understand English (subject to medical waiver); (c) not know or have reason to know of a physical or mental condition that would interfere with safely operating a drone; and (d) have passed either an initial knowledge test or a recurrent knowledge test within the past twenty-four months.<sup>49</sup> Both the initial and recurrent knowledge tests cover, *inter alia*, regulations applicable to drone flight, airspace classification, emergency procedures, aeronautical decision-making and judgment, airport operations, and maintenance and preflight inspection procedures;<sup>50</sup> the initial knowledge test additionally covers radio communication procedures, effects of weather on drone performance, and the physiological effects of drugs and alcohol.<sup>51</sup> After passing an initial knowledge test, a prospective pilot may file an application for a remote pilot certificate.<sup>52</sup> Once received, a commercial drone pilot must keep her pilot certification on her person while operating the drone and be able to produce this certificate upon request.<sup>53</sup> Several journalism schools have started drone journalism programs where they teach aspiring drone journalists how to pilot a drone.<sup>54</sup>

In addition to obtaining a remote pilot certificate, drone journalists must register their drones with the FAA. Commercial drone operators may register their drones on the FAA website, subject to a \$5 fee, with the registration valid for three years.<sup>55</sup> After successful registration, drone journalists must keep their drone registration on their person while flying.<sup>56</sup> They must also affix their drone registration number to the exterior of the device.<sup>57</sup> Unlike other civil aircraft, drones are not subject to airworthiness requirements.<sup>58</sup> Instead, pilots must inspect the drone to ensure it is

49. *Id.* § 107.61. Alternatively, a drone pilot may demonstrate her aeronautical knowledge and thus satisfy the final criteria for pilot certification if she holds a pilot's license issued under 14 C.F.R. § 61, meets the flight review requirements in 14 C.F.R. § 61.56, and completes an initial training course in commercial drone flight, as specified in 14 C.F.R. § 107.74. *See id.* § 107.61(d)(2).

50. *Id.* § 107.73(b).

51. *Id.* § 107.73(a). The FAA offers a number of testing locations. *See, e.g., Locate a Testing Center*, COMPUTER ASSISTED TESTING SERV., <https://perma.cc/3CCN-ZWBY> (last visited Oct. 27, 2019). Aspiring commercial drone operators should expect to wait a few days to receive their test scores, after which they undergo a background check, receive a temporary certificate under 14 C.F.R. § 107.64, and, finally, receive a permanent certificate. *See* Will McDonald, *How to Fly Drones for Journalism in the U.S.*, POYNTER (Apr. 21, 2017), <https://perma.cc/T53F-4XSZ>.

52. 14 C.F.R. § 107.63 (2019).

53. *Id.* § 107.7.

54. *See, e.g.,* Amy Dunkin, *Drone Journalism Takes off at the Newmark J-School*, CRAIG NEWMARK GRADUATE SCH. OF JOURNALISM (Oct. 18, 2018), <https://perma.cc/H2EK-HHEB>; Rick Shaw, *Drone Flight Labs – Spring 2017*, UNIV. OF MO. DRONE JOURNALISM (Apr. 29, 2017), <https://perma.cc/4S2P-SNZ9>.

55. *See* FAADRONEZONE, <https://perma.cc/6G5P-27C9> (last visited Aug. 30, 2019); *Certified Remote Pilots Including Commercial Operators*, FAA (Aug. 20, 2019, 11:17:47 AM), <https://perma.cc/36LU-8Q9N>.

56. *See* 14 C.F.R. § 107.13 (2019); *id.* § 91.203(a)(2).

57. *Id.* pt. 48 (2019).

58. *Fact Sheet – Small Unmanned Aircraft Regulations (Part 107)*, FAA (July 23, 2018), <https://perma.cc/36LU-8Q9N> (“You are responsible for ensuring a drone is safe before flying, but the FAA does not require small UAS to comply with current agency airworthiness standards or obtain aircraft certification. For example, you will have to perform a preflight inspection that includes checking the communications link between the control station and the UAS.”).

safe for flight prior to takeoff and must discontinue use if they know or have reason to know that their drone is no longer safe.<sup>59</sup> Finally, the 2018 Act makes it a criminal offense to knowingly or recklessly interfere with a manned aircraft.<sup>60</sup>

## 2. The Rules of the Sky and Notable Examples of The Waiver Process

In addition to requiring commercial drone operators to obtain a license and a registration number for their drone, the FAA also addresses the safe operation of drones by imposing rules of the sky that ban a swath of conduct.<sup>61</sup> Drone operators may not fly over crowds or any human being unless they are “directly participating” in the drone’s operation or located underneath a structure that provides reasonable protection from falling drones.<sup>62</sup> Operators also may not fly their drone at night and may only fly during “periods of civil twilight” when the drone is equipped with anticollision lighting visible for “at least 3 statute miles.”<sup>63</sup> Additionally, a remote operator who does not maintain a visual line of sight with the drone (perhaps because she observes the drone through binoculars or a control pad displaying a live video feed) must employ a visual observer to “maintain awareness” of the drone “through direct visual observation” to ensure it avoids “air traffic or hazards” and “does not endanger the life or property of another.”<sup>64</sup> The regulations similarly prohibit any pilot or visual observer from operating more than one drone at a time.<sup>65</sup> Finally, the regulations impose a series of operating limitations that constrain commercial operators. Drones may not fly higher than 400 feet above the ground,<sup>66</sup> and must maintain a certain distance from clouds.<sup>67</sup> Drones must yield right of way to manned

59. 14 C.F.R. § 107.15 (2019).

60. FAA Reauthorization Act of 2018 § 384; 18 U.S.C.A. § 39B (Westlaw through Pub. L. No. 116-65). In the years leading up to the 2018 Act, members of Congress proposed alternative laws to regulate drones. This provision mirrors a bill proposed by Sen. Sheldon Whitehouse, *see* Drone Operator Safety Act of 2017, S. 1755, 115th Cong. (introduced Aug. 3, 2017), <https://perma.cc/J9YY-WPVT>, and serves as an example of a proposed law that made its way into the 2018 Act. *But see infra* Part III.B (discussing proposed bills that ended up on the cutting room floor).

61. *See* 14 C.F.R. §§ 107.15–51 (2019).

62. *Id.* § 107.39; *see also Part 107 Waivers*, FAA (Aug. 1, 2019, 2:14:22 PM), <https://perma.cc/7HL3-UU6G> (defining “over” as “directly over any part of a person. . . . An operation during which a small UAS flies over any part of any person, regardless of the dwell time, if any, over the person, would be an operation over people” and defining “directly participating” personnel as “specific personnel that the remote pilot in command has deemed to be involved with the flight operation of the small unmanned aircraft” including the remote pilot in command, the person manipulating a drone’s controls, the visual observer, and “any person who is necessary for the safety of the . . . operation”).

63. 14 C.F.R. §§ 107.29(a)–(b) (2019). “Civil twilight” is defined as the period thirty minutes before official sunrise or official sunset until official sunrise or official sunset, except in Alaska. *Id.* § 107.29(c). A “statute mile” measures 5,280 feet and is otherwise called a “mile.” *See Mile*, BLACK’S LAW DICTIONARY (Bryan A. Garner, 10th ed. 2014). It should not be confused with a nautical mile. *Id.*

64. 14 C.F.R. §§ 107.31–33 (2019).

65. *Id.* § 107.35.

66. *Id.* § 107.51(b). Alternatively, drones can fly within 400 feet of the “immediate uppermost limit” of structures. *See id.* For examples of what a drone can see from 400 feet, see Stetson Doggett, *What Does a Drone See from 400 Feet*, DRONEGENUITY, <https://perma.cc/ZDL9-P69S> (last visited Oct. 27, 2019).

67. 14 C.F.R. § 107.51(d) (2019) (requiring that drones maintain a minimum distance of 500 feet below clouds and 2,000 feet horizontally away from the cloud).

aircraft,<sup>68</sup> stay out of Class B, C, or D airspace,<sup>69</sup> stay away from prohibited or restricted areas,<sup>70</sup> and respect temporary airspace restrictions generally applicable to aircraft.<sup>71</sup>

The FAA provides a process for obtaining a waiver of most of these provisions.<sup>72</sup> When the FAA first promulgated Part 107, obtaining a waiver was a long, drawn-out process. The head of CNN's drone journalism division, Greg Agvent, describes obtaining CNN's first-ever waiver of the flight-over-people prohibition as a headache-inducing, two-and-a-half-year process in which "there were times when we were frustrated with the FAA, and I think there were just as many times when the FAA was frustrated with us."<sup>73</sup> CNN obtained the first flight-over-people waiver on August 29, 2016.<sup>74</sup> Today, forty-nine additional flight-over-people waivers are active.<sup>75</sup>

Drone operators can now apply for waivers of Part 107's provisions through the FAA's "DroneZone" web portal.<sup>76</sup> In this application, a waiver seeker must describe the details of how she plans to use the drone, including how high the drone will fly and in what type of airspace; the drone's specs, including the drone's type, size, and power source; personnel details, including level of experience and training; and the operational risks associated with the proposed waiver and how the operator will mitigate them.<sup>77</sup> The FAA considers the risk mitigation assessment to be of the utmost importance and will deny any waiver application submitted "without hazard identification and risk mitigation strategies."<sup>78</sup> The FAA intends to "do our best and review and approve or disapprove waiver requests within ninety days of submission," depending on the complexity of the application (for example, the type of waiver requested).<sup>79</sup> As of the 2018 Act, the FAA must promptly confirm that the agency has received a filed application and must provide updates on the application's status.<sup>80</sup> In addition to waivers, drone operators may apply for an "instant authorization" (a temporary status) to fly in controlled airspace, through the Low Altitude Authorization and Notification Capability (LAANC) tool accessible via the

68. *See id.* § 107.37(a).

69. *Id.* § 107.41.

70. *Id.* § 107.45.

71. *Id.* § 107.47; *see also id.* §§ 91.137–145; *id.* § 99.7.

72. Of the above-discussed provisions, only the restrictions on flight in prohibited or restricted areas and flight in temporarily restricted airspace are not waivable. *See id.* § 107.205. A drone pilot may obtain temporary authorization to operate in these areas. *See infra* note 81 and accompanying text.

73. *See #083 – CNN AIR With Greg Agvent, supra* note 6, at 16:15–16:40.

74. *See Part 107 Waivers Issued*, FAA, (Aug. 22, 2019), <https://perma.cc/UV8N-2AG2>.

75. *Id.* Compared to the one flight-over-people waiver granted in 2016, eight were granted in 2017, thirteen were granted in 2018, and twenty-nine were granted in 2019, as of August 22, 2019.

76. *See* FAADRONEZONE, <https://perma.cc/PS52-8HN7> (last visited Mar. 20, 2019).

77. *Waiver Safety Explanation Guidelines for Part 107 Waiver Applications*, FAA (Dec. 21, 2018), <https://perma.cc/RVQ2-Z8HH>; *see also* FAA, *How-To Apply for a Drone Waiver*, YOUTUBE (June 7, 2018), <https://perma.cc/3HT9-5S7D>.

78. *See* FAA, *How-To Identify, Assess & Mitigate Risks Posed to Your Drone Operation*, YOUTUBE (June 21, 2018), <https://perma.cc/66RB-UJMX>.

79. *Part 107 Waivers*, FAA (Dec. 21, 2018), <https://perma.cc/3VDG-KDYF>.

80. *See* FAA Reauthorization Act of 2018 § 352(b).

“DroneZone” portal or a third-party app.<sup>81</sup> This authorization allows for flight in controlled airspace, near airports, and in areas of temporary restrictions. In short, the FAA has gradually facilitated easier access to commercial drone regulation waivers.

It is worth considering whether the waiver process properly accommodates drone journalism. The waiver process, at least, allows pilots who have obtained waivers to operate their drones in ways that would otherwise be unlawful. CNN’s waivers provide an illustration of drone waivers for journalism. CNN currently has four waivers to fly over people for various types of drones,<sup>82</sup> one waiver to fly up to 600 feet,<sup>83</sup> and one to fly at night, beyond a minimum flight visibility of three statute miles and closer to clouds than usually permissible.<sup>84</sup> Taking CNN’s third waiver for flight over people as an example, the waiver certificate indicates that CNN submitted a number of supporting documents that described how CNN would mitigate risk.<sup>85</sup> The waiver imposes a number of requirements for flying over people, including: CNN must use the specific drone model with which they applied, the drone may not fly higher than 150 feet, direct participants (essentially the flight crew) must wear easily identifiable clothing, and CNN must keep records of any flights conducted under the waiver.<sup>86</sup> On the other hand, CNN’s second flight-over-people waiver does not require a specific drone, but imposes much more restrictive limitations on how the drone can be flown.<sup>87</sup> In contrast, CNN’s fourth flight-over-people waiver requires that the drone be flown higher than sixty-three feet over non-participants, be no heavier than 3.55 pounds, and be equipped with a parachute system to mitigate risk.<sup>88</sup> CNN’s nighttime waiver also contains a provision that allows a drone to fly closer to clouds than usual during the daylight. To fly under this waiver, CNN must issue a Notice to Airmen of an operation at least twenty-four hours before the operation and needs to use anticollision lighting and reflective

81. FAADRONEZONE, <https://perma.cc/FRH9-RMK7> (last visited Mar. 20, 2019); *see, e.g., Access LAANC with Skyward*, SKYWARD, <https://perma.cc/R285-T7R6> (last visited Mar. 20, 2019) (third-party app offering Low Altitude Authorization and Notification Ability, or LAANC); *see also* FAA, *How-To Apply for a Drone Waiver*, YOUTUBE (June 7, 2018), <https://perma.cc/T4NG-WSYS> (5:40–7:40) (distinguishing between waivers and airspace authorization).

82. Certificate of Waiver or Authorization, No. 107W-2019-04251, FAA (Aug. 7, 2019), <https://perma.cc/SRG3-6PDC> [hereinafter “CNN’s Flight Over People Waiver IV”]; Certificate of Waiver or Authorization, No. 107W-2017-04544, FAA (Oct. 13, 2017), <https://perma.cc/B2BK-S7DL> [hereinafter “CNN’s Flight Over People Waiver III”]; Certificate of Waiver or Authorization, No. 107W-2017-03321A, FAA (Aug. 2, 2017), <https://perma.cc/B6N9-8ESN> [hereinafter “CNN’s Flight Over People Waiver II”]; Certificate of Waiver or Authorization, No. 107W-2016-00001A, FAA (Nov. 15, 2016), <https://perma.cc/DTR7-CYS3> [hereinafter “CNN’s Flight Over People Waiver I”].

83. Certificate of Waiver or Authorization, No. 107W-2017-01043A1, FAA (May 5, 2017), <https://perma.cc/PUK5-V7U5> [hereinafter “CNN’s Altitude Waiver”].

84. Certificate of Waiver or Authorization, No. 107W-2016-01677A, FAA (June 27, 2017), <https://perma.cc/J6ZG-YRV5> [hereinafter “CNN’s Nighttime and Cloud Waiver”].

85. CNN’s Flight Over People Waiver III, *supra* note 82, at 2.

86. *Id.* at 3–5; *see also* Vantage Robotics, *Introducing Vantage Robotic’s Snap. The First Safe Portable Flying Camera.*, YOUTUBE (Sept. 2, 2015), <https://perma.cc/F972-VVDH> (depicting the drone that CNN must use with its third flight-over-people waiver).

87. *See* CNN’s Flight Over People Waiver II, *supra* note 82, at 4–6.

88. *See* CNN’s Flight Over People Waiver IV, *supra* note 82, at 3, 5–6.

coating on the exterior of the drone.<sup>89</sup> These waivers show that the waiver process is equipped to accommodate innovative uses of drones for journalism and content production purposes.

The FAA has started to relax two Part 107 provisions with a new proposed rule.<sup>90</sup> First, the proposed rule would allow drone flight to be conducted at night if the pilot underwent additional knowledge testing or training and if the drone was equipped with an anticollision light that was visible for at least three statute miles.<sup>91</sup> The anticollision light requirement may be waived entirely if an applicant demonstrates “sufficient measures to mitigate the risk associated with the proposed operation.”<sup>92</sup> Additionally, and importantly for drone journalism, the draft rule proposes relaxing the prohibition against flying over people who are not directly participating in the operation or protected from falling drones.<sup>93</sup> The proposed rule would group drones flying over people into three distinct categories, based on the potential of that type of drone to injure someone if it fell.<sup>94</sup> The first category would impose no operational restrictions if the drone weighed less than 0.55 pounds.<sup>95</sup> The second category would also impose no operational restrictions if a drone weighing more than 0.55 pounds: (1) was designed in such a way that a falling drone would not result in serious injury; (2) did not have exposed rotating parts capable of lacerating human skin; and (3) had no FAA-identified safety defects.<sup>96</sup> The third category (any drone without an exposed rotor that would not severely injure a person in a drone fall, with a greater chance of injury than the second category) imposes the following operational restrictions: (1) prohibiting flight over any open-air assembly of people; (2) limiting operations to a closed site where people are on notice that a drone might fly over them; (3) restricting any operations not in the closed site, to “transit[ing] but not hover[ing] over people[.]”<sup>97</sup> A user of a category two or three commercial drone must label it as such before using it for an operation over people.<sup>98</sup> The proposed rule does not discuss limitations applicable to drones that do not fall into one of the three categories; presumably, those drones are subject to the current prohibition on flights over people. Although it has not yet been finalized, this rule would make flying over people and flying at night even easier if using a compliant drone.

89. CNN’s Nighttime and Cloud Waiver, *supra* note 84, at 3–4.

90. Operation of Small Unmanned Aircraft Systems Over People, 84 Fed. Reg. 3856 (proposed Feb. 13, 2019) (to be codified at 14 C.F.R. pt. 107), <https://perma.cc/N5TL-RXD7>.

91. For a definition of “statute mile,” see *supra* note 63.

92. Operation of Small Unmanned Aircraft Systems Over People, 84 Fed. Reg. at 3857–58, 3869, <https://perma.cc/N5TL-RXD7>.

93. *Id.* at 3857–59.

94. *Id.* at 3858.

95. *Id.* at 3856 (to be codified at 14 C.F.R. § 107.120(a)(2)–(2)). For reference, CNN’s first flight-over-people waiver requires that the drone weigh less than 1.37 pounds. CNN’s Flight Over People Waiver I, *supra* note 82, at 3.

96. Operation of Small Unmanned Aircraft Systems Over People, 84 Fed. Reg. at 3858.

97. *Id.* at 3858–59. The second requirement resembles CNN’s flight-over-people waiver’s notice requirement. See CNN’s Flight Over People Waiver I, *supra* note 82, at 4.

98. Operation of Small Unmanned Aircraft Systems Over People, 84 Fed. Reg. at 3860.

### B. THE THREE CATEGORIES OF STATE AND LOCAL LAWS

In addition to the federal safety regulations on commercial drone use, state and local governments also impose regulations on drones.<sup>99</sup> These regulations are not limited to safety regulations; state and local governments are also concerned with privacy and region-specific interests like hunting and other environmental regulations. However, these regulations pose a risk of impeding journalism. Poorly-drawn regulations run the risk of inadvertently criminalizing journalistic drone uses or imposing compliance costs for drone journalists. When enacting a drone regulation, the implications for drone journalism and its concomitant First Amendment interests should never be far from regulators' minds.

In addition to safety, privacy, and region-specific regulations, several state governments have also preempted local governments from passing drone-related rules. Currently, at least nine states preempt local governments from enacting any regulation related to drone flight.<sup>100</sup> Two other states preempt some local laws with exceptions: Connecticut preempts local laws but allows municipalities to pass ordinances or resolutions for the purpose of protecting their water supply;<sup>101</sup> and Florida prohibits local governments from enacting safety-related regulations but allows local ordinances "relating to nuisances, voyeurism, harassment, reckless endangerment, property damage, or other illegal acts arising from the use of [drones] if such laws or ordinances are not specifically related to the use of an unmanned aircraft system for those illegal acts."<sup>102</sup> Thus, over twenty percent of states have adopted preemption schemes to ensure orderly regulation of commercial drones.<sup>103</sup> Finally, some jurisdictions have passed complete bans on commercial drone flight,<sup>104</sup> or have resolutions to ban municipal agencies (including law enforcement) from using drones until adequate "Constitutional safeguards" to protect citizens' First and

99. "Local" refers to any subdivision of a state government, including county, city, town, village, and parish governments. *Cf., e.g.*, Drone Innovation Act of 2017 § 2(2), H.R. 2930, 115th Cong. (introduced June 16, 2017), <https://perma.cc/XK5Q-Y7KJ> (defining "local" in this way).

100. DEL. CODE ANN. tit. 11, § 1334(e) (West, Westlaw through ch. 210 of the 150th Gen. Assemb. (2019-2020)); VA. CODE ANN. § 15.2-926.3 (West, Westlaw through end of 2019 Reg. Sess.); GA. CODE ANN. § 6-1-4 (West, Westlaw through 2019 Sess. of Gen. Assemb.) (preempting local ordinances adopted after April 1, 2017, but grandfathering in any ordinances passed before that date); LA. STAT. ANN. § 2:2(A) (West, Westlaw through 2019 Reg. Sess.); MICH. COMP. LAWS § 259.305(1) (Westlaw through P.A. 2019, No. 57, of 2019 Reg. Sess., 100th Leg.); UTAH CODE ANN. § 72-14-103 (West, Westlaw through 2019 Gen. Sess.); ARIZ. REV. STAT. ANN. § 13-3729(C) (Westlaw through 1st Reg. Sess. of 54th Leg. (2019)); R.I. GEN. LAWS ANN. § 1-8-1 (Matthew Bender, LEXIS through ch. 310 of 2019 Sess.) (granting exclusive authority to the state of Rhode Island and the Rhode Island Airport Corporation to impose drone regulations); MD. CODE ANN., ECON. DEV. § 14-301(b) (West, Westlaw through 2019 Reg. Sess. of Gen. Assemb.). Interestingly, the Town of Bethany Beach, Delaware, enacted a municipal ordinance prohibiting, among other things, flight over its beach, boardwalk, and other public places, setting up potential state and federal preemption fights. *See* BETHANY BEACH, DEL., ORDINANCES ch. 212, art. III, §§ 212-6, 212-7, <https://perma.cc/6JD2-GP24>.

101. CONN. GEN. STAT. ANN. § 7-149b(b) (West, Westlaw through 2019 Jan. Reg. Sess. and 2019 July Spec. Sess.).

102. FLA. STAT. ANN. § 330.41(3)(b)-(c) (West, Westlaw through 2019 1st Reg. Sess. of 26th Leg.).

103. *Cf.* Part III.B.

104. *See* Part III.B.4 for discussion of a Newton, Massachusetts, ordinance effectively barring commercial drone flight that was struck down as preempted by federal regulations.

Fourth Amendment rights are in place.<sup>105</sup>

### 1. Safety Regulations

State and local governments regulate drones in a number of ways that promote safe use. These regulations can take the shape of bans on drone flight in specified places based on the sensitivity of the location, temporary bans on drone flight based on a particularly sensitive event, prohibitions against weaponizing drones, and limiting the drone use of certain people. Also, some municipalities make it a locally enforceable misdemeanor to violate federal regulations.<sup>106</sup>

First, permanent bans on drone flight in certain places are perhaps the most popular form of local safety regulation. Some of these laws are expansive, such as Oxford, Alabama's ordinance that applies up to a \$500 fine or up to six months' incarceration for flying a drone on municipal property, including city parks and recreational areas, except in cases where the police chief has given written permission for drone flight.<sup>107</sup> Similarly, Bonita Springs, Florida, requires that a person who wants to use a drone to photograph activity in a municipal park must have a special event permit and may photograph only their special event.<sup>108</sup> In addition to prohibitions over parks, several states also expressly forbid operations over correctional facilities or places defined as "critical infrastructure." For example, Wisconsin prohibits any flight over a correctional facility including its grounds, subject to a \$5,000 fine,<sup>109</sup> while Oklahoma law prohibits flying within 400 feet of "critical infrastructure," including prisons, dams regulated by the state or federal government, or "a port, railroad switching yard, trucking terminal or other freight transportation facility."<sup>110</sup> Similarly, although Arkansas does not prohibit flight over critical infrastructure, it prohibits using a drone to "conduct surveillance of, . . . or photographically or electronically record critical infrastructure" without the owner's written consent.<sup>111</sup> This regulation indicates how safety regulations can impose burdens on journalism in excess of operational limits.

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105. SYRACUSE COMMON COUNCIL, N.Y., RES. 36-R (Dec. 16, 2013), <https://perma.cc/B5XD-9NDB>.

106. See, e.g., CALABASAS, CAL., MUN. CODE § 9.10.030(1) (2019), <https://perma.cc/G4JG-XQXE>.

107. OXFORD, ALA., CODE OF ORDINANCES ch. 26, art XI, §§ 26-292-94 (2019), <https://perma.cc/AS6W-E6PX>; see also 312 IND. ADMIN. CODE 8-2-8(i) (Westlaw through Sept. 4, 2019) (prohibiting drone use in state parks, subject to waiver).

108. See BONITA SPRINGS, FLA., CITY CODE ch. 28, art. II, § 28-41(k) (2019), <https://perma.cc/E3B5-9MMT>. Confusingly, the ordinance also requires that "the fields" be "unoccupied" if a drone is to be used. *Id.* The ordinance also prohibits flying drones within twenty-five feet of "people, power lines, buildings, or light fixtures." *Id.*

109. WIS. STAT. ANN. § 114.045 (West, Westlaw through 2019 Act 5).

110. OKLA. STAT. ANN. tit. 3, § 322 (Westlaw through 1st Reg. Sess. of 57th Leg. (2019)). Of course, this height establishes an effective ban, unless a commercial drone operator has a waiver from the FAA to fly above 400 feet. See *supra* note 83 and accompanying text (mentioning CNN's waiver to fly up to 600 feet above ground). Compare Nevada law that prohibits operation without consent "500 horizontal feet" or "250 vertical feet" over critical infrastructure, which seems *would* allow drone journalism. NEV. REV. STAT. ANN. § 493.109 (West, Westlaw through end of 80th Reg. Sess. (2019)).

111. ARK. CODE ANN. § 5-60-103(b) (West, Westlaw through end of 2019 Reg. Sess. of 92nd Ark. Gen. Assemb.).

Next, state and local governments also deploy temporary bans on flight based on special events. For example, Miami, Florida, has established an ordinance that bans drone activity within a half mile of its professional sports stadiums and other large venues during “large venue special events.”<sup>112</sup> The ordinance explains that the “restrictions are intended to protect persons gathered in groups where a UAS incident would cause greater harm and risk of injury due to a greater number of people gathered in a close proximity.”<sup>113</sup> It also provides a waiver process for special events, and requires an operator to carry liability insurance.<sup>114</sup> Schaumburg Village, Illinois, similarly prohibits drone flight during any special event (defined as “[a]ny public gathering or event held outdoors on Village Property” requiring a permit) within 100 feet of any village property.<sup>115</sup> The Schaumburg ordinance does not provide any waiver mechanism.<sup>116</sup> Finally, some cities will impose temporary bans on drone flights during specific weeks when activity is expected to be at its most hectic.<sup>117</sup> The FAA similarly imposes bans for special events.<sup>118</sup>

Finally, state and local governments also limit the use of drones, and who can use drones, to promote safety. For example, several states prohibit outfitting drones with weapons, firearms, explosives, destructive devices, or ammunition.<sup>119</sup> Oregon makes purposely, knowingly, or recklessly using a weaponized drone to cause serious physical injury to another person a Class B felony, using the system to fire a bullet or projectile a Class C felony, and equipping a drone with a weapon a Class A misdemeanor.<sup>120</sup> Nevada, similarly, makes it a category C felony to weaponize a drone and fire the equipped weapon.<sup>121</sup> Notably, Congress also recently forbade the weaponization of drones in the 2018 Act.<sup>122</sup> Finally, several states forbid registered sex offenders from using drones to knowingly or intentionally follow, contact, or capture images of specific people.<sup>123</sup>

## 2. Privacy Regulations

In addition to imposing regulations on drones to preserve safety interests, state and local governments also impose regulations to protect the privacy of individuals.

112. MIAMI, FLA., CODE § 37-12 (2019), <https://perma.cc/9GSY-6UM4>.

113. *Id.*

114. *Id.* § 37-12(d), (g).

115. SCHAUMBURG, ILL., ORDINANCE 15-070 (July 28, 2015), <https://perma.cc/LZ54-DLDW>.

116. *Id.*

117. *See* Pan Am. v. Municipality of San Juan, Civ. No. 18-1017, 2018 WL 6503215, at \*2 (D.P.R. Dec. 10, 2018).

118. *See, e.g., Atlanta is a “No Drone Zone” During Super Bowl LII*, FAA, (Jan. 28, 2019), <https://perma.cc/PP8M-72AM>.

119. *See, e.g.,* FLA. STAT. ANN. § 330.411 (West, Westlaw through 2019 1st Reg. Sess. of 26th Leg.). Somewhat redundantly, Miami, Florida, also prohibits using drones that are “equipped to carry a weapon.” MIAMI, FLA., CODE § 37-12(c)(2)(a) (2019), <https://perma.cc/9GSY-6UM4>.

120. OR. REV. STAT. ANN. § 837.365(1)–(2) (West, Westlaw through 2019 legislation).

121. NEV. REV. STAT. ANN. § 493.106(2) (West, Westlaw through 80th Reg. Sess. (2019)).

122. *See supra* note 43.

123. IND. CODE ANN. § 35-42-4-12.5 (West, Westlaw through 2019 1st Reg. Sess. of 121st Gen. Assemb.); MICH. COMP. LAWS § 259.322(4) (Westlaw through P.A.2019, No. 57, of 2019 Reg. Sess., 100th Leg.).

Privacy regulations ultimately break into two broad categories: those that regulate how private citizens can operate drones and those that impose limitations on law enforcement use of drones. This Section focuses on state and local laws that regulate the conduct of private individuals.<sup>124</sup> These regulations break down into several categories: statutes that specifically enumerate lawful drone uses, those that modify existing criminal laws for the drone age, those that specifically prohibit “trespass” by drone, and those that prohibit intrusions on expectations of privacy.

Tennessee’s Senate Bill 1892 provides an example of a privacy regulation that specifically exempts certain drone uses.<sup>125</sup> The statute makes it a class C misdemeanor to use a drone to photograph an individual or privately-owned real property with the intent to “conduct surveillance on the individual or property captured in the image” or to knowingly publish such an image.<sup>126</sup> The statute does not define “surveillance.” An affirmative defense is (1) destroying the offending image as soon as the person knew the way the image was captured violated the statute if (2) the person did not “disclos[e], display[], or distribut[e]” the image to a third party.<sup>127</sup> The statute also expressly exempts sixteen different uses, such as academic research, military operations, fire suppression, and licensed real estate brokers “in connection with the marketing, sale, or financing of real property” (as long as no individuals are visible in the image).<sup>128</sup> The statute does not exempt journalists.<sup>129</sup> Although this law is clear, it does not seem to leave much room for drone journalism, unless a journalist receives express permission to fly over private property—a potentially difficult task in an emergency or in the course of investigative reporting. The prohibition on publication potentially criminalizes a journalist publishing drone footage obtained by someone else. The lack of a journalistic exception for these provisions when other exceptions are specified is problematic and troubling.

Other states take a nuisance-inspired trespass approach to drone use. For

124. Law enforcement uses, the Fourth Amendment implications, and the state and local regulations posing limitations on law enforcement are fascinating but are beyond the scope of this Note. For discussions of these issues, see Jessica Dwyer-Moss, *The Sky Police: Drones and the Fourth Amendment*, 81 ALB. L. REV. 1047 (2017); Matthew R. Koerner, Note, *Drones and the Fourth Amendment: Redefining Expectations of Privacy*, 64 DUKE L.J. 1129 (2015). While advocating for increased usage of drones for journalism, I am mindful of potentially reducing individuals’ expectations of privacy with a proliferation of flying newsgathering machines. See Beth Shane, Note, *After ‘Knowing Exposure’: First and Fourth Amendment Dimensions of Drone Regulation*, 73 N.Y.U. SURV. AM. L. 323, 347–48 (2018) (“Not only does drone journalism increase the likelihood of an individual being unwittingly caught on camera while navigating the public space, but under the current Fourth Amendment doctrine, the more pervasive the civilian use of drones, the stronger the government’s right to surveil its citizenry without triggering Fourth Amendment protections.”); Marc Jonathan Blitz, James Grimsley, Stephen E. Henderson & Joseph T. Thai, *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 110 (2015). Without spending too much time on the question, a recognition that pervasive drone use allows low-cost law enforcement information gathering would be essential to balancing First and Fourth Amendment interests. Cf. *Carpenter v. United States*, 138 S. Ct. 2206, 2217–18 (2018).

125. TENN. CODE ANN § 39-13-902 (West, Westlaw through 2019 1st Extraordinary Sess. of 111th Tenn. Gen. Assemb.). Texas has a similar statute, discussed *infra* Part II.C.

126. *Id.* § 39-13-903(a)–(b).

127. *Id.* § 39-13-903(c).

128. *Id.* § 39-13-902(a)(1)–(16).

129. *Id.* § 39-13-902(a)(1)–(16).

example, Oregon makes it a Class B violation to fly a drone over “the boundaries of privately-owned premises in a manner as to intentionally, knowingly, or recklessly harass or annoy the owner or occupant of the privately owned premises.”<sup>130</sup> The law provides for stepped-up punishment after multiple violations.<sup>131</sup> This nuisance approach does not require any privacy violation, but rather punishes annoyance or harassing behavior. In fact, the law does not specify whether harassment and annoyance are meant to be judged by an objective or subjective standard. Although the trespass approach creates an easier-to-administer bright-line rule, that clarity will necessarily sweep in legitimate newsgathering conduct that does severely infringe on privacy.

States also modify existing criminal laws to apply to drones. Kansas expanded its offense of harassment to include harassment “carried out through the use of a[] [drone] over or near any dwelling, occupied vehicle or other place where one may reasonably expect to be safe from uninvited intrusion or surveillance.”<sup>132</sup> The offense requires “two or more separate acts over a period of time[.]” However, the law also specifies that it does not prohibit “[c]onstitutionally protected activity[.]”<sup>133</sup> Other states apply existing laws to the new reality of drones. In lieu of passing new statutes specifically targeting drones, Alaska has distributed guidelines for drone use.<sup>134</sup> These guidelines are non-binding, and simply circulate standards that drone operators should observe to respect the privacy of their neighbors. They call, essentially, for being courteous and recognizing that some people expect more privacy than others.<sup>135</sup> However, the guidelines also suggest that Alaska’s generally applicable statutes prohibiting “stalking” and “peeping Tom” activities also apply to commercial drone operators who photograph a house.<sup>136</sup> At the same time, it makes clear that homeowners should not shoot down drones.<sup>137</sup> Thus, states have also modified existing privacy laws or apply existing laws to the new context of drones.

Finally, based on the Fourth Amendment concept of a reasonable expectation of privacy,<sup>138</sup> states are adapting previously-enacted statutes to combat fears about voyeurism and other privacy infringements specifically from drone intrusions. Mississippi makes it a felony to look through a “window, hole, or opening” with a drone for the “lewd, licentious and indecent purpose of spying upon the occupant or

130. OR. REV. STAT. ANN. § 837.370(1) (West, Westlaw through 2019 legislation). *Cf.* RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979) (describing conduct required for private nuisance as “intentional and unreasonable” “invasion of another’s interest in the private use and enjoyment of land”).

131. OR. REV. STAT. ANN. § 837.370(3) (West, Westlaw through 2019 legislation) (stating that after one conviction, the offense is a Class A violation, and after two or more it’s a Class B misdemeanor). Utah has a similar criminal-trespass-by-drone law. *See* UTAH CODE ANN. § 76-6-206 (West, Westlaw through 2019 Gen. Sess.).

132. KAN. STAT. ANN. § 60-31a02(d)(1) (West, Westlaw through 2019 Reg. Sess. of Kan. Leg.).

133. *Id.* § 60-31a02(d)(2).

134. UAS LEGISLATIVE TASK FORCE, 29TH ALASKA STATE LEGISLATURE, *Drone/UAS Operator Safety Guidelines and FAQs About Privacy* (Oct. 1, 2015), <https://perma.cc/4VUK-JFSR>.

135. *See id.* at 3.

136. *Id.* at 11, 19.

137. *Id.* at 9.

138. *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

occupants thereof” and also makes it a felony to photograph a person in such a scenario where the person has a reasonable expectation of privacy.<sup>139</sup> With its focus on lewd purpose, this would likely steer clear of drone journalism. Similar to Mississippi’s statute, Louisiana, Virginia, and Arkansas also require proving lewd purpose.<sup>140</sup> However, Michigan’s statute sweeps more broadly than voyeurism to prohibit operating a drone to capture any “photographs, video, or audio recordings of an individual in a manner that would invade the individual’s reasonable expectation of privacy.”<sup>141</sup> This prohibition is not limited to lewd voyeurism and seems to also prohibit journalism. Another potential limitation, in addition to the voyeurism one, is to enact a law like California’s, which prohibits a physical invasion on private property where a drone operator knowingly captures “any type of visual image, sound recording, or other physical impression of a person engaging in a private, personal, or familial activity” that is offensive to a reasonable person.<sup>142</sup> Although this might limit collection of newsworthy stories like New Jersey Governor Chris Christie tanning with his family on a state beach that he closed,<sup>143</sup> it would provide slightly more definite rules about the conduct that is acceptable.<sup>144</sup>

### 3. Region-Specific Regulations

In addition to the safety and privacy interests already discussed, states and localities may have interests specific to their locality that justify a region-specific regulation. For example, New York City may be justified in enforcing a city-wide ban on private drone flight (except for five parks spread across Brooklyn, Queens, and Staten Island) based on the complexity of New York’s airspace.<sup>145</sup> While this concern may not apply to Montana, that state may need to prohibit drones from interfering with wildfire suppression efforts because of a high incidence of wildfires, a concern not present in New York City.<sup>146</sup> At the same time, Minnesota might want to appropriate \$348,000 to assess drones’ environmental effects on the local moose

139. MISS. CODE ANN. § 97-29-61(1)(b) (West, Westlaw through 2019 Reg. Sess.).

140. See ARK. CODE ANN. § 5-16-101(b) (West, Westlaw through 2019 Reg. Sess. of 92nd Ark. Gen. Assemb.), amended by 2019 ARK. ACTS 461; LA. STAT. ANN. § 14:283(A)(1) (West, Westlaw through 2019 Reg. Sess.); VA. CODE ANN. § 18.2-130.1 (West, Westlaw through 2019 Reg. Sess.).

141. MICH. COMP. LAWS § 259.322(3) (Westlaw through P.A.2019, No. 57, of 2019 Reg. Sess., 100th Leg.).

142. CAL. CIV. CODE § 1708.8(a) (West, Westlaw through ch. 860 of 2019 Reg. Sess.).

143. See Gerry Mullany, *Chris Christie Hits a Closed State Beach, and Kicks up a Fury*, N.Y. TIMES (July 3, 2017), <https://perma.cc/44NH-JVQQ>. Assume, for the purposes of the hypothetical, that the beach was private property.

144. Interestingly, the City of Hermosa Beach, California, enacted an ordinance that was intended to “supplement” California’s law by prohibiting capturing any photographs where there is a reasonable expectation of privacy. HERMOSA BEACH, CAL., MUN. CODE, ch. 9, § 38.040(H) (2016), <https://perma.cc/9AQB-NVB7>.

145. See *Drones*, NYC, <https://portal.311.nyc.gov/article/?kanumber=KA-01541> (last visited Mar. 21, 2019); Chris Glorioso, Erica Jorgensen & Evan Stulberger, *Major Spike in Illegal Drones over New York, Pilot Recounts Close Encounters*, NBC (Feb. 15, 2018), <https://perma.cc/B5QH-QNUT>; see also *Model Aircraft Fields*, NYC PARKS, <https://perma.cc/Z8XA-VV7Z> (last visited Mar. 21, 2019).

146. See MONT. CODE ANN. § 76-13-214(1) (West, Westlaw through 2019 Sess.).

population.<sup>147</sup>

Many region-specific regulations of drones tend to focus on hunting fish and game. These hunting regulations can be understood in three categories: prohibitions on hunting or harassing wildlife and livestock,<sup>148</sup> hunters using drones to gain an advantage,<sup>149</sup> and drone operators interfering with hunters.<sup>150</sup> Notably, in the third category, Tennessee and New Hampshire statutes also prohibit conducting “video surveillance” of hunters,<sup>151</sup> which could be wielded against journalists.<sup>152</sup> Therefore, even as region-specific regulations demonstrate local interests that cannot be regulated on a national scale, legislatures must consider drone journalism.

In summary, state and local governments have legitimate interests in regulating drones based on safety, privacy, and region-specific concerns. However, regulators should stay aware of the burdens these regulations place on journalists, particularly where a regulation restricts photography or publication. Safety regulations should only impose operational restrictions to the extent necessary to promote safe drone use and, when possible, should provide the opportunity to obtain a waiver. Region-specific regulations should take a similar approach. Other safety regulations could hinder the ability of drone journalists to produce content or conduct investigatory journalism. For example, the ban of flight over correctional facilities or critical infrastructure could limit the ability of drone journalists to report on conditions at a prison or failures of a power plant.

Privacy regulations can accommodate drone journalism in several ways based on the statutes on the books. Privacy statutes can specifically exempt journalism from sanction, define invasions in narrow ways that do not encompass journalism (namely, voyeurism), or, as discussed later, incorporate a newsworthiness defense.

Finally, regulators should be mindful of passing laws that grant discretion to shut down drone journalism. One final regulation that could grant this sort of discretion is a California law that grants immunity to first responders who damage a drone while providing emergency services.<sup>153</sup> This grant is limited to personnel providing medical, firefighting, and search and rescue services.<sup>154</sup> However, an expansion of

147. 2017 MINN. SESS. LAW, S.F. No. 550, ch. 96, sec. 2, § 3(j).

148. UTAH CODE ANN. § 76-9-308(2) (West, Westlaw through 2019 Gen. Sess.) (prohibiting intentionally, knowingly, or recklessly chasing, disturbing, or harming livestock with a drone); IDAHO CODE ANN. § 36-1101(b)(1)–(2) (West, Westlaw through 2019 1st Reg. Sess. of 65th Idaho Leg.) (prohibiting the use of drones for hunting or harassing animals, birds, or fur-bearing animals).

149. ALASKA ADMIN. CODE tit. 5, § 33.398 (2019) (prohibiting the use of drones to scout salmon for commercial fishing), <http://perma.cc/28EC-LMA8>; IND. CODE ANN. § 14-22-6-16 (West, Westlaw through 2019 1st Reg. Sess. of 121st Gen. Assemb.) (prohibiting the use of drones to scout game during hunting season).

150. MICH. COMP. LAWS § 324.40112(2) (Westlaw through P.A.2019, No. 57, of the 2019 Reg. Sess., 100th Leg.); 720 ILL. COMP. STAT. ANN. 5/48-3(b)(10) (West, Westlaw through P.A.101-172) (establishing that it is a misdemeanor to interfere with a hunter lawfully “taking” wildlife by use of a drone).

151. N.H. REV. STAT. ANN. § 207:57(I) (West, Westlaw through ch. 345 of 2019 Reg. Sess.); TENN. CODE ANN. §§ 70-4-302(a)(1), (6) (West, Westlaw through 2019 1st Extraordinary Sess. of 111th Tenn. Gen. Assemb.).

152. *Cf.* Part III.A (discussing the application of the First Amendment to “ag-gag” statutes).

153. CAL. CIV. CODE § 43.101 (West, Westlaw through ch. 860 of 2019 Reg. Sess.).

154. CAL. GOV’T CODE § 853 (West, Westlaw through ch. 860 of 2019 Reg. Sess.).

this immunity could infringe on a journalist's ability to document police misconduct. While there are legitimate reasons for search and rescue personnel to ground a drone, this ability should not extend beyond the emergency context.

### C. ILLUSTRATION OF COMPREHENSIVE STATE REGULATION: TEXAS

Having examined state and local drone regulations promoting safety, privacy, and region-specific interests, I want to briefly discuss Texas's regime for regulating drones.<sup>155</sup> While some states have enacted only a few piecemeal pieces of legislation (or none at all) to regulate drones, Texas has enacted both safety and privacy legislation. Therefore, it serves as a useful illustration of how a comprehensive state drone regulatory regime *could* look.

First, Texas preempts local laws, except in the case of special events. This is somewhat of a departure from the other preemption laws discussed above, but it provides some accommodation for the safety interests of temporary regulations.<sup>156</sup> In terms of safety, Texas prohibits flight over correctional facilities and sports venues (similar to Miami's ordinance).<sup>157</sup> Flying over a sports venue is a Class B misdemeanor.<sup>158</sup> Texas also prohibits flight over critical infrastructure facilities if the drone is 400 feet (or lower) from the ground,<sup>159</sup> which effectively bans commercial use unless the pilot has a waiver to fly above 400 feet.

On the privacy front, Texas has a very similar privacy law to Tennessee's. The statute criminalizes using a drone to capture an image of an individual or privately-owned real property with the "intent to conduct surveillance" on the individual or property, and also makes it an offense to distribute any such image.<sup>160</sup> Although it provides exceptions to the law, journalists do not qualify for an exception.<sup>161</sup> Texas has not enacted any of the alternative privacy regulations.

These provisions place limitations on how journalists can use their drones. For one, unless they have a waiver from the FAA, they cannot fly over anything defined as critical infrastructure. They also may not fly over correctional facilities to report on potential abuses.<sup>162</sup> These provisions are not subject to waiver or authorization. Furthermore, Texas's privacy laws do not allow for a journalistic exception, and they make photography or publication of images punishable as various classes of misdemeanors.<sup>163</sup> These provisions make drone journalism an uncertain proposition,

155. A press advocacy group recently challenged this regulatory scheme and, as of October 27, 2019, the case is pending. *See* Complaint, Nat'l Press Photographers Assoc. v. McCraw, 1:19-cv-00946-RP (W.D. Tex. Sept. 26, 2019), ECF No. 1.

156. TEX. GOV'T CODE ANN. § 423.009 (Vernon, Westlaw through 2019 Reg. Sess. of 86th Leg.).

157. *Id.* §§ 423.0045, 423.0046; *see supra* notes 112 & 113 and accompanying text.

158. TEX. GOV'T CODE ANN. § 423.0046(d) (Vernon, Westlaw through 2019 Reg. Sess. of 86th Leg.).

159. *Id.* § 423.0045(b)(1).

160. *Id.* §§ 423.003, 423.004.

161. *Id.* § 423.001(a)(1)–(19).

162. *Cf. supra* notes 7–8 and accompanying text (describing BBC use of drones to record camps on United States-Mexico border).

163. TEX. GOV'T CODE ANN. §§ 423.003, 423.004 (Vernon, Westlaw through 2019 Reg. Sess. of 86th Leg.).

given the undefined term of “intent to conduct surveillance.” Finally, the preemption provision clarifies the state and local legal picture for a drone journalist, making it so she only needs to familiarize herself with federal and Texas laws and temporary local regulations. Although the preemption provision simplifies the regulatory picture, Texas’s other provisions provide barriers to journalistic use of drones.

### III. PROMOTING SAFE DRONE USE WHILE ACCOMMODATING FIRST AMENDMENT INTERESTS

The foregoing discussion of federal and state regulations enacted to preserve safety, privacy, and region-specific interests exhibits a complicated framework that journalists must navigate to use drones for content production and investigative reporting. Part III will now examine regulations meant to promote safe drone flight while Part IV will focus on the state and local regulations that address privacy interests.<sup>164</sup>

This Part first examines potential First Amendment challenges to the FAA’s regulatory scheme and reasons why the FAA’s scheme is likely subject to an intermediate tier of scrutiny. While as-applied challenges remain available for instances where the FAA imposes pretextual restrictions that drive newsgathering activity from federally controlled airspace,<sup>165</sup> a facial challenge to the FAA’s drone regulation seems unlikely to succeed and, ultimately, counterproductive where an errant drone might fall from the sky onto an unsuspecting bystander below.<sup>166</sup> In an effort to streamline regulations, I propose preempting state and local safety regulations, except in the case of temporary restrictions for special events. Additionally, this Part also proposes that the FAA should establish a specialized waiver process for journalists.

#### A. THE FAA’S COMMERCIAL DRONE REGULATIONS PASS INTERMEDIATE SCRUTINY

Meant to preserve the safety of United States airspace, the FAA’s commercial drone regulations are likely not susceptible to a facial First Amendment challenge. However, regulation of newsgathering activities necessarily invokes First Amendment interests that must be considered when enacting these safety regulations. Although the Supreme Court has not ruled on the First Amendment protection

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164. Although they provide interesting examples of idiosyncratic interests that motivate state and local legislatures, the region-specific regulations are not discussed further.

165. See, e.g., Shane, *supra* note 124, at 330 (describing no-fly zone over public protests in Ferguson, Missouri, as a pretextual prohibition); see also Jason Koebler, *Drone Journalist Faces 7 Years in Prison for Filming Dakota Pipeline Protests*, MOTHERBOARD (May 25, 2017), <https://perma.cc/FC2H-5EPS> (the journalist was acquitted); Janus Kopfstein, *Police Are Making It Impossible to Use Drones to Document Protests*, VOCATIV (Jan. 27, 2017, 10:10 AM), <https://perma.cc/DFH9-VQ9S>.

166. Cf. *Janus v. Am. Fed’n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (expressing concern that in striking down labor union agency fees the Court “prevents the American people, acting through their state and local officials, from making important choices about workplace governance . . . by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy”).

afforded to drone newsgathering specifically or photography or videography<sup>167</sup> generally, such activity is likely protected and certainly implicates First Amendment interests that federal, state, and local drone regulators should accommodate.

Dissenting in *Branzburg v. Hayes*, Justice Potter Stewart wrote that a “corollary” of the established “right to publish,” which he called “central to the First Amendment and basic to the existence of constitutional democracy” must be “the right to gather news.”<sup>168</sup> Although the *Branzburg* majority decided not to extend an absolute right for a journalist to refuse revealing her sources to a grand jury, the majority similarly recognized that “news gathering is not without its First Amendment protections[.]”<sup>169</sup> In a later case, the Court quoted *Branzburg* to say that “[t]here is an undoubted right to gather news ‘from any source by means within the law[.]’”<sup>170</sup>

The burgeoning “right to record” partially supports First Amendment protection for drone photography. Although the Supreme Court has not recognized the right to record, at least the First, Third, Fifth, Ninth, and Eleventh Circuits recognize that citizens have a right to record police officers during the course of a law enforcement encounter.<sup>171</sup> These cases typically start from the proposition that the “First Amendment protects film”<sup>172</sup> and reason that, as a “corollary” “the First Amendment protects the act of making film” because “there is no fixed First Amendment line between the act of creating speech and the speech itself.”<sup>173</sup> The element of police monitoring is an important one in “right to record” cases: “Filming the police contributes to the public’s ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy.”<sup>174</sup> Although district courts and lower state courts have extended the right to record outside of the police context,<sup>175</sup> federal appellate court opinions generally tether their holdings to the police accountability rationale.<sup>176</sup> At least one district court opinion has limited the right to record to police officers performing their duties.<sup>177</sup> Another district court in a circuit without an established right to record,

167. Hereinafter, I refer to photography and videography collectively as “photography.”

168. *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting).

169. *Id.* at 702 (majority opinion).

170. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg*, 408 U.S. at 681–82).

171. See *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Glik v. Cunniffe*, 655 F.3d 78, 83–84 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332–33 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); see also *Higginbotham v. City of New York*, 105 F. Supp. 3d 369 (S.D.N.Y. 2015); Komal S. Patel, Note, *Testing the Limits of the First Amendment: How Online Civil Rights Testing is Protected Speech Activity*, 118 COLUM. L. REV. 1473, 1501–03 (2018); Kendall Jackson, Note, *I Spy: Addressing the Privacy Implications of Live Streaming Technology and the Current Inadequacies of the Law*, 41 COLUM. J.L. & ARTS 125, 141 (2017).

172. *Turner*, 848 F.3d at 688 n.40 (citing *Kingsley Int’l Pictures Corp. v. Regents of Univ. of State of New York*, 360 U.S. 684, 688 (1959)).

173. *Id.* at 689 n.41 (citing *Am. Civil Liberties Union v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012)).

174. *Id.* at 689.

175. See Patel, *supra* note 171, at 1502–03. For example, the New Jersey district court extended the right to record to monitoring and photographing the city’s mayor. See *Pomykacz v. Borough of West Wildwood*, 438 F. Supp. 2d 504, 512–13 (D.N.J. 2006).

176. See, e.g., *Glik*, 655 F.3d at 84.

177. *Maple Heights News v. Lansky*, No. 1:15CV53, 2017 WL 951426, at \*3 (N.D. Ohio Mar. 10,

while skeptical that the right to record existed, ruled that the right to record extends only to persons on the ground, and not to drones.<sup>178</sup> The right-to-record cases emphasize the importance of recording law enforcement officials for accountability purposes in the age of ubiquitous recording devices. These decisions demonstrate the First Amendment interests entangled with drone journalism. However, given the uncertainty of their reach and lack of nationwide application, they need additional support.

That support comes from another line of cases. Although not yet considered by the Supreme Court, several courts have struck down so-called “ag-gag” statutes<sup>179</sup> that criminalize undercover reporting of animal abuses in “agricultural production facilit[ies.]”<sup>180</sup> The Ninth Circuit determined that Idaho’s statute was invalid because it criminalized protected speech involved in entering a “production facility” through misrepresentation and “making audio or video recordings of the ‘conduct of an agricultural production facility’s operations.’”<sup>181</sup> The federal district court in Utah found similar provisions proscribed protected speech.<sup>182</sup> In evaluating whether recording is protected speech, the Ninth Circuit and District of Utah courts consulted the right-to-record cases.<sup>183</sup> Specifically, the Ninth Circuit “easily dispose[d]” of the argument that “the act of creating an audiovisual recording is not speech protected by the First Amendment” because “[i]t defies common sense to disaggregate the creation of the video from the video or audio recording itself.”<sup>184</sup> The Utah district court similarly conceptualized photography: “[T]he act of recording is protectable First Amendment speech.”<sup>185</sup> This broad view of the right to record is not tethered to an accountability rationale and applies to commercial drone journalism.

Because expressive interests are involved in piloting a commercial drone for journalistic purposes, I consider the level of scrutiny that would be applied to the FAA’s drone regulations. If strict scrutiny is applied, the FAA’s commercial drone regulations may not be narrowly tailored, but they surely serve the compelling governmental interest of promoting safety.<sup>186</sup> However, the FAA’s commercial

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2017) (refusing to extend the right to record to a city council meeting).

178. *Rivera v. Foley*, No. 3:14-cv-00196, 2015 WL 1296258, at \*10 (D. Conn. Mar. 23, 2015).

179. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011), <https://perma.cc/NLW6-9VVM>.

180. IDAHO CODE ANN. § 18-7042 (West, Westlaw through 2019 1st Reg. Sess. of 65th Idaho Leg.), *invalidated by* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018); *see also* *Animal Legal Def. Fund v. Reynolds*, 353 F. Supp. 3d 812 (S.D. Iowa 2019), *appeal docketed*, No. 19-1364 (8th Cir. Feb. 22, 2019); *Animal Legal Def. Fund v. Herbert*, 263 F. Supp. 3d 1193 (D. Utah 2017); *cf. Herbert*, 263 F. Supp. 3d at 1196–98 (describing the history of ag-gag laws).

181. *Wasden*, 878 F.3d at 1195, 1203.

182. *Herbert*, 263 F. Supp. 3d at 1201–08. The court in the Southern District of Iowa dealt only with a misrepresentation prohibition. *Reynolds*, 353 F. Supp. 3d at 821.

183. *See Wasden*, 878 F.3d at 1203–04; *Herbert*, 263 F. Supp. 3d at 1206–08.

184. *Wasden*, 878 F.3d at 1203.

185. *Herbert*, 263 F. Supp. 3d at 1208. This court was concerned with allowing the government to ban indirectly, for example, “music videos, or videos critical of the government, or any video at all” by proscribing their creation and, thus, effectively banning their distribution.

186. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231–32 (2015) (assuming traffic safety is a compelling interest); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997) (upholding fixed buffer zones outside of abortion clinics on the basis of, *inter alia*, “public safety and order”); *Paris Adult Theater*

drone regulations are content-neutral and, therefore, a lower level of scrutiny would apply to the federal regulations. Unlike, for example, the ag-gag statutes which specifically proscribed “the subject matter of any audio or visual recordings of *agricultural operations* made without consent,”<sup>187</sup> the FAA does not “defin[e] regulated speech by particular subject matter . . . [or] by its function or purpose.”<sup>188</sup> Instead, it prohibits any commercial use of a drone for any purpose if the drone is operated in an unsafe manner.

To pass First Amendment intermediate scrutiny, a law must (1) further an important government interest, (2) that is unrelated to the suppression of free speech,<sup>189</sup> in such a way that is (3) narrowly tailored, meaning that the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>190</sup> Additionally, (4) the regulations must “leave open ample alternative channels for communication.”<sup>191</sup> As discussed, air safety is an important (and almost certainly a compelling) interest that is unrelated to the suppression of free expression. Given the potential danger of a falling or errant drone, the FAA’s goals would be achieved less effectively without the regulations. The regulation does not close the entire sky to drone journalism, and, therefore, leaves open channels of communication.<sup>192</sup>

Alternatively, the commercial drone safety regulations bear some resemblance to the ecosystem of broadcast television that allowed Congress to impose the various Fairness Doctrine provisions at issue in *Red Lion Broadcasting Co. v. FCC*.<sup>193</sup> In *Red Lion*, a radio broadcaster levied a First Amendment challenge against Fairness Doctrine provisions that regulated personal attacks and political editorializing in the context of controversial political issues.<sup>194</sup> Although a content-based regulation

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*I v. Slaton*, 413 U.S. 49, 57–59 (1973) (justifying non-protected status of obscenity based on a state’s legitimate interests in “the quality of life and the total community of environment, the tone of commerce in the great city centers, and, possibly, the public safety itself”); *see also* *Craig v. Boren*, 429 U.S. 190, 199–200 (1976) (stating “the protection of public health and safety represents an important function of state and local government” for the purpose of the equal protection intermediate scrutiny). Although the FAA’s regulations do not serve the interest of promoting privacy, if privacy regulations were challenged and subject to strict scrutiny, the Supreme Court might similarly find protecting the privacy of the home to be a compelling governmental interest as well. *See* *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (recognizing that the state’s interest in “protecting the well-being, tranquility, and privacy of the home” is of the “highest order” because of the home’s “unique nature” as protecting the unwilling listener).

187. *Wasden*, 878 F.3d at 1204 (emphasis added).

188. *Reed*, 135 S. Ct. at 2227. Facially content-neutral statutes will nevertheless be considered content-based if they “cannot be justified without reference to the content of the regulated speech,” or if the government adopts the regulation “because of disagreement with the message [the speech] conveys.” *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alteration in original). FAA regulations similarly do not satisfy these criteria.

189. *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

190. *Ward*, 491 U.S. at 799 (citation omitted).

191. *City of Ladue v. Gilleo*, 512 U.S. 43, 46 (1994).

192. *See* *Kovacs v. Cooper*, 336 U.S. 77, 81–82 (1949).

193. 395 U.S. 367 (1969). The Fairness Doctrine was an FCC policy that required broadcast stations to cover matters of public importance in a manner that presented contrasting viewpoints on those matters. *See generally* Kathleen Ann Ruane, *Fairness Doctrine: History and Constitutional Issues*, CONG. RESEARCH SERV., July 13, 2011, <https://perma.cc/6A89-Y4DA>.

194. *Red Lion*, 395 U.S. at 370–372.

would typically be afforded strict scrutiny, the *Red Lion* court applied a form of intermediate scrutiny and upheld the Fairness Doctrine provisions as constitutional because of “the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views . . . .”<sup>195</sup> This environment of scarcity with an active governmental role in allocating space for various activities also resembles the problem of navigable airspace and the government’s role of deciding what aircraft can fly where and when. These factors are important for describing *Red Lion*’s anomalous result. Almost three decades later, in *Turner Broadcasting System, Inc. v. FCC*, the Court held that *Red Lion*’s lower level of scrutiny did not apply to cable television because the problems of spectrum scarcity, signal interference, and the government’s regulatory role did not exist for cable.<sup>196</sup>

Finally, several scholars and commentators have considered whether the FAA’s regulations are impermissible regulations of First Amendment activity in a public forum.<sup>197</sup> The Supreme Court has established three different types of public forums— traditional, designated, and limited (also called “nonpublic”)—in which the government may enact reasonable, content-neutral restrictions on time, place, and manner that meet additional criteria.<sup>198</sup> Different restrictions on regulations attach to the different types of public forums.<sup>199</sup>

195. *Id.* at 386, 400–01. Although the FCC later declined to enforce the Fairness Doctrine, finding it unconstitutional, Ruane, *supra* note 193, at 7 (citing *In re Complaint of Syracuse Peach Council against Television Station WTVH*, Syracuse, New York, 2 FCC RCD. 5043 (1987)), that does not diminish the Supreme Court’s reasoning that scarcity and an active governmental role may diminish the level of scrutiny applied to a regulation of speech within that environment of scarcity, *see* *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 638 (1994) (declining to question the “continuing validity” of the “scarcity rationale” for “our broadcast jurisprudence”).

196. *Turner Broad. Sys.*, 512 U.S. at 638–40 (“[T]he special physical characteristics of the broadcast market . . . underlie our broadcast jurisprudence.”).

197. *See* Shane, *supra* note 124; Blitz, Grimsley, Henderson & Thai, *supra* note 124, at 49; Love, Lawson & Holton, *supra* note 5, at 22. Notably, the regulatory landscape has changed significantly from 2015, when the FAA banned all commercial drone flight with a few exceptions. That blanket ban presented a much closer constitutional question than the status quo. *See id.* at 57–58.

198. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998); *see also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (“The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”).

199. Traditional public forums, “streets and parks which ‘have immemorially been held in trust for the use of the public,’” are subject to the strictest restrictions on what the government can regulate, where any regulation must be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end,” or, as discussed, be a reasonable time, place, or manner restriction. *Perry*, 460 U.S. at 45. The government creates designated public forums when it intends to make property not traditionally open for debate available for “expressive use by the general public or by a particular class of speakers.” *Arkansas Educ. Television Com’n*, 460 U.S. at 677–78; *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (“[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.”). Unlike a traditional public forum, the government may close a designated public forum to expressive activity whenever it chooses. *See Seattle Mid-east Awareness Campaign v. King Cty.*, 781 F.3d 489 (9th Cir. 2015) (citing *Perry*, 460 U.S. at 45–46). The government may also create a forum “limited to use by certain groups or dedicated solely to the discussion of certain subjects” and may impose

Cynthia Love and her co-authors agree with Beth Shane that airspace should be considered a traditional public forum.<sup>200</sup> However, Marc Blitz and his co-authors note the Court’s reluctance to “update the category of traditional public forums to protect modern spaces where the public may assemble and exchange ideas, including public airports and Internet terminals[,]”<sup>201</sup> and, while noting the analytical difficulties of considering when private and public airspace begin,<sup>202</sup> suggested that navigable airspace is a limited public forum.<sup>203</sup> Shane writes that the FAA’s current regulations would fail public forum analysis as a content-based restriction on speech in a traditional public forum.<sup>204</sup> Because they assume navigable airspace is a limited public forum, Blitz and his co-authors argue that reasonable manner restrictions related to safety like limitations “on the altitude, speed . . . proximity to other aircraft or to airports . . . [and] on the qualifications of an operator” are permissible as reasonable time, place, or manner restrictions.<sup>205</sup> Assuming drone photography is protected as First Amendment speech, it seems tempting to combat any restrictions imposed. However, the FAA’s safety restrictions (and the growing availability of waivers and possible further loosening of regulations) resemble time, place, or manner restrictions rather than content-based limitations.

The FAA’s drone safety regulations are likely not subject to strict scrutiny in a facial First Amendment challenge. However, commercial drone journalism involves significant First Amendment interests that call for the FAA to make commercial drone regulations as closely tailored as possible to accomplish its safety goals while accommodating journalism, as a matter of policy.

### B. REJECTING “DRONE FEDERALISM” IN FAVOR OF PREEMPTION

As a policy matter, preemption of state and local safety regulations would streamline the regulatory scheme applicable to drone journalism. Although Congress has not explicitly preempted state and local safety regulations, courts should nevertheless find implied preemption because the FAA’s safety regulations indicate a Congressional intent to occupy the field of commercial drone safety regulations. While a finding of implied preemption with respect to state and local safety regulations raises the question of whether that preemption extends to state and local

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reasonable, viewpoint-neutral restrictions on speech. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009); see also Blitz, Grimsley, Henderson & Thai, *supra* note 124, at 114–16 (explaining the doctrinal differences between limited and nonpublic forums but deciding to refer to them interchangeably because “the Court has so far assigned the same test to them”). Indeed, discrimination against a speaker based on viewpoint is not permissible in any public forum. See *Summum*, 555 U.S. at 469–70.

200. Shane, *supra* note 124, at 338–41; Love, Lawson & Holton, *supra* note 5, at 55–57.

201. Blitz, Grimsley, Henderson & Thai, *supra* note 124, at 112.

202. Blitz, Grimsley, Henderson & Thai, *supra* note 124, at 123–25; see also *infra* Part III.B; cf. *United States v. Causby*, 328 U.S. 256, 266 (1946).

203. Blitz, Grimsley, Henderson & Thai, *supra* note 124, at 125.

204. Shane, *supra* note 124, at 341–44 (2018). Love et al., similarly, find that the pre-Part 107 ban on commercial drone flight fails public forum analysis. Love, Lawson & Holton, *supra* note 5, at 57–58. However, because the regulations have changed to allow commercial drone use with restrictions, this analysis no longer holds.

205. Blitz, Grimsley, Henderson & Thai, *supra* note 124, at 126–27.

privacy statutes and state tort laws,<sup>206</sup> Congress and the FAA have shown an intent to prescribe regulations for commercial drone safety. These safety regulations contribute to Congress's overall goal to safely and effectively introduce drones into the national airspace system. The extension of federal supremacy of drone safety regulations follows logically from the federal government's historical control of airspace. Federal preemption of state and local drone safety regulations would simplify the regulatory scheme applicable to drone journalists.

### 1. Congressional Considerations of Preempting State and Local Drone Laws

Generally, federal aviation regulations preempt state and local regulations,<sup>207</sup> and at least one court has recognized that those preemption principles extend to drones.<sup>208</sup> Additionally, Congress has considered several preemption schemes.<sup>209</sup> However, those plans might actually complicate the regulatory picture for drone journalists, and this Note proposes an alternative route forward. Before the 2018 Act was passed, two proposed Congressional bills considered preemption. Additionally, Senator Edward J. Markey proposed a bill that would regulate privacy by requiring a submission of a data collection plan with any drone registration.<sup>210</sup>

First, Senator Dianne Feinstein introduced the Drone Federalism Act of 2017 to explicitly increase the power of state and local governments to regulate drones.<sup>211</sup> Cosponsored by a bipartisan group of senators (Senators Richard Blumenthal, Mike Lee, and Tom Cotton) the Drone Federalism Act would have made illegal the operation of a drone within 200 feet of property,<sup>212</sup> and would have limited federal preemption "to the extent necessary to ensure the safety and efficacy of the national airspace system for interstate commerce" while preserving "legitimate interests of State, local, and tribal governments" including safety, privacy, property rights, land use, and restrictions on nuisances and noise pollution.<sup>213</sup> This bill would surely further embolden state and local governments to pass regulations in excess of FAA requirements, thus complicating the picture for drone journalists.

Second, the Drone Innovation Act of 2017, also cosponsored by a bipartisan group (Representatives Jason Lewis, Julia Brownley, Todd Rokita, John Garamendi, and Grace F. Napolitano) took a slightly different tack. Instead of establishing a drone trespass law or expressly preempting federal law at a certain height, the Drone Innovation Act calls on the Secretary of Transportation to collaborate with state,

206. See *infra* Part IV.A.

207. See *infra* notes 234–240 and accompanying text.

208. See *infra* notes 241–244 and accompanying text.

209. See *infra* notes 210–218 and accompanying text.

210. Drone Aircraft Privacy and Transparency Act of 2017, S. 631, 115th Cong. (2017), <https://perma.cc/5E6P-NSRA>. Sen. Markey has recently renewed his call for federal privacy protections. Press Release, Senator Ed Markey, Senator Markey Calls for Privacy Protections in Wake of FAA Drone Proposal (Jan. 15, 2019), <https://perma.cc/83UP-ZXU2>.

211. Drone Federalism Act of 2017, S. 1272, 115th Cong. (introduced May 25, 2017), <https://perma.cc/B8BD-SZ2K>.

212. *Id.* § 3.

213. *Id.* § 2(a)(1)–(2).

local, and tribal stakeholders to establish a local operational framework that would standardize state, local, and tribal regulations.<sup>214</sup> The framework would provide guidelines for state and local governments to “creat[e] an environment that is hospitable to innovation and fosters the rapid integration of unmanned aircraft into the national airspace system” and to “harmonize” regulations “that are local in nature.”<sup>215</sup> The bill lays out considerations that the framework should consider,<sup>216</sup> provides that the FAA should not issue a rule that would impede state or local governments’ ability to define property rights,<sup>217</sup> and states that state and local governments may not “unreasonably or substantially impede” drones from taking off by, for example, passing an outright ban on flight or making flight nearly impossible by overregulation.<sup>218</sup> These approaches do not accommodate drone journalism because they would allow states to impose draconian restrictions and would complicate the regulatory scheme, thus increasing compliance costs. Congress should step in and explicitly state what it has implied: The FAA’s drone safety regulations, like the federal government’s modern-day supremacy in navigable airspace, preempt state and local drone safety regulations.

## 2. Historical Roots of Federal Airspace Sovereignty

Historically, property owners controlled the airspace over their property. At common law, the “maxim of the law” was that the ownership of real property extended “an indefinite extent, upwards as well as downwards” and that “the word ‘land’ includes not only the face of the earth, but everything under it, or over it.”<sup>219</sup> The *ad coelum* doctrine meant that an action that infringed on someone’s land from above or below was a trespass.<sup>220</sup> This concept was imported into American common law.<sup>221</sup>

However, as the use of airplanes increased in the middle of the twentieth century, the old *ad coelum* doctrine gave way to the new technological reality. In *United States v. Causby*, the Supreme Court held that an unbounded *ad coelum* rule “has no place in the modern world” because Congress has declared that “[t]he air is a public highway[.]”<sup>222</sup> Therefore, maintaining the old principle would subject every

214. Drone Innovation Act of 2017, H.R. 2930, 115th Cong. § 3 (2017), <https://perma.cc/MD48-AQV9>.

215. *Id.* § 3(b).

216. *Id.* § 3(c)–(d).

217. *Id.* § 5(c). *But see infra* Part IV.C.

218. *Id.* § 5(d).

219. 2 WILLIAM BLACKSTONE, COMMENTARIES \*18; *see also* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, bk. 1, ch. 1, § 1, at 4r (London, Society of Stationers 1628) (“[T]he earth hath in law a great extent upwards, not only of water as hath been said, but of aire, and all other things even up to heaven, for *cujus est solum ejus est usque ad coelum*[.]”); *Ad Coelum Doctrine*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining the term as “[t]he common-law rule that a landowner holds everything above and below the land, up to the sky and down to the earth’s core, including all minerals”).

220. *See* KEITH N. HYLTON, TORT LAW: A MODERN PERSPECTIVE 55 (2016).

221. *See id.*; *see also* Penn. Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting).

222. *United States v. Causby*, 328 U.S. 256, 261 (1946).

transcontinental flight to “countless trespass suits.”<sup>223</sup> However, while establishing this “general principle,” the Court held that the government may have taken a prescriptive easement where military aircraft “frequent[ly]” and “regular[ly]” flew eighty-three feet over a chicken farm.<sup>224</sup> The Court recognized that, while “the airplane is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment,” a landowner must have “exclusive control of the *immediate reaches* of the enveloping atmosphere” of her property to have full enjoyment of the land.<sup>225</sup> The Court did not define “immediate reaches” but said that a taking would occur when an interference was “so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”<sup>226</sup> Although *Causby*’s establishment of federal preemption of state tort law claims for trespass is most relevant for the foregoing discussion, these takings principles are relevant in considering how far federal preemption extends. In addition to *Causby*, the statute provides that the federal government “has exclusive sovereignty of airspace of the United States” and that the FAA has authority to “establish security provisions that will encourage and allow maximum use of the navigable airspace by civil aircraft consistent with national security.”<sup>227</sup>

### 3. Preemption Principles and Navigable Airspace

Federal preemption of state and local laws finds its basis in the Constitution’s Supremacy Clause.<sup>228</sup> While federal preemption is a relatively recent innovation in some fields of law like products liability,<sup>229</sup> the proposition that state laws conflicting with federal laws are “without effect” has a long and storied history.<sup>230</sup> Courts apply two distinct types of preemption. First, when Congress has expressly preempted state statutory and common law claims, a Court will find *express* preemption, subject to limitations.<sup>231</sup> Second, even if Congress has not expressly preempted state law claims, a court may find one of the two flavors of *implied* preemption: (1) *field preemption*, where a court infers that Congress intended to dominate a given area of law because the federal regulatory scheme is “so pervasive” that Congress “left no

223. *Id.*

224. *Id.* at 258, 261, 274–75. For a discussion of “aviation easements,” see JON W. BRUCE & JAMES W. ELY, Jr., *THE LAW OF EASEMENTS & LICENSES IN LAND* § 5:35.

225. *Causby*, 328 U.S. at 264, 266 (emphasis added).

226. *Id.* at 266.

227. 49 U.S.C. § 40103(a)(1), (b)(3) (2012).

228. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

229. See HYLTON, *supra* note 220, at 372 (citing *Wood v. Gen. Motors Corp.*, 865 F.2d 395 (1st Cir. 1988)).

230. See *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 479–80 (2013) (citing *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819)).

231. While “[i]t is accepted that Congress has the authority, in exercising its Article I powers, to preempt state law[.]” *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989), express preemption provisions should be construed narrowly “in light of the presumption against the pre-emption of state police power regulations.” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 518 (1992).

room for the States to supplement it” and the federal interests are so “dominant” that the federal system is “assumed” to preclude state laws,<sup>232</sup> or (2) *conflict preemption*, which addresses state law that renders impossible simultaneous compliance with state and federal law or “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>233</sup>

The Court has determined that Congress intends to occupy the entire field of aircraft regulation, with the exception of activities that may incidentally burden air travel like special taxes on aircraft. In *City of Burbank v. Lockheed Air Terminal, Inc.*, the Court held that the Federal Aviation Act and the Noise Control Act preempted a city ordinance that prohibited jet aircraft takeoffs between 11:00 p.m. and 7:00 a.m.<sup>234</sup> The Court reasoned in that case, “the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is [field] preemption.”<sup>235</sup> Upholding the ordinance could “severely limit the flexibility of FAA in controlling air traffic flow” which would cause congestion and decrease safety.<sup>236</sup> Discussing the pervasive federal control of airplanes in navigable airspace, the Court quoted a previous case:

Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.<sup>237</sup>

In an earlier case, the Court explained that an airplane’s propensity for quickly “escap[ing] the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.”<sup>238</sup> The Court distinguished airplanes from land and sea vehicles because of the way they “burst suddenly upon modern governments, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority.”<sup>239</sup> However, preemption of state regulations of aircraft in flight does not extend to preempt a special state tax on aircraft that lands a certain number of times in the state.<sup>240</sup> These cases show broad preemption of state regulations that call to regulate aircraft flight in navigable airspace.

232. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203–04 (1983) (quoting *Fid. Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982)).

233. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *ARC Am. Corp.*, 490 U.S. at 100–101.

234. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639–40 (1973).

235. *Id.* at 633–34.

236. *Id.* at 639.

237. *Id.* at 633–34 (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

238. *Chi. & So. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 107–08 (1948).

239. *Id.* at 107–08.

240. See *Braniff Airways v. Neb. State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954),

#### 4. Airspace Preemption Applied to State and Local Drone Safety Regulations

In this tradition, the District Court for the District of Massachusetts struck down portions of a city drone ordinance two years ago. In *Singer v. City of Newton*, the court found that provisions of Newton's ordinance that "essential[ly]" banned commercial and recreational drone flight "within the limits of Newton" were subject to conflict preemption.<sup>241</sup> The court struck down provisions applicable to both recreational and commercial drone use that imposed limitations on allowable flight altitude, registration requirements, and visual line of sight requirements, in excess of FAA regulations.<sup>242</sup> Although the court found that the FAA had not sought to occupy the entire field of drone regulation (and therefore that field preemption did not apply) because the FAA contemplated state or local privacy regulation of drones,<sup>243</sup> it struck down the challenged provisions of the Newton ordinance that protected safety interests.<sup>244</sup> *Singer* provides a rubric for thinking about federal preemption of drone regulations.

The two Congressional proposals advanced in 2017 that concern explicit preemption of some state and local drone regulations merit brief consideration. An explicit preemption of state and local safety regulations would certainly clarify that drone journalists only need be mindful of federal safety regulations, special event regulations, and regulations related to privacy. Such an explicit preemption would reduce compliance costs and the coinciding burdens on journalists. Congress should seriously consider making its implicit intention to occupy the field of drone safety regulations an explicit pronouncement upon which journalists can rely.

However, neither of the proposed bills would accomplish this goal. Both Senator Dianne Feinstein's Drone Federalism Act of 2017 and Representative Jason Lewis's Drone Innovation Act of 2017 would ensure that no federal regulations are preempted below 200 feet, while Feinstein's Act would expand this to allowing state regulation within 200 feet of any structure. Both bills preserve state and local governments' ability to pass regulations for public safety. Representative Lewis's proposal to create a local policy framework could promote uniformity in drone safety regulations but would not expressly preempt state and local safety laws.

Recognizing that some local governments may have heightened security interests, Congress could create some process by which local governments can apply for particular security regulations. The FAA would review them and, if they were deemed necessary, they could be published in the centralized DroneZone portal where commercial drone operators could easily view additional safety regulations. After that, drone operators could seek airspace authorizations of these additional security regulations through the preexisting LAANC tool.<sup>245</sup>

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241. *Singer v. City of Newton*, 284 F. Supp. 3d 125, 130–33 (D. Mass 2017), *appeal dismissed per stipulation*, No. 17-2045, 2017 WL 8942575 (1st Cir. Dec. 7, 2017).

242. *Id.*

243. *Id.* at 130.

244. *Id.* at 131–34.

245. Currently, the Low Altitude Authorization and Notification Capability (LAANC) tool allows drone operators to apply for an "instant authorization" (a temporary status) to fly in controlled airspace. LAANC is accessible through the "DroneZone" portal or a third-party app. *See supra* note 81 and

Even if Congress does not expressly preempt state and local drone safety regulations as a matter of policy, courts should still find implied preemption. Implied preemption of state and local drone safety regulations fits into a line of cases about Congressional preemption of state and local restrictions on manned aircraft in and around navigable airspace. The *Singer* court found implied conflict preemption because Newton's restrictions made commercial drone flight impossible—in contradiction of the FAA's safety regulations. The court did not find implied field preemption because the FAA did not seek to regulate privacy and left that arena open to the states. However, courts could also theorize that Congress intended to occupy the field of general drone safety regulations but to leave open the field of privacy regulations for state and local governments. Either theory allows for a finding that Congress implicitly intended to preempt state and local drone safety requirements.

The prospect of courts finding implied preemption of state and local safety regulations raises two additional questions for courts to solve: First, what happens to temporary flight restrictions imposed because of special events and, second, can federal drone safety regulations cover the “immediate reaches” of property without constituting a taking?

First, state and local regulations of drone flights for special events may survive preemption. Although the FAA imposes some temporary airspace restrictions,<sup>246</sup> the limited treatment of these temporary restrictions in its regulations does not evince an intention to occupy the field for field preemption.<sup>247</sup> Conflict preemption presents a closer question, but an appropriately tailored process that still allows for commercial operation compliant with FAA rules could possibly survive. Therefore, to best accommodate drone journalists, state or local procedures for imposing temporary restrictions based on special events should follow a prescribed process, provide sufficient notice to drone photographers, and allow journalists and photographers to obtain waivers of the prohibitions. Miami's special events safety regulation serves as a good illustration.<sup>248</sup> To avoid preemption concerns and accommodate the existing FAA waiver process, any special events grant of authority could provide an exception for flight that is otherwise valid under FAA standards.<sup>249</sup> Given these considerations, special event safety regulations are likely permissible if properly tailored.

Second, federal safety regulations extending from heaven (or, for most

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accompanying text.

246. See *supra* note 71 and accompanying text.

247. See FAA Air Traffic and General Operating Rules, 14 C.F.R. §§ 107.43–47 (2019).

248. See *supra* notes 112–114 and accompanying text.

249. The Miami ordinance provides such an exception. MIAMI, FLA., CODE § 37-12(e) (2019), <https://perma.cc/5SQU-LU9B> (“Notwithstanding the prohibitions set forth in this section, nothing in this section shall be construed to prohibit, limit, or otherwise restrict any person who is authorized by the Federal Aviation Administration to operate small unmanned aircraft in any city air space, pursuant to Sections 331–336 of the FAA Modernization and Reform Act of 2012 or certificate of waiver, certificate of authorization, or airworthiness certificate under section 44704 of Title 49 of United States Code or other Federal Aviation Administration grant of authority for a specific flight operation or operations, from conducting such operation(s) in accordance with the authority granted by the Federal Aviation Administration.”). A commonsense reading of this exception seems like it would allow a commercial drone operator with a valid flight-over-people waiver to fly during a declared special event.

commercial drone operators without an altitude waiver, 400 feet) to earth would not constitute a taking of the “immediate reaches” of real property. *Causby* rejected the traditional notion of preemption of trespass law in aircraft flight because of the pervasive nature of noisy aircraft frequently taking off eighty-three feet above Mr. Causby’s chicken farm. Although it’s true that drones have the ability to fly below eighty-three feet, the prospect of commercial drone safety regulations allowing drones to fly close to property is not sufficiently particularized to any specific landowner to raise concerns of a takings claim.<sup>250</sup> To the extent that commercial drone flight may infringe on someone’s privacy in their property, that issue is for consideration as a privacy regulation and not as a safety one. Therefore, the concern about extending drones into the immediate reaches of property is not properly considered as an objection to preemption of state and local safety regulations.

### C. A PROPOSAL FOR A COMPLEMENTARY IMPROVEMENT TO THE WAIVER PROCESS

Aside from explicitly preempting state and local drone safety laws, Congress can better facilitate drone journalism through other legislative enactments. For example, Congress could create a specific waiver process for drone journalists. This waiver process would not waive portions of the FAA’s commercial drone safety rules that are not waivable for the general public, but it could provide a fee waiver or expedited processing of waiver applications. Congress and federal agencies have provided for similar accommodations in other areas. For example, the Freedom of Information Act (FOIA) provides for expedited processing and fee waivers in the face of demonstrated compelling need.<sup>251</sup> While definitional concerns would likely be raised, the expedited processing for a drone journalism statute could crib its definition of “representative of the news media” from the FOIA statute.<sup>252</sup> Of course,

250. See *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992) (requiring “concrete and particularized injury” to establish standing); *United States v. Richardson*, 418 U.S. 166, 179 (1974) (lacking standing to litigate a generalized political grievance); cf. *Flores v. Texas*, No. 5:16-CV-130, 2017 WL 1397126, at \*4 (S.D. Tex. Mar. 31, 2017) (finding that plaintiff lacked standing to challenge provision of Texas drone law that deprived him of civil action based on his property’s proximity to the international border).

251. 5 U.S.C. § 552(a)(4)(A)(ii)(II) (2018) (stating that “fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made . . . a representative of the news media”); *id.* § 552(a)(6)(E) (calling for agencies to promulgate regulations “providing for expedited processing of requests for records” in cases where an applicant has a compelling need).

252. That definition is as follows:

[A]ny person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ‘news’ means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ‘news’) who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through

commenters identify issues with FOIA's expedited processing clause,<sup>253</sup> but if an expedited waiver process for journalists was implemented correctly it could ensure that drone journalists are able to get off the ground more quickly and at less expense. The FAA already considers the interests of drone journalists, shown by its implementation of the Low Altitude Authorization and Notification Capability (LAANC) program that allows drone operators to obtain "instant authorization" to fly in controlled airspace.<sup>254</sup> Furthermore, this journalistic accommodation mirrors the solicitude courts have for newsgathering activities in other contexts.<sup>255</sup> This special status for drone journalists could better accommodate drone journalism while maintaining the FAA's existing safety scheme.

#### IV. CRAFTING STATE AND LOCAL PRIVACY REGULATIONS TO PRIVILEGE NEWSGATHERING

Federal preemption of state and local safety regulations raises the question of whether preemption extends to state and local privacy regulations and state privacy tort law claims. Keeping the goal of simplifying the federal and state regulatory picture facing drone journalists in mind, preemption of the full suite of state and local privacy laws would doubtlessly lead to a regulatory picture that is easier to comprehend. However, I contend that these regulations are not preempted by federal law because Congress has not evinced the intention to occupy the field of drone privacy regulations (yet) and complying with state and local privacy regulations does not make compliance with federal regulations impossible.

At the same time, state and local governments do not need to operate in a vacuum when crafting drone privacy statutes. These governments can draw on guidelines stemming from a body of common and constitutional law that balances privacy and newsgathering interests. Furthermore, several statutes already enacted may fail First Amendment scrutiny. These aspects of state and local privacy regulations are considered in turn.

##### A. FEDERAL SAFETY REGULATIONS DO NOT PREEMPT STATE AND LOCAL PRIVACY REGULATIONS

The Federal Aviation Administration's current drone regulations do not explicitly or implicitly preempt state and local drone privacy regulations or state privacy torts.

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that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

*Id.* § 552(a)(4)(A)(ii).

253. See, e.g., Erin Carroll, *Why FOIA's Speed Clause is Broken*, COLUM. JOURNALISM REV. (Oct. 15, 2015), <https://perma.cc/3T4D-J2A4>.

254. See *Drone Journalists Get Very Good News – Instant Waivers*, POYNTER (July 19, 2017), <https://perma.cc/KD6D-4WRU>; see also *supra* note 81 and accompanying text.

255. See, e.g., *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *CNN v. Trump*, 1:18-cv-02610-TJK (D.D.C. Nov. 16, 2018), transcript granting TRO, <https://perma.cc/6ASY-R3MJ>; see also David A. Fischer, *Jim Acosta's First Amendment Defense*, COLUM. J.L. & ARTS BEAT (Nov. 16, 2018), <https://perma.cc/3HTN-BMSJ>.

Explicit preemption occurs when Congress explicitly indicates an intent to preempt state and local laws; such express preemption provisions are generally interpreted narrowly.<sup>256</sup> Congress has not expressly preempted any state or local regulation of drones. The two types of implied preemption are *field* preemption, which occurs when Congress indicates an intention to occupy an entire field of regulation without leaving room for state and local governments to regulate, and *conflict* preemption, which occurs when state regulation contradicts federal regulation or would make complying with federal regulation impossible.<sup>257</sup>

As discussed above, Congress and the FAA have indicated an intent to occupy the field of drone safety regulation.<sup>258</sup> However, because Congress does not empower the FAA to promulgate drone privacy regulations and because the agency itself disclaims responsibility for privacy regulations with respect to drones, state and local privacy regulations are not preempted.<sup>259</sup> Indeed, the *Singer* court found that the city of Newton's safety regulations were preempted by federal law but that the FAA had left room for state and local governments to regulate privacy issues related to drones.<sup>260</sup> At the same time, this could change in the future if Senator Edward J. Markey revives his push for a federal drone privacy regulation.<sup>261</sup> A regime with uniform safety and privacy regulations would be preferable for reforming the regulatory environment to best accommodate drone journalists, but that is not the current status quo.

State privacy tort law claims are also not preempted by the FAA's drone safety regulations. Federal regulations preempt state tort law claims when a federal regulatory agency thoroughly considers the costs and benefits of a proposed regulation with a greater degree of expertise than a court would be able.<sup>262</sup> The FAA has not considered the privacy tradeoffs of drones at all, and, therefore, a state privacy tort claim would be able to proceed.

### B. BALANCING NEWSGATHERING AND PRIVACY AT COMMON AND CONSTITUTIONAL LAW

Because federal drone safety regulations do not preempt state privacy tort actions, these common law actions are available against drone journalists. Two of Prosser's four privacy torts are most relevant to drone journalism.<sup>263</sup>

First, the intrusion on seclusion tort assigns liability where "[o]ne . . . intentionally

256. See *supra* note 231 and accompanying text.

257. See *supra* notes 232–233 and accompanying text.

258. See *supra* Part III.B.

259. See *supra* notes 39–45 and accompanying text.

260. *Singer v. City of Newton*, 284 F. Supp. 3d 125, 130–34 (D. Mass. 2017), *appeal dismissed per stipulation*, No. 17-2045, 2017 WL 8942575 (1st Cir. Dec. 7, 2017).

261. See *supra* note 210 and accompanying text.

262. Compare *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 877–81 (2000) with *Williamson v. Mazda Motor of Am.*, 131 S. Ct. 1131 (2011); see also HYLTON, *supra* note 220, at 375–76.

263. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (identifying privacy torts as (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) publicity which places plaintiff in a false light; (4) appropriation of plaintiff's name or likeness for defendant's advantage); see also Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person.”<sup>264</sup> The Restatement comments clarify that the intrusion may be “with or without mechanical aids” and does not require publication to be actionable.<sup>265</sup> This tort penalizes the specific act of intruding upon private affairs in a highly offensive way, without regard to whether the fruits of such intrusion are ultimately published. It could sweep in legitimate drone journalism, without regard for whether it is ultimately published. It also seems to mirror state prohibitions on intrusions where someone has a reasonable expectation of privacy and has a broader definition than the state voyeurism statutes.<sup>266</sup> However, the bar is somewhat high because it requires a “substantial” interference and would likely not include something like accidentally photographing someone’s property from the air while covering a hurricane, or the like.<sup>267</sup>

Next, the public disclosure of private facts tort actually involves *publication* of private facts. The tort subjects to liability anyone “who gives publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”<sup>268</sup> Whether a disclosed private fact is “highly offensive” should be evaluated “relative to the customs of the time and place” and will only give rise to liability when a reasonable person “would feel justified in feeling seriously aggrieved” by the disclosure.<sup>269</sup> Furthermore, as the second element of the tort indicates, the tort is unavailable when the disclosure concerns a matter of “legitimate public concern,” or, in other words, is newsworthy.<sup>270</sup> Therefore, this particular tort takes account of legitimate newsgathering on matters of public concern.

Newsworthiness is typically a malleable standard that examines whether a disclosed fact concerns a matter of legitimate public concern. “The common law has long recognized that the public has a proper interest in learning about many matters,” and, accordingly, a newsworthy disclosure is not a tortious one.<sup>271</sup> The bar for newsworthiness is lower in cases of public figures, where legitimate matters of public concern may extend beyond the reason why the person is a public figure, within reason.<sup>272</sup> Whether something is “news” depends on “the mores of the community” and how “publishers and broadcasters have defined the term” as long as something has “genuine, . . . popular appeal.”<sup>273</sup> Finally, facts that are more private become

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264. RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST., 1965).

265. *Id.* cmt. b.

266. *See supra* note 139–140.

267. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d.

268. *Id.*

269. *Id.* cmt. c (“Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.”). As drones become more pervasive, it seems that it would become less possible to evoke this particular tort. *See supra* note 124.

270. RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (citing *Cox Broad. Co. v. Cohn*, 420 U.S. 469 (1975)).

271. *Id.*

272. *See id.* cmts. e, f.

273. *Id.* cmt. g.

matters of legitimate interest as figures become more known.<sup>274</sup> Although the standard has some flexibility, this common law balancing of newsworthiness and privacy can inform how drone privacy laws are regulated to account for newsgathering interests.

The Supreme Court has also considered newsworthiness defenses to disclosures of private and sensitive information in a constitutional context. These cases set out principles for state and local governments to draw from when crafting their regulations. One principle is that “interests in privacy fade when the information involved already appears on the public record” and, to avoid “timidity and self-censorship” a rule shouldn’t make public records generally available but forbid publication if the facts are offensive to a reasonable person.<sup>275</sup> The Supreme Court drew on this principle for a number of sensitive factual scenarios: striking down an injunction that prohibited newspapers from publishing the name and picture of a subject of a juvenile proceeding where the hearing was open to the public;<sup>276</sup> publishing information about juvenile offenders gathered by monitoring police band radio frequencies and interviewing eyewitnesses;<sup>277</sup> and disallowing a damage award where the newspaper obtained the name of rape victim from a publicly released police report.<sup>278</sup> Similarly, protecting the reputation of state judges was not sufficiently compelling to support a state statute that barred the publication of details about a pending investigation of a state judge.<sup>279</sup> These cases indicate how newsworthiness can overcome expectations of privacy. While an application of a state drone privacy statute against a newsworthy disclosure might fail on constitutional grounds, state and local policymakers would do well to explicitly exempt newsworthy disclosures from privacy statutes. This standard would draw standards of newsworthiness found in common and constitutional law. While a journalist may win when a case goes to the Supreme Court, the unpredictability of judging and the limited bank accounts of publications and journalists counsel for a statutory rule that would privilege newsworthy disclosures gathered by drone.

### C. CONSTITUTIONAL LIMITATIONS ON STATE AND LOCAL DRONE PRIVACY REGULATIONS

Finally, several state regulations may be unconstitutional under the First Amendment. First, Tennessee’s and Texas’s statutes forbidding publication of drone footage captured with an “intent to conduct surveillance” raise constitutional questions in some circumstances.<sup>280</sup> In *Bartnicki v. Vopper*, the Court held that a

274. *Id.* cmt. h (“Some reasonable proportion is also to be maintained between the event or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.”).

275. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494–96 (1975).

276. *Okla. Pub. Co. v. District Court*, 430 U.S. 308 (1977).

277. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).

278. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

279. *Landmark Commc’ns, Inc. v. Virginia*, 435 U.S. 829, 841–42 (1978).

280. *See supra* notes 125–129, 160–161 and accompanying text.

shock jock was not liable for airing an illegally recorded conversation because the recording contained matters of public concern and the defendants were not involved in the conversation's recording.<sup>281</sup> Similarly, Texas may not be able to hold a journalist who aired drone footage obtained illegally under Texas law liable if the journalist was not involved in the drone operation and the footage was newsworthy. This would not weigh on the applicability of the statute against a journalist who participated in the operation.

Second, state and local laws forbidding trespass on private property by a drone may similarly be unconstitutional as applied to drone journalism.<sup>282</sup> Although the Supreme Court has not considered an analogous case, lower courts have barred recovery for trespass when an undercover reporter did not possess a duty of loyalty to an employer.<sup>283</sup> While the doctrine is unclear, the newsworthiness of disclosure could also operate as a bar against a trespass suit in that factual scenario.

Finally, California's statute granting qualified immunity to emergency responders for destroying a drone in the course of an emergency response may also be unconstitutional as applied to certain limited factual scenarios.<sup>284</sup> Although the definition seems to limit the qualified immunity to emergency medical services, firefighting, and search and rescue services, to the extent that this qualified immunity grant interfered with the First Amendment right to record police during a law enforcement encounter, it could be unconstitutional.<sup>285</sup>

State and local governments have the ability to regulate drones to preserve the privacy of their citizens. However, they should be conscious of the problems that broad privacy regulations can cause for journalists and publications who are moving forward with newsworthy facts discovered by drone journalism or footage that might incidentally capture private details. Therefore, these governments should draw on the balancing of privacy and newsgathering at common and constitutional law and allow a newsgathering defense or require an element of non-newsworthiness in their drone "surveillance" statutes. If they do not properly accommodate drone journalism, their statutes run the risk of being struck down as unconstitutional.

## V. CONCLUSION

In the spirit of a law school exam hypothetical, let's imagine an aspiring drone

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281. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

282. *See supra* notes 130–131 and accompanying text.

283. *Compare* *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345 (7th Cir. 1995) (barring trespass suit by dental practice where undercover reporters posed as patients) *with* *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (allowing trespass suit where undercover reporters became grocery store employees to investigate grocery store). At the same time, the case of drones might be more analogous to *Dietmann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), where journalists trespassed by gaining access to the office portion of plaintiff's home. However, as drones proliferate, they might be more analogous to *Sanders v. Am. Broad. Cos.*, 978 P.2d 67 (Cal. 1999), where a covert recording of an office phone call was not a tortious invasion of privacy because an office worker lacks a complete expectation of privacy in workplace conversations. *See also* *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1196 (10th Cir. 2017).

284. *See supra* notes 153–154 and accompanying text.

285. *See supra* notes 171–178 and accompanying text.

journalist named Rita Skeeter.<sup>286</sup> After a successful career as a tabloid journalist in the United Kingdom, self-described as having a “savage quill [which] has punctured many inflated reputations,”<sup>287</sup> Skeeter has decided to change her beat. She has moved to the United States and wants to cover the 2020 presidential election using a drone to capture video for TheDailyProphet.com. She believes her experience as a gossip columnist has prepared her well for the campaign trail.

In the current regulatory environment, Skeeter would have to go through the following steps to lawfully operate a drone for journalistic purposes. First, after buying her drone, she must register it with the FAA. Next, because the FAA considers photography for journalism to be a commercial use of a drone, she must follow the FAA’s commercial drone rules. Assuming Skeeter does not possess a pilot’s license, she must pass a test that demonstrates she possesses the knowledge required for safe operation of a commercial drone. Through this test, she will learn about the limitations the FAA places on how she can operate her drone, like how high she can fly, that she can’t fly over people or at night, and that she or a third-party visual observer must keep the drone within their line of sight when flying. During this process, she might decide to apply for a waiver for one of the FAA’s safety limitations. She’ll hopefully hear from the FAA within 90 days whether her waiver request is approved. She will also have to monitor whether the FAA places additional limitations on commercial drone flight or whether the FAA relaxes preexisting requirements. If she determines that a planned flight flies within five miles of an airport, she will need to apply for authorization for her specific operation.

Even if she diligently complies with all of the FAA’s safety regulations, she might be subject to additional safety regulations imposed by state and local governments in excess of, or even in contradiction of, FAA safety regulations. As she travels across the United States in pursuit of the candidate to whom she is assigned, she will have to search through state statute books and municipal ordinances to determine whether the locality she is in imposes additional safety constraints. She also must consider special event restrictions. Even if she diligently complies with this complicated thicket of safety regulations, she will also need to consider broadly-worded state and

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286. A character in the *Harry Potter* series, *Daily Prophet* reporter Rita Skeeter flits around the fourth book revealing gossipy details from the grounds of Hogwarts Castle. One notable scoop was that the Hogwarts gamekeeper Rubeus Hagrid’s mother was the famed giantess Fridwulfa. J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* 437–40 (2000). Despite being banned from the wizarding boarding school, Skeeter manages to unearth these scoops by turning herself into a beetle and flying around the grounds. *See id.* at 727–28. Through a difficult process that few wizards are able to accomplish, Skeeter can turn herself into a beetle at will as an “Animagus.” *Id.* Similarly to the FAA’s approach with drones, the Ministry of Magic maintains an “Animagus Registry” and any wizard with the ability must report the animal they turn into and any distinguishing markings. *See Unregistered Animagi from Rita Skeeter to Peter Pettigrew*, POTTERMORE, <https://perma.cc/3LJG-AQJZ> (last visited Feb. 28, 2019). The Registry serves dual purposes: to put wizarding society on notice that an animal may actually be a person (this rationale protects wizarding privacy), and to protect the safety of an individual attempting the difficult venture of transforming. *See id.*; *see also Everything You Didn’t Know About Animagi*, POTTERMORE, <https://perma.cc/44A5-GQXP> (last visited Feb. 28, 2019). In this hypothetical, Skeeter has learned her lesson after failing to register as an Animagus and intends to comply with the United States’ federal, state, and local laws regulating drone journalism.

287. ROWLING, *supra* note 286, at 304.

local privacy regulations that could penalize her legitimate journalism. Although the safety and privacy of their citizens are important state regulatory interests, this complicated scheme makes it difficult for Skeeter to use her drone for journalism in compliance with all applicable laws. She may even need to hire a lawyer to ensure compliance.

The analysis and proposals contained herein would trim the regulatory thicket that Skeeter faces. Skeeter would have to comply with the current FAA commercial drone safety regime. However, she would not need to worry about contradictory state and local safety regulations. To the extent that local governments impose special event restrictions, those should put Skeeter on notice of a restriction and, if Skeeter possesses an FAA waiver like a waiver to fly over people, the special event restriction should accommodate that waiver. Skeeter would also be able to avail herself of her status as a news media representative to obtain a fee waiver and expedited processing of her waiver request from the FAA.

Federal preemption of state and local safety regulations would significantly reduce the complexity of safety regulations with which Skeeter must comply. While explicit Congressional preemption of state and local safety regulations would best indicate to Skeeter that she must only pay attention to the FAA's drone safety regulations, the current FAA framework already implicitly preempts state and local safety regulations and could similarly assure Skeeter. As discussed, preemption does not extend to state and local privacy laws and state privacy tort actions, so Skeeter will need to remain abreast of these laws. For the most part, the newsworthiness of her photography, and the Supreme Court's precedents balancing privacy and newsgathering should guide how she conducts her journalism. However, the First Amendment restrains several state and local privacy statutes: Newsgathering justifies trespass in the absence of a breach of loyalty, Skeeter may publish unlawfully recorded footage lawfully obtained from an anonymous source, and Skeeter may recover from some instances of emergency response personnel destroying her drone based on the right to record. Although this system is still vague, it provides clearer rules and better accommodates Skeeter's use of a drone to conduct journalism.

Commercial drones have the potential to be powerful new tools for content production and investigative reporting. In a short span of time, safety regulations have become increasingly more permissive of commercial drone use as the FAA considers how best to integrate commercial drones into the federal airspace system. As these regulations become more relaxed, the entire federal, state, and local regulatory scheme must become simpler too, to allow journalists to use these tools without fear of civil and criminal penalties. To be sure, governments have interests in protecting the safety, privacy, and other regional or region-specific interests of their citizens. But they must do it in a way that also accommodates the legitimate use of drones as a tool for journalism.