

Washington Law Review

Volume 91 | Number 2

6-1-2016

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Recommended Citation

Ashleigh B. Rhodes, Comments, *Legislating Agency Use of Unmanned Aerial Vehicles in Washington State*, 91 Wash. L. Rev. 887 (2016).
Available at: <https://digitalcommons.law.uw.edu/wlr/vol91/iss2/22>

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LEGISLATING AGENCY USE OF UNMANNED AERIAL VEHICLES IN WASHINGTON STATE

Ashleigh B. Rhodes

Abstract: After years of hearing about “drone strikes” in the Middle East meant to kill terrorists that also kill and maim innocent civilians, Americans have legitimate concerns about the government’s use of unmanned aerial vehicles (UAVs) domestically. The public’s anxiety over law enforcement agency use of domestic UAVs stems from worries that UAVs will significantly invade citizens’ privacy. In an effort to allay these privacy concerns, state legislators, including those in Washington State, have introduced statutes aimed at curbing law enforcement agency use of UAVs. However, state legislators should carefully draft legislation to ensure that agencies not acting in a law enforcement capacity do not get lumped in with traditional law enforcement agencies. Agencies such as Department of Natural Resources, Department of Fish & Wildlife, and Department of Ecology have many cost-effective and beneficial uses for UAVs that would cause negligible risk to Washingtonians’ privacy rights. This Comment suggests statutory language that would allow citizens to reap the substantial benefits of UAVs for environmental and wildlife regulation while still protecting their privacy privileges from intrusion by law enforcement agencies.

INTRODUCTION

As early as the 1960s, banks and at least one U.S. city installed video cameras to monitor public areas.¹ By 1971, a federally funded program installed a video camera surveillance system, known as closed circuit television (CCTV), in a New York City suburb.² Despite the fact that the presence of the CCTV system reduced crime in the area by fifty percent,³ some expressed concern over the constitutionality of the new technology.⁴ Then came events such as the first World Trade Center

1. Gary C. Robb, *Police Use of CCTV Surveillance: Constitutional Implications and Proposed Regulations*, 13 U. MICH. J.L. REFORM 571, 572 n.5 (1980); MARCUS NIETO, CAL. RESEARCH BUREAU, CAL. STATE LIBRARY, CRB-97-005, PUBLIC VIDEO SURVEILLANCE: IS IT AN EFFECTIVE CRIME PREVENTION TOOL? (1997), <http://www.library.ca.gov/crb/97/05/crb97-005.html#contemporary> [<https://perma.cc/AW7B-UM2C>]; see also 12 C.F.R. § 208.61 (2015) (requiring member banks of the Federal Reserve System, pursuant to 12 U.S.C. § 1882, to adopt “security procedures to discourage robberies, burglaries, and larcenies” as well as to aid in identifying the persons who committed the acts and suggesting the security program include procedures like “maintaining a camera that records activity in the banking office”).

2. Robb, *supra* note 1, at 572–73, 572 n.6, 573 n.7.

3. *Id.* at 573 n.9.

4. See generally *id.* at 571, 572 n.4 (evaluating “the constitutionality of CCTV ‘searches’” and

bombing in 1993 and the Oklahoma City bombing in 1995. These attacks on American soil made the public more concerned about security and more accepting of the video surveillance industry.⁵ Now video cameras can be attached to small flying objects, similar to the model planes of yesteryear,⁶ but these unmanned aerial vehicles (UAVs), commonly referred to as drones,⁷ can be used for things much more sinister than a recreational flight over an open field.⁸

A UAV is a device without an onboard pilot that is “used or intended

quoting a Senator’s concerns, voiced in 1975, that technological advancements were arriving too rapidly and “fundamentally” altering the fabric of society).

5. See NIETO, *supra* note 1 (“A leading security industry spokesperson asserts, ‘years ago shoppers objected to electronic eyes recording their moves; today it’s not only accepted, it’s preferred.’”); Michael Ravenscroft, *Through a Cracked Lens: CCTV and the Urban Crisis in HBO’s The Wire*, 29 HIST. & TECH. 301, 305 (2013) (“In post 9/11 America, surveillance cameras are frequently credited as a means of improving public safety.”); cf. Ville Heiskanen & Dina Bass, *Apple Calls on Congress to Form Committee for Privacy Issues*, BLOOMBERGBUSINESS (Feb. 22, 2016, 4:09 AM), <http://www.bloomberg.com/news/articles/2016-02-22/apple-calls-for-congress-to-form-committee-for-privacy-issues> [<https://perma.cc/PHM3-3K8U>] (reporting that in the fight over whether Apple should have helped the FBI hack the San Bernadino shooter’s iPhone, a Pew Research Center survey found that fifty-one percent of Americans supported the FBI’s stance while only thirty-eight percent believed that Apple was justified in refusing to unlock the phone).

6. Model aviation has been around since the early twentieth century. ACAD. OF MODEL AERONAUTICS, HISTORY OF THE ACADEMY OF MODEL AERONAUTICS: NATIONAL MODEL AVIATION MUSEUM & MODEL AVIATION MAGAZINE (2008), <https://www.modelaircraft.org/files/AMANMAMMAhistory.pdf> [<https://perma.cc/4MCD-2Q8E>] (noting that the first National Aeromodeling Championships were held in 1923).

7. See ALISSA M. DOLAN & RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42940, INTEGRATION OF DRONES INTO DOMESTIC AIRSPACE: SELECTED LEGAL ISSUES 1 n.1 (2013), <https://nppa.org/sites/default/files/Integration%20of%20Drones%20into%20Domestic%20Airspace%2004-04-13.pdf> [<https://perma.cc/D3LA-7N85>]. Due to the continuing negative connotation “drone” can have, this Comment uses UAV to refer to the devices that state agencies will likely use once authorized, even though “drone” has become more commonplace. See Brian Fung, *Why Drone Makers Have Declared War on the Word ‘Drone,’* WASH. POST (Aug. 16, 2013), <https://www.washingtonpost.com/news/the-switch/wp/2013/08/16/why-drone-makers-have-declared-war-on-the-word-drone/> [<https://perma.cc/V9GW-D9N3>] (reporting that UAV manufacturers are engaging in a “massive rebranding campaign” to offset the “images of lethal spy planes raining missiles down on targets in foreign theaters of war” and convince people that the devices “can be used off the battlefield in new, safe and uncontroversial ways”). The industry tends to use unmanned aircraft systems (UAS) to encompass the entire system, not just the vehicle itself; therefore, when material is quoted throughout the Comment that refers to UAS, no alteration will be made. See FED. AVIATION ADMIN., U.S. DEP’T OF TRANSP., INTEGRATION OF CIVIL UNMANNED AIRCRAFT SYSTEMS (UAS) IN THE NATIONAL AIRSPACE SYSTEM (NAS) ROADMAP 7 (2013), http://www.fas.org/irp/program/collect/uas_roadmap_2013.pdf [<https://perma.cc/6VU5-9D4T>] [hereinafter INTEGRATION ROADMAP] (recounting the history of different terms used to refer to unmanned aircraft and stating that “[t]oday, the term UAS is used to emphasize the fact that separate system components are required to support airborne operations without a pilot onboard the aircraft”).

8. See *infra* notes 13, 25–29 and accompanying text.

to be used for flight in the air.”⁹ UAVs operate as part of a system, known as an unmanned aircraft system (UAS), which includes the device, “digital network, and personnel on the ground.”¹⁰ The U.S. military’s recent use of these devices in the “war on terror”¹¹ has put citizens on high alert, especially with the increasing militarization of police forces on American soil.¹² After years of news stories on “drone strikes” targeting terrorists but also killing or maiming innocent civilians in Afghanistan, Iraq, and Pakistan,¹³ Americans are apprehensive about

9. INTEGRATION ROADMAP, *supra* note 7, at 8.

10. RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42701, DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES 2 (2013), <http://fas.org/sgp/crs/natsec/R42701.pdf> [<https://perma.cc/G98E-UADE>].

11. Jim Michaels, *Drones: The Face of the War on Terror*, USA TODAY (Mar. 20, 2015, 5:34 AM), <http://www.usatoday.com/story/news/world/2015/03/19/drones-pakistan-iraq/25033955/> [<https://perma.cc/67QE-ZFKH>] (stating that “more than 500 suspected terrorists leaders” have been killed, mostly through “drone strikes,” since shortly after September 11, 2001); *see also* Mary Kaldor, *Why Another ‘War on Terror’ Won’t Work*, NATION (Nov. 17, 2015), <http://www.thenation.com/article/why-another-war-on-terror-wont-work/> [<https://perma.cc/KW5P-6SS6>] (“It was President Bush who declared a ‘war on terror’ after 9/11, a statement that led us to the Patriot Act, the invasions of Afghanistan and Iraq, and Guantánamo.”).

12. Alex Johnson, *Obama: U.S. Cracking Down on ‘Militarization’ of Local Police*, NBC NEWS (May 18, 2015, 7:23 PM), <http://www.nbcnews.com/news/us-news/u-s-cracking-down-militarization-local-police-n360381> [<https://perma.cc/QAB4-2NNW>] (reporting that after officers in armored vehicles and camouflage confronted protestors in Ferguson, Missouri in 2014, the “federal government will no longer provide heavy military equipment like tanks and grenade launchers” to local police departments, which have been able to apply for “surplus military equipment” since 1997); *see also* Martin Kaste, *Police Militarization Becomes a Hot Topic*, NPR (Aug. 19, 2014, 5:00 AM), <http://www.npr.org/2014/08/19/341542537/police-militarization-becomes-a-hot-topic> [<https://perma.cc/RWE2-S4V8>] (indicating that police militarization could also be the result of a shift from “guardian” mindset to “warrior” mindset and not just because surplus gear is available). *See generally* *Police Militarization*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/criminal-law-reform/reforming-police-practices/police-militarization> [<https://perma.cc/ZF3T-9NMF>] (last visited Mar. 22, 2016).

13. Conor Friedersdorf, *If a Drone Strike Hit an American Wedding, We’d Ground Our Fleet*, ATLANTIC (Dec. 16, 2013), <http://www.theatlantic.com/politics/archive/2013/12/if-a-drone-strike-hit-an-american-wedding-wed-ground-our-fleet/282373/> [<https://perma.cc/7GYE-FTZ5>] (reporting that fourteen civilians were killed and twenty-two injured when a “U.S. drone mistakenly targeted a wedding convoy in Yemen[] . . . after intelligence reports identified the vehicles as carrying al Qaeda militants”); *see also* INT’L HUMAN RIGHTS & CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCH. & GLOB. JUSTICE CLINIC AT NYU SCH. OF LAW, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN*, at v (2012), http://law.stanford.edu/wp-content/uploads/sites/default/files/publication/313671/doc/slspublic/Stanford_NYU_LIVING_UNDER_DRONES.pdf [<https://perma.cc/625Z-LSA7>] [hereinafter *LIVING UNDER DRONES*] (providing “firsthand testimony about the negative impacts US policies are having on the civilians living under drones”); Conor Friedersdorf, *The Wedding That a U.S. Drone Strike Turned into a Funeral*, ATLANTIC (Jan. 9, 2014), <http://www.theatlantic.com/international/archive/2014/01/the-wedding-that-a-us-drone-strike-turned-into-a-funeral/282936/> [<https://perma.cc/YPV7-PDPU>] (quoting one local who said, “[w]e live in fear day and night . . . Our children and women cannot sleep”).

the introduction of UAVs in their skies. But Americans appear less concerned about weaponized domestic UAVs and more concerned about the potential use of UAVs to invade their privacy.¹⁴ State legislators are trying to ease that apprehension by introducing legislation to make it difficult for law enforcement agencies to use drones equipped with video cameras to monitor citizens' movements.¹⁵

This negative publicity has impeded the introduction of UAVs into potentially productive areas. Government use of UAVs could provide numerous benefits to citizens and the environment.¹⁶ Instead, worries over government's increased ability to subject citizens to ubiquitous surveillance¹⁷ led Washington State legislators to join in the rush to enact legislation restricting the use of UAVs by "agencies" in Washington.¹⁸ But the term "agencies" encompasses more than just Washington State Patrol and what the public would typically think of as a law enforcement agency.¹⁹ Lumping all Washington agencies together

14. See *Domestic Drones*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/domestic-drones> [<https://perma.cc/TZ64-BG4B>] (last visited Mar. 22, 2016) (expressing concern over UAVs "equipped with facial recognition software, infrared technology, and speakers capable of monitoring personal conversations [that] would cause unprecedented invasions of our privacy rights," noting that "[t]iny drones could go completely unnoticed while peering into the window of a home or place of worship," and listing a prohibition on drones equipped with weapons at the end of a list of five suggested safeguards to implement).

15. See *Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. ST. LEGISLATURES (Feb. 26, 2016), <http://www.ncsl.org/research/transportation/current-unmanned-aircraft-state-law-landscape.aspx#1> [<https://perma.cc/UTN9-GFJP>]. Arkansas, California, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia, and West Virginia passed legislation to prohibit or limit UAV use; while Alaska, Georgia, New Mexico, Pennsylvania, and Rhode Island adopted UAV related resolutions. *Id.* This Comment will focus exclusively on Washington State's efforts to legislate UAV use by state agencies.

16. See *infra* Part II.

17. See GREGORY MCNEAL, BROOKINGS, DRONES AND AERIAL SURVEILLANCE: CONSIDERATIONS FOR LEGISLATORS 2 (2014), <http://www.brookings.edu/research/reports/2014/11/drones-and-aerial-surveillance> [<https://perma.cc/TTD5-2JX7>] ("Privacy advocates contend that with drones, the government will be able to engage in widespread pervasive surveillance because drones are cheaper to operate than their manned counterparts."); *Domestic Drones*, *supra* note 14 (advocating for regulation of UAVs to ensure the country does not move "closer to a 'surveillance society' in which our every move is monitored, tracked, recorded, and scrutinized by the government").

18. H.R. 1639, 64th Leg., Reg. Sess. § 1 (Wash. 2015) (engrossed substitute bill) ("It is the intent of the legislature to allow for the performance of legitimate state and local agency functions in accordance with clear standards for the lawful use of [UAVs].").

19. *Id.* § 2(1) (defining agency as "the state of Washington, its state and local agencies, political subdivisions, and their respective employees and agents, except the Washington national guard in Title 32 U.S.C. status"); *id.* § 3(1) ("No state agency including, but not limited to, the Washington state patrol and the department of natural resources, shall procure a[] [UAV] unless moneys are expressly appropriated by the legislature for this specific purpose.").

deprives entities like the Department of Natural Resources (DNR), Department of Fish & Wildlife (DFW), and Department of Ecology (Ecology) of the opportunity to use UAVs in their capacities as managers of public welfare, not as law enforcers.

This Comment recognizes that concerns over privacy are valid, but argues that citizens should be less worried about the use of UAVs by agencies charged with protecting our environment, natural resources, and wildlife. Allowing some non-law enforcement agency use of UAVs, within Washington State's established privacy protections, will result in benefits to the public that will significantly outweigh any potential loss of privacy. Carefully drafted laws will ensure that citizens reap the substantial benefits of UAV use for environmental and wildlife regulation while still protecting privacy privileges from intrusion by law enforcement agencies.

This Comment advocates for a permissive approach to legislating Washington State agencies' use of UAVs when acting in their capacities as managers of public welfare. Part I briefly covers the history of UAVs and discusses the public's privacy concerns before addressing the current state of privacy law in Washington. Part II explores the useful ways agencies like DNR, DFW, and Ecology could use these devices. In Part III, the Comment provides a brief summary the Federal Aviation Administration's (FAA) regulation of domestic UAVs²⁰ before reviewing legislation introduced in the 2013, 2014, and 2015 Washington State legislative sessions.²¹ Lastly, Part IV draws from the previously proposed legislation and recommends carefully drafted language that allows wide discretion for non-law enforcement agencies but still requires law enforcement agencies to obtain search warrants before using UAVs, except in strictly defined emergency circumstances.

I. RIGHT TO PRIVACY

This Part provides a brief overview of the U.S. government's use of

20. FAA's regulation of UAVs is related primarily to the technical restrictions and operations in the national airspace system, such as flight altitude, flight paths, equipment, and operator training requirements. *See* FED. AVIATION ADMIN., STATE AND LOCAL REGULATION OF UNMANNED AIRCRAFT SYSTEMS (UAS) FACT SHEET 3 (2015), http://www.faa.gov/uas/regulations_policies/media/UAS_Fact_Sheet_Final.pdf [<https://perma.cc/4SSM-A3XM>]. Thus, state laws intending to regulate whether or not a warrant is needed to use a UAV or specifying the permitted uses for UAVs "generally are not subject to federal regulation." *Id.*

21. Legislation introduced in 2016 is not discussed because it is not relevant to agency use of UAVs. *See* S. 6437, 64th Leg., Reg. Sess. § 2 (Wash. 2016) (substitute bill) (expressly stating that the legislation would not apply to UAV operations by governmental agencies).

UAVs, before examining the public's privacy concerns regarding law enforcement agency UAV use over American soil. It then addresses the heightened privacy protections provided by article I, section 7 of the Washington State Constitution. And because Washington State does not allow a civil cause of action for a violation of its constitution, the Comment discusses the Washington State courts' approach to the common law right of privacy.

A. *Public's Privacy Concerns over Law Enforcement Agency Use of Domestic UAVs*

The United States began experimenting with UAV technology during World War I.²² It was not until the Cold War and the Vietnam War that the interest developed in the surveillance, reconnaissance, and combat arenas.²³ After a decade of little progress, the Pentagon pushed for more use based on Israel's successful combat implementation of UAVs against Syria in 1973.²⁴ UAVs broke into the mainstream consciousness as counterterrorism weapons when they were used in both the Iraq and Afghanistan conflicts following the attacks in New York and Washington, D.C. in 2001.²⁵ Some believe that these incidents in Pakistan and Afghanistan have led to "unnecessary drama" and stigma about UAVs because, in non-military settings, "[t]hey are no different from having a police helicopter over your head, or a security camera pointed at you."²⁶ Others have written to public officials stating that

22. JEREMIAH GERTLER, CONG. RESEARCH SERV., R42136, U.S. UNMANNED AERIAL SYSTEMS 1 (2012), <http://fas.org/sgp/crs/natsec/R42136.pdf> [<https://perma.cc/A223-XTMX>]; see also Brandon Bellows, *Floating Toward a Sky Near You: Unmanned Aircraft Systems and the Implications of the FAA Modernization and Reform Act of 2012*, 78 J. AIR L. & COM. 585, 591 (2013).

23. Bellows, *supra* note 22, at 592; AEROSPACE INDUS. ASS'N, UNMANNED AIRCRAFT SYSTEMS: PERCEPTIONS & POTENTIAL 5 (2013), http://www.aia-aerospace.org/assets/AIA_UAS_Report_small.pdf [<https://perma.cc/8QFD-MBKF>] [hereinafter PERCEPTIONS & POTENTIAL] ("From 1964 to 1975, the U.S. Air Force flew 3,435 reconnaissance drone missions over North Vietnam and its surrounding areas, and lost 554 UAVs during the conflict").

24. Bellows, *supra* note 22, at 592; see also Chris Schlag, *The New Privacy Battle: How the Expanding Use of Drones Continues to Erode Our Concept of Privacy and Privacy Rights*, 13 PITT. J. TECH. L. POL'Y 1, 5 nn.22 & 24, 5–6 (2013) (discussing Israel's pioneering use and noting that "[d]uring the Kosovo Conflict in 1999, the [U.S.] military's use of UAVs flourished").

25. See GERTLER, *supra* note 22, at 1; Nicholas Ryan Turza, *Dr. Dronelove: How We Should All Learn to Stop Worrying and Love Commercial Drones*, 15 N.C. J.L. & TECH. ON. 319, 323 (2014). The first authorized "covert lethal use" was in Pakistani territory in 2004. Peter Bergen & Jennifer Rowland, *Drones Decimating Taliban in Pakistan*, CNN (July 3, 2012), <http://www.cnn.com/2012/07/03/opinion/bergen-drones-taliban-pakistan/index.html> [<https://perma.cc/8MN6-P9WN>].

26. Barry Neild, *Not Just for Military Use, Drones Turn Civilian*, CNN (June 12, 2013, 6:57 AM), <http://www.cnn.com/2012/07/12/world/europe/civilian-drones-farnborough> [<https://perma.cc/7JUF-QTNW>] (quoting Andrew Duggan, managing director of Insitu Pacific); see also

“America is not a battlefield[,] and the citizens of this nation are not insurgents in need of vanquishing.”²⁷

In reality, however, UAVs have already proved useful in operations unrelated to military conflict.²⁸ Insitu originally developed the ScanEagle, one of the most useful UAVs to the military, to observe tuna and dolphins.²⁹ The U.S. Navy used ScanEagles in the 2009 rescue of Captain Richard Phillips after Somali pirates hijacked the container ship *MV Maersk Alabama*.³⁰ More recently Insitu Pacific worked with university researchers to use ScanEagles on a trial basis to track marine mammals off the western coast of Australia.³¹

PERCEPTIONS & POTENTIAL, *supra* note 23, at 3 (recognizing bias against UAVs, especially regarding military use because “public opinion regarding these systems often begins in the imagination, and may harden into myth through misconception, popular culture and an inability to imagine the non-military benefits of a platform that has traditionally been used for national defense”).

27. Andrew Cain, *GOP Delegate, ACLU to Push Legislation on Drones*, RICHMOND TIMES-DISPATCH (July 13, 2012, 1:00 AM), http://www.richmond.com/news/gop-delegate-aclu-to-push-legislation-on-drones/article_6ca7ad96-bbfe-5b30-9876-fb6e59112fbd.html [<https://perma.cc/NQ5G-AJ7G>] (quoting a letter written by John W. Whitehead, president of The Rutherford Institute, to the governor of Virginia).

28. Advancements in the technology used to manufacture and operate UAVs have made it possible for them to be effectively used in areas far removed from combat. *See* Richard Conniff, *Drones Are Ready for Takeoff*, SMITHSONIAN MAG. (June 2011), <http://www.smithsonianmag.com/science-nature/drones-are-ready-for-takeoff-160062162/?no-ist=> [<https://perma.cc/FP9W-36WF>] (“The potential seems limitless—handling routine monitoring of pipelines and power lines, for instance, or gathering geomagnetic data about natural resources (a job that entails flying hundreds of miles in a straight line, at low altitude, then moving 50 yards over and flying straight back). Drones could help farmers monitor crops in distant fields, allow real estate developers to perform simple construction jobs in remote or difficult locations or enable environmentalists to spot polluters.”). *See generally* PERCEPTIONS & POTENTIAL, *supra* note 23 (exploring the benefits of domestic UAVs).

29. *From Dolphins to Destroyers: The ScanEagle UAV*, DEF. INDUSTRY DAILY (Jan. 22, 2016), <http://www.defenseindustrydaily.com/from-dolphins-to-destroyers-the-scaneagle-uav-04933/> [<https://perma.cc/E55M-Z63F>] (“ScanEagle[] . . . was originally developed . . . to track dolphins and tuna from fishing boats, in order to ensure that the fish you buy in supermarkets is ‘dolphin-safe.’”).

30. *Museum Displays ScanEagle Drone Used in “Captain Phillips” Rescue*, MUSEUM OF FLIGHT (Oct. 7, 2013), <http://www.museumofflight.org/press/museum-displays-scaneagle-drone-used-captain-phillips-rescue> [<https://perma.cc/UA2Z-SQYE>] (“It was one of several ScanEagles that provided real-time intelligence, surveillance and reconnaissance imagery that contributed to the Phillips’ rescue.”).

31. Allison Bone, *From Saving Soldiers to Saving Whales*, BOEING (Feb. 14, 2011), <http://www.boeing.com.au/featured-content/scan-eagle.page> [<https://perma.cc/6ACM-VJT8>] (quoting Andrew Duggan, managing director of Insitu Pacific: “UAVs such as the ScanEagle offer a unique, long-endurance capability to monitor whale, dugong and dolphin populations without posing a risk to aircrew in what is generally accepted as a higher-risk environment . . . because aircraft conducting this type of mission have to fly long periods at low altitude, well off the coast”). There have been similar instances on American soil in which UAVs could have proved useful. *See Boeing Drones on Standby to Help Rescue Workers*, KING 5 NEWS (Mar. 28, 2014, 1:18 PM), <http://www.king5.com/story/news/local/oso-landslide/2014/08/05/13408536/> [<https://perma.cc/>]

Still, citizens worry that domestic UAV use will usher in an Orwellian dystopia.³² A UAV test flight on the USS *McInerney*, where the crew followed suspected drug smugglers,³³ indicated that using a UAV is different from having a police helicopter overhead.³⁴

Over the next three hours, the skiff stopped twice and shut down its engine—standard practice among smugglers listening for law enforcement aircraft. The drone, a 23-foot-long helicopter trailing a mile or two behind, was quiet enough to evade detection. It also had the range to keep up the pursuit when a manned helicopter, roughly twice its size, would have had to turn back and refuel. By the time the skiff made its rendezvous with a fishing boat under cover of darkness, the *McInerney* was on its tail.³⁵

This account gives some credence to worries that law enforcement will use UAVs invasively³⁶ and is the type of UAV use that citizens and legislators worry will lead to ubiquitous government surveillance.³⁷ It is against this backdrop that some states, including Washington, have introduced or adopted legislation that requires law enforcement agencies to obtain a search warrant before deploying a UAV.³⁸ But this strategy unnecessarily lumps agencies that manage public welfare in with law

D7XU-66BC] (“Insitu . . . confirms the drones could monitor the Oso slide night and day without risking the lives of human pilots.”); Maggie Clark, *Boston Bombings Show Future Use for Police Drones*, PEW CHARITABLE TR.: STATELINE (May 1, 2013), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/05/01/boston-bombings-show-future-use-for-police-drones> [https://perma.cc/C7T7-MKR9] (acknowledging that UAVs could have been used in the pursuit of the Boston marathon bombing suspects, “[b]ut pre-emptively hovering drones over an event still makes many uncomfortable. . . . [d]espite the call for more surveillance cameras after the successful identification of the Boston suspects using video footage”); Phyllis Fletcher, *How Drones Quietly Mapped Oso Landslide Area*, KUOW.ORG (May 5, 2014), <http://kuow.org/post/how-drones-quietly-mapped-oso-landslide-area> [https://perma.cc/K9DM-E4LD] (“[D]rone flight ‘protects first responders because we don’t have to go into dangerous spots just to find out what’s there.’ Imaging may be just the first wave of drone use in recovery operations.”).

32. See DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY 25, 177 (2011) (noting that George Orwell’s *1984*, which depicted a government that subjected its citizens to inescapable surveillance, is used as a metaphor to highlight the evils of government surveillance); M. Ryan Calo, *The Drone as Privacy Catalyst*, 64 STAN. L. REV. ONLINE 29, 32 (2011) (referencing Orwell’s description of small flying objects used to peek into windows).

33. Conniff, *supra* note 28.

34. See *supra* note 26 and accompanying text.

35. Conniff, *supra* note 28 (emphasis in original).

36. Turza, *supra* note 25, at 337.

37. See *supra* note 17 and accompanying text.

38. See Schlag, *supra* note 24, at 20; H.R. 1639, 64th Leg., Reg. Sess. (Wash. 2015); H.R. 2789, 63d Leg., Reg. Sess. (Wash. 2014); H.R. 1771, 63d Leg., Reg. Sess. (Wash. 2013).

enforcement agencies, which forces agencies like DNR, DFW, and Ecology to forego the possible enormous economic and environmental benefits of using UAVs.³⁹

B. Washington State's Constitution Expressly Protects Citizens' Privacy from Invasion by Law Enforcement Agencies

For those Washingtonians worried that law enforcement agencies will use UAVs to secretly spy on them, Washington State's constitution "clearly recognizes an individual's right to privacy with no express limitations."⁴⁰ Although Washington courts have not specifically addressed State invasion of privacy through UAV use, they have determined that some technology use is more likely to rise to the level of a constitutional violation.⁴¹ Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."⁴² This provision specifically protects citizens' privacy from government intrusion, without regard to intent.⁴³ This protection is broader than that given by the Fourth Amendment to the United States Constitution, which merely "guarantee[s] a certain degree of privacy through the right 'to be secure in [one's] person[], house[], papers, and effect against unreasonable searches and seizures.'"⁴⁴ Because article I, section 7 provides broader protection, when Washington courts decide cases alleging privacy violations under both the state and federal constitutions, they review privacy challenges made under the state

39. See *infra* Part II.

40. *State v. Hinton*, 179 Wash. 2d 862, 868, 319 P.3d 9, 12 (2014) (citation and quotation omitted) (finding that a third party's text message conversation was a private affair and the state constitution required that the police officer obtain a warrant to view the conversation on arrestee's cell phone).

41. See *infra* notes 58–62 and accompanying text.

42. WASH. CONST. art. I, § 7.

43. See *Fisher v. State ex rel. Dep't of Health*, 125 Wash. App. 869, 879, 106 P.3d 836, 840 (2005) (upholding district court's decision to dismiss cause of action for invasion of privacy by intrusion on seclusion where appellant's medical records were released as part of investigation into complaint against appellant's physician).

44. Schlag, *supra* note 24, at 12 (quoting U.S. CONST. amend. IV). Both constitutions "prohibit the government or a state actor from conducting certain searches without a warrant issued by a court of competent jurisdiction. This prohibition is enforced by requiring exclusion of evidence obtained in violation of the warrant requirement, unless an exception applies." H. 63-2789, Reg. Sess., at 2 (Wash. 2014); see also H. 64-1639, Reg. Sess., at 2 (Wash. 2015) (substitute bill); *Hinton*, 179 Wash. 2d at 869 n.2, 319 P.3d at 12 n.2 ("Generally, article I, section 7 rights may be enforced by exclusion of evidence only at the instance of one whose own privacy rights were infringed by government action." (citation omitted)).

constitution first and do not reach the Fourth Amendment question.⁴⁵ Thus, this Comment will not analyze the Fourth Amendment implications for UAV use in Washington.

Washington courts engage in a two-part analysis for article I, section 7 inquiries.⁴⁶ In the first step, courts ask whether the state “intruded into a person’s private affairs.”⁴⁷ Something is considered a private affair if the “information obtained . . . reveals intimate or discrete details of a person’s life.”⁴⁸ If the interest is one that has been historically protected, the inquiry stops, and the interest is deemed a private affair.⁴⁹ Even if the interest has not received historical protection, courts will “consider whether the expectation of privacy is one that a citizen of this state is entitled to hold.”⁵⁰ The privacy protections to which Washingtonians are entitled are “not confined . . . to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.”⁵¹ If the court determines that the State disturbed a privacy interest, the second step of the analysis determines whether the constitutionally-required authority of law justifies the intrusion.⁵² The

45. *Hinton*, 179 Wash. 2d at 868, 319 P.3d at 12 (“We do not reach the Fourth Amendment inquiry as we resolve this case under our state constitution, which clearly recognizes an individual’s right to privacy with no express limitations.” (internal quotation marks and citations omitted)); see also *State v. Hathaway*, 161 Wash. App. 634, 642, 251 P.3d 253, 258 (2011) (noting that the Washington State Constitution provides greater protections than the Fourth Amendment in some areas and, therefore, “a *Gunwall* analysis is unnecessary to establish that we should undertake an independent state constitutional analysis” (emphasis in original) (footnote omitted)).

46. *State v. Monaghan*, 165 Wash. App. 782, 788, 266 P.3d 222, 225 (2011) (determining defendant did not give consent to search of locked container in trunk of car, thus, defendant’s privacy rights were violated when police searched the container).

47. *Id.* (citation omitted); see also *Hinton*, 179 Wash. 2d at 868, 319 P.3d at 12 (“The private affairs inquiry is broader than the Fourth Amendment’s reasonable expectation of privacy inquiry.” (citation omitted)).

48. *State v. Haq*, 166 Wash. App. 221, 256–57, 268 P.3d 997, 1015 (2012) (alteration in original) (citation and quotation omitted) (finding defendant’s “limited privacy rights as a detainee” were not violated when recordings of phone conversations with parents were admitted into evidence).

49. See *Hathaway*, 161 Wash. App. at 642–43, 251 P.3d at 258–59 (holding that privacy rights under article I, section 7, were not violated by standard screening process for jail visitors in which driver’s licensing records were checked in Department of Licensing database).

50. *Id.* at 643, 251 P.3d at 259.

51. *Hinton*, 179 Wash. 2d at 870, 319 P.3d at 13 (quoting *State v. Myrick*, 102 Wash. 2d 506, 511, 688 P.2d 151, 154 (1984)) (finding that text messages can contain similar intimate information to “phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law,” and therefore are considered “private affairs” regardless of the fact that text message technology rendered defendant’s communication more vulnerable to intrusion).

52. See *Monaghan*, 165 Wash. App. at 788, 266 P.3d at 225 (citing *State v. Valdez*, 167 Wash. 2d

authority of law required is customarily a valid warrant; however, there are a “few jealously guarded exceptions,”⁵³ which “fall[] into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops.”⁵⁴

Given the various technologies with which UAVs can be equipped,⁵⁵ the 1994 Washington State Supreme Court decision, *State v. Young*,⁵⁶ is instructive when considering possible privacy invasions through UAV use. In that case, the Court determined that warrantless infrared surveillance was a “particularly intrusive method of viewing,” which constituted an invasion of private affairs as protected under article I, section 7.⁵⁷ On the other hand, the Court acknowledged that the use of binoculars to view an object that could be “seen with the naked eye had the officer been closer to the object” is not considered a particularly intrusive method of viewing.⁵⁸ The distinction rested on the fact that the

761, 772, 224 P.3d 751, 757 (2009)).

53. *Id.*

54. *Id.* at 788 n.22, 266 P.3d at 225 n.22 (emphasis in original) (quoting *State v. Hendrickson*, 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996)).

The plain view exception provides that evidence from a search is admissible “when law enforcement officers (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to realize the evidence they see is associated with criminal activity.” *State v. Ruem*, 179 Wash. 2d 195, 200, 313 P.3d 1156, 1160 (2013) (quoting *State v. Hatchie*, 161 Wash. 2d 390, 395, 166 P.3d 698, 702 (2007)). This should not be confused with the open view doctrine, which provides that an officer, “conducting legitimate business,” who “is lawfully present at the vantage point and able to detect something by utilization of one or more of his senses” does not conduct a search at all and, therefore, does not need a warrant. *State v. Ross*, 141 Wash. 2d 304, 313, 4 P.3d 130, 135 (2000) (citing *State v. Seagull*, 95 Wash. 2d 898, 901, 632 P.2d 44, 46 (1981); *State v. Young*, 123 Wash. 2d 173, 182, 867 P.2d 593, 597 (1994)). The open view doctrine does not apply after officers have entered an area in which a person maintains a reasonable expectation of privacy. *See State v. Myers*, 117 Wash. 2d 332, 346, 815 P.2d 761, 769 (1991). At that point, the evidence is admissible only if the two requirements of the plain view doctrine are met, *id.* (citing *Seagull*, 95 Wash. 2d at 901, 632 P.2d at 46), or some other “jealously guarded exception[]” applies.

55. Jonathan Olivito, Note, *Beyond the Fourth Amendment: Limiting Drone Surveillance Through the Constitutional Right to Informational Privacy*, 74 OHIO ST. L.J. 669, 677–78 (2013) (listing some of the various devices with which UAVs can be equipped such as “infrared and ultraviolet imaging devices, see-through imaging (radar technology),” “conventional microphones,” “laser optical microphones,” as well as face and body recognition software, not to mention weapons like “rubber bullets and tear gas” (footnotes omitted)).

56. 123 Wash. 2d 173, 867 P.2d 593 (1994) (finding that officers’ warrantless use of an infrared thermal detection device to identify “abnormal heating patterns” to conclude that defendant was operating a marijuana grow in his home invaded defendant’s private affairs).

57. *Id.* at 183–84, 867 P.2d at 598 (“The infrared thermal detection investigation represents a particularly intrusive method of surveillance which reveals information not otherwise lawfully obtained about what is going on within the home.”).

58. *Id.* at 183 n.1, 867 P.2d at 598 n.1 (citing *State v. Manly*, 85 Wash. 2d 120, 124, 530 P.2d

infrared device “expose[d] information that could not have been obtained without the device.”⁵⁹ Therefore, under a *State v. Young* analysis, it is likely that a UAV equipped with a simple camera would be categorized like the binoculars. Depending, however, on how closely a Washington court would analyze whether the mere use of a UAV “expose[d] information that could not have been obtained without the device,” it is possible a court would regard an agency’s use of a UAV as a particularly intrusive method of viewing that, absent a warrant, would violate a citizen’s private affairs.⁶⁰

Thus, a Washingtonian who can show that the state agency disturbed a recognized privacy interest by using a UAV could have any evidence obtained from the use of the UAV excluded from a criminal or civil trial pursuant to article I, section 7,⁶¹ unless the intrusion falls within an exception like plain view, exigent circumstances, or inventory searches.⁶² This protection may prove useful to Washingtonians whose privacy is invaded pursuant to a criminal matter; however, more Washington citizens are anxious about the mere prospect of an agency UAV gathering private information about them that would not be subject to exclusion as evidence.⁶³ But Washington State does not have a statute

306, 308 (1975)).

59. *Id.*

60. Even if the UAV was equipped with only a simple camera, it is possible that a court could decide that the UAV itself “expose[d] information that could not have been obtained without the device” because the UAV allowed the agency access to an area that it could not have accessed without using the UAV. *See State v. Jackson*, 150 Wash. 2d 251, 256, 262, 76 P.3d 217, 220, 223 (2003) (holding that article I, section 7 requires law enforcement to obtain a warrant before attaching a GPS device to a car to track a person’s movements because “unlike binoculars or a flashlight, the GPS device does not merely augment the officers’ senses, but rather provides a technological substitute for traditional visual tracking”); *cf. Calo*, *supra* note 32, at 30 (stating that UAVs could be the technological change that brings on a shift in privacy law).

61. *State v. Hinton*, 179 Wash. 2d 862, 869 n.2, 319 P.3d 9, 12 n.2 (2014) (“Generally, *article I, section 7 rights may be enforced by exclusion of evidence* only at the instance of one whose own privacy rights were infringed by government action.” (emphasis added) (citation omitted)).

62. *See State v. Monaghan*, 165 Wash. App. 782, 788 n.22, 266 P.3d 222, 225 n.22 (2011).

63. *See Governor Task Force on Unmanned Aircraft Systems*, TVW (June 30, 2014), <http://www.tvw.org/watch/?eventID=2014061067> [hereinafter *Task Force June 30*] (statement of Sen. Maralyn Chase) (expressing constituents’ worries about the files accumulated on their personal lives and their concerns that that information is collected in “fusion centers”). Fusion centers are physical locations where data from “local, state, tribal, territorial, and federal agencies” is analyzed, and the intelligence is shared between those agencies. *See, e.g., Dia Kayyali, Why Fusion Centers Matter: FAQ*, ELECTRONIC FRONTIER FOUND., (Apr. 7, 2014), <https://www.eff.org/deeplinks/2014/04/why-fusion-centers-matter-faq#2> [<https://perma.cc/KXT4-WVML>]. The Department of Homeland Security states that this coordinated effort “creates a national capacity to gather, process, analyze, and share information in support of efforts to protect the country.” *National Network of Fusion Centers Fact Sheet*, DEP’T HOMELAND SECURITY, <http://www.dhs.gov/national-network-fusion-centers-fact-sheet> [<https://perma.cc/WQP7-MXGX>] (last visited Mar. 22, 2016).

that allows an action for damages against the government, and its courts have expressly denied a civil cause of action for violations of the Washington State Constitution.⁶⁴ Importantly, the Washington State Court of Appeals decision in *Youker v. Douglas County*⁶⁵ expressly allowed for a person to “sue the government for *common law* privacy invasion if it *intentionally* intrudes upon his or her solitude, seclusion, or private affairs.”⁶⁶ The remainder of this Part discusses the common law right to privacy as it is recognized in Washington State.

C. *Washington’s Common Law Privacy Jurisprudence*

The common law right to privacy traces its lineage to the now-famous law review article, *The Right to Privacy*.⁶⁷ What everyone now takes for granted as a right to privacy developed as a consequence of a bad experience with Boston newspapers during the era of “yellow journalism.”⁶⁸ The influential article contended that there was a “general right of the individual to be let alone,”⁶⁹ and that the law should “protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of *any other modern device for recording or reproducing scenes or sounds*.”⁷⁰ This protectable interest has grown to include four separate torts—intrusion, disclosure, false light, and appropriation.⁷¹ All of these involve “interference with the interest of the individual in leading . . . a secluded and private life, free

64. *See Reid v. Pierce Cty.*, 136 Wash. 2d 195, 241, 961 P.2d 333, 343 (1998) (explicitly stating that Washington State recognizes the *common law* right of privacy and holding that “immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent”); *cf.* 42 U.S.C. § 1983 (2012) (authorizing a federal civil action for person’s deprived of “any rights, privileges, or immunities secured by the Constitution and laws” by persons operating “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia”).

65. 178 Wash. App. 793, 327 P.3d 1243, *petition for review denied*, 180 Wash. 2d 1011, 325 P.3d 913 (2014).

66. *Id.* at 797, 327 P.3d at 1245 (emphasis added) (citing *Reid* and declining to “create a constitutional cause of action for governmental privacy invasions” while ruling that officers did not invade appellant’s privacy when, following a tip from his ex-wife, they found a rifle in his home).

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

68. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 383–84 (1960).

69. Warren & Brandeis, *supra* note 67, at 205.

70. *Id.* at 206 (emphasis added).

71. *See Eastwood v. Cascade Broad. Co.*, 106 Wash. 2d 466, 469, 722 P.2d 1295, 1296 (1986) (ruling that false light invasion of privacy claim is governed by the same two-year statute of limitations as a defamation claim). *See generally* Prosser, *supra* note 68 (defining the four torts and compiling cases that address aspects of each one).

from the prying eyes, ears and publications of others.”⁷² This Comment only addresses “[i]ntrusion upon the plaintiff’s seclusion or solitude, or into his private affairs.”⁷³ With private lives lived more publicly,⁷⁴ courts have a difficult task in determining when in fact an individual’s seclusion, solitude, or private affairs have been invaded.⁷⁵

Unlike the privacy intrusion proscribed by article I, section 7, a common law privacy invasion by the government requires proving intent.⁷⁶ The “deliberate intrusion” does not have to be physical, but the intruder must act with the “certain belief” that the resulting intrusion on solitude, seclusion, or private affairs would occur.⁷⁷ At least one Washington court has held that there is no viable claim for a “minimal” intrusion because footage obtained did not show the plaintiff in a compromising situation and “facial features were not recognizable.”⁷⁸ That court also acknowledged that a person has no legal right to be alone when in any public place, nor is it an “invasion of [one’s] privacy to do no more than follow him about and watch him [in public] . . . [or] to take his photograph in such a place, since this amounts to nothing more than

72. *Eastwood*, 106 Wash. 2d at 469, 722 P.2d at 1296 (quoting RESTATEMENT (SECOND) OF TORTS § 652A cmt. b at 377 (AM. LAW INST. 1977)).

73. Prosser, *supra* note 68, at 389.

74. See, e.g., Mark Weinstein, *Is Privacy Dead?*, HUFFINGTON POST (Apr. 24, 2013, 1:14 PM), http://www.huffingtonpost.com/mark-weinstein/internet-privacy_b_3140457.html [<https://perma.cc/84XF-4N2S>] (acknowledging that MySpace, blogs, Facebook, and Google made it possible to “discover everything about your friends, neighbors, and strangers”).

75. Even before technology progressed to everyone carrying pocket-sized global positioning system (GPS) units with them everywhere, see SOLOVE, *supra* note 32, at 47 (mentioning how cell phone towers can be used to locate a person’s cell phone—and the person, if the person is carrying the cell phone with them—“through a process called ‘triangulation,’” thereby effectively making cell phones GPS units), scholars recognized the courts’ difficulty, exacerbated by modern technology, in balancing the protection of an individual’s right to seclusion with “the freedom of action and expression of those who threaten the seclusion of others,” Adam J. Tutaj, *Intrusion upon Seclusion: Bringing an “Otherwise” Valid Cause of Action into the 21st Century*, 82 MARQ. L. REV. 665, 666 (1999) (internal quotation marks omitted).

76. Compare *Fisher v. State ex rel. Dep’t of Health*, 125 Wash. App. 869, 879, 106 P.3d 836, 840 (2005) (noting that when the government intrudes on a person’s private affairs and violates article I, section 7 “[i]ntent is not a factor”), with *id.* (stating that intent is an “essential element” of the civil cause of action for intrusion upon the plaintiff’s seclusion or solitude).

77. *Id.* (citing *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wash. 2d 490, 505–06, 844 P.2d 403, 412 (1993) (“If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.” (citation omitted))).

78. *Mark v. Seattle Times*, 96 Wash. 2d 473, 499, 635 P.2d 1081, 1095 (1981) (finding no invasion of privacy where TV cameraman shot footage of petitioner through window of closed and locked door because the place from where the shot was taken was “open to the public and thus any passerby could have viewed the scene recorded by the camera”).

making a record.”⁷⁹ And another court ruled that filming that takes place in an area “open to the public and d[oes] not involve any subterfuge” does not violate privacy rights as long as the “intrusion [i]s not highly offensive” and does not offend “a person of normal sensibilities.”⁸⁰ This view of intrusion on one’s privacy would leave citizens, who are anxious about possible surveillance in public through law enforcement agency use of UAVs, without legal recourse.⁸¹

Under these determinations, for an agency’s UAV use to be considered an intrusion on a citizen’s solitude, seclusion, or private affairs, the footage would have to be highly offensive to a person of normal sensibilities or catch the citizen in a compromising situation where some identifying feature was visible. More importantly, the person operating the UAV for the agency would have to have the “certain belief” that the footage would result in an intrusion.⁸² In one of the most often-used hypotheticals, footage is inadvertently gathered of a woman sunbathing in her backyard.⁸³ This woman might have a valid cause of action against the agency for invasion of her privacy. The footage could be highly offensive to a person of normal sensibilities; however, it is unclear whether the required intent that the intrusion be “deliberate” would be satisfied. It is unlikely that the agency UAV operator flew the UAV with the “certain belief” that footage of a sunbather would be recorded. But, if it can be shown that the agency operator was “substantially certain” that he would gather footage of the sunbather—for instance, proof that the operator had departed from the set flight-plan because he or she knew that the woman was sunbathing—the intent requirement could be satisfied,⁸⁴ and the woman could prove that the agency invaded her privacy under the common law. Therefore, even in the unlikely event that a UAV—used by an agency in its

79. *Id.* at 497, 635 P.2d at 1094 (quoting WILLIAM L. PROSSER, TORTS 808–09 (4th ed. 1971)).

80. *Peters v. Vinatieri*, 102 Wash. App. 641, 657, 9 P.3d 909, 918 (2000) (discussing *Mark* and finding similarities with the case at bar).

81. *See SOLOVE, supra* note 32, at 176–78 (discussing lack of Fourth Amendment protection for public video surveillance). *See generally* Calo, *supra* note 32 (considering the possibility that domestic UAV use could change the state of privacy law).

82. *See supra* note 77 and accompanying text.

83. McNEAL, *supra* note 17, at 22. This general hypothetical is used because there are no Washington cases addressing the possible invasion of privacy through the use of a UAV.

84. *See supra* notes 76–77 and accompanying text. *But see* *Youker v. Douglas Cty.*, 178 Wash. App. 793, 797–98, 327 P.3d 1243, 1245, *petition for review denied*, 180 Wash. 2d 1011, 325 P.3d 913 (2014) (determining that proof would be needed to show that the government “deliberately embarked on a course of conduct guaranteed to result in an unlawful [search] with the intent of causing distress or embarrassment” to the plaintiff) (alteration in original) (quoting *Fisher v. State ex rel. Dep’t of Health*, 125 Wash. App. 869, 879, 106 P.3d 836, 840 (2005)).

capacity as a manager of public welfare—did invade a Washingtonian’s privacy, that citizen could successfully sue the government for common law invasion of privacy.

II. USEFUL PURPOSES

Despite the horror stories of drone mishaps in combat,⁸⁵ UAVs have useful purposes.⁸⁶ Some of them, as previously mentioned, are used to help rescue and disaster-relief workers.⁸⁷ UAVs were even used to assess the true damage during the Fukushima plant meltdown in 2011.⁸⁸ UAVs can also be used to observe more long-term damage like the melting polar ice caps.⁸⁹ Use of the devices in “situations too dangerous for humans” is becoming commonplace.⁹⁰

In addition to search and rescue and public safety uses, UAV uses can include monitoring wildlife and their habitats. The U.S. Geological Survey worked with the Bureau of Land Management to survey the Sandhill crane population at the U.S. Fish and Wildlife Refuge in Colorado in March 2011.⁹¹ During this inaugural UAV mission for the

85. See generally LIVING UNDER DRONES, *supra* note 13, at 55–101, 147–52 (reporting narrative accounts of drone attacks in the Waziristan region of Pakistan, as well as testimony of individuals who “survived or witnessed drone strikes, or lost family members in strikes,” and documenting the impacts on mental health, education, and other vital parts of the communities).

86. PERCEPTIONS & POTENTIAL, *supra* note 23, at 3 (“[T]he potential benefits of . . . [UAVs include] a variety of domestic applications that will improve the safety of our communities, strengthen public services and achieve countless additional benefits to a wide variety of commercial and government organizations.”); see also Schlag, *supra* note 24, at 9 n.60 (“Drones can also be effective tools for scientific research during storms, in volcanoes and in arctic work because they can be designed with temperature shields, which withstand changes in barometric pressure and changes in weather conditions.”).

87. See *supra* notes 28–31 and accompanying text.

88. *U.S. to Send Drones Over Damaged Nuke Plant*, CBS NEWS (Mar. 16, 2011), <http://www.cbsnews.com/news/us-to-send-drones-over-damaged-nuke-plant/> [https://perma.cc/3KT3-LEY5].

89. Suzanne Goldenberg, *Drones Proving Useful in Polar Regions to Study the Melting of the Ice*, THE GUARDIAN (Aug. 27, 2013, 9:36 AM), <http://www.theguardian.com/world/2013/aug/27/drones-polar-melting-ice-antarctica-greenland> [https://perma.cc/AZW7-Y8XB].

90. *Id.* (reporting that “UAVs are increasingly being sent into situations too dangerous for humans, such as the centre of a developing storm or to extremely remote areas”); see also PERCEPTIONS & POTENTIAL, *supra* note 23, at 5 (noting that UAVs have been deployed “where the mission for manned vehicles may be too ‘dirty, dull or dangerous’”).

91. See Chris Mailey, *Are UAS More Cost Effective Than Manned Flights?*, AUVSI (Oct. 24, 2013, 9:29 AM), <http://www.auvsi.org/hamptonroads/blogs/chris-mailey/2013/10/24/are-uas-more-cost-effective-than-manned-flights> [https://perma.cc/CBV7-NRL8]; *Monte Vista National Wildlife Refuge, CO Sand Hill Crane Population Estimates*, USGS: NAT’L UNMANNED AIRCRAFT SYS. (UAS) PROJECT OFF., http://uas.usgs.gov/CO_SandhillCranesMonteVistaNWR.shtml [https://perma.cc/7R4G-GZHT] (last visited Mar. 22, 2016) [hereinafter *Sand Hill Crane*].

U.S. Geological Survey National UAS Project Office, the UAV flight, as well as the sensors used to monitor the crane population, exceeded expectations.⁹² Additional flights established that the UAV “imagery provide[d] acceptable population counts without disruption to the cranes, especially when flown at night when the cranes [we]re at rest in the roosting areas.”⁹³ Similarly, oil companies operating in Alaska “have employed small manned aircraft flying at 300 feet, 200 miles offshore, in icy conditions” to monitor marine mammal populations.⁹⁴ The University of Alaska at Fairbanks monitored the populations using a UAV so quiet it did not scare off the mammals.⁹⁵ Finally, more recently, scientists used a UAV to photograph a new orca calf and its mother in British Columbian waters.⁹⁶ It is likely that Washington State agencies, working in their capacities as managers of public welfare, would utilize UAVs for similar functions.⁹⁷

Although DNR and DFW both employ enforcement officers,⁹⁸ which means the agencies work as law enforcement agencies in at least some small capacity, those officers still ensure that the agencies can manage public welfare.⁹⁹ UAVs could prove especially helpful to DNR officers

Population Estimates].

92. See *Sand Hill Crane Population Estimates*, *supra* note 91 (observing that the UAV “found birds that we did not know were there” (internal quotation marks omitted)).

93. *Id.* In addition, using a UAV for the mission cost only \$2645, while similar manned aircraft surveys—that were arguably less accurate—cost over \$4000 and even up to \$35,000 if privately contracted. *Id.*

94. Conniff, *supra* note 28.

95. *Id.*

96. *Baby Orca Swimming Alongside Mom Photographed by Drone*, SEATTLE TIMES (Sept. 11, 2015, 7:00 AM), <http://www.seattletimes.com/seattle-news/drone-captures-photos-of-endangered-baby-orca-mom/> [https://perma.cc/R96W-J5EZ].

97. *Task Force June 30*, *supra* note 63 (mentioning that UAVs could be used to monitor flowering in seagrass beds or to monitor hoof disease in elk); see also *infra* Sections II.A, II.B, and II.C.

98. See *Enforcement: About WDFW Police*, WASH. DEP’T FISH & WILDLIFE, <http://wdfw.wa.gov/enforcement/about.html> [https://perma.cc/FJ26-U2Q8] (last visited Mar. 22, 2016); *Natural Resources Police*, WASH. ST. DEP’T NAT. RES., <http://www.dnr.wa.gov/police> [https://perma.cc/KF9K-5U54] (last visited Mar. 22, 2016).

99. *Compare Enforcement: About WDFW Police*, *supra* note 98 (“Enforcement Program Mission Statement: ‘To protect our natural resources and the public we serve.’”), and *Natural Resources Police*, *supra* note 98 (“Our Mission: Our purpose is to ensure your safety and to protect state assets and the environment. We want to make sure you have a safe and enjoyable experience when you are on state trust lands.”), with *About Us: Mission Statement*, WASH. ST. PATROL, <http://www.wsp.wa.gov/about/mission.htm> [https://perma.cc/22G9-FQ7T] (last visited Mar. 22, 2016) (“The Washington State Patrol makes a difference every day, enhancing the safety and security of our state by providing the best in public safety services.”), and *id.* (stating an agency goal of reducing crime and terrorism).

who often work alone in remote areas.¹⁰⁰ Because immediate assistance is not available in these remote areas,¹⁰¹ the agency could use UAVs to avoid the possibility of jeopardizing its officers' lives. A DFW officer's responsibilities include responding to "public safety issues such as dangerous wildlife encounters, natural disasters (including floods, fires, and severe storms)" as well as "general law enforcement calls for service."¹⁰² UAVs have been designed domestically to help these officers stay safe in perilous situations like these.¹⁰³ Notwithstanding the fact that these officers are in fact law enforcement officers, most of the public's concerns over law enforcement use¹⁰⁴ are diminished because these officers are working to further the missions of their respective agencies, specifically to protect the State's environment and resources.¹⁰⁵ Furthermore, UAV use by DNR and DFW law enforcement officers could operate as a test case to explore the possibility of limited warrantless use by regular law enforcement officers in the future.

The remainder of this Part explores the missions of DNR,¹⁰⁶ DFW,¹⁰⁷ and Ecology¹⁰⁸ and outlines ways in which UAVs could help the agencies achieve their missions without compromising citizens' privacy. In some of these instances, there is a chance that footage of persons

100. *Natural Resources Police*, *supra* note 98.

101. *Id.*

102. *Enforcement: About WDFW Police*, *supra* note 98.

103. See PERCEPTIONS & POTENTIAL, *supra* note 23, at 5 (noting that UAVs have been deployed "where the mission for manned vehicles may be too ' . . . dangerous'").

104. See *supra* Section I.A.

105. See *Enforcement: About WDFW Police*, *supra* note 98 ("Enforcement Program Mission Statement: 'To protect our natural resources and the public we serve.'"); *Natural Resources Police*, *supra* note 98 ("Our Mission: Our purpose is to ensure your safety and to protect state assets and the environment. We want to make sure you have a safe and enjoyable experience when you are on state trust lands.").

106. *About the Washington Department of Natural Resources*, WASH. ST. DEP'T NAT. RES., <http://www.dnr.wa.gov/about-washington-department-natural-resources> [<https://perma.cc/HG9U-R3HT>] (last visited Mar. 22, 2016) ("Our mission: In partnership with citizens and governments, the Washington State DNR provides innovative leadership and expertise to ensure environmental protection, public safety, perpetual funding for schools and communities, and a rich quality of life.").

107. *About WDFW: Mission and Goals*, WASH. DEP'T FISH & WILDLIFE, http://wdfw.wa.gov/about/mission_goals.html [<https://perma.cc/VR77-J8QW>] (last visited Mar. 26, 2016) ("Our Mission: To preserve, protect and perpetuate fish, wildlife and ecosystems while providing sustainable fish and wildlife recreational and commercial opportunities.").

108. *About Us: About the Department of Ecology*, DEP'T ECOLOGY STATE WASH., <http://www.ecy.wa.gov/about.html> [<https://perma.cc/GPZ4-YK9W>] (last visited Mar. 22, 2016) ("Our mission is to protect, preserve and enhance Washington's land, air and water for current and future generations.").

could accidentally be gathered. For instance, when DFW is using a UAV to monitor remote lands, it is possible that it could accidentally take footage of hunters.¹⁰⁹ But DFW would not be specifically trying to gather this information and would have no need for it, unless it turns out that the hunters were violating the terms of their hunting license. In that case, using the footage would fall under the open view doctrine because the hunters knowingly exposed themselves to the public and, therefore, are “not subject to any reasonable expectation of privacy [so] the [footage] is not within the scope of the constitution.”¹¹⁰ These agencies—acting as the managers of public welfare rather than as law enforcement agencies—see UAV use as the best available plan to reduce costs to the taxpayer while still accomplishing the agency goals.¹¹¹

A. *Department of Natural Resources*

DNR was created in 1957 to manage the state trust lands that the federal government provided to Washington just before it became a state.¹¹² Through managing these trusts, the department generates revenue to fund schools and communities.¹¹³ From the three million acres of land originally bestowed on the new state, DNR now manages almost six million acres of land ranging from forest and grassland to agricultural, aquatic, and commercial lands.¹¹⁴ Its mission is to ensure public safety and environmental protection as well as the funding for communities and schools.¹¹⁵ In addition to controlling fires through its fire suppression program, the agency serves as steward of over 2.6 million acres of aquatic lands, advises officials about the risks of earthquakes, volcanoes, and landslides in Washington State, and ensures the health and safety of the forests by “oversee[ing] the activities of private property owners interested in harvesting timber, building or

109. *Governor Task Force on Unmanned Aircraft Systems*, TVW (Aug. 11, 2014), <http://www.tvw.org/watch/?customID=2014080017> [hereinafter *Task Force August 11*] (statement of Joanna Eide, Former Criminal Justice Liaison/Regulations Coordinator at DFW).

110. *State v. Seagull*, 95 Wash. 2d 898, 902, 632 P.2d 44, 47 (1981); *see also supra* note 54 (distinguishing between plain view and open view doctrines); *infra* note 260 (discussing this situation in the context of the proposed statutory language).

111. Telephone Interview with Jessica Archer, Assessment and Policy Coordinator at Ecology (Jan. 26, 2015).

112. *About the Washington Department of Natural Resources*, *supra* note 106.

113. *Id.*

114. *Id.*

115. *Id.*

repairing forest roads or culverts, or thinning their forests.”¹¹⁶ At this time, DNR’s only intended purpose for UAVs would be for monitoring and assessing risks in the wildfire division to ensure public safety.¹¹⁷

Washington’s yearly struggle with wildfires makes it unlikely that the legislature would deprive DNR of the chance to more effectively monitor the fires.¹¹⁸ In fact, in July 2014, the FAA authorized DNR’s use of UAVs for that very purpose.¹¹⁹ After the unprecedented Oso landslide and devastating wildfires in Central Washington in 2014, DNR requested almost \$30 million from the Washington Legislature to fund “aerial photography and radar mapping to find areas prone to landslides and other geologic hazards” as well as wildfire prevention.¹²⁰ The 2015 wildfire season was even more devastating than the 2014 season.¹²¹ As a result, DNR requested at least \$24 million during the 2016 legislative session to help train firefighters and improve communications systems.¹²² In 2015, DNR requested an additional \$70 million to cover the continuing costs of fighting the 2014 wildfires.¹²³ It was projected that DNR would request \$137 million in 2016 to “cover cost overruns from fighting” the 2015 wildfires.¹²⁴ Although UAVs might be a significant investment on the front-end, their ability to deliver accurate and timely information coupled with their overall cost-effectiveness¹²⁵

116. *Id.*

117. Telephone Interview with Mary Verner, Deputy Supervisor for Resource Protection & Administration at DNR (Dec. 23, 2014).

118. *Hearing on H.R. 2789 Before the S. Law & Justice Comm.*, 63d Leg., Reg. Sess. (Feb. 26, 2014), http://www.tvw.org/index.php?option=com_tvwliveplayer&eventID=2014021219.

119. *Boeing Drones Approved to Monitor Washington Wildfires*, KING 5 NEWS (July 16, 2014, 4:34 PM), [http://www.king5.com/story/tech/science/aerospace/2014/08/18/14031036/\[https://perma.cc/E5F9-TVM4\]](http://www.king5.com/story/tech/science/aerospace/2014/08/18/14031036/[https://perma.cc/E5F9-TVM4]) (“DNR regularly uses airplanes and helicopters to monitor and control wildfires, but wind and smoke can ground these types of aircraft. A drone can fly in conditions where manned aircraft can[no]t and can relay important video and information.”).

120. Joseph O’Sullivan, *Oso Slide, Wildfires Prompt DNR Bid to Boost Budget*, SEATTLE TIMES (Nov. 15, 2014, 7:00 PM), http://old.seattletimes.com/html/localnews/2025034016_dnrrequestxml.html [https://perma.cc/D6Y9-G5PJ].

121. See Melissa Santos, *Wildfire Season to Require More Resources Next Year, Washington Officials Say*, NEWS TRIB. (Oct. 28, 2015, 1:50 PM), <http://www.thenewtribune.com/news/local/politics-government/article41734236.html> [https://perma.cc/SZ84-RNGW].

122. *Id.*

123. O’Sullivan, *supra* note 120.

124. Santos, *supra* note 121.

125. It is difficult to directly compare the costs of UAV operations and manned aircraft operations. See Mailey, *supra* note 91. There are differences in the data obtained itself: the quality of the recorded data can vary based on flight conditions, and a pilot of a manned aircraft can process information as he or she sees it, while data recorded from a UAV will likely need processing after it is gathered. *Id.* These differences are harder to quantify than the more practical aspects of

could save the taxpayers money if it means that DNR, and other agencies, will not have to continue to request over \$200 million in supplementary budgets.

B. *Department of Fish & Wildlife*

Shortly after Washington achieved statehood,¹²⁶ Washington's first governor appointed the first Fish Commissioner.¹²⁷ Throughout the first century of Washington's statehood, the legislature instituted Game Codes and Game-Fish Codes, replaced the Fish Commissioner with the Department of Fisheries, changed the Department of Game to the Department of Wildlife, and finally, in 1994, created DFW by merging the Department of Wildlife with the Department of Fisheries.¹²⁸ In addition to administering fishing and hunting licenses and permits,¹²⁹ DFW is directly involved in conservation of species,¹³⁰ habitat restoration,¹³¹ preservation of wildlife areas,¹³² the health of the State's native wildlife,¹³³ and even in mitigating and adapting to climate change.¹³⁴

DFW personnel have testified that the department is not currently

maintenance costs and costs to move the device from one location to another. *Id.* Although there are comparison difficulties, it is not as though we are comparing apples to oranges. Therefore, data from the Bureau of Land Management showing that UAVs can cost between \$1700 and \$9000 less per flight than manned aircraft (and sometimes as much as over \$30,000 less) indicates that the devices are more cost effective than their manned counterparts. *Id.*

126. Keith A. Murray, *Statehood for Washington*, COLUM.: THE MAG. NW. HIST., Winter 1989, at 30, 35 (stating that Washington was admitted to the Union on November 11, 1889).

127. *About WDFW*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/about/> [https://perma.cc/6DPD-A8ZV] (last visited Mar. 26, 2016).

128. *Id.*

129. *See Licensing & Permits*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/licensing/> [https://perma.cc/D86P-H6DP] (last visited Mar. 26, 2016).

130. *See Conservation: Species Recovery & Management*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/conservation/species/> [https://perma.cc/T466-EHGU] (last visited Mar. 22, 2016).

131. *See Conservation: Habitat Conservation, Protection & Restoration*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/conservation/habitat/> [https://perma.cc/KCU4-3SX4] (last visited Mar. 22, 2016).

132. *See WDFW Lands: Introducing Washington's Wildlife Areas*, WASH. DEP'T FISH & WILDLIFE, http://wdfw.wa.gov/lands/wildlife_areas/ [https://perma.cc/2BHE-U3G7] (last visited Mar. 22, 2016).

133. *See Conservation: Wildlife Health*, WASH. DEP'T FISH & WILDLIFE, <http://wdfw.wa.gov/conservation/health/> [https://perma.cc/L42D-M3KB] (last visited Mar. 22, 2016).

134. *See Conservation: Climate Change*, WASH. DEP'T FISH & WILDLIFE, http://wdfw.wa.gov/conservation/climate_change/ [https://perma.cc/72EX-QPPE] (last visited Mar. 22, 2016).

using UAVs nor does it have any immediate plans to use them.¹³⁵ But with increasing expenditures and ever-decreasing budgets, the department would like the opportunity to take advantage of every available cost efficiency.¹³⁶ DFW does not want a blanket prohibition on the ability to use UAVs in areas where it could only use manned aircraft before, at a significantly higher cost.¹³⁷ Specifically, DFW foresees many beneficial ways in which UAVs could be used to help the department reach its goals of protection, sustainability, and enforcement. The agency could use the devices to patrol remote areas, some of which are only accessible by horse or on foot, without dispatching officers.¹³⁸ The UAVs would allow a wider range for monitoring commercial fishing operations.¹³⁹ The department currently uses boats that are restricted to much smaller areas.¹⁴⁰ Furthermore, the ability to use UAVs would allow DFW to increase its effectiveness in wildlife habitat conservation.¹⁴¹

C. *Department of Ecology*

In 1970, Washington became the first state to establish a Department of Ecology; it even preceded the federal government's creation of the Environmental Protection Agency.¹⁴² Ecology's goals include pollution prevention as well as protection and restoration of the State's natural resources.¹⁴³ Ecology counts among its many duties enforcement of "general nationwide standards for clean air, water, land and waste management" and overseeing the Hanford nuclear reservation cleanup to ensure that it remains a priority for the federal government.¹⁴⁴ The agency also manages the state's water supply to guarantee enough water

135. *Task Force August 11*, *supra* note 109 (statement of Joanna Eide, Former Criminal Justice Liaison/Regulations Coordinator at DFW).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. WASH. STATE DEP'T OF ECOLOGY, ECOLOGY PUB. NO. 05-01-006, HISTORICALLY SPEAKING: AN ORAL HISTORY IN CELEBRATION OF THE FIRST 35 YEARS, 1970–2005, at 1 (2005), <http://www.ecy.wa.gov/pubs/0501006.pdf> [<https://perma.cc/F8Q5-VWXD>].

143. *About Us: Overview of the Washington Department of Ecology*, DEP'T OF ECOLOGY STATE WASH., <http://www.ecy.wa.gov/about/overview.html> [<https://perma.cc/D4JZ-ZV53>] (last visited Mar. 26, 2016).

144. *Id.*

for salmon, communities, and farms as well as supervising oil and hazardous material shipments in Washington.¹⁴⁵

Ecology, like DFW, does not currently use UAVs, nor does it have any immediate plans to start using them.¹⁴⁶ But Ecology has a very long list of ways it thinks that UAVs could help the department achieve its goals: map stream and channel morphology; identify the extent of oil spills, especially at night; investigate reports of dangerous hazardous waste instances; collect temperature data to ensure that streams are compliant with water quality standards; thermal detection of smoke during burn bans; search for potential water pollution sources; and inspect possibly compromised dams.¹⁴⁷ As with the other agencies, Ecology's use of UAVs to achieve its environmental protection goals would be invaluable and less likely to implicate citizens' privacy concerns than regular law enforcement agency use of the devices.

III. WASHINGTON LEGISLATORS INTRODUCE BILLS TO ADDRESS CITIZENS' PRIVACY CONCERNS

The FAA¹⁴⁸ recognized a demand for non-military use of UAVs in 2005 and required that non-recreational UAV operators get FAA clearance before using the devices.¹⁴⁹ The FAA distinguishes between public and civil non-recreational UAVs¹⁵⁰: public UAVs are owned,

145. *Id.*

146. *Task Force August 11*, *supra* note 109 (statement of Jessica Archer, Assessment and Policy Coordinator at Ecology).

147. *Id.*

148. The FAA was created in 1958 to "provide for the safe and efficient use" of the national airspace system. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958).

149. Bellows, *supra* note 22, at 600; *see also* AVIATION SAFETY UNMANNED AIRCRAFT PROGRAM OFFICE AIR-160, FED. AVIATION ADMIN., INTERIM OPERATIONAL APPROVAL GUIDANCE 08-01: UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN THE U.S. NATIONAL AIRSPACE SYSTEM 2 (2008), http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/coa/faq/media/uas_guidance08-01.pdf [<https://perma.cc/GQ7A-GXVC>] [hereinafter INTERIM OPERATIONAL APPROVAL GUIDANCE] ("These [clearances] are required due to the fact that [UAVs] are not compliant with . . . [established regulations for manned aircraft] and therefore, require an alternate means of compliance. Most notably, the lack of an on-board pilot requires an alternate method of the 'see-and-avoid' [regulations] . . .").

150. Bellows, *supra* note 22, at 600; *see also Unmanned Aircraft Systems*, FED. AVIATION ADMIN., <http://www.faa.gov/uas/> [<https://perma.cc/P6LT-BSG4>] (last visited Mar. 23, 2016) (differentiating between governmental public operations, non-governmental civil operations, and model aircraft to be used for "[h]obby or [r]ecreation *only*" (emphasis in original)). Congress specifically singled-out model, also known as recreational, aircraft in the FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (2012) (to be codified in scattered sections of 49 U.S.C.), providing that the FAA "may not promulgate any rule or regulation regarding a model aircraft" if the aircraft met five restrictions, including if "the aircraft [wa]s flown strictly for hobby

operated, or leased by a governmental entity;¹⁵¹ civil UAVs are all other non-recreational UAVs that are not owned, operated, or leased by a governmental entity.¹⁵² The required clearance for a public UAV, known as a certificate of waiver or authorization (COA),¹⁵³ is necessary because the FAA is currently fitting UAVs into the same framework that manned aircraft have operated under since the FAA's inception.¹⁵⁴ The FAA issues COAs on a case-by-case basis for public UAVs; once issued, the COAs are valid for up to two years.¹⁵⁵ COAs only permit agencies "to operate a particular aircraft, for a particular purpose, in a particular area" during a specified time, and the permit "includes special safety provisions unique to the proposed operation."¹⁵⁶

The FAA Modernization and Reform Act of 2012¹⁵⁷ directed the FAA to develop a plan to integrate UAVs into the national airspace system,

or recreational use," § 336(a)(1)–(5), 126 Stat. at 77.

151. See FAA Modernization and Reform Act of 2012 § 331(4), 126 Stat. at 72; 49 U.S.C. § 40102(a)(41)(B)–(D) (2012).

152. See 49 U.S.C. § 40102(a)(16)–(17).

153. INTERIM OPERATIONAL APPROVAL GUIDANCE, *supra* note 149, at 5 ("Public applicants should utilize the COA application process.")

154. See Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(5), 72 Stat. 731, 737 (1958) (defining aircraft as "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air"); 49 U.S.C. § 40102(a)(6) (defining aircraft as "any contrivance invented, used, or designed to navigate, or fly in, the air"); FAA Modernization and Reform Act of 2012 § 331(8), 126 Stat. at 72 (defining unmanned aircraft as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft"); INTEGRATION ROADMAP, *supra* note 7, at 14 ("To ensure the FAA has the appropriate UAS framework, many policy, guidance, and regulatory products will need to be reviewed and revised to specifically address UAS integration into the [national airspace system].")

155. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-610, UNMANNED AERIAL SYSTEMS: FAA CONTINUES PROGRESS TOWARD INTEGRATION INTO THE NATIONAL AIRSPACE 9 (2015), www.gao.gov/assets/680/671469.pdf [<https://perma.cc/FXN6-BZXA>] [hereinafter PROGRESS TOWARD INTEGRATION]. The process to apply for a COA can be burdensome. Applicants must provide information about the UAV as well as the proposed use for the UAV, including an operational description and a system description. FED. AVIATION ADMIN., SAMPLE COA APPLICATION, http://www.faa.gov/about/office_org/headquarters_offices/ato/service_units/systemops/aaim/organizations/uas/media/COA%20Sample%20Application%20v%201-1.pdf [<https://perma.cc/DAZ4-ML2E>]. The application also requires information on performance characteristics, airworthiness, equipment, electronic and visual surveillance detection capability, a flight operations area and plan, along with other information relevant to the requested use. *Id.* See generally INTERIM OPERATIONAL APPROVAL GUIDANCE, *supra* note 149 (providing policy guidance for personnel reviewing applications for COAs).

156. *Public Operations (Governmental)*, FED. AVIATION ADMIN., http://www.faa.gov/uas/public_operations/ [<https://perma.cc/BCW3-XV8P>] (last visited Mar. 23, 2016).

157. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, 126 Stat. 11 (2012) (to be codified in scattered sections of 49 U.S.C.).

thereby no longer requiring COAs to be issued.¹⁵⁸ Because the FAA's mandate is chiefly concerned with safety of the national airspace system,¹⁵⁹ state laws intending to regulate whether or not a warrant is needed to use a UAV or specifying the permitted uses of UAVs do not conflict with the FAA's UAV regulation.¹⁶⁰ The majority of the state legislation introduced across the country requires that UAVs be used pursuant to a valid search warrant,¹⁶¹ indicating citizens' worries about privacy protection (or at least their legislators' perception of those worries).¹⁶²

Although Washington legislators introduced at least ten pieces of legislation to regulate some aspect of UAV use since legislation was first proposed in 2013,¹⁶³ this Part will focus on four proposed bills in detail.¹⁶⁴ Then Part IV suggests a combination of portions of the proposed legislation that would allow for broad UAV use by agencies

158. *Id.* § 334(b), 126 Stat. at 76 (requiring development and implementation of “operational and certification requirements for the operation of public [UAVs] in the national airspace system”); *see also id.* § 332(a)(1)–(3), 126 Stat. at 73 (same for civil UAVs).

159. *See supra* note 148.

160. *See supra* note 20.

161. *See 2013 State Unmanned Aircraft (UAS) Legislation*, NAT'L CONF. ST. LEGISLATURES (July 2, 2015), <http://www.ncsl.org/research/transportation/2013-state-unmanned-aircraft-systems-uas-legislation.aspx> [<https://perma.cc/JYR6-XTRU>] (listing Florida, Idaho, Illinois, Oregon, Tennessee, and Texas as requiring a warrant for UAV use and Montana requires that in order for information obtained by a UAV to be admitted as evidence in a prosecution, it must have been gained with a search warrant); *2014 State Unmanned Aircraft (UAS) Legislation*, NAT'L CONF. ST. LEGISLATURES (July 2, 2015), <http://www.ncsl.org/research/transportation/2014-state-unmanned-aircraft-systems-uas-legislation.aspx> [<https://perma.cc/6HB2-RGPB>] (listing Alaska, Indiana, Iowa, North Carolina, Utah, and Wisconsin as requiring a warrant); *Current Unmanned Aircraft State Law Landscape*, *supra* note 15 (stating that Maine and Virginia also require warrants).

162. *See* MCNEAL, *supra* note 17, at 2 n.6 (quoting ACLU advocate who states that the ACLU wants legislation that covers all manner of surveillance, but “right now we have an opportunity to get in place some rules around drones because there is so much public interest and fascination with drones . . . so we are pushing forward on that front”); *cf.* Laura Wagner, *North Dakota Legalizes Armed Police Drones*, NPR (Aug. 27, 2015, 7:16 PM), <http://www.npr.org/sections/thetwo-way/2015/08/27/435301160/north-dakota-legalizes-armed-police-drones> [<https://perma.cc/2H6E-R6YT>] (reporting that bill originally prohibited use of all weapons on law enforcement UAVs, but as a compromise to include provision that required search warrants to protect citizens' privacy, the legislation as passed permits the use of “tear gas, rubber bullets, beanbags, pepper spray and Tasers” as well as other “less than lethal” weapons).

163. H.R. 2774, 64th Leg., Reg. Sess. (Wash. 2016); S. 6437, 64th Leg., Reg. Sess. (Wash. 2016); H.R. 1093, 64th Leg., Reg. Sess. (Wash. 2015); H.R. 1639, 64th Leg., Reg. Sess. (Wash. 2015); H.R. 2016, 64th Leg., Reg. Sess. (Wash. 2015); S. 5499, 64th Leg., Reg. Sess. (Wash. 2015); S. 5714, 64th Leg., Reg. Sess. (Wash. 2015); H.R. 2178, 63d Leg., Reg. Sess. (Wash. 2014); H.R. 2179, 63d Leg., Reg. Sess. (Wash. 2014); H.R. 2789, 63d Leg., Reg. Sess. (Wash. 2014); H.R. 1771, 63d Leg., Reg. Sess. (Wash. 2013).

164. Wash. H.R. 1639; Wash. H.R. 2016; Wash. H.R. 2789; Wash. H.R. 1771.

acting as managers of public welfare while still protecting citizens' privacy from invasion by law enforcement agencies. As of the end of the 2016 regular session, legislators proposed two more UAV related bills but did not pass any measure.¹⁶⁵

A. *2013 Legislative Session: Washington Legislators React to the Public's Privacy Concerns*

Shortly after the federal government passed the FAA Modernization and Reform Act, Washington representatives introduced the State's first legislation that would heavily restrict public UAV use.¹⁶⁶ Part of the legislature's purpose in proposing the bill was to avoid liability for state and local jurisdictions that may result from a "lack of clear statutory authority for the use of [UAVs]."¹⁶⁷ Public testimony in support of the bill contended that "[c]itizens deserve protection from the state from use of taxpayer funds for invasion of privacy."¹⁶⁸ Some even went so far as to say that "[u]nregulated drone use would make the government into a despotism."¹⁶⁹ Supporters echoed the common belief that there would be increased surveillance because UAVs are "different than helicopters because they are cheaper, less noticeable to the public, and have no risk, unlike putting an officer up in the air."¹⁷⁰

Those testifying in opposition to the legislation—the Washington Association of Sheriffs and Police Chiefs, the Washington Association of County Officials, the Association for Unmanned Vehicle Systems International, and Innovate Washington—noted the "huge lifesaving possibilities" of the devices and expressed frustration over the "false difference between [UAVs] and other technology" because none of these restrictions¹⁷¹ were "in place for any other kinds of aircraft."¹⁷² On a

165. Wash. H.R. 2774; Wash. S. 6437.

166. See *HB 1771: Establishing Standards for the Use of Public Unmanned Aircraft Systems*, DETAILED LEGIS. REP. – BILL SUMMARY, <https://app.leg.wa.gov/DLR/billsummary/default.aspx?year=2013&bill=1771> [<https://perma.cc/WAC6-F53C>] (last visited Mar. 26, 2016) (indicating the bill was first introduced on February 8, 2013).

167. Wash. H.R. 1771, at 2 (substitute bill).

168. H. 63-1771, Reg. Sess., at 6 (Wash. 2013) (substitute bill). Groups testifying in support of the bill included King County Sheriff's Office, El Comité, Council on American-Islamic Relations of Washington State, Washington Farm Bureau, and Libertarian Party of Washington. *Id.*

169. *Id.*

170. *Id.* at 5–6.

171. See *infra* notes 184–205 and accompanying text.

172. Wash. H. 63-1771, at 6–7 (substitute bill).

national scale, at least one scholar has observed this false dichotomy.¹⁷³

These legislative efforts have been aimed at restricting the government's use of [UAV] technology, while largely allowing the government to conduct identical surveillance when not using [UAV] technology. This absurd anachronism is intentional, as privacy advocates have explicitly chosen to capitalize on the public interest and attention associated with the demonization of [UAV] technology as a way to achieve legislative victories.¹⁷⁴

After reintroduction during both the first and third special sessions of the 2013 legislative session, the bill was returned to the Rules Committee early during the 2014 legislative session and did not progress further.¹⁷⁵

B. 2014 Legislative Session: Restrictive Legislation

During the 2014 legislative session, Representative David Taylor, with the support of the Washington chapter of the American Civil Liberties Union (ACLU),¹⁷⁶ introduced another bill that would institute strict guidelines for Washington State agency use of UAVs.¹⁷⁷ Representative Taylor proposed the legislation to establish “guardrails”¹⁷⁸ that would control and prevent fishing expeditions¹⁷⁹ and preserve privacy protection for Washingtonians.¹⁸⁰ The legislation, which had bipartisan support,¹⁸¹ passed both houses,¹⁸² but Governor Inslee vetoed the bill in April 2014.¹⁸³

173. See generally MCNEAL, *supra* note 17.

174. *Id.* at 2.

175. See *HB 1771: Establishing Standards for the Use of Public Unmanned Aircraft Systems*, *supra* note 166.

176. *Legislature Passes Bill to Regulate Government Drone Use*, AM. CIV. LIBERTIES UNION WASH. ST. (Mar. 12, 2014), <https://aclu-wa.org/news/legislature-passes-bill-regulate-government-drone-use> [<https://perma.cc/95NM-PQDN>].

177. H.R. 2789, 63d Leg., Reg. Sess. (Wash. 2014).

178. *H. Floor Deb. on H.R. 2789*, 63d Leg., Reg. Sess. (Feb. 17, 2014), <http://www.tvw.org/watch/?customID=2014020124> (statement of Rep. Jeff Morris); *Hearing on H.R. 2789 Before the S. Law & Justice Comm.*, 63d Leg., Reg. Sess. (Feb. 26, 2014), <http://www.tvw.org/watch/?eventID=2014021412> (statement of Rep. Jeff Morris) (engrossed bill).

179. *H. Floor Deb. on H.R. 2789*, *supra* note 178 (statement of Rep. Roger Goodman).

180. *Task Force June 30*, *supra* note 63 (statement of Shankar Narayan, Legislative Director at the ACLU of Washington).

181. S. 63-2789, Reg. Sess., at 4 (Wash. 2014) (engrossed bill).

182. Wash. H.R. 2789 (engrossed bill); see also H. 63-2789, Reg. Sess., at 4 (Wash. 2014) (final bill report).

183. Letter from Jay Inslee, Governor, Wash., to the Honorable Speaker and Members, The House of Representatives of the State of Wash. (Apr. 4, 2014), http://www.governor.wa.gov/sites/default/files/documents/2014_veto/2789.pdf [<https://perma.cc/AP3L-K94R>] [hereinafter *Veto*].

The legislation broadly addressed technology-enhanced government surveillance¹⁸⁴ so that as other technologies came onto the market, they could be regulated within the framework¹⁸⁵ of this bill instead of needing a separate bill to govern everything that was not considered a UAV.¹⁸⁶ Thus, when first introduced, the bill defined an “extraordinary sensing device” as an “unmanned aircraft system.”¹⁸⁷ After testimony in committee hearings expressed concern over the ambiguity of that definition,¹⁸⁸ the bill was amended to specify that an extraordinary sensing device was the sensing device *attached to* the UAV.¹⁸⁹ A “sensing device” was further defined as a “device capable of remotely acquiring personal information from its surroundings, using any frequency of the electromagnetic spectrum, or a sound detecting system.”¹⁹⁰ But a sensing device did not include equipment that was only needed to “provide information necessary for safe air navigation or operation of a vehicle.”¹⁹¹ The bill also contained a detailed three-part definition for “personal information” that encompassed “anything about a person” that described, located, or indexed that person, with a nonexclusive list of items ranging from social security numbers and other identifying numbers to “real or personal property holdings derived from tax returns” to medical history and even “intellectual property, trade secrets, proprietary information, or operational information.”¹⁹² The definition also extended to all information that:

(b) Afford[ed] a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to

Letter].

184. Wash. H.R. 2789, at 1 (engrossed bill).

185. *H. Floor Deb. on H.R. 2789*, *supra* note 178 (statement of Rep. Norma Smith); *Hearing on H.R. 2789 Before the S. Law & Justice Comm.*, *supra* note 178 (statement of Shankar Narayan, Legislative Director at the ACLU of Washington).

186. *Hearing on H.R. 2789 Before the S. Law & Justice Comm.*, *supra* note 178 (statements of Rep. Jeff Morris and Shankar Narayan, Legislative Director at the ACLU of Washington).

187. Wash. H.R. 2789, § 2(4). The legislation treats the terms UAS and UAV interchangeably, but the industry recognizes that the UAS is the broader system and the UAV is the device that operates within the system. *See* INTEGRATION ROADMAP, *supra* note 7, at 7 (“Today, the term UAS is used to emphasize the fact that separate system components are required to support airborne operations without a pilot onboard the aircraft.”); PERCEPTIONS & POTENTIAL, *supra* note 23, at 3 (stating that UAVs are the “flying component of an unmanned aircraft system”).

188. *Hearing on H.R. 2789 Before the S. Law & Justice Comm.*, *supra* note 178 (statement of Nancy Bickford, Intergovernmental Affairs & Policy Office for Washington Military Department).

189. Wash. H.R. 2789, § 2(3) (engrossed bill).

190. *Id.* § 2(6)(a).

191. *Id.* § 2(6)(b).

192. *Id.* § 2(5)(a)(i)–(ii).

such person; and the record of the person's presence, registration, or membership in an organization or activity, or admission to an institution; or (c) Indexe[d] anything about a person including, but not limited to, his or her activities, behaviors, pursuits, conduct, interests, movements, occupations, or associations.¹⁹³

The bill was intended to regulate agencies' procurement and use of UAVs as well as reporting requirements when the devices were used.¹⁹⁴ Under this bill, for an agency to procure a UAV, money had to be "expressly appropriated by the legislature for this specific purpose."¹⁹⁵ Overall, the bill was restrictive and required a search warrant¹⁹⁶ for almost all uses except for (1) emergency situations that met certain requirements,¹⁹⁷ (2) non-regulatory enforcement operations¹⁹⁸ that were not intended to and were unlikely to collect personal information accidentally, (3) military training exercises, conducted on a military base, that did not collect personal information from people who were not on the military base, (4) "training, testing, or research purposes by an agency" that did not collect personal information unless the person had provided written consent, or (5) emergency or disaster response "for which the governor ha[d] proclaimed a state of emergency under RCW 43.06.010(12)."¹⁹⁹ The non-regulatory enforcement operations, with which this Comment is chiefly concerned, were limited to only four uses:

(a) [m]onitoring to discover, locate, observe, and prevent forest fires; (b) [m]onitoring an environmental or weather-related catastrophe or damage from such an event; (c) [s]urveying for wildlife management, habitat preservation, or environmental damage; and (d) [s]urveying for the assessment and evaluation of environmental or weather-related damage, erosion, flood, or

193. *Id.* § 5(b)–(c).

194. *Hearing on H.R. 2789 Before the S. Law & Justice Comm., supra* note 178 (statement of Rep. David Taylor).

195. Wash. H.R. 2789, § 4(1) (engrossed bill).

196. *Id.* § 7.

197. *Id.* § 9(1)(a)–(c) (qualifying an emergency situation as one that "[d]oes not involve criminal activity, unless exigent circumstances exist; [p]resents immediate danger of death or serious physical injury to any person; and [h]as characteristics such that operation of a[] [UAV] can reasonably reduce the danger of death or serious physical injury").

198. This language is used here to mirror the language of the legislation. It is equivalent to the non-law enforcement agency or agencies working in their capacities as managers of public welfare language that has been used previously throughout this Comment.

199. *Id.* § 9(2)–(5).

contamination.²⁰⁰

By trying to limit law enforcement agencies' ability for constant surveillance of the public, the bill severely limited the ways in which non-law enforcement agencies could use the devices in their capacities as managers of public welfare.²⁰¹ The legislation also required that all operations, whether authorized by search warrant or exempted under section 9,²⁰² be conducted so that collection and disclosure of personal information was minimized.²⁰³ Furthermore, section 16 of the proposed legislation provided maintenance guidelines for records of every use of a UAV²⁰⁴ and outlined the minimal information that must be included in an annual report.²⁰⁵ The legislation easily passed both houses.²⁰⁶

Notwithstanding the clause in section 13 that preserved an agency's obligations to disclose public records per Washington's Public Records Act,²⁰⁷ Governor Inslee decided that the retention requirements for footage captured by UAVs conflicted with disclosure requirements of the Public Records Act.²⁰⁸ The Governor also expressed concern over the bill's effect on the open view and plain view doctrines²⁰⁹ as well as the expansive personal information definition.²¹⁰ Governor Inslee

200. *Id.* § 9(2)(a)–(d).

201. *Task Force June 30, supra* note 63 (statement of Jessica Archer, Assessment and Policy Coordinator at Ecology). As just one example, if enacted into law, this bill would have inhibited Ecology's ability to purchase survey data from independent contractors, significantly increasing the price of obtaining some data by itself.

202. *See supra* notes 197–200 and accompanying text.

203. Wash. H.R. 2789, § 6 (engrossed bill). For personal information that was collected in accordance with restrictions set forth in the bill, it could “not be used, copied, or disclosed for any purpose after the conclusion of the operation, unless there [wa]s probable cause that the personal information [wa]s evidence of criminal activity.” *Id.* § 13(1).

204. *Id.* § 16.

205. *Id.* § 16(1)(a)–(h).

206. H. 63-2789, Reg. Sess., at 4 (Wash. 2014) (final bill report).

207. Wash. H.R. 2789, § 13(1) (engrossed bill) (“Nothing in this act is intended to expand or contract the obligations of an agency to disclose public records as provided in chapter 42.56 RCW.”).

208. Veto Letter, *supra* note 183.

209. *See Governor Task Force on Unmanned Aircraft Systems*, TVW (Oct. 13, 2014), <http://www.tvw.org/watch/?eventID=2014101040>; *supra* note 54 (discussing plain view and open view doctrines).

210. Veto Letter, *supra* note 183. As indicated by the discussion above, *see supra* notes 192–93 and accompanying text, the personal information definition covered almost everything that could conceivably be used to identify an individual. In contrast, Washington's constitutional privacy protection under article I, section 7, *see supra* notes 40–59 and accompanying text, extends only to “information obtained . . . [that] reveals intimate or discrete details of a person's life,” *State v. Haq*, 166 Wash. App. 221, 257, 268 P.3d 997, 1015 (2012) (citation and quotation omitted) (first alteration in original).

appreciated the importance of the bill and considered vetoing only certain sections of it, but taken together, the concerns were too great, and he decided to veto the legislation as a whole.²¹¹ To determine if a better middle ground existed than the proposed bill, he convened a special task force to complete a thorough examination of the public's privacy concerns and the agencies' needs.²¹²

C. 2015 Legislative Session: A Slightly More Permissive Approach

Following the Governor's task force meetings in the summer and fall of 2014, during which no consensus was reached, legislators opened the 2015 session with a flurry of UAV bills.²¹³ In this session, Representative Taylor and the ACLU collaborated on House Bill 1639.²¹⁴ Although still requiring legislative permission to procure UAVs²¹⁵ and search warrants for most uses²¹⁶—except emergency circumstances²¹⁷ and instances in which there was no intent to gather personal information²¹⁸—this legislation did attempt to reach a middle ground more palatable to non-law enforcement agencies.²¹⁹ The bill also tried to dial back the expansive personal information definition,²²⁰ but some still believed the definition reached too far in including “information obtained from a particular vehicle or particular residence,

211. Veto Letter, *supra* note 183.

212. *Id.*; see also Tom Banse, *State Task Force Starts Work on New Drone Regulations in Washington*, NW NEWS NETWORK (June 30, 2014, 3:44 PM), <http://nwnewsnetwork.org/post/state-task-force-starts-work-new-drone-regulations-washington> [https://perma.cc/A4ZG-Q9PN].

213. H.R. 1093, 64th Leg., Reg. Sess. (Wash. 2015); H.R. 1639, 64th Leg., Reg. Sess. (Wash. 2015); H.R. 2016, 64th Leg., Reg. Sess. (Wash. 2015); S. 5499, 64th Leg., Reg. Sess. (Wash. 2015); S. 5714, 64th Leg., Reg. Sess. (Wash. 2015).

214. *Hearing on H.R. 1639 Before the H. Pub. Safety Comm.*, 64th Leg., Reg. Sess. (Feb. 4, 2015), <http://www.tvw.org/watch/?customID=2015021038>.

215. Wash. H.R. 1639, § 3(1).

216. *Id.* § 8.

217. *Id.* § 9.

218. *Id.* § 7.

219. See *Hearing on H.R. 1639 Before the H. Pub. Safety Comm.*, *supra* note 214 (statement of Shankar Narayan, Legislative Director at the ACLU of Washington) (noting that if not collecting personal information there is a “huge carve out” for warrantless use). Compare Wash H.R. 1639, § 7(1) (permitting UAV use without a search warrant “if the agency reasonably determines that the operation does not intend to collect personal information”), with *id.* § 8(1) (allowing disclosure of personal information gathered using a UAV “if the operation and collection of personal information [are] pursuant to a search warrant . . . and the operation, collection, and disclosure are compliant with the provisions of this chapter”).

220. See Wash. H.R. 1639, § 2(5).

including the curtilage thereof, relating to that individual.”²²¹

Nevertheless, the Governor’s Office and some members of the task force felt House Bill 1639 focused too much on the UAV technology rather than information that might be gathered.²²² This contingent introduced House Bill 2016 later in the session.²²³ House Bill 2016 raised its own concerns, as it appeared to negate the exclusionary rule,²²⁴ which is the only protection provided by article I, section 7 of Washington State’s constitution.²²⁵ It also created an awkward situation for DFW and other agencies with enforcement branches. This permissive legislation would have allowed an agency “not acting as a law enforcement agency” to use a UAV without obtaining a search warrant, as long as it met certain requirements.²²⁶ The next section of the bill placed some restrictions—including the need to obtain a search warrant—on a law enforcement agency using a UAV “in furtherance of an administrative, civil, or criminal investigation.”²²⁷

At first glance, this would seem to solve the problems on which this Comment has focused. Unfortunately, these two sections taken together created a situation where an agency with an enforcement branch, like DNR or DFW, would have to obtain a warrant to get information from

221. *Id.* Jessica Archer with Ecology testified that a boat, even in public waters, would be considered personal information with the definition as written. *See Hearing on H.R. 1639 Before the S. Law & Justice Comm.*, 64th Leg., Reg. Sess. (Mar. 17, 2015), <http://www.tvw.org/watch/?customID=2015030140>.

222. *Hearing on H.R. 1639 Before the H. Pub. Safety Comm.*, *supra* note 214 (statement of Sandy Mullins, Governor’s Senior Policy Advisor for Government Operations and Public Safety); *see also Hearing on H.R. 2016 Before the H. Pub. Safety Comm.*, 64th Leg., Reg. Sess. (Feb. 18, 2015), <http://www.tvw.org/watch/?customID=2015020190> (statement of Rep. Brad Klippert) (remarking that the majority of the task force supported the language of House Bill 2016).

223. *HB 2016: Concerning Unmanned Aerial Vehicles*, DETAILED LEGIS. REP. – BILL SUMMARY, <https://app.leg.wa.gov/dlr/bills/summary/default.aspx?year=2015&bill=2016> [<https://perma.cc/44RB-DYNG>] (last visited Mar. 26, 2016).

224. *Hearing on H.R. 2016 Before the H. Pub. Safety Comm.*, *supra* note 222 (statement of Bob Cooper, Washington Association of Criminal Defense Lawyers). Specifically, the proposed bill allowed an agency to use a UAV without obtaining a warrant. *See* H.R. 2016, 64th Leg., Reg. Sess. § 3(2) (Wash. 2015). Furthermore, if during the warrantless use of the UAV the agency “inadvertently or unintentionally collect[ed] information of an individual as a result of an intrusion on the private affairs of a person,” the bill allowed the agency to use that information if the agency “obtained an order from a court of competent jurisdiction.” *See id.* The court would issue the order if the agency “show[ed] by clear and convincing evidence that (a) the collection of the information was unintentional or inadvertent, (b) the agency followed the minimization policies and protocols . . . , and (c) it ha[d] a compelling interest in use of the information.” *Id.*

225. *See State v. Hinton*, 179 Wash. 2d 862, 869 n.2, 319 P.3d 9, 12 n.2 (2014) (“Generally, article I, section 7 rights may be enforced by exclusion of evidence . . .”).

226. Wash. H.R. 2016, § 3.

227. *Id.* § 4.

itself. The bill required that a law enforcement agency obtain a warrant if it sought information that an agency *not acting* as a law enforcement agency had collected using a UAV.²²⁸ The section specific to agencies not acting as law enforcement agencies did not require a warrant for UAV use unless article I, section 7 of Washington State's constitution or some other applicable law or rule required it.²²⁹ Even with this illogical and inconvenient outcome, DFW personnel preferred this bill to Representative Taylor's House Bill 1639.²³⁰

Despite having the majority of the task force members' support,²³¹ House Bill 2016 was not reported out of the House Public Safety Committee.²³² Instead, parts of it were incorporated into Engrossed Substitute House Bill 1639, which passed the House on March 4, 2015.²³³ The Senate passed it on April 15, 2015, after adopting floor amendments, and at the end of the 2015 Regular Session, the bill was back in the House and referred to the Rules Committee.²³⁴

IV. WASHINGTON AGENCIES ACTING AS MANAGERS OF PUBLIC WELFARE SHOULD HAVE BROAD PERMISSIONS FOR UAV USE

This Comment has shown that although some of the public's privacy concerns are valid,²³⁵ focusing too much on protecting privacy can lead to forgone benefits²³⁶ and unintended consequences.²³⁷ It is important that Washington State adopt legislation that carefully balances the benefits of state agency use of UAVs when acting in their capacities as managers of public welfare with the need to place some restrictions on law enforcement agency use of the devices. This Part suggests language

228. *See id.* § 4(2)(b).

229. *Id.* § 3.

230. *Hearing on H.R. 2016 Before the H. Pub. Safety Comm., supra* note 222 (statement of Joanna Eide, Former Criminal Justice Liaison/Regulations Coordinator at DFW).

231. *See Hearing on H.R. 2016 Before the H. Pub. Safety Comm., supra* note 222 (statement of Rep. Brad Klippert) (stating that the majority of the task force supported the language of House Bill 2016).

232. *HB 2016: Concerning Unmanned Aerial Vehicles, supra* note 223.

233. *HB 1639: Concerning Technology-Enhanced Government Surveillance*, DETAILED LEGIS. REP. – BILL SUMMARY, <https://app.leg.wa.gov/dlr/bills/summary/default.aspx?year=2015&bill=1639> [<https://perma.cc/9NLM-93G8>] (last visited Mar. 26, 2016).

234. *Id.*

235. *See, e.g., supra* notes 33–36 and accompanying text.

236. *See supra* Part II.

237. *See Wagner, supra* note 162 (reporting on North Dakota bill that allowed UAVs to be equipped with “less than lethal” weapons in order to preserve the search warrant requirement).

that would adequately balance these needs while still protecting citizens' privacy. It combines pieces of Engrossed Substitute House Bill 1639 and House Bill 2016.²³⁸ A bill drafted from this language should ensure that agencies like DNR, DFW, and Ecology realize the benefits of UAVs in their capacities as managers of public welfare while still protecting citizens from privacy invasion by law enforcement agencies.

A. *Definitions*

Given this Comment's focus on law enforcement versus non-law enforcement agency functions, it is appealing to simply define the agencies as either law enforcement or non-law enforcement and split the UAV requirements along that line as House Bill 2016 did.²³⁹ Unfortunately, as previously discussed,²⁴⁰ that dichotomy creates challenges for agencies like DNR and DFW that have enforcement branches. Accordingly, the legislation should define "agency" as:

- (a) The state of Washington, its agencies and political subdivisions, a city, county, or municipal authority, excluding the national guard in Title 32 U.S.C. service.
- (b) Any entity or individual, whether public or private, with whom any of the entities identified in (a)(i) of this subsection has entered into a contractual relationship or any other type of relationship, with or without consideration, for purposes of operating a[] [UAV].²⁴¹

In addition, the legislation should adopt the FAA's definitions for unmanned aircraft and unmanned aircraft system and abandon the unnecessarily confusing "extraordinary sensing device" language. It is

238. This Comment addresses only the portions of these proposed pieces of legislation that most directly affect the balance between allowing agencies to reap the benefits of UAV use while still protecting citizens' privacy.

239. H.R. 2016, 64th Leg., Reg. Sess. §§ 3–4 (Wash. 2015).

240. See *supra* notes 226–29 and accompanying text.

241. Wash. H.R. 2016, § 2(1)(a)(i)–(ii). Section (b) is necessary because, once the FAA's proposed rules for small civil UAVs are finalized, see Operation and Certification of Small Unmanned Aircraft Systems, 80 Fed. Reg. 9544 (proposed Feb. 23, 2015) (to be codified at 14 C.F.R. pts. 21, 43, 45, 47, 61, 91, 101, 107, and 183), some agencies might contract with private sector UAV operators to obtain aerial footage, rather than purchase the UAV to get the footage themselves, see *Task Force August 11*, *supra* note 109 (statement of Jessica Archer, Assessment and Policy Coordinator at Ecology) (discussing possibility that Ecology might purchase data sets from someone who used a UAV to compile the data or hire a group to research the water temperatures in area streams). This is yet another cost-saving mechanism for cash-strapped agencies. See *Hearing on H.R. 2016 Before the H. Pub. Safety Comm.*, *supra* note 222 (statement of Jessica Archer, Assessment and Policy Coordinator at Ecology) (opining that UAVs are a good alternative when the agency cannot afford the "\$1500 an hour that a plane typically costs").

likely that the legislators decided to use this language to prevent agencies from using a manned aircraft to do the very thing that the UAV legislation is trying to prohibit.²⁴² “Extraordinary sensing device” is also reminiscent of the *State v. Young* decision. That case distinguished between devices, which provided “sense-enhancing capabilit[ies],” that reveal information that could be obtained without the device as opposed to those that “expose information that could not have been obtained without the device.”²⁴³ However, the current definition of “extraordinary sensing device” is restricted to a device “attached to or used in conjunction with” a UAV and likely includes even a simple camera.²⁴⁴ Therefore, to avoid confusion, the legislature should use the definition for unmanned aircraft and unmanned aircraft system provided by the FAA.²⁴⁵ This approach also allows the Washington courts to determine on a case-by-case basis if the technology with which the UAV is equipped rises to the level of “expos[ing] information that could not have been obtained without the device.”²⁴⁶

The personal information definition from the proposed 2015 legislation is more reasonable than that used in the 2014 legislation that Governor Inslee vetoed,²⁴⁷ but some agencies continue to express concerns,²⁴⁸ especially relating to information obtained from a vehicle with no location restrictions.²⁴⁹ The definition should be revised to

242. See *supra* note 174 and accompanying text.

243. *State v. Young*, 123 Wash. 2d 173, 183 n.1, 867 P.2d 593, 598 n.1 (1994); see also *supra* notes 56–60 and accompanying text.

244. H.R. 1639, 64th Leg., Reg. Sess. § 2(3) (Wash. 2015) (engrossed substitute bill) (“[A] sensing device attached to or used in conjunction with an aircraft that is operated without the possibility of human intervention from within or on such aircraft, together with its associated elements.”). “Sensing device” is further defined as “a device capable of remotely acquiring personal information from its surroundings” but “does not include equipment whose sole function is to provide information directly necessary for safe air navigation or operation of a vehicle.” *Id.* § 2(6)(a)–(b).

245. FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 331(8), 126 Stat. 11, 72 (2012) (to be codified in scattered sections of 49 U.S.C.) (defining unmanned aircraft as “an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft”); *id.* § 331(9), 126 Stat. at 72 (defining unmanned aircraft system as the “unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system”).

With the removal of the “extraordinary sensing device” language, that would also eliminate the need for a definition of “sensing device.” See Wash. H.R. 1639, § 2(6) (engrossed substitute bill).

246. *Young*, 123 Wash. 2d at 183 n.1, 867 P.2d at 598 n.1.

247. See *supra* notes 192–93 and accompanying text.

248. See *supra* note 221 and accompanying text.

249. Wash. H.R. 1639, § 2(5)(d) (engrossed substitute bill).

specify that the information about an individual obtained from a vehicle while using a UAV is considered personal information only if that vehicle is parked near the person's residence and possibly their workplace. This revised definition would likely appease those still concerned with the reach of the definition proposed in the 2015 legislation. Utilizing more precise definitions will give the agencies more certainty in their UAV use, which will ultimately serve to protect citizens' privacy because the agencies will likely know exactly what they can and cannot do rather than worry over whether they are complying with unwieldy definitions.

B. Permission to Use UAVs

To reach the goal of allowing beneficial uses while limiting uses that potentially invade people's privacy, the legislation should not include a provision requiring express legislative permission before procuring a UAV.²⁵⁰ Until the FAA issues its standards for operation and certification for public UAVs,²⁵¹ public entities, regardless of whether they are acting as law enforcement agencies, will continue to apply for COAs to receive approval to operate the UAVs in the national airspace.²⁵² Thus, the extensive nature of the COA application will restrict agency use of UAVs.²⁵³

Because the legislation cannot adequately distinguish between law enforcement agency use and agency use in their capacities as managers of public welfare through a definition,²⁵⁴ it must develop another way to allow agencies to realize the substantial benefits of UAV use without unduly jeopardizing citizens' privacy rights. Emphasizing whether or not the agency intends to collect personal information achieves that goal.²⁵⁵ By worrying about privacy invasions, Washingtonians have expressed anxiety about any and all UAV information gathering, regardless of its extent or the agency involved.²⁵⁶ If the legislation allowed broad warrantless use for agencies monitoring forest fires, monitoring damage from environmental and weather-related events, or "[s]urveying for

250. *Id.* § 5.

251. FAA Modernization and Reform Act § 334(b), 126 Stat. at 76.

252. *See supra* notes 153–56 and accompanying text.

253. *See supra* note 155.

254. *See supra* notes 239–41 and accompanying text.

255. *See* Wash. H.R. 1639, § 7 (engrossed substitute bill).

256. *See supra* note 63 and accompanying text.

wildlife management, habitat preservation, or environmental damage,”²⁵⁷ those actions are unlikely to collect personal information. And even if they do collect personal information, the legislation could mandate that:

No agency may make any effort to identify an individual from the information collected by the operation or to associate any information collected by the operation with a particular individual, nor shall the information be disclosed to a third party unless that party agrees to be bound by the same restrictions. These restrictions shall not apply if there is probable cause that the information is evidence of criminal activity [or a regulatory violation].²⁵⁸

For purposes expressly meant to gather personal information to investigate criminal activity or a regulatory violation, the legislation could create a separate requirement that agencies obtain a search warrant.²⁵⁹ The proposed bill could also provide some assurance for agencies needing to use a UAV to investigate criminal activity or a regulatory violation through a section authorizing action without a search warrant in exigent circumstances.²⁶⁰

To ensure the most privacy protection, where agencies like DNR, DFW, or Ecology are using UAVs without the intention of gathering personal information, those agencies should look to common law privacy jurisprudence to guide the policies they adopt for use of the devices.²⁶¹ And citizens should rest assured that where personal information is inadvertently gathered, without authority of law like a warrant, it will not be used.²⁶² Notwithstanding these robust, general privacy protections, the proposed legislation could adopt the “belt and suspenders” approach and provide that:

Whenever any personal information from a[] [UAV] has been

257. See Wash. H.R. 1639, § 7(1)(a)–(c) (engrossed substitute bill).

258. *Id.* § 7(2).

259. See *id.* § 9.

260. See *id.* § 8. Legislation using this language would even cover the hypothetical situation where DFW accidentally gathers footage of hunters while out monitoring remote lands. See *supra* notes 109–10 and accompanying text. Unless there was probable cause to think that the hunters were engaged in criminal activity or violating the terms of their hunting license (a regulatory violation), DFW could not try to identify the hunters. See *supra* note 258 and accompanying text. At the same time these provisions avoid the awkward situation of requiring DFW to obtain a warrant for its own footage, see *supra* notes 226–29 and accompanying text, while still allowing DFW, and other agencies with an enforcement branch, to realize the benefits of UAV use for their environmental protection missions.

261. See *supra* Section I.C.; *infra* notes 266–68 and accompanying text.

262. See *supra* Section I.B.

acquired, no part of such personal information and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state or a political subdivision thereof if the collection or disclosure of that personal information would be in violation of this subchapter.²⁶³

Furthermore, after all these allowances for agencies, the legislation could go a step further than the common law privacy provisions or the constitutional provisions and expressly provide that a person who has been injured through a violation of this legislation could sue for damages and even recover attorneys' fees and litigation costs.²⁶⁴

C. *Guidelines for Agency UAV Operations*

The permissive approach to Washington State agency UAVs will be more acceptable to Washington citizens if they are well informed about when, where, and how agencies will use UAVs. To that end, any final legislation should contain some express guidelines with which agencies must comply to be able to operate UAVs.²⁶⁵

One such set of guidelines would outline the necessary policies and procedures that agencies must adopt before using UAVs. Any proposed bill should include a section outlining the creation of a website that would act as a repository for all the agencies' written policies and procedures for UAV use.²⁶⁶ This section of the proposed legislation would require disclosure of (1) the purpose for which the UAV is used, (2) the personal information, if any, the agency intends to collect as well as how the agency plans to use that information, (3) policies and procedures that the agency will use to minimize the collection of personal information, including how the agency will protect the personal information once it is collected, and (4) the identity of a contact person for "citizen complaints and concerns regarding the agency's use and operation" of the UAV.²⁶⁷ As an added protection for citizens' privacy rights, the agency must "provide notice and opportunity for public

263. Wash. H.R. 1639, § 11 (engrossed substitute bill).

264. *Id.* § 12.

265. Agencies could also reduce anxiety by engaging in a media campaign to let citizens know about the numerous beneficial uses and money-saving advantages of UAVs. However, this Comment only suggests the minimum that the agencies should be legally required to maintain to inform the citizenry.

266. *See id.* § 4; H.R. 2016, 64th Leg., Reg. Sess. § 3(1) (Wash. 2015).

267. Wash. H.R. 1639, § 4 (engrossed substitute bill).

comment prior to adoption of the[se] written policies and procedures.”²⁶⁸

In addition to providing citizens with the assurance that the agencies are not misusing UAVs, the policies and procedures give the agencies a guarantee as well. As discussed above,²⁶⁹ the agency must adopt policies and procedures specific to minimizing extraneous collection of personal information.²⁷⁰ The proposed bill would establish a rebuttable presumption that if the agency adopts those minimization protocols and adheres to them, then the agency complied with the requirement to minimize unnecessary collection of personal information.²⁷¹ Although the “presumption can be overcome by clear and convincing evidence to the contrary,”²⁷² the agencies still get the peace of mind of knowing that compliance with the legislation will help protect them from possibly frivolous suits alleging that an agency did not adequately ensure that the risk of inadvertently collecting personal information was minimal.

It is also important to expressly provide that any personal information that is gathered “may not be used, copied, or disclosed for any purpose after conclusion of the operation for which the [UAV] was authorized, unless there is probable cause that the personal information is evidence of criminal activity.”²⁷³ However, any specific details about how long personal information can be kept on file should not be included in the final legislation.²⁷⁴ One of the reasons that Governor Inslee vetoed the legislation in 2014 was because of conflicting record retention provisions.²⁷⁵ In addition, at least one agency indicated that the retention provisions in the proposed legislation could conflict with criminal

268. *Id.* § 4(1). There is one portion of this provision that should not be included in the final piece of legislation. It is no longer necessary for the state to require UAV registration numbers, *id.* § 4(1)(e), 4(3) (requiring—in two separate parts of the section—that a unique registration number, assigned by the agency for identification purposes, be marked on the UAV), because the FAA now requires that all UAVs, even those used only for hobby or recreation, be registered, which will generate a unique identification number to be affixed to the body of the UAV, *see Press Release – Unmanned Aircraft Registration System Takes Flight*, FED. AVIATION ADMIN. (Dec. 21, 2015), http://www.faa.gov/news/press_releases/news_story.cfm?newsId=19874 [<https://perma.cc/2JTD-ZGJJ>].

269. *See supra* notes 266–67 and accompanying text.

270. *See* Wash. H.R. 1639, § 4(1)(c) (engrossed substitute bill).

271. *Id.* § 6.

272. *Id.*

273. *Id.* § 10(1).

274. *See id.* § 10(2) (requiring personal information be deleted “within thirty days if the personal information was collected on a target of a warrant authorizing” the use of a UAV, or within ten days for personal information collected on anyone else).

275. *See supra* notes 207–08 and accompanying text.

statutes of limitation.²⁷⁶ Removing this part of the proposed legislation avoids confusion for the agencies, which already must comply with record retentions for the Public Records Act.

As one final safeguard to protect citizens' privacy, the legislation should require that the agencies maintain detailed records of their UAV uses.²⁷⁷ Retaining records for UAV use is comparable to the written policies and procedures discussed earlier.²⁷⁸ Documenting information like the purpose for using the UAV²⁷⁹ as well as the type of information collected²⁸⁰ will hold the agencies accountable for their actions. The additional requirement for agencies "having jurisdiction over criminal law or regulatory violation enforcement," such as DFW and DNR, to provide annual reports to the office of financial management²⁸¹ is another precaution that will allow agencies to fully realize the benefits of UAVs while assuring citizens that the utmost care has been taken with their right to be let alone.

CONCLUSION

Washington State legislation that includes language as provided in Part IV of this Comment would strike the important balance between allowing warrantless agency use for operations not intended to gather personal information while maintaining careful oversight of law enforcement operations that are more likely to violate Washingtonians' privacy rights. The draft language employs a more reasonable definition of personal information than the bill Governor Inslee vetoed in 2014.²⁸² It more clearly outlines the steps necessary to adopt required policies and procedures for the public's information.²⁸³ Most importantly, legislation utilizing this language would prioritize non-law enforcement agency use because it lists the section governing non-emergency warrantless uses before the section for uses that require a search warrant

276. See *Hearing on H.R. 1639 Before the S. Law & Justice Comm.*, *supra* note 221 (statement of Joanna Eide, Former Criminal Justice Liaison/Regulations Coordinator at DFW).

277. See Wash. H.R. 1639, § 14 (engrossed substitute bill).

278. See *supra* notes 266–68 and accompanying text.

279. Wash. H.R. 1639, § 14(1)(e) (engrossed substitute bill).

280. *Id.* § 14(1)(d).

281. *Id.* § 14(2), (4). To really dot all the i's and cross all the t's, the legislation should also include a provision that requires any agency using a UAV, regardless of whether they have jurisdiction over criminal or regulatory matters, to maintain and submit an annual report to the office of financial management. See *id.* § 14(3), (4).

282. *Id.* § 2(5) (excluding intellectual property as personal information).

283. *Id.* § 4.

for law enforcement agencies.²⁸⁴

Given law enforcement agencies' potential reach, search warrant requirements for UAV operations, absent exigent circumstances, should be mandated. But forcing agencies not acting in a law enforcement capacity to adhere to the same rules and regulations is unnecessary. For these agencies acting as managers of public welfare and not as law enforcers, a large portion of their UAV use would never obtain information likely to invade a citizen's privacy, and if an operation did gather such information, the agency would probably have no use for it. Agencies like DNR, DFW, and Ecology are more concerned with meeting their goals of protection, sustainability, and enforcement. It is possible to allow wide use by agencies for environmental, natural resource, and wildlife conservation while still protecting citizens' privacy rights.

284. Compare *id.* § 7 (using including, but not limited to language to describe the non-emergency warrantless searches allowed under the statute), and *id.* § 9 (describing search warrant restrictions for UAV use), with H.R. 2789, 63d Leg., Reg. Sess. § 7 (Wash. 2014) (engrossed bill) (allowing operation of UAV if a search warrant is obtained), and *id.* § 9(2) (limiting non-emergency warrantless searches to only four categories).