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## The Drone: The Impact on Civil and Criminal Concern

by Ross Failla

(English 1102)

**B**y definition the “drone” is an unmanned aircraft or ship guided by remote control or onboard computers (*Merriam-Webster*). A defining feature in war is the ability to make remote killings and targeted strikes on enemies, and in the modern area, the use of drones has provided the U.S. military with that ability. With modern technology and the ever-growing need for specialized warfare, drones have the ability to conduct surveillance, provide facial recognition, read license plates, and launch missiles from hundreds or thousands of miles away. In the 21<sup>st</sup> century, drones have progressed from military use to the law enforcement community; they are now readily available to citizens and hobbyists. The citizen drone has features similar to those of military or law enforcement drones, in that they can travel far distances while taking still or video images. The abilities of these machines raises both ethical and legal concerns.

Drones date back to as early as World War I, when they were intended to be used for aerial surveillance (Aquino-Segarra, 2016, p. 336). It wasn't until World War II that remote-controlled B-24s were used in bombing missions. In the Vietnam War, United States Armed Forces had remote-controlled drones with still cameras that were used for surveillance (Aquino-Segarra, 2016, p. 336f.) In the mid-90s, a video camera was added to these drones, and this started the rapid evolution of their development into modern day.

The current domestic use of drones by police and civilians has raised public concern in both privacy issues and government overreach. Drone use among law enforcement agencies include, but are not limited to, conducting surveillance, surveying traffic or road conditions, searching for missing persons, or tracking criminals. With this advanced technology, legislative review has become a priority among states to enact laws and regulations to govern police use with drones, to prevent privacy violations and Fourth Amendment violations of citizens.<sup>1</sup>

Currently, drone use is only regulated by the Federal Aviation Administration (FAA) (Aquino-Segarra, 2016, p. 335).<sup>2</sup> The concern is that the federal regulation only addresses the “safety” portion of the law, which only describes how and where people can safely operate drones. It does not necessarily address privacy issues or police misuse. For this reason, it has been the responsibility of each respective state to enact its own laws governing the use of drones by police.

Joseph J. Vacek, J.D., wrote an article in 2014 titled “Remote Sensing of Private Data by Drones Is Mostly Unregulated: Reasonable Expectations of Privacy Are at Risk Absent Comprehensive Federal Legislation,” that addresses tort law and tort liability associated with drones.<sup>3</sup> Joseph Vacek is a tenured associate professor at the University of North Dakota School of Aerospace Sciences. He specializes in various topics including space law and Fourth Amendment search and seizure law.

Vacek's article focuses on the laws regulating remote sensing of data under tort laws from which the general right of privacy is developed. He identifies three areas of tort law relating to drone use: tort of nuisance, trespass, and invasion of privacy (Vacek, 2014, p. 466). Nuisance refers to questions of whether people should be compensated for not only personal injuries, but also injuries to a person's property. The law of nuisance has developed the idea of zoning when referring to property. As it relates to drones invading personal property, it may give way to litigation to the drone operator. The second class of tort is trespass, which is much more clearly defined as “wrongful interference with another's possessory rights in real property” (Vacek, 2014, p. 468f.) In addition,

possessory rights of property also extend upwards in air space and air rights of the land owner. The flying of drones may potentially unlawfully trespass on people's personal property, or air space, which could lead to litigation. The third tort Vacek acknowledges is invasion of privacy, which refers to a civil tort action of "intrusion upon seclusion." A *Harvard Law Review* article in 1890 foreshadowed that technology would develop faster than the law.<sup>4</sup> This is a classic example of how technology has progressed before any concrete laws have been established. The Harvard article concluded that, at the time of the article, the federal and state laws have provided only limited protection to people based on their protection under the Fourth Amendment and civil tort laws.

To further expand on civil tort law and liability of drone operations by civilian and hobbyists, Benjamin D. Mathews, J.D., discusses these issues in an article called "Potential Tort Liability for Personal Use of Drone Aircraft." The article was published in 2015, and at the time, Mathews was a staff writer for the *St. Mary's Law Journal*, and as a staff writer was responsible for conducting extensive legal research and citation-checking of articles in preparation for publication.

Mathews' article addresses potential tort liability associated with the private use of drone aircrafts. In short, it presents issues that arise when the rights of one private individual to own and fly a drone conflict with another private individual's right to be safe from trespass and invasion of privacy. Similar to the above article, Mathews agrees on three main topics of civil tort for the private citizen: nuisance, trespass, and invasion of privacy.

A new concept that is addressed is "strict liability" to private citizens when operating drones. Strict liability means, "the exercise of due care does not absolve the actor of accountability" (Mathews, 2015, p. 597). Strict liability cases are used in activities that the courts have deemed as abnormally dangerous activities. Blasting, releasing poisonous gas, and storing explosives have all been classified as activities that are abnormally dangerous (Mathews, 2015, p. 597). Courts will need to interpret drone use and see if it falls in the scope of abnormally dangerous activities, in the event for example an operator crashes a drone into private property or a person, resulting in injury or damage. This means, even if the operator used their best due care and best intentions not to crash a drone onto their land or person, engaging in an act that may be classified as abnormally dangerous may still hold the operator liable to litigation.

Mathews concludes that the law is least equipped to address private use of drones and trespass to property. He points out that in previous times people's ability to spy on their neighbor was limited. To spy on a neighbor who is sunbathing, one would have to peek over the fence. Now with drones one has have the ability to fly over someone's yard with a machine that is capable of capturing images in high definition quality, and zoom in further than the naked eye. Legislators will have to decide the height at which these drones can be operated at, proximity to private land, and time of day, to name of few.

In addition to the personal liability among private citizen use, another crucial matter is the use of drones by police. Michael L. Smith J.D., discusses the drone use among law enforcement in a 2015 article titled, "Regulating Law Enforcement's Use of Drones: The Need for State Legislation," which was published in the *Harvard Journal on Legislation*. Smith is a J.D. graduate from UCLA School of Law and is currently an associate at the Los Angeles office of Lewis Brisbois. An interesting statistic the article points out is that the FAA projects that 30,000 private drones may be flying in the United States airspace by the year 2020 (Smith, 2015, p. 423f.) To put that in perspective, a 2014 statistic said the United States had 7,064 commercial planes in inventory (*Aeroweb*). Although that number of 30,000 is high, it should be noted that not all drones are the size of commercial aircrafts. Many of them can be the size of a human palm, or an arm's length.

Smith's article is twofold: its calls attention to those states that have passed regulations of drones, and compares the differences between those regulations. For purposes of this paper, I will focus on Illinois law and regulations. At the time Smith's article was published in 2015, only thirteen states had successfully passed legislation regulating government drone use, Illinois being one of

them. Police practice is modeled around the Fourth Amendment, which in short, states that people have the right to be secure in their persons, houses, papers and effects without unreasonable searches by the government without warrant. Smith breaks down the thirteen states' drone laws into three broad categories: those that allow broad judicial exceptions to warrant requirement; those that explicitly provide statutory exceptions; and those that contain moratoriums on government drone use (Smith, 2015, p. 427).

Illinois falls under Smith's category of states that have explicit statutory exceptions to the warrant restriction. This means that Illinois has a law spelling out that police shall obtain a warrant prior to its use; however, it has some clear exceptions allowing police to use a drone without first obtaining a warrant.<sup>5</sup> Some of those exceptions in the Illinois law state that a warrantless search by drones may be used to locate missing persons, survey a crime scene, or survey a traffic collision (Smith, 2015, p. 430). In addition, warrantless searches of drones may be used to counter a terrorist attack from which credible information was obtained or during a natural disaster to public health.

Smith concludes that states that have yet to enact laws regarding police drone use must update their laws, and current states that have enacted laws must closely monitor them for updates as technology expands.

Orlando Aquino-Segarra investigates further, similar ideas of drone use by the police in a 2016 article titled "Drones: The Need for More Regulations." Aquino-Segarra is a third-year law school student at Pontifical Catholic University of Puerto Rico, School of Law. As mentioned previously, the FAA is in charge of enacting all drone regulations at the federal level. Aquino-Segarra agrees with other findings, that the FAA regulation is only to promote air safety and is not to speak upon the privacy and government overreach issues. Currently, twenty states have passed laws relating to drone use by police (Aquino-Segarra, 2016, p. 342). Several other states have considered legislation involving drone laws, but have yet to enact them.

Aquino-Segarra points out two different ideas of drone laws with the police. First, the technology impact on privacy, and second, safety concerns involving crashes. He suggests that with technology advancing, these drones now are able to be equipped with night vision cameras, thermal imaging cameras, or GPS tracking. Typically, what can be seen by the naked eye in a public setting does not constitute a search by police; however, when using sensitive technology such as thermal imaging or night vision, drones may go beyond the scope of what the human eye could naturally see. Most state laws, thus far, do not have a clear outline addressing drones equipped with such sensitive technology. Aquino-Segarra then points out the safety concern of flying an unmanned aircraft. In 2014, there were reportedly 238 interactions with drones and pilots, and 780 through August of 2015 (Aquino-Segarra, 2016, p. 3350). It is suggested that if vehicles are required to have license plates and insurance, perhaps drones should as well.

As the articles discussed above indicate, it is clear that drones have developed many concerns in both the private citizen and governmental use. The research suggests that states need not only to enact laws governing their use, but also to closely monitor them as the rapid change in technology further advances these machines' abilities.

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## Notes

1. The Fourth Amendment of the Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. For hobbyist or civilian, the FAA states that the owner should be 13 years or older, the drone must weigh more than 0.55 pounds and fewer than 55 pounds, fly below 400 feet and remain clear of surrounding obstacles, keep the aircraft within visual line of sight at all times, and remain well clear of manned aircraft operations and cannot not operate the device carelessly or reckless.
3. Tort laws are civil theories generally referring to civil conduct. They are simply used in civil lawsuits or litigation, where one person sues another for money.
4. The article was written by a Louis D. Brandeis and Samuel V. Warren who both addressed privacy issues long before the Supreme Court had addressed them. It is said to be a defining piece of work in law history, which defined the word privacy in many aspects and which protected individuals from intrusion by others. It can be found in the *Harvard Law Review* December of 1890, Vol. 4 Issue 5, pp. 193-220.
5. See Illinois Compiled Statute Chapter 725 ILCS 167/1, “Freedom from Drone Surveillance Act,” for further and complete description of Illinois State Law regarding police drone use.

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