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Domestic Surveillance Via Drones: Looking Through the Lens of the Fourth Amendment

Dr. Saby Ghoshray[†]

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“Those who would give up essential Liberty, to purchase a little Temporary Safety, deserve neither Liberty nor Safety.”

— Benjamin Franklin¹

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I. INTRODUCTION

Imagine for a moment. A scenic drive along a picturesque highway, it is a vacation, a trip of a lifetime. Suddenly, the serenity of your surrounding is interrupted by a Hellfire missile from a Predator drone. You are obliterated. Again, imagine you are in the seclusion of your fenced in backyard. Lounging, barely clothed, and drenched in suntan lotion, it is your well-earned time off from work. Suddenly, your zone of private reflection is shattered by the buzzing noise of a Hummingbird drone above. Before you can cover up, the high-resolution zoom lens of the drone has already completed its mission—to capture multiple images of sunbathers like yourself. This was a self-led mission by a voyeur rogue law enforcement personnel. Your privacy is obliterated.

This Orwellian dystopia is no imagination. Rather, it may be coming sooner than any of us can imagine. Welcome to the post-modern America—where society may be heading to a fast track dissent into the abyss of limitless government surveillance. The domestic drones have arrived, and they are almost ready to intrude upon our sacrosanct zone of private seclusion.² The above scenarios are certainly not this author’s imagination. They are not bad dreams or morbid fantasies either. Instead, they are based on the recorded incidences of killer drones wreaking havoc in the civilian communities in the rugged mountains of Pakistan, Afghanistan, and Yemen.³ The

Review, Georgetown International Environmental Law Review, Temple Political & Civil Rights Law Review, Fordham International Law Journal, Santa Clara Law Review, Michigan State International Law Journal, Loyola Law Journal, Washburn Law Journal, and Miami Law Review, among others. The author would like to thank Jennifer Schulke for her assistance in legal research and typing of the manuscript. Also to my beautiful children—Shreyoshi and Sayantan, I owe much for their love and support. Dr. Ghoshray can be reached at sabyghoshray@sbcglobal.net.

1. Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), reprinted in 6 THE PAPERS OF BENJAMIN FRANKLIN 238, 242 (Leonard W. Labaree ed., 1963).

2. See Yochi J. Dreazen, *From Pakistan, with Love: The Technology Used to Monitor the Skies over Waziristan Is Coming to Your Hometown*, NAT’L J., Mar. 13, 2011, <http://www.nationaljournal.com/magazine/drones-may-be-coming-to-your-hometown-20110313>.

3. See Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 16, 2009, http://www.nytimes.com/2009/03/17/business/17uav.html?_r=1&hp; see also David Kilcullen & Andrew McDonald Exum, *Death from Above, Outrage Down Below*, N.Y. TIMES, May 16, 2009, <http://www.nytimes.com/2009/05/17/opinion/17exum.html?pagewanted=all> (noting that the use of drones—a type of unmanned aerial vehicle (“UAV”)—in military operations has steadily grown); see also Mary Louise Kelly, *Officials: Bin Laden Running Out of Space to Hide*, NPR, June 5, 2009, <http://www.npr.org/templates/story/story.php?storyId=104938490> (stating that the pace and precision of drone attacks has increased steadily); see generally *Effective Counterinsurgency: The Future of the U.S.-Pakistan Military Partnership: Hearing*

very same drones are now waiting for either a legislative nod or the regulatory approval to begin hovering over the byways and alleys of America. Yet, it seems the national discourse has not awakened to this new reality.

These drones are relatively cheap to build, remotely controlled, and devoid of emotions and physiological limitations. Today's drones can both strike with deadly finality⁴ and peer deep into individual homes with see-through imaging capability,⁵ high-powered zoom lenses,⁶ and night-vision capability.⁷ This emerging new reality will soon be at the horizon of American social landscape for various reasons. First, the public proclamation of success in containing al-Qaeda⁸ has emboldened the current administration. This has created a fertile ground for law enforcement agencies in various states to deploy drones for domestic surveillance.⁹ Second, previously limited as an aid in border protection,¹⁰ drones have now become a desirable necessity for law enforcement across the nation.¹¹ Third, despite the federal

Before the Full Comm. of the Comm. on Armed Serv., 111th Cong. 21 (2009) (statement of David Kilcullen, Partner, Crumpton Group, LLC, Senior Fellow, EastWest Institute, Member of the Advisory Board, Center for a New American Security) (discussing the unpopularity of drone strikes and the casualties caused to civilians when using drones for military purposes).

4. See Drew, *supra* note 3.

5. See Department of Defense Resource Center, *Ground Moving Target Indicator (GMTI) Radar Discrimination of Combatants versus Animals in Severe Clutter*, DARPA, (topic number SB082-019), available at http://www.dodsbir.net/sitis/archives_display_topic.asp?Bookmark=32303; see generally Mathew R. Lopez, Sandia National Laboratories, *Synthetic Aperture Radar Applications* (2005) <http://www.sandia.gov/radar/sarapps.html>; Alicia Tejada, *MIT Develops New Radar Technology: Military Could See Through Walls*, ABC NEWS, Oct. 20, 2011, <http://abcnews.go.com/Technology/radar-technology-mit-walls/story?id=14773871>.

6. See William Saletan, *Nowhere to Hide*, SLATE, Sept. 17, 2008, http://www.slate.com/articles/health_and_science/human_nature/2008/09/nowhere_to_hide.html; See also Greg Miller & Julian E. Barnes, *Special Drones Pursue Militias*, L.A. TIMES, Sept. 12, 2008, <http://articles.latimes.com/2008/sep/12/world/fg-pakistan12>.

7. See Austin Richards, *Digital Reflected-Ultraviolet Imaging*, ADVANCED IMAGING, 18-20 (Apr. 2006) available at <http://www.uvcorder.com/pdf/ADI0406%20Component%2018-20.pdf>.

8. See Fred Lucas, *Obama Has Touted Al Qaeda's Demise 32 Times Since Benghazi Attack*, CNSNEWS.COM, Nov. 1, 2012, <http://cnsnews.com/news/article/obama-touts-al-qaeda-s-demise-32-times-benghazi-attack-0#sthash.s1Q9pRfy.dpuf>.

9. See W.J. Hennigan, *It's a Bird! It's a Spy! It's Both*, L.A. TIMES, Feb. 17, 2011, <http://articles.latimes.com/2011/feb/17/business/la-fi-hummingbird-drone-20110217>; see also Brian Bennett, *Police employ Predator drone Spy planes on home front*, L.A. TIMES, Dec. 10, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-drone-arrest-20111211,0,72624,full.story>.

10. *Id.*

11. See James Nelson, *Utah City May Use Blimp as Anti-Crime Spy in The Sky*, REUTERS, Jan. 16, 2011, <http://www.reuters.com/article/2011/01/16/us-crime-blimp-utah-idUSTRE70F1DJ20110116>; see also Stephen Dean, *Police Line Up to Use Drones on Patrol After Houston Secret Test*, EXAMINER.COM, Jan. 11, 2010,

government's reluctance in allowing pervasive use for fear of aviation safety,¹² recent presidential declarations¹³ and congressional authorization¹⁴ has brought this drone-induced Orwellian dystopia into palpable reality. Domestic drones have the potential to obliterate individual privacy and transmogrify the traditional way of life. Yet, the public hue and cry is well muted. Why? This Article examines the issue in two threads. In the first, it dissects the factors that brought us face-to-face with this impending reality. In the second, it analyzes a set of constitutional, ethical, and philosophical reasons for the illegitimacy of future deployment of domestic drones. Thus, this Article proceeds as follows:

Part II examines the current landscape to identify the socio-legal factors that may have contributed to the emergence of the mindset of domestic surveillance. Identifying the post-9/11 landscape as the primary contributor to an emerging reality of a security-centric society, this Part evaluates how jurisprudence may have attenuated the original understanding of the Fourth Amendment, while enabling the law enforcement framework to rise above individual privacy concerns. Part II also analyzes the reasons and societal factors that have given rise to the sociological apathy towards a growing privacy disaster in our horizon.

Part III examines how the current Fourth Amendment jurisprudence can still be a viable bulwark against an all-pervasive imposition of a drone culture. By analyzing the aspiratory dimensions of the Framers' view and evaluating the continued applicability of older cases in analogues behavior in the post-modern era, this Part identifies why an individual's expectation of privacy when decoupled from the shaping effect of society's mass hysteria may be an objective measure to reject drone surveillance.

Part IV delves into a fundamental analysis of the impending domestic surveillance. By combining social contract theory with the deeper liberty principles espoused by Warren and Brandeis, this Part drives home that individuals in the contemporary American society have a fundamental right and long-standing inheritance to be secure within their private seclusion.

Finally, Part V concludes that the Fourth Amendment jurisprudence may still be robust enough to address complexities arising out of drone sur-

<http://www.examiner.com/article/police-line-up-to-use-drones-on-patrol-after-houston-secret-test>; see also Peter Finn, *Domestic Use of Aerial Drones by Law Enforcement Likely to Prompt Privacy Debate*, WASH. POST, Jan. 23, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204111.html>; see also Neal Ungerleider, *Oklahoma Wants to Reserve Airspace for Drones*, TPM IDEA LAB, July 26, 2011, <http://idealab.talkingpointsmemo.com/2011/07/oklahoma-blocks-off-airspace-for-drones.php>.

12. See Lucas, *supra* note 8.

13. *Id.*

14. *Id.*

veillance and when taken in conjunction with social contract theory, may present a strong rationale for rejecting drones introduction at this time.

II. CANVASSING THE LANDSCAPE—FROM THE PAST TO THE PRESENT

The seduction of drones within the law enforcement parlance is a product of two diverging strands of societal progression—superior technological advancement and debilitating addiction of fear. The use of drones and their superficial success in dealing with terror suspects on foreign shores has jump started this seduction, which unfortunately is unfolding into a future state of affairs that would shrink individual privacy to a non-existent dystopian reality. Despite technology's broader intrusion into our lives, privacy is still recognized as a fundamental life force of human existence. There is a universal recognition of privacy as a necessary stepping-stone for fulfilling the promise of individual liberty.¹⁵ Yet, technology's advancement has allowed individual privacy to rapidly shrink along many dimensions. With the reality of drones buzzing the domestic skylines, the time is now for an introspective look at the emerging chasm between privacy law's inert contour and technology's innovative trajectory.¹⁶ In this evolving reality, mass adoption of drones for law enforcement is simply following the contour of least resistance by developing societal conditions that are conducive to lowering individuals' subjective evaluation of privacy. Will the drone culture destroy individual privacy for the post-modern individual? Is domestic surveillance a constitutionally sanctified governmental intrusion? The facial inconsistency of this new paradigm calls for a re-evaluation of both the constitutional framework and ethical dialectic of this drone-induced privacy intrusion.¹⁷ However, before we do that, let us trace the roots of the culture of fear that enabled where we are today as a society—a society that stands at the precipice of a massive intrusion of our private lives by governmental machineries. This is the shaping effect of 9/11.

15. See Scott Ness, Comment, *The Anonymous Poster: How to Protect Internet Users' Privacy and Prevent Abuse*, 2010 DUKE L. & TECH. REV. 8, ¶ 1 (noting that the right to privacy is recognized in the Universal Declaration of Human Rights).

16. See Saby Ghoshray, *Privacy Distortion Rationale for Reinterpreting the Third-Party Doctrine of the Fourth Amendment*, 13 FLA. COASTAL L. REV. 33 (2011) [hereinafter Ghoshray, *Privacy Distortion Rationale*]. See, e.g., Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 239 (noting we must look at the tension between law and technology more broadly than we have in the past), 241 (noting that the law has fallen behind technology).

17. See generally Ghoshray, *Privacy Distortion Rationale*, *supra* note 16.

A. EXAMINING THE SHAPING EFFECT OF 9/11

The saga of 9/11 is a unique historical event in American history.¹⁸ Its uniqueness is manifested in its ability to inculcate within the social-legal landscape both a perpetual addiction to fear¹⁹ and a faulty perception of American exceptionalism,²⁰ as I have shown elsewhere.²¹ Besides introducing an all-pervasive existential threat, 9/11 introduced a lingering effect on jurisprudence.²² So sweeping is the post-9/11 fear psychosis that a security-centric mass hysteria has percolated from the masses to the military establishment and from the government to the law enforcement.²³ Because of an all-pervasive desire to be insulated from this existential threat, the administration and law enforcement agencies have promoted an environment that has shaped various judicial determinations indexed at advancing the security agenda of law enforcement.²⁴ The natural outcome of the process is a

18. See generally Saby Ghoshray, *Guantánamo: Understanding the Narrative of Dehumanization Through the Lens of American Exceptionalism and Duality of 9/11*, 56 WAYNE L. REV. 163 (2011) [hereinafter Ghoshray, *Guantánamo*] (providing an in-depth discussion of the shaping effect of 9/11).

19. *Id.*

20. This can be understood from the framework of American exceptionalism. A misconstrued notion of “exceptionalism” manifested itself in developing a distorted sense of vulnerability post-9/11, which provoked a mad quest for “invulnerability” within the social construct. While literature is replete with references, the media has carefully crafted the image that “America is a world unto itself,” such that the physical attack of 9/11 magnified multifold in its psychological impact domestically. See Paul Dibb, *America—a World unto Itself*, ON LINE OPINION, Jan. 29, 2007, <http://www.onlineopinion.com.au/view.asp?article=5428>. Despite the advancement of technology narrowing the physical gap between the United States and the rest of the world, America has become both a very *involved, yet surprisingly aloof nation* as it relates to international affairs. Compare Tom Koch, *Care, Compassion, or Cost: Redefining the Basis of Treatment in Ethics and Law*, 39 J.L. MED. & ETHICS 130, 135 (2011) (noting that the United States has spent more than a trillion dollars to support the invasions of Afghanistan and Iraq over the past ten years), with Aya Gruber, *An Unintended Casualty of the War on Terror*, 27 GA. ST. U. L. REV. 299, 302 (2011) (noting that America has become more isolationist after 9/11). This isolationist viewpoint, therefore, not only accentuates America’s sense of vulnerability but also provides a snapshot of how the national collective consciousness may have been manipulated into developing an existential vulnerability, while developing an intensely defeatist attitude that requires an earth-shattering response.

21. See generally Ghoshray, *Guantánamo*, *supra* note 18 (discussing how a flawed conception of exceptionally has entered the contemporary American discourse post 9/11).

22. *Id.* at 261-64 (discussing the illegitimacy of post-9/11 detentions at Guantánamo and subsequent challenges raised at the Supreme Court).

23. *Id.*

24. See Thomas P. Crocker, *Still Waiting for the Barbarians: What is New About Post-September 11 Exceptionalism?*, 19 LAW & LITERATURE 303, 308-09 (2007) (noting that the Supreme Court decisions in *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld* were mere “procedural solutions that leave unasked and unanswered the underlying substantive questions about what is being done through this perhaps new exceptionalism”).

restriction in individual liberty with a concomitant retrenchment of individuals' privacy.²⁵ Against this emerging restrictive covenant of law enforcement, the encroachment upon individual liberty must be recognized. The reality of law enforcement today is premised on a flawed existential need for security,²⁶ which propelled the evolving new reality of domestic surveillance by drones.

B. ATTENUATION OF THE ORIGINAL INTENTION OF THE FOURTH AMENDMENT

Surveillance via drones is a violent assault against individual privacy. The Framers introduced the Fourth Amendment as a constitutional bulwark against privacy violation. It was intended to protect private space and personal property, including an individual's zone of private seclusion. Thus, the original contour of the Fourth Amendment was shaped by the Framers' natural conception of common law. As the Framers were predominantly driven towards prohibiting trespass into an individual's secluded zone of private affairs, they were reluctant to allow law enforcement wider discretion within the search and seizure framework. Unfortunately, various interacting components of privacy, fundamental possessory interest, trespass prohibition, and the warrant requirement posed doctrinal difficulties for the Fourth Amendment jurisprudence. However, later jurisprudence allowed wider latitude in police search and seizure on account of exigencies of situations. Regardless of facial exigencies articulated by law enforcement, allowing domestic surveillance by drones will certainly jeopardize such trespass barriers, which until now has been solemnized in law as a constitutional inheritance of the U.S. citizen. As the post-9/11 societal landscape continues to dilute the various sacrosanct constitutional grants, such as the individual privacy, the absence of passionate discourse on drones intruding our privacy is a hallmark of a society that is gradually failing to recognize its constitutional roots. Yet, this failure is the historic emerging reality of the twenty-first century evolution of the Fourth Amendment.

The modern doctrinal constructions of the Fourth Amendment have authorized carving out countless exceptions to warrantless searches. However, this evolution in jurisprudence is contrary to the original intent. The post-Framing period has witnessed the Supreme Court crafting various exceptions to the warrant requirement. This outgrowth of creative judicial interpretation of the Fourth Amendment was primarily designed to satisfy the needs of law enforcement's administrative responsibilities. As political manipulation started to shape societal aspirations for individual liberty,

25. See Ghoshray, *Guantánamo*, *supra* note 18, at 259-64.

26. *Id.*

judicial constructions began to relegate individual liberty interests in favor of administrative interests.²⁷ As a result, the judiciary began to grant maximal discretion to the law enforcement administrative mechanisms. With this, the doctrinal components of warrantless search and seizure and law enforcement trespass became distorted by the predominance of the basic law paradigm.²⁸ Consequently, police power rose asymmetrically, and warrantless intrusions became the prominent Fourth Amendment concern for individuals. Thus, the amendment's original aspiration has become nearly forgotten under the reality of modern times and, now, is quickly losing its original context and relevance.

The above interpretative lens of law enforcement's trespass into an individual's private space provides a necessary construct through which to understand drone surveillance's deleterious impact on individual privacy. While the framing period's privacy debate was focused at securing a person's right from physical trespass, the construct nonetheless calls for a revitalized discussion. Therefore, in our current discourse, we must introspect over how secure a person's secluded zone of private affairs must be from digital and remote trespass via unmanned aerial vehicles.

C. NATIONAL SECURITY FOCUS DRIVING LAW ENFORCEMENT AGENDA

The post-9/11 exigency developed a fearful collective consciousness that called for temporary suspension of basic liberties.²⁹ This emboldened law enforcement to intrude upon individual privacy.³⁰ Residing within this existential fear paradigm is an alarmist variant of national security mind-

27. See Saby Ghoshray, *Doctrinal Stress or in need of a face lift: Examining the Difficulty in Warrantless Searches of Smartphones Under the Fourth Amendment's Original Intent*, 33 WHITTIER L. REV. 571, 598-99, 607-10 (2012) [hereinafter Ghoshray, *Doctrinal Stress*] (noting the post-framing period's interjection of many exceptions into the Fourth Amendment's warrant requirements to facilitate law enforcement interest over individual privacy).

28. See, e.g., *United States v. Robinson*, 414 U.S. 218, 236 (1973); *United States v. Edwards*, 415 U.S. 800, 808 (1974); *United States v. Chadwick*, 433 U.S. 1, 15 (1977).

29. See Saby Ghoshray, *Untangling the Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249, 264 (2006) [hereinafter Ghoshray, *Untangling the Legal Paradigm*].

30. See generally John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083 (2002) ("Under the guise of stopping terrorism, law enforcement officials and government leaders have now been given the right to conduct searches of homes and offices without prior notice, use roving wiretaps to listen in on telephone conversations, and monitor computers and e-mail messages . . .").

set³¹ that advocates suspension of individual privacy.³² Thus, by making individual privacy subservient to the security mechanism excess, the framework has been able to advance an overarching surveillance agenda by law enforcement.³³ The judiciary has enabled this flawed framework by allowing a significantly lower threshold of material evidence, which has led to the gradual erosion of individual privacy rights.³⁴

Viewing the emerging Fourth Amendment jurisprudence through this prism of post-9/11 culture of fear reveals a curious distortion within the struggle between competing interests of law enforcement's prosecution interest and individual privacy interests.³⁵ As individual privacy interests continue to get subsumed into a pervasive governmental criminal prosecution interest,³⁶ the unanimous call for drone deployment for domestic law enforcement has gained momentum. The contextual relevance within a systemic framework is important in conceptualizing the backdrop of this new drone phenomenon. Historically, the judicial branch can act as a neutral bulwark against governmental distortionary impact on society. Unfortunately, if the judiciary becomes unduly influenced by the shaping effect of any externally imposed new stimulus, the evaluation of competing merits of interacting interests³⁷ finds that, often times, the individual's right becomes sublimated against broader interests. As the national security interest is pervasively injected within the current system, its deleterious effects on common law enforcement practices are often ignored in contemporary discourse. Judging by the yardstick of the last decade's saga of judicial determination of security-infected law enforcement prosecution, the contours of individual privacy have become unduly constrained.³⁸ During this period,

31. See generally Ghoshray, *Untangling the Legal Paradigm*, *supra* note 29 (discussing this phenomena at length).

32. *Id.* at 218 n.301; Whitehead & Aden, *supra* note 30, at 1084.

33. See Whitehead & Aden, *supra* note 30, at 1083-84.

34. In case after case since 2001, judges in the federal court system have observed that temporary suspension of individual privacy interests can be allowed if doing so would further law enforcement investigative objectives. See Emanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights: The Right to Privacy Versus the National Interest—The Proper Balance*, 37 CORNELL INT'L L.J. 27, 71-72 (2004).

35. Nick J. Sciallo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 580 (2011).

36. *Id.*

37. James D. Phillips & Katharine E. Kohm, *Current and Emerging Transportation Technology: Final Nails in the Coffin of the Dying Right of Privacy?*, 18 RICH. J.L. & TECH. 1, 10 (2011) (arguing that advances in technology have led to Supreme Court decisions that have created confusion in Fourth Amendment privacy law).

38. See Gross, *supra* note 34, at 68 (noting that the *Katz* Court eliminated the trespass rule for determining whether law enforcement violated the Fourth Amendment due to changes in technology).

more often than not, the judiciary's relative emphasis on security over individual privacy resulted in providing law enforcement with much wider latitude than necessary.³⁹ Recognizing this would allow us to recognize the fertile landscape on which domestic surveillance of common citizens is forthcoming unless the Fourth Amendment rises from its current attenuation for over almost a century.

III. DRONES THROUGH THE LENS OF THE FOURTH AMENDMENT

Within the international arena, drones have become efficient killing machines, engaging in targeted killing of terrorists by adopting a legal framework for an expanded conception of hostilities.⁴⁰ As I have noted elsewhere,⁴¹ such targeted killings gave rise to significant civilian casualties and collateral damages that raised limited protest because of the invocation of the "the law of 9/11."⁴² Through its contradiction with the human rights

39. I refer to the general legal environment that emerged post-9/11, in which simple criminal offenses have been upgraded to include serious charges against individuals on either questionable legal precedents or incomplete evidence. See Charles Doyle, Cong. Res. Service, CONG. RESEARCH SERV, RL 31377, *The USA PATRIOT Act: A Legal Analysis*, 51-52 (2002); Andrew Ayers, *The Financial Action Task Force: The War on Terrorism Will Not Be Fought on the Battlefield*, 18 N.Y.L. SCH. J. HUM. RTS. 449, 458 (2002); Whitehead & Aden, *supra* note 30, at 1084-85; Marc Cooper, *Uncensored Gore: The Take-No-Prisoners Social Critic Skewers Bush, Ashcroft and the Whole Damn Lot of Us for Letting Despot's Rule*, L.A. WKLY., Nov. 20, 2003, <http://www.laweekly.com/2003-11-20/news/uncensored-gore/>. See generally Ghoshray, *Untangling the Legal Paradigm*, *supra* note 29 (discussing the government's use of the "Laws of War" model and "unlawful combatant" status).

40. See generally Mary Ellen O'Connell, *Unlawful Killing with Combat Drones, A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT 3 (Simon Bronitt ed., 2011), available at <http://www.ssrn.com/abstract=1501144> (noting that a strike on Yemen in 2003 was concluded to be a clear extrajudicial killing).

41. See Saby Ghoshray, *Targeted Killing in International Law: Searching for Rights in the Shadow of 9/11*, (forthcoming) [hereinafter Ghoshray, *Targeted Killing*].

42. By the "law of 9/11," I refer to a general trend in the post-9/11 jurisprudence that promotes a broader right to kill and is premised on U.S. political thought process that is decoupled from accepted framework of international law. The law of 9/11 can be identified through scholarships premised on U.S. entitlement to a flexible regime that allows for acts, such as, indefinite detention, targeted killing by extrajudicial means, torture in secret CIA prisons, etc. For literature that exemplifies law of 9/11 in the context of targeted killing, see, e.g., Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM, 346-400 (Benjamin Wittes, Brookings Institution Press 2009); Saby Ghoshray, *Untangling the Legal Paradigm*, *supra* note 29 (providing a general discussion of how the law of 9/11 has impacted almost every aspect of American Law); Mary Ellen O'Connell, *Enhancing the Status of Non-State Actors Through a Global War on Terror*, 43 COL. J. TRANSNAT'L. L. 435 (2005) (explaining why

law's sanctity of life paradigm, and in its contrarian position with the customary international law's due process paradigm, adoption of targeted killing has undoubtedly created some ripples in international jurisprudence.⁴³ Domestic drones, on the other hand, are not subjected to the vagaries of

the evolving law of 9/11 may fall outside the legal norms of international law); John Yoo, *Using Force*, 71 UNIV. CHI. L. REV. 729 (2004) (discussing the law of 9/11 in the context of the general U.S. right in global war).

43. While discussing the scope distinction of IHL and HRL, there is a tendency of the States to invoke IHL in order to avoid HRL's stricter guidelines for behavior in hostilities while being governed by IHL's more permissive guidelines supervising killing. In this context, Special Rapporteur recently observed:

[B]oth the US and Israel have invoked the existence of an armed conflict against alleged terrorists ("non-state armed groups"). The appeal is obvious: the IHL applicable in armed conflict arguably has more permissive rules for killing than does human rights law or a State's domestic law, and generally provides immunity to State armed forces. Because the law of armed conflict has fewer due process safeguards, States also see a benefit to avoiding compliance with the more onerous requirements for capture, arrest, detention or extradition of an alleged terrorist in another State. IHL is not, in fact, more permissive than human rights law because of the strict IHL requirement that lethal force be necessary. But labeling a situation as an armed conflict might also serve to expand executive power both as a matter of domestic law and in terms of public support.

Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Addendum: Study on Targeted Killings, U.N. Doc. A/HRC/14/24/Add.6, para. 47 (May 28, 2010). In the context of the legality of killing, HRL and IHL may apply coextensively and simultaneously unless there is a conflict between them. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Mr. Philip Alston), U.N. Doc. E/CN.4/2005/7, (Dec. 22, 2004), para. 46; Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, U.N. Doc. A/HRC/4/20 (Jan. 29, 2007), paras. 18-19; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum: Mission to the United States of America, U.N. Doc. A/HRC/11/2/Add.5 (May 28, 2009), paras. 71-73, 83; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum: Summary of Cases Transmitted to Government and Replies Received, U.N. Doc. A/HRC/4/20/Add.1, 222 (Mar. 12, 2007), pp. 342-58; Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Summary of Cases Transmitted to Governments and Replies Received, at 264-65, U.N. Doc. E/CN.4/2006/53/Add.1 (Mar. 27, 2006); Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum: Summary of Cases Transmitted to Government and Replies Received, U.N. Doc. A/HRC/4/20/Add.1, 222 (Mar. 12, 2007), pp. 358-61. In situations that do not involve the conduct of hostilities, where law enforcement operations during non-international armed conflict can be supported, the *lex generalis* of human rights law would apply. See MICHAEL N. SCHMITT, CHARLES H. B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: WITH COMMENTARY 1.2 (2006).

conflicting and interacting statutes of international law⁴⁴ and have largely stayed under the radar of public discourse. Given the robustness of American domestic jurisprudence, could we then rely on the Constitution to protect citizens from governmental acquiescence to all-pervasive drone surveillance?

A. BULWARK FROM THE FOURTH AMENDMENT

As we sit at the precipice of an impending governmental intrusion in our technology-fueled privacy space, we must attempt to understand how the Fourth Amendment's continued viability may still contradict with aspirations of today's law enforcement.⁴⁵ Technology's explosion, digital immersion, and speed and access of data transfer have metamorphosized the ability of surveillance and privacy intrusion. From spy satellites prying inside an individual bedroom to killer drones tracking individuals through rugged terrain, automation has changed the modes by which a supervisory entity can intrude upon individual privacy. How the trajectory of intrusion may change in the drone era is the operative paradigm through which we must understand how the Fourth Amendment would respond to such violation of privacy. For a more nuanced understanding of the Fourth Amendment's implication, we must segment this part of the analysis to separate the Framers' original understanding of privacy and how jurisprudence has responded to automation-fuelled surveillance in the past.

1. *Drones in American Sky—an Anathema to the Framers' View*

The Fourth Amendment is anchored in ensuring the inherent sanctity of an individual's home.⁴⁶ The right to be secure in one's dwelling is the fundamental precept of American privacy jurisprudence.⁴⁷ Spy satellites and unmanned aerial vehicles hovering over an individual's home will give unbridled access to the details of an individual's home. Currently, no other technology has such an overwhelming ability to intrude into inner sanctums

44. See generally Ghoshray, *Targeted Killing*, *supra* note 41 (discussing in detail the various relevant statutes of international law currently being used to justify drone warfare).

45. See Adam Liptak, *Justices Wrestle Over Allowing DNA Sampling at Time of Arrest*, N.Y. TIMES, Feb. 26, 2013, available at <http://www.nytimes.com/2013/02/27/us/supreme-court-hears-arguments-on-dna-sampling.html> ("For now, Justice Scalia said, the law's purpose is 'to catch the bad guys, which is a good thing.' But, he added, 'the Fourth Amendment sometimes stands in the way.'").

46. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 552, 576-77 (1999).

47. *Id.* at 551.

of individual dwellings. Introducing drones for domestic surveillance will usher in an era that will not have any point of return. Thus, once surveillance drones are allowed as a preventive law enforcement mechanism, or for surveillance, our existing conceptions of fundamental liberty will be instantly incinerated. The Framers viewed any unreasonable intrusion into private dwellings as rather sacrilegious, which is echoed in their deep-rooted distrust of law enforcement searches.⁴⁸

The most significant element of the amendment was . . . the generic concept of [unreasonable search and seizure] The amendment's first clause, which explicitly renounces all unreasonable searches and seizures, overshadows the second clause, which implicitly renounced only a single category, the general warrant. The framers of the amendment were less concerned with a right against general warrants than with the broader rights those warrants infringed.

The history that preceded the Fourth Amendment . . . reveals a depth and complexity that transcend[s] language. To think of the amendment as a right against general warrants disparages its intricacy. The amendment expressed not a single idea but a family of ideas whose identity and dimensions developed in historical context.⁴⁹

Ironically, drone surveillance will usher in an era of unwarranted intrusion into private lives—the very apprehension that prompted the Framers to conceptualize the Fourth Amendment as a bulwark against such excessive and unwarranted intrusion into individual's private space,⁵⁰ as can be gleaned from historical texts outlining the developmental history of the Fourth Amendment:

[T]hat the said Constitution be never construed to authorize Congress to infringe the just liberty of the press, or the rights of conscience; or to prevent the people of the United States, who are peaceable citizens, from keeping their own arms; or to raise standing armies, unless when necessary for the defence of the United States, or of some one or more of them; or to prevent the people from petitioning, in a peaceable and orderly manner, the federal legislature, for

48. WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602-791, at 765-72 (2009).

49. *Id.* at 765-66, 770.

50. Davies, *supra* note 46, at 551.

a redress of grievances; or to subject the people to unreasonable searches and seizures of their persons, papers or possessions.⁵¹

This observation provides an indication of how the Fourth Amendment's original contours related to search and trespass may stand in stark contradiction to the emerging law enforcement desire to populate the domestic skies with surveillance drones.⁵² Clearly, by making the scope, context, and boundary of a search warrant as the operative content of the Fourth Amendment, the Framers ensured that their view of life and liberty would be reflected in any future attempt to introduce life altering elements, like drones, into the equation.⁵³

2. *Drones through the Prism of the Karo-Knotts Doctrine*

The Court originally addressed the technological nuances of the tension between governmental intrusion and individual privacy through the *Karo-Knotts* framework.⁵⁴ The Court upheld Fourth Amendment rights in *United States v. Karo*⁵⁵ by finding intrusive elements in beeper surveillance where police revealed activities inside a private dwelling.⁵⁶ In contrast, in *United States v. Knotts*,⁵⁷ the Court rejected the Fourth Amendment claims on the grounds that the usage revealed critical facts about the interior of the premises that the government was interested in knowing, and such information could not have been obtained without a warrant.⁵⁸ What does the *Karo-Knotts* framework inform us about the Supreme Court's view on drone surveillance? This nuanced framework fundamentally rests on revealing physical encroachment inside a private dwelling.⁵⁹ Here, physical intru-

51. DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS HELD IN THE YEAR 1788, AND WHICH FINALLY RATIFIED THE CONSTITUTION OF THE UNITED STATES 86-87 (William White, Printer to the Commonwealth 1856).

52. *See generally* Dean, *supra* note 11.

53. *Id.*

54. *See* William Curtiss, Note, *Triggering a Closer Review: Direct Acquisition of Cell Site Location Tracking Information and the Argument for Consistency Across Statutory Regimes*, 45 COLUM. J.L. & SOC. PROBS. 139, 159 n.103 (2011).

55. *United States v. Karo*, 468 U.S. 705 (1984) (involving the interior of a home where homeowners intended to conceal their activities).

56. *Id.* at 727-28.

57. *United States v. Knotts*, 460 U.S. 276 (1988).

58. *Id.* at 284-85.

59. *See, e.g.*, David H. Goetz, Note, *Locating Location Privacy*, 26 BERKELEY TECH. L.J. 823, 832 (2011) ("Taken together, *Knotts* and *Karo* are generally understood to mean that the government is free to place a tracking device on a suspect's car without a warrant and track the suspect's movements on public roads, but cannot obtain information about a suspect's home from such a device without a warrant.").

sion is recognized as the tipping point in privacy violation.⁶⁰ With an all-pervasive digital immersion, the same construction can be extended in an analogous scenario dealing with remote controlled intrusion via drones, which indeed will be a delineating factor in identifying when a privacy violation occurs.

3. *Surveillance Drones and the Individual Expectation of Privacy*

Technological advancement, the shaping effect of 9/11, and the Fourth Amendment's doctrinal difficulties have all contributed to this emerging paradigm of drone surveillance. Yet, fundamental liberty consequences from drones can be efficiently conceptualized by developing a deeper insight into the individual privacy dimension of the Fourth Amendment.⁶¹ The Fourth Amendment's recognition of the individual right to privacy was solidified under the framework designed in *Katz v. United States*.⁶² Despite emerging views as seen through the nuanced analysis of the *Karo-Knotts* framework, *Katz* remains the predominate anchor for the broader doctrinal implications of the Fourth Amendment,⁶³ as it provides one of the most elegant and robust frameworks for individual privacy protection through whose lens the issue of drone surveillance can be reviewed.⁶⁴

Let us now place drone surveillance within the framework of a Katzian construction of a subjective evaluation of individual privacy that is indexed at society's objective expectation. In the event of a drone buzzing over an individual's backyard—one of many possible scenarios in a domestic surveillance regime—we must first identify whether a targeted individual has a subjective expectation of privacy.⁶⁵ We must then evaluate this subjective

60. See, e.g., Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1010 (2010) (noting that a search is triggered for Fourth Amendment purposes when officers enter enclosed spaces).

61. See *supra* notes 34-58 and accompanying text.

62. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

63. Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 1 (2009).

64. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

65. *Id.* While echoing similar understanding of Justice Harlan's famous test in *Katz*, Peter Winn observed:

[In] Justice Harlan's concurrence on its merits, we have seen that in working on the reasonable expectation of privacy test, he refined the test in his own way, adding both a subjective and an objective component. Perhaps he thought that the subjective component was needed to clarify that, although an objective expectation of privacy might exist, a subjective expectation might not, as when a person in his (objectively private) home is overheard intentionally speaking in a loud voice out of on [sic] open window. . . . Perhaps Justice Harlan felt the subjective component of the test was still needed to mirror the old trespass element that an in-

expectation of privacy by determining whether an individual's expectation of privacy is a reflection of society's objectively reasonable expectation of privacy.⁶⁶ Therefore, this framework involves an equality mechanism whereby collective objective parameters factor in to make a deterministic evaluation of an individual's subjective expectation.⁶⁷ Therefore, this analysis now turns into a rhetorical question: Do Americans as a society have a reasonable expectation of being insulated from the prying eyes of drones in the sky?

If we look through this construction, we can clearly see how the shaping effect of 9/11 can have disastrous consequences for an individual's privacy interest.⁶⁸ Post-9/11 addiction of fear has already infected society's perception in such a way that some communities might indeed be aligned with law enforcement in having drones over their skies. Yet, an individual's subjective expectation of privacy is more fundamental in nature, especially in matters related to an individual's private affairs.⁶⁹ In this context, two important observations are worth noting. First, *Katz*'s two-pronged test relies upon a collective evaluation to identify individual privacy's contour. Second, a deterministic evaluation of an individual's expectation is dependent on society's view. This, therefore, would lead to the potential for structural distortion to occur via flawed injection of externally imposed stimuli, such as the fear psychosis and the culture of fear discussed in the above Part II. As the broader distortion potential is dependent on the collective consciousness, it is quite possible that the culture of fear may have created a fertile ground for a drone culture to become integrated within the societal landscape. Such eventuality will indeed bring a disastrous outcome.

Finally, the Fourth Amendment protection for drone surveillance must be evaluated by the threshold question of whether the act of surveillance was a type of search found within the meaning of constitutional jurisprudence. Although simple in its framing, its evaluation is fraught with multiple layers of deterministic paradigms—the area of the search, the technology utilized in the search, the societal expectation of privacy related to the search, and finally, whether a warrant was required or, if based on an exception, could the search be conducted without a warrant. Unfortunately, the final answer might come down to a judicial determination based on var-

trusion lack permission. However, when applying the test in subsequent cases, even Harlan himself only referenced the objective component.

Winn, *supra* note 63, at 11.

66. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

67. *Id.*

68. See Ghoshray, *Privacy Distortion Rationale*, *supra* note 16.

69. See Ghoshray, *Doctrinal Stress*, *supra* note 27, at 596-97 (observing the original intent of the Fourth Amendment as creating a constitutional bulwark against governmental intrusion against individual's private affairs inside the seclusion of their home).

ious exceptions identified in existing jurisprudence or determination via a faulty paradigm premised on the post-9/11 legal landscape. This calls for an examination based on a fundamental framework, which is detailed below.

IV. LOOKING THROUGH THE FUNDAMENTALS

A nuanced framework for analysis of the Fourth Amendment application may introduce error in judgment. Such examples are common within contemporary society's evolutionary trajectory, as has been documented in the legal framework of the law of 9/11 and the cultural framework of addiction to fear. The discussion in the preceding Parts underscored the structural weaknesses in the evaluative aspect of the Fourth Amendment's expectation of privacy. This prompts us to confront various legitimate unanswered questions. Framed adequately, each of these questions could lead to separate reasonable expectations from their unreasonable counterparts.⁷⁰ When the collective consciousness of society is infected with flawed irrationality, how can we objectively define society's reasonable expectations? Do we have the objective capability to measure such reasonableness? In the contemporary environment, where the masses are inundated with false information, propaganda, and fear-mongering,⁷¹ is it even possible to objectively define a reasonable expectation? For example, the contemporary discourse continues to remain silent on the corporate agenda in creating a new industrial sector for domestic drones. Similarly, the shaping effect of 9/11 has been instrumental in developing the current law enforcement mindset that allowed for the contemplation of domestic surveillance. Yet, the social landscape is silent on such important issues of our time. This silence compels us to delve deeper into the issue of domestic drones, and consider two fundamental dimensions—privacy as a fundamental liberty component and sublimation of some rights of individuals from a social contract doctrinal viewpoint.

A. DOMESTIC SURVEILLANCE THROUGH THE PRISM OF FUNDAMENTAL PRIVACY

Privacy is much more fundamental than contemporary society has allowed it to become. Domestic drones' continuous surveillance will further erode privacy of individuals within the society. This core privacy concern is

70. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (stating that an individual's interest in privacy involves determining whether an individual's subjective expectation of privacy is one that society is willing to recognize as "reasonable").

71. See Marjorie Cohn, *Trading Civil Liberties for Apparent Security is a Bad Deal*, 12 CHAP. L. REV. 615, 637 (2009) (arguing that following 9/11 the Bush Administration attempted to maintain a state of fear in the United States).

the central most rationale for rejection of a drone culture, as the concern emanates from a much deeper right-to-life connotation of privacy espoused by Samuel Warren and Louis Brandeis more than a century before.⁷² Recognizing how technology's onslaught may intrude into an individual's private affairs, both Warren and Brandeis cautioned us about the prospect of abrogation of privacy⁷³ by observing that, "[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible."⁷⁴

This plea for establishing a broader "right to be let alone"⁷⁵ could not be any more relevant than what we are witnessing today. Conceptually, drones can be introduced in various aspects of human activities that take place within a society, and, as such, it can be connected to a law enforcement interest. If drones are allowed in most of these instances of human lives, the right to be let alone will forever be lost in domestic American lives—an eventuality none of us should be ready to embrace. While Warren and Brandeis's passionate observation was a plea for privacy in the midst of nineteenth-century technology,⁷⁶ its continued relevance is beginning to reverberate louder than ever, as society is confronted with a significant attenuation of privacy in the twenty-first century.

Every human has a fundamental right to be left alone in a zone of private seclusion where the individual must be free from a supervisory entity's intrusion. More than a century back, this conception of privacy was the operating principle that had animated Warren and Brandeis' recognition of the sacrosanct realms "of private and domestic life."⁷⁷ Domestic surveillance undoubtedly interferes and, most times, obstructs an individual's right of privacy within the confines that the individual creates.⁷⁸ The revered fundamentals of privacy must equally extend to both the interior of the individual's physical dwelling as well as the individual's digital confines of the home-like community of connected individuals. Technology may have allowed a supervisory entity, such as the government or its law enforcement

72. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-95 (1890) (discussing the need for privacy as technology developed in 1890).

73. See *id.* at 193.

74. See *id.*

75. See Connie Davis Powell, "You Already Have Zero Privacy. Get Over It!": *Would Warren and Brandeis Argue for Privacy for Social Networking?*, 31 PACE L. REV. 146, 148 (2011) (quoting Warren & Brandeis, *supra* note 72, at 193) (noting details on various third-party mechanisms in communication, social media, and the Internet).

76. See Warren & Brandeis, *supra* note 72, at 195-96.

77. See *id.* at 195.

78. See *id.* at 205.

agencies, the ease, access, and frequency of information to monitor individuals. It does not, however, necessarily strip the individuals from exercising their right to be left alone.⁷⁹ Allowing drones in the domestic sky will alter this right and allow the fundamental right to privacy to move into inevitable obsolescence.

B. CONFLICT WITH THE SOCIAL CONTRACT THEORY

Almost as old as modern civilization, social contract theory originated from Plato and Socrates. Nurtured in the modern era by Hobbs,⁸⁰ Rousseau,⁸¹ and Hume,⁸² the social contract theory posits that an individual in a society surrenders some of her freedoms and submits to the authority of a supervisory entity in exchange for the protection of such individual's remaining rights. Implicit in this paradigm is a core belief of individual consent. This idea of individual consent as a prerequisite of fundamental liberty has been further solidified in the contemporary era by legal scholar Randy Barnett.⁸³ Yet, the digital explosion and the ease of technology has created a dystopian nightmare where the related supervisory entities, like the government and law enforcement agencies, may be rejecting this idea of social contract theory. Through implicit rejection of social contract, the supervisory entities are gradually depriving individuals some of their rights, such as the right to privacy within their own confines. This emerging phenomenon must be evaluated for its full implications within the context of domestic surveillance via drones. In a futuristic scenario where a domestic drone may be buzzing over a community, either searching for a fleeing criminal or guarding against crime from being committed, the tracking and storing mechanism would automatically record private moments and personal affairs for which the individuals have not provided consent. Social contract theory prohibits such law enforcement intrusion on private space of individuals. If we were to balance the rights relinquished against the rights being preserved, it would be revealed that no significant preservation takes

79. See Chip Walter, *A Little Privacy, Please*, SCI. AM (June 17, 2007), <http://www.scientificamerican.com/article.cfm?id=a-little-privacy-please>.

80. See generally THOMAS HOBBS, *LEVIATHAN* (Penguin Classics 1985) (1651).

81. See generally JEAN-JACQUES ROUSSEAU, *THE BASIC POLITICAL WRITINGS* (Hackett Publishing Company 1987) (1754).

82. See generally DAVID HUME, *ESSAYS, MORAL, POLITICAL, AND LITERARY* (Eugene F. Miller, ed. 1987) (1742) available at <http://www.econlib.org/library/LFBooks/Hume/hmMPL35.html>.

83. See generally RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (Princeton Univ. Press, paperback ed. 2005) (2003); excerpted in *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS* (Choper, Fallon, Kamisar, Shiffrin, eds., 10th ed., forthcoming) available at <http://www.amazon.com/Restoring-Lost-Constitution-Presumption-Liberty/dp/0691123764/randyebarnetbost/>.

place. Yet, a significant portion of individual rights is being put in jeopardy, if not in peril. Tracking of an individual via drones or recording an individual's private moments give rise to other concerns. In yet another reversal for implications of privacy, when such recordings take place, the surveillance and data storing may erroneously create illegitimate proxies for an individual profile based on imprecise or incomplete vignettes of life evolving within a fleeting temporal sequence. Law has yet to respond to this imprecise and flawed subjective assessment based on intrusive privacy violations, unbridled data mining, and tracking that unmanned aerial vehicles might be engaged in.

Drones raise many issues related to pervasive video surveillance. In a free society, public places, public squares, and places of assembly must be free from the prying eyes of the government and its law enforcement agencies. When a surveillance drone is deliberately parked in front of a specific landmark at designated times tracking or video recording individual activities in a public place, the issue of the sacred social contract must certainly rise within the discourse. Social contract theory categorically emphasizes the value of providing private seclusion for individuals, and thus, no individual can be put on surveillance without prior consent. Yet, drones do not require consent. Rather, within the current legal framework, they may be operating in an extra-legal environment, causing injury to the integrity within the social structuring.

Drones will usher in the unwarranted era of automated law enforcement, where technology will be used to impart justice with minimal human interaction. In the absence of a full evaluation of the scope, context, and parameters of such mechanism, it is not clear as to what kind of appellate review procedure will be available during a drone-fuelled criminal justice mechanism. Furthermore, from a surface level analysis, it is certainly not the most robust and prudent justice mechanism. The fairness and equity of justice is highly difficult to achieve without the objectivity and rational introspection that a human-centric justice mechanism can bring in.

Within the current socio-legal framework, social contract theory is not consistent with allowing an unbridled governmental right to mass surveillance via drones. Doing so will undoubtedly signal the attenuation of privacy, eventually witnessing the right to privacy becoming eviscerated. For example, an individual staying within the permissible bounds of social norms and legal framework can engage in adulterous affairs with another consenting adult within the private confines of one's dwelling. While the act's trajectory will be mediated by individual preference and the ethical determination subject to such preference, the social contract theory would posit that the product of such act is clearly not for public consumption. Therefore, there should not be any public recording of such acts.

Yet, in a drone enabled societal landscape, several significant outcomes are possible. By virtue of video surveillance, there will be a video

recording that could be subject to voyeurism, blackmailing, unscrupulous and discriminatory persecution, and institutional abuse, among others. Once a digital product is created, the scope and duration of its existence is unlimited. For example, unscrupulous action of law enforcement operating with the benefit of lack of legal precedents can access such prohibited material. This will introduce a flawed assessment of an individual's criminal culpability for any number of predictive analytic purposes. Such a search into an individual's secluded zone of private affairs is against the social contract theory. Moreover, it violates both the individual's First Amendment right to freedom of expression and the Fourth Amendment right to be secure within an individual's private surroundings. In the absence of settled law, robust legislation, and precedent judicial determination, drone surveillance could become an unbridled exercise in developing unfair inference and that places privacy and anti-discrimination in a collision course along the way while implicating basic fundamental constitutional rights.

V. CONCLUSION

The saga of drones over the domestic sky in the United States has just begun. Unless lawmakers and policy analysts are careful in developing the appropriate framework, drones could end privacy for all, for which this Article is a stark reminder. The objective of this Article has been a two-fold inquiry. In the first, it presented the landscape that allowed governmental conceptualization of domestic surveillance of its own citizens. In the second, it examined a limited set of legal and philosophical dimensions to understand whether allowing domestic drones within law enforcement framework comports with fundamental principles of liberty.

At a fundamental level, drones in the domestic sky are emblematic of human civilization's distortionary trajectory. Drones for domestic surveillance also represent how human ingenuity may have taken an undesirable detour towards an addiction to fear post 9/11. This culture of fear has allowed law enforcement interests to subsume some of the cherished fundamental liberties. Against a backdrop of law's inability to catch up with technology's explosion, placing drones in the sky to spy on citizens may bring total eclipse of individual privacy. Loss of privacy impacts freedom of expression, which impacts both ingenuity and the democratic process. Therefore, society must not allow the privacy of its citizens to be sublimated under governmental interest of surveillance, for which this Article has submitted two fundamental rationales. First, despite the growing cacophony of law enforcement's proclamation of the advantageous use of drones, the Fourth Amendment of the U.S. Constitution continues to be a viable bulwark against a pervasive abrogation of individual privacy. Second, social contract theory reminds us of the ethical danger of the state unilaterally removing rights from its citizens.

Finally, looking through the prism of a rights narrative, the right of a state to place drones over its citizens' heads must be evaluated within the framework of aligning rights of entities within a shared space. In this context, whenever a living entity is enclosed within a physical space, multiple legal rights are created. The state has the right to regulate and control activities within its space. Similarly, citizens residing within the space also have concomitant rights to be free from intrusion. As I have shown elsewhere, rights have to be envisioned in order for them to be executed.⁸⁴ Therefore, within the context of drone surveillance, we can legitimately ponder over whose rights must be given primacy. First, if there is unilateral play, such as the governmental imposition upon the citizens without consent, the inquiry should be focused on whether we recognize remedy without rights. This is precisely what the locus of purview surrounding drone surveillance must be centered on. Second, how can the rights of citizens be recognized if they were never part of the original discussion? This is the most vexing, and the most pivotal question that must be answered. Indeed, the answer might very well determine the future course of privacy rights of citizens in the United States.

84. See Ghoshray, *Guantánamo*, *supra* note 18.