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CONSUMER CLAIMS FOR INSURANCE COMPANY DRONE SURVEILLANCE

Chad J. Pomeroy[1]

I. Introduction

Insurance companies and their products have lately been in the news quite a bit.

Car insurance is up more than 20% in the last year,[2] and home insurance is up nearly as much.[3] Much of this above-inflation spike in costs has occurred post-pandemic, but it is not expected to stop any time soon.[4] Of course, America is a large place, and this rise has not been uniform, with premiums rising as much as 60% in some places (like Texas and Colorado).[5] Making matters worse for many, these changes accelerate even more for people who make any sort of insurance claim.[6]

And, sad to say, this kind of rapid increase is not the worst of it. As with so many things in life, it seems, the only thing worse than homeowners' insurance is no homeowners' insurance.[7] In particular, many people do not own their homes outright—they finance the purchase of their home by taking out a mortgage against it. This typically means that the homeowner is contractually obligated to do a number of things—like pay real

[1] James N. Castleberry, Jr., Chair, Professor of Law, St. Mary's University School of Law.
[2] As of mid-2024. *See* Scott Horsely, *Soaring Insurance Rates Send More People Shopping for Deals,* NPR (June 15, 2024, 7:20 AM), https://www.npr.org/2024/06/11/nx-s1-4987948/insurance-rates-quotes-shopping.
[3] *See* Scott Horsley, *'Everything is Rising at a Scary Rate': Why Car and Home Insurance Costs Are Surging,* NPR (Mar. 3, 2024, 6:00 AM), https://www.npr.org/2024/03/03/1233963377/auto-home-insurance-premiums-costs-natural-disasters-inflation; US home insurance rates are rising fast—hurricanes and wildfires play a big role, but there's more to it. Andrew J. Hoffman, *Why Home Insurance Rates are Rising Fast Across the US – Climate Change Plays a Big Role*, THE CONVERSATION (Sep. 24, 2024, 8:32 AM), https://theconversation.com/why-home-insurance-rates-are-rising-fast-across-the-us-climate-change-plays-a-big-role-238939 ("Nationwide, [home insurance] premiums rose 34% between 2017 and 2023, and they continue[] to rise in 2024.").
[4] *See States Where Home Insurance Costs Are Surging Highest*, NAT'L ASS'N RELATOR (May 20, 2024), https://www.nar.realtor/magazine/real-estate-news/states-where-home-insurance-costs-are-surging-highest ("[H]omeowners nationwide are expected to see a 6% uptick in average [home insurance] premiums by the end of the year. . . . on top of a 20% increase over the two years prior."); Aimee Picchi, *Car Insurance Rates Could Jump 50% in 3 States this Year. Here's Where They Are.*, CBS NEWS (Aug. 20, 2024, 9:05 AM), https://www.cbsnews.com/news/car-insurance-rates-up-50-percent-in-these-states-insurify/ ("[R]esidents of [some] states could see their [car insurance] rates spike by 50% in 2024. . . . [with the] typical U.S. insurance policy . . . jump[ing] 22% [in 2024] . . . .").
[5] *See* Hoffman, *supra* note 3 (focusing on the years 2017–2023).
[6] *See id.*
[7] A long and varied list that includes time at the gym, billable hours, and holidays.

property taxes, keep the property in good condition, and keep it *insured*,[8] even as prices

[8] The following is an example of this kind of requirement and is excerpted from the author's deed of trust document:

> Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to preceding sentences can change during the term of the Extension of Credit. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Extension of Credit, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.
>
> If Borrower fails to maintain any of the coverage described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.
>
> All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall include the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.
>
> In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payment as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of the Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.
>
> If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle claim, then Lender may negotiate and settle the claim. The 30 day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 21 or otherwise, Borrower hereby assigns to Lender

skyrocket.

But it continues to get even worse! Not only are rates going up on a product that homeowners have no choice but to purchase, but the pool of providers is materially shrinking: "[A]n insurance crisis that could result in the biggest set of regulatory changes since . . . 1988. . . . [Has resulted from insurers pulling] back from the homeowners [insurance] market . . . .[9] The "crisis reached new heights . . . when leading insurer State Farm General announced that it wouldn't renew 72,000 property owner policies [in California,] joining Farmers, Allstate and other companies in either not writing or limiting new policies or tightening underwriting standards."[10] This is not limited to California: "An exodus of national insurance companies from Florida, combined with local private insurers canceling plans, has left many homeowners there with only one option: Citizens Property Insurance Corp.[,] [t]he state-backed nonprofit home insurance company [that] was set up to be an insurer of last resort . . . ."[11]

Another large state facing this dilemma is Texas. Within the last year, Progressive Insurance "halted homeowners' insurance policies," joining "Foremost Insurance, a holding of Farmers Insurance, [which has also] stopped writing and renewing new policies . . . ."[12] It does not stop there though, as this has become a national issue, affecting homeowners in states all over the country, including Minnesota, Wisconsin, South Dakota, Iowa, Colorado, Oklahoma, and Nebraska.[13]

Somewhat counter-intuitively (but not really, if you think about it), this has led state regulators to attempt to make it easier for insurers to raise their rates.[14] Insurance companies pull out of markets because they cannot make enough money in those

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(a) Borrower's rights to insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund or unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

[9] Laurence Darmiento, *California's Home Insurance Crisis: What Went Wrong, How It Can be Fixed and What Owners Can Do*, L.A. TIMES (Mar. 29, 2024, 1:08 PM), https://www.latimes.com/business/story/2024-03-29/californias-insurance-crisis-what-went-wrong-whats-being-done-to-fix-it-and-how-homeowners-can-help-themselves.

[10] *Id.*

[11] Elisabeth Buchwald, *Florida's Home Insurer of Last Resort Is in Serious Trouble. Will Milton Put It Over the Edge?*, CNN BUS. (Oct. 11, 2024, 11:30 AM), https://www.cnn.com/2024/10/11/business/citizens-insurance-hurricane-milton/index.html (noting that even this "insurer of last resort" may face financial difficulties, necessitating a state regulation permitted "premium surcharge to its policyholders and other Florida consumers . . . .").

[12] Tom Perumean, *Progressive Is the Latest Insurance Company to Stop Offering Homeowner Coverage in Texas*, TEX. PUB. RADIO (Sep. 9, 2024, 11:51 AM), https://www.tpr.org/news/2024-09-09/progressive-is-the-latest-insurance-company-to-stop-offering-homeowner-coverage-in-texas.

[13] Tu-Uyen Tran, *Homeowners Insurance Costs Are Growing Fast but Coverage Is Shrinking*, FED. RSRV. BANK OF MINNEAPOLIS (Aug. 28, 2024), https://www.minneapolisfed.org/article/2024/homeowners-insurance-costs-are-growing-fast-but-coverage-is-shrinking.

[14] *See* Darmiento, *supra* note 9.

markets to be profitable.[15] So, some states—notably California—have begun removing some of the regulatory limitations that affect how and when insurance companies can raise premiums.[16]

This is a big issue, and there are a lot of factors at play. One relatively minor, but related, issue is how insurance companies are assessing the potential costs and risks associated with their decisions to drop insured parties—and, in particular, how some companies are starting to use drone surveillance to monitor customers and reassess their risk profiles. As discussed in Part II, it is clear that insurance companies are doing this.

Of course, this is not so much an issue of insurance companies dropping whole geographic areas of coverage, as discussed above, but it is relevant in that it relates to the ability of those who need property insurance to secure that coverage, in the face of insurance company decisions about who they want to cover. But it is still a thorny issue. In particular, it is problematic, I think, because it runs afoul of a variety of privacy laws and protections laced into American common law and various state constitutional provisions. The difficulty is acute, not because it is "bad" or "undesirable" for insurance companies to assess, reassess, and non-renew clients.[17] It is simply because this specific, new tool of the insurance industry violates rights and protections that are meant to ensure human dignity. These rights and protections effectively prevent the kinds of wrong-headed and misguided decisions that these companies are liable to make.

The potential claims this activity gives rise to are discussed in Part III. Firstly, there are common law claims.[18] These claims are built upon rights that have traditionally relied on a multi-faceted and subjective right tied to the ephemeral need to be left alone. In the age of advanced technology—and, especially, of drones—it makes sense to locate the legal right to privacy within the ambit of property law and property rights. Understanding this, and articulating it thusly, makes pretty clear that the invasive use of drones for commercial advantage is actionable. Secondly, insurance carrier drone surveillance runs afoul of a variety of state constitutional provisions. This type of claim is more speculative than the common-law claim just discussed, but I think that there are a number of state constitutional provisions that contemplate a strong right to privacy which could serve as the basis for a claim against insurers in this context, particularly given the highly regulated nature of insurance companies.

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[15] Matthew Sellers, *Tens of Thousands Hits as Yet Another Insurer Looks to Leave State*, INS. BUS. (Feb. 29, 2024), https://www.insurancebusinessmag.com/us/news/property/tens-of-thousands-hit-as-yet-another-insurer-looks-to-leave-state-479343.aspx (quoting American National Group as explaining that it was leaving California due to "significant and persistent profitability issues . . . ."); *See also* Oliver Milman, *How Climate Risks Are Driving up Insurance Premiums Around the US – Visualized*, THE GUARDIAN (Dec. 5, 2024, 6:00 AM), https://www.theguardian.com/environment/2024/dec/05/climate-crisis-insurance-premiums (serving, at least, to tie insurance coverage issues to underlying profitability).

[16] Darmiento, *supra* note 9.

[17] Indeed, though it seems harsh, this is, in fact, precisely what insurance is meant to do.

[18] Much of this section of the paper builds upon prior writing of mine that explores privacy rights in the context of drone usage. *See* Chad J. Pomeroy, *All Your Air Right Are Belong to Us*, 13 NW. J. TECH. & INTELL. PROP. 277 (2015).

Insurance companies, however, do have a facially appealing defense because most insurance contracts seem to permit this kind of inspection (or, perhaps, something akin to it). However, as Part IV explains, this "defense" is unavailing for traditional public policy reasons, especially given the novel, and frankly brazen, nature of drone technology to observe people in their most private arena, their home.

The conclusion identifies that this sort of activity is impermissible under the current law,—or is at least arguably impermissible given the application of existing law to this new sort of activity. Simply put, the law never contemplated enormous commercial enterprises using new technology to physically spy on people in the safety of their own homes. Given this, consumers should stand up for their rights and push back on any activity of this sort.

II. Insurance Company Drone Surveillance

To start, let us take a moment to delve into the reports of insurance companies using drones to monitor the insured. Actually, to be more clear and less diplomatic: the reports of insurance companies using advanced technology to spy on people in the sanctity of their own homes. When one takes a moment to contemplate what is being discussed, it becomes clear that what is being discussed is fairly extraordinary. From there, we can examine whether the companies can hide behind some contractual fig leaf,[19] but let us start by examining what these insurance companies are doing.

A. Popular Accounts of Drone Surveillance

These insurance companies are committing an extraordinary invasion of traditionally held views and concepts of privacy. Of course, that is the heart of this Article,[20] but it is helpful to understand the scope of the issue by examining a few examples of this behavior.

Take a Wall Street Journal example from April 2024.[21] As relayed therein, a woman named Cindy Picos, who lives in northern California, was dropped by her home insurer, a company called CSAA Insurance, which claimed that it had aerial photos of her roof that proved the roof had lived its full life expectancy (and so presumably was a poor insurance risk).[22] The company refused to reconsider, despite Picos retaining an independent inspector who found that the roof had another 10 years of life.[23] Moreover, the company refused to even share its photos or let her see the damage.[24]

[19] *See infra* Part II.B.
[20] *See infra* Part III.
[21] *See* Jean Eaglesham, *Insurers Are Spying on Your Home from the Sky*, THE WALL ST. J. (April 6, 2024, 5:30 AM), https://www.wsj.com/real-estate/home-insurance-aerial-images-37a18b16.
[22] *Id.*
[23] *Id.*
[24] *Id.* (CSAA Insurance claims that it now allows customers to see its spy-drone images "upon request.").

A similar scenario played out "[w]hen Joan Van Kuren of Modesto[, California] got a notice from her insurance company . . . ."[25] The company stated that it had discovered—via aerial images taken from a drone—a "'substantial increase in hazards'" around her house.[26] Ms. Van Kuren was surprised and disappointed.[27] Initially, the insurance company informed her that it had flown a drone over her house.[28] But when pressed by a local news agency the insurance company denied this, instead claiming that they used "proprietary aerial imagery" not drones.[29] Ms. Van Kuren was evidently not able to convince the company to change its decision and summarized the situation by stating that, "It almost feels like someone's looking in your windows . . . ."[30]

A Florida homeowner living in Daytona Beach never had an insurance claim in 52 years—"[s]o he was shocked when, [in 2022,] his insurance company didn't want to renew his policy."[31] This time, the homeowner, a man named Mike Arman, was able to secure the photo for inspection.[32] It looked grainy and unclear, and appeared to be taken from a satellite rather than a drone.[33] The insurance company refused to reconsider, even though Arman claimed his roof was only six years old.[34] Arman secured alternative insurance—which was again dropped when the insurer used a drone to photograph the roof and insisted it was problematic (despite Arman paying a home inspector to certify that the roof was in good condition).[35]

If it seems melodramatic to view this as *Orwellian* (as I do), consider that this is not the exception but the rule: you are being watched. "Nearly every building in the country is being photographed. . . ."[36] This is perhaps because the insurance-funded Geospatial Insurance Consortium "has an airplane imagery program [that] covers 99% of the U.S. population."[37] This means that people—corporations and individuals who work for them—are watching you, your yard, and your home. The bureaucracy that these few stories hint at ineluctably follows an organizational plan of systemized observation, and the whole scheme calls to mind the East German Ministry for State Security, or Stasi,

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[25] Joe Cortez, *California Woman Who Spent Over $200K on Remodels Only to be Dropped by Insurer Over Drone Captured Images of 'Clutter,'* YAHOO! FINANCE, https://finance.yahoo.com/news/california-homeowner-spent-200k-remodels-100100220.html (last updated Aug. 9, 2024).
[26] *Id.*
[27] *See id.*
[28] *Id.*
[29] *Id.* (Left unsaid by the article was how one gathers aerial imagery, if not gathered by drone. Perhaps a manned reconnaissance mission? Private satellites?).
[30] *Id.*
[31] Kiri Blakely, *A Home Insurance Drone Spied on My House – Then My Premium Was Hiked: Could Your Policy Be at Risk, Too?,* REALTOR.COM (Sept. 10, 2024), https://www.realtor.com/news/trends/home-insurance-drone-spied-on-my-house-policy-premium-hiked/.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *See* Eaglesham, *supra* note 21.
[37] *Id.*

"one of the most intrusive surveillance organisations in human history," which "at one point contained files on an estimated six million people."[38]

Of course, it could be cheap and demeaning to compare the photographing of the outside of your house to a totalitarian regime that monitored and terrorized millions.[39] Surely, it is not that bad. But it is bad. The spying is taking place on an industrial scale—the photos taken are sorted by computer models and categorized as to potential insurance underwriting issues (damaged roofs, yard debris, undeclared trampolines, etc.).[40] This is all within the context of a nationwide effort to "de-risk" their insurance portfolios: dropping homes in an effort to avoid having to pay out, despite a variety of state restrictions regarding insurance non-renewal.[41] It is also unapologetic. Tom Wilson, the CEO of Allstate, has bragged about how far along the company is in using digital images and about how "'there's even more to come.'"[42]

We are all being watched, and this is set against the backdrop of increasing insurance rates and mandatory coverage for home loan borrowers. It seems, I think it is fair to say, relatively shocking, at least on its face. So, what is the prima facie basis for this sort of behavior?

B. Contractual Coverage

Part II.A claims that insurance companies are behaving in a shocking fashion—but it should not be read to suggest that these companies are stupid or rash. The basis for their behavior is the insurance contract they promulgate that governs the nature of their coverage. Of course, different companies have different policies,[43] but, generally speaking, "insurance policies typically state that the homeowner agrees to allow the insurer to perform inspections under the contract."[44] And "though privacy laws vary by state, it's likely that most homeowners' insurance contracts include broad enough language to allow the use of drones . . . to gather information about a home's condition."[45]

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[38] *See Lessons from the Stasi – A Cautionary Tale on Mass Surveillance*, AMNESTY INT'L (Mar. 31, 2015), https://www.amnesty.org/en/latest/news/2015/03/lessons-from-the-stasi/.
[39] *See id.*
[40] Eaglesham, *supra* note 21.
[41] *Id.* It is also within the context of the insurance contracts that insureds enter into with their insurance companies. *See id*. I find the argument that these contracts allow this activity to be generally unavailing. *See infra* Parts I.B. and IV.
[42] *See id.* One former agent for Farmers Insurance quit her job in 2023, claiming that, "It's like they're using anything as an excuse to get people off their books," and noting that "she saw nonrenewal notices . . . for everything from trampolines to moss on the side of a vacation home." *Id*.
[43] And different customers may receive, and be bound by, different versions of a given company's policy.
[44] Lanie Raphael, *Eye in the Sky: As Insurers Use Drones to Collect Data on Your Home, What Can You Expect?*, B.F. SAUL INS. (May 6, 2024), https://www.bfsaulinsurance.com/blog/as-insurers-use-drones-to-collect-data-on-your-home-what-can-you-expect.
[45] *Id.*

Generically, then, insurance companies are not behaving entirely irrationally or without any basis in fact or law. But let us dive into the particularities to more finely assess the kinds of claims and provisions they are relying on, as I later (in Part IV) attempt to counter this claim by insurers,[46] and having a somewhat solid grounding in the actual policies and provisions at issue is helpful thereto.

Firstly, it is worth mentioning that there are different kinds of homeowners insurance policies, which are designated by policy number,[47] and it is probably worth it to review these fairly quickly. There are HO-1, HO-2, HO-3, HO-4, HO-5, HO-6, HO-7, and HO-8 policies, with each providing different levels of coverage.[48] An HO-1 policy is known as basic homeowners insurance and provides a relatively low level of coverage, limited to damage caused by ten specific kinds of damage, and it usually only provides coverage for the house structure, at actual cash value.[49] An HO-2 policy provides the same coverage as HO-1, plus it covers damage from freezing of plumbing, bulging, or cracking caused by a sudden and accidental event, falling object, and sudden and accidental damage caused by artificially generated electrical current.[50] HO-2 also expands what is covered, to include other structures on your property, personal belongings, and it can cover some instances of personal liability, loss of use or additional living expenses, and medical payments to others.[51] Next, HO-3 covers all perils, unless something is specifically listed as an exclusion.[52] HO-3 is the most common form of homeowner insurance and will pay to repair or replace a homeowner's house, up to policy limits.[53] An HO-4 policy is a renters insurance policy, which is meant to cover one's belongings, additional living expenses, and liability risks.[54] HO-5 policies are similar to HO-3, except they pay out for replacement rather than actual cash value.[55] HO-6 policies are primarily for people who live in condominiums or co-op buildings.[56] HO-6 polices cover perils that affect the inside of the unit.[57] An HO-7 policy is similar to HO-3 but is intended for mobile homes instead of real property.[58]

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[46] *See infra* Part IV.
[47] *See* Les Masterson, *8 Types of Homeowners Insurance Policies*, FORBES (Oct. 9, 2023, 6:53 AM), https://www.forbes.com/advisor/homeowners-insurance/policy-types/.
[48] *See id.*
[49] *Id.* (listing the covered perils as fire or lightning, windstorm or hail, explosion, riot or civil commotion, damage caused by aircraft, damage caused by vehicles, smoke damage, vandalism or malicious mischief, theft, and volcanic eruptions).
[50] *Id.*
[51] *Id.*
[52] *Id.* (noting that HO-3 policies are known as "'open peril'" policies and noting that the common exclusions are power failure, industrial pollution or smoke, earthquake, flooding, intentional damage, war or nuclear accidents, pets and insects, settling and wear and tear, damage or theft in unoccupied homes, deterioration due to weather conditions, and negligence). This policy also covers personal belongings for many perils. *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* (noting that this policy is often called "walls-in coverage").
[58] *Id.* (noting that these policies insure mobile homes, manufactured homes, trailers, sectional homes, and modular homes).

Finally, HO-8 policies are for older homes, for which the cost of rebuilding is greater than the home's market value.[59] The covered perils for HO-8 polices are limited.[60]

As described above, there are various options for most homeowners. Next to consider is that regardless of the general nature of the coverage, the relationship between the insured and the insurer is covered by an insurance contract. This contract is typically described in a bound policy delivered to an insured by the insurer. There is no negotiation or back-and-forth about the contents thereof once the general kind of policy has been selected. And, of importance here, these policies typically provide the insurer with a fairly healthy right of inspection. I have reviewed a number of homeowners policies that are available online,[61] and while there is some heterogeneity, these policies typically require transparency on the part of the insured homeowner.[62]

In particular, the policies I reviewed provided the insurer with broad, though not extensively defined, inspection rights:

> "We have the right, with advance notice to you, to inspect your property as often as we deem necessary to confirm structural 'replacement cost' and/or condition."[63]

> "We have the right to . . . [m]ake inspections and surveys at any time . . . ."[64]

> "We have the right to inspect any premises covered by this policy as often as may be reasonable during the term of this policy. You agree to allow us to come onto those premises and into any buildings on those premises."[65]

These are broad grants of authority, from homeowners to insurers, to inspect.

While I will return to this topic more fully in Part IV below,[66] it is worth noting here that the insurance companies do seem to have the right to perform inspections. And to be fair, the language, as sampled above, is probably broad enough to cover the kind of drone surveillance at issue here. I am sure that there are various arguments to be made

[59] *Id.* (noting that historic homes and registered landmarks often have HO-8 policies).
[60] *Id.*
[61] *See, e.g.*, TOWER HILL INS. SELECT CO., HOMEOWNERS 3 SPECIAL FORM, https://www.thig.com/assets/citizens/HO3-Homeowners-Special-Form.pdf; AAA INS., OKLAHOMA HOMEOWNERS POLICY, https://www.oid.ok.gov/wp-content/uploads/2022/04/HS-00-03-OK-10-14.pdf; SHELTER INS., HOMEOWNERS' INSURANCE POLICY, https://www.oid.ok.gov/wp-content/uploads/2019/08/Shelter_HO-4Renters.pdf.
[62] They are also typically written in a manner that is fairly described as intentionally opaque. They are not well organized or intuitive, they do not use easy-to-understand terms or phrases, and they are laced with confusing cross-references. They are, in a word, indecipherable.
[63] AAA INS., *supra* note 61, at 56.
[64] TOWER HILL INS. SELECT CO., *supra* note 61, at 26.
[65] SHELTER INS., *supra* note 61, at 9 (emphasis omitted).
[66] *See infra* Part IV.

regarding specific provisions (for instance, the third example above, which requires the inspection to be reasonable—there is surely a lot of argument to be had there), but as a general matter, the insurance companies are probably acting in accord with the technical terms of their insurance policies.

III. Consumer Claims for Insurance Company Drone Surveillance

This is a particular manifestation of an issue that I have written about before—the use of drones to invade people's privacy.[67] Drones represent the ability to monitor individuals from the sky from very far away, without the target ever knowing of the surveillance, which in effect permits the observation of people (i.e., the invasion of people's privacy) in ways never imagined before. As I argued previously,[68] and as I indicate below, the law should accommodate itself to this advance, given the enormous change it represents. I think this can be done in two ways. The first involves reviving the power of the common law to protect private property and personal expectations of privacy. The second involves a (admittedly) more creative attempt to utilize state constitutional guarantees to push back against the kinds of privacy infringements described herein. Indeed, I would argue that the stakes are even higher now than when I previously wrote about this issue—the kind of privacy invasions I predicted in my earlier article have come true but in a commercialized context, which I think makes this an even more poignant issue requiring some sort of legal response.

A. State Law Privacy Rights

To start with, let us review the law's view of one's right to privacy and set that within the context of property rights and aircraft and drone technology. Years ago, the courts grappled with how the advent of video capability would affect an individual's right not to be viewed while in private, but the question now is how the commercial use of drone technology will affect that right. What is "private" depends on what one expects,[69] and the concepts of justifiable expectations and property rights are inextricably intertwined therewith.[70] In particular, what is "private" depends, to some extent, on what you "own" and on your property rights therein. At its most basic, trespass is entering onto another's

[67] *See* Pomeroy, *supra* note 18. Much of the material in Part III.A is taken from this article, and this footnote is intended to act as a blanket attribution to it and to the material cited therein.
[68] *See id.*
[69] *See id.* at 284.
[70] *See, e.g.,* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967) ("Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others.").

land without permission,[71] and the relevant question here is what is "another's land," in the context of overhead drone flights?

Upon first review, the answer to this question is fairly clear. "Land has an indefinite extent, upwards as well as downwards, so as to include everything terrestrial, under or over it."[72] This maxim, known in short as *ad coelum*, is hornbook law, and "[t]he inevitable corollary of this theory . . . is that 'any invasion of the close of another, whether above, below, or on the surface of the ground, constitutes a trespass.'"[73] Historically, things did not get very far above the ground,[74] so the idea that your property rights extended "forever" did not seem extreme. Indeed, in the United States at least, an individual did not even need to demonstrate damages—any encroachment was the commission of a trespass, so any violation of air rights would suffice.[75] [76]

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[71] "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." RESTATEMENT (SECOND) OF TORTS § 158. Interestingly, note how similar this is to the "common law" tort of invasion of privacy. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B. *See supra* Part II for a discussion of rights.

[72] 1 COKE ON LITTLETON *4a; 2 WILLIAM BLACKSTONE, COMMENTARIES *18; 3 JAMES KENT, COMMENTARIES *401; 2 TIFFANY REAL PROPERTY §585 (3d ed. 1939).

[73] *Trespass by Acts Above Surface*, 42 A.L.R. 945 (originally published in 1926) (quoting 26 R. C. L. 939).

[74] Blackstone articulated the rule as "[c]ujus est solum, ejus est usque ad coelum," which means "upwards, therefore no man may erect any building or the like, to overhang another's land." BLACKSTONE, *supra* note 72; *see also* John C. Cooper, *Roman Law and the Maxim "Cujus est Solum" in International Air Law*, 1 MCGILL L. J. 23, 27–28 (1952) (tracing the history of this Roman Law maxim). The simplicity of the time is reflected in the phrase "any building, or the like . . . ." BLACKSTONE, *supra* note 72. There were no airplanes or flying machines at the time this law was formulated, so the only conceivable conflicts to one's air rights were essentially ground-based, such as "buildings, or the like . . . ." *See* BLACKSTONE, *supra* note 72. Note, however, that this concept has been criticized: "It has been referred to as 'the production of some black letter lawyer,' 'a glittering generality,' and . . . characterized as 'another fanciful phrase.'" *See Trespass by Acts Above Surface*, *supra* note 73 (quoting Wandsworth Bd. Works v. United Tel. Co. (1884) L. R. 13 Q. B. Div. 904, 12 Eng. Rul. Cas. 630, Brett, M. R.).

[75] *See* Notes, *Trespass by Airplane*, 32 HARV. L. REV. 569, 569-70 (1919) ("That the encroaching landowner is liable also for all foreseeable damage is settled; but whether there is a cause of action for the mere entry into the air space resulting in no real injury is not so clear. In England there are, in addition to conflicting *dicta* on the exact case of a balloon, irreconcilable statements concerning the encroachment cases. In this country, however, actual damage from the encroachment does not seem to be requisite for a cause of action. The air space, at least near the ground, is almost as inviolable as the soil itself.") (footnotes and citations omitted). The Note's averment regarding American law and the lack of a damages requirement appears well-founded. *See id.* at 570, n.7 (referencing Puortó v. Chieppa, 62 Atl. 664 (Conn. 1905); Ackerman v. Ellis, 79 Alt. 883 (N.J. 1911); Smith v. Smith, 110 Mass. 302 (1872); Harrington v. McCarthy, 48 N. E. 278 (Mass. 1897); McCourt v. Eckstein, 22 Wis. 153, 159 (1867); Beck v. Ashland Cigar & Tobacco Co., 130 N. W. 464 (Wis. 1911); Hannabalson v. Sessions, 90 N. W. 93 (Iowa 1902); Butler v. Frontier Tel. Co., 186 N. Y. 486, 491 (1906)). The Note's hedge regarding rights "near the ground" also appears well-founded, for the reasons discussed at length in Part IV. *See id.* at 570; *infra* Part IV.

[76] Consider a few historical examples drawn from 42 A.L.R. 945 (originally published in 1926). *See Trespass by Acts Above Surface*, *supra* note 73. In *Herrin v. Sutherland*, the Montana Supreme Court ruled on the question of whether the defendant, though standing on an adjacent parcel of land, "interfered with 'the quiet, undisturbed, peaceful enjoyment' of the plaintiff, and thus committed a technical trespass . . . " by firing a shotgun over the plaintiff's property. Herrin v. Sutherland, 241 P. 328, 331 (Mont. 1925). In *Ellis v. Loftus Iron Co.*, the court held that the act of a horse, in reaching its head over a dividing fence,

Of course, this could not last in the age of airplanes. On December 17, 1903, Orville took his and his brother's latest invention for a 12 second flight.[77] This, of course, changed history and air travel has grown exponentially since that time, with millions of people now flying over others' properties on a daily basis.[78] The trespass regime discussed above, which would hold flyers liable, would clearly be unworkable, so the law had to change. Widespread flight instantly rendered the common law outdated, so the courts and other responsible authorities crafted an "exception" to address air navigation.

Generically speaking, this exception moved air travel outside the traditional ambit of trespass, though the authorities were not consistent regarding their analyses. The reasoning and bases for the exception broadly fell into one of four camps.[79]

The first camp is the only one we need to spend time on here, as it is the most important and relevant to the issues at hand.[80] It clearly "limits the landowner's rights in the

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constituted trespass and exposed its owner to liability for any proximate damages. *Trespass by Acts Above Surface*, *supra* note 73. Many of these cases seem primarily addressed to "quarrelsome" neighbors and petty grievances, but the concept was important, even prior to the advent of flight. *See id.* In *Butler v. Frontier Tel. Co.*, the Court of Appeals of New York prohibited a telephone company from stringing a telephone wire across a piece of property at a height of 30 feet, stating that "[t]he law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly." Butler v. Frontier Tel. Co., 186 N.Y. 486, 491 (1906).

[77] Tom D. Crouch, *Wright Brothers*, BRITANNICA, https://www.britannica.com/biography/Wright-brothers (last updated Mar. 24, 2025).

[78] *See, e.g., id.* Consider, for example, the last time you flew on an airplane. One can only guess how many others' parcels you passed over, "trespassing" each and every time, under the common law.

[79] *See Rights Above the Surface – As Affected by Air Navigation,* 2 TIFFANY REAL PROPERTY § 584 (3rd ed. 1939). This is an arbitrary conceptual division, chosen due to the well-recognized authority of Herbert Thorn Dike Tiffany. *See id.* Others have acknowledged additional theories. *See, e.g.*, ROBERT R. WRIGHT, THE LAW OF AIRSPACE, 145 (1968) (recognizing at least six theories on airspace rights). Still others define the spectrum differently. *See id.* Another common approach, referred to as "Rhyne's division," utilizes five categories. *See* CHALES S. RYNE, AIRPORTS AND THE COURTS, 154–62 (1944).

[80] One of the other responses "limit[ed] the landowner's rights to so much of the airspace as he actually uses, taking no count of possible future use." *Rights Above the Surface – As Affected by Air Navigation, supra* note 79. The next camp, or theory, on air rights "denies to the landowner any ownership or possessory right in the airspace above his land." *Id.* This treatise relies entirely on a citation to the case of *Pickering v. Rudd*, 4 Camp. 219 (1815). *Id.* Therein, Lord Ellenborough held that an overhanging board was not a trespass. *See* Pickering v. Rudd, (1815) 171 E.R. 400 (UK). This is the most extreme, and the most clear, of the views. *See Rights Above the Surface – As Affected by Air Navigation, supra* note 79. The final of the four views "admits the landowner's ownership of the air space, but grants to aircraft the right of navigation therein, subject to certain restrictions." *Id.* (footnotes omitted). One example is *Brandes v. Mitterling*, which held that the invasion of property owners' air rights by the aircraft utilizing a neighboring airport was permitted but *only* if such invasion did not "worketh hurt, inconvenience, or damage to the owner of the soil over which he is flying." Brandes v. Mitterling, 196 P.2d 464, 468 (Ariz. 1948) (quotation marks omitted). If the invasion did so—i.e., if it "interfere[d] with the then existing use to which the land [was] put . . ."—then it was "an unprivileged intrusion in the space above the land, . . . [constituting] a trespass." *Id*. Like the first two theories, this view of air rights walks a fine line between the common law rule of unlimited rights and the third view, discussed immediately above, which grants no rights. *See Rights Above the Surface – As Affected by Air Navigation, supra* note 79. As with all of the views discussed herein, this theory has been criticized on multiple grounds. *See, e.g., Id.* at n.20.

airspace above his land to that part thereof of which he has effective possession.[81] This is obviously important here, to the extent that I am arguing that traditional property rights should affect the law's approach to modern drone technology. However, this obviation of property rights in the context of air navigation is not as profound, here, as it might initially seem. This is because "navigation" has a very specific meaning—that is "the act or practice of navigating" or "the science of getting ships, aircraft, or spacecraft from place to place."[82] That act, in modern times, can be accomplished in a variety of ways—but, at the time that this law was being shaped and developed, it could only be done by a person. It could not be done remotely or by computer; it required a real, live human to be in the airplane physically guiding it to its destination.

Moreover, and perhaps of more importance to the thesis of this Article, the first camp clearly contemplates transporting people (or at least cargo) to a destination. This means that the law deprives people of their historically unlimited air rights by permitting manned air navigation and transport.[83] Because surveillance drones are typically

[81] *See id*. (citing *Antonik v. Chamberlain*, 78 N.E.2d 752 (Ohio 1947)). There is some difference in opinion regarding the ownership of air rights, and even of what the different tests are. *See* Colin Cahoon, Comment, *Low Altitude Airspace: A Property Rights No-Man's Land*, 56 J. AIR L. & COM. 157, 191–92 (1990) ("More than eighty years after Kitty Hawk and more than forty years after *Causby*, courts have yet to adopt a uniform theory of airspace property ownership."). The Comment goes on to identify a number of purported approaches. *See id.* Suffice it to say that there are divisions and a variety of potential avenues that various courts have pursued. *See id.* Ultimately, this is not directly relevant to the thesis of this Article, though it is helpful to walk through some of the different approaches to establish the evolution of the law, as is done in the balance of this Part of the Article. This is the "more generally accepted" theory and arises from a combination of federal statutes and regulations and Supreme Court precedent. *See Rights Above the Surface – As Affected by Air Navigation, supra* note 79. Indeed, Congress has clearly stated that "[t]he United States Government has exclusive sovereignty of airspace of the United States[,]" and that "citizen[s] of the United States [have] a public right of transit through the navigable airspace." 49 U.S.C.A. § 40103(a). The Supreme Court has similarly spoken. *See* Cahoon, *supra* note 81, at 160–61 ("[T]he following discussion focuses on 'low altitude' airspace property rights. The reason for this narrow focus, as opposed to a discussion of airspace property rights in general, is practical in nature. That a landowner has no right to airspace at 30,000 feet above his property not only makes common sense, but has clearly been determined by the United States Supreme Court as well.") (citations omitted). This is clearly true. *See, e.g.,* Laird v. Nelms, 406 U.S. 797 (1972); United States v. Causby, 328 U.S. 256 (1946). *United States v. Causby* is a classic case with very strong language:

> Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea. To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim.

Causby, 328 U.S. at 261. *Causby* was a good test case for navigation rights. *See id*. at 256–68. The U.S. military repeatedly flew heavy bombers, fighters, and other heavy aircraft over the home of the plaintiff at low altitudes. *See id.* at 259. Some of the plaintiff's chickens died as a result and the rest experienced a fall in egg production. *See id.* This clearly sets up the context between the needs of aviation and the needs of property owners. *See id* at 258–59.

[82] *Navigation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/navigation (last visited Apr. 27, 2025).

[83] This makes sense. *United States v. Causby* solidified the government's sovereignty over the country's collective airspace to enable a specific type of use by the public. *Causby*, 328 U.S. at 260 (confirming that Congress intended for the United States to have "'complete and exclusive national sovereignty in the air space' over this country." (quoting 49 U.S.C. § 176(a))). Eight years later, the Supreme Court again recognized this "exclusive national sovereignty" over air space. Braniff Airways, Inc. v. Nebraska State

unmanned, drones are not "aircrafts" of the type contemplated by the "aircraft exception" to trespass law.

Of course, these older authorities do not speak in these terms—in terms of a manned transfer of people or goods—because it was, at the time these cases were decided and statutes and regulations passed, unthinkable that aircraft could travel without people or for any reason other than transport. Saying anything of this sort would have been surplusage and silly.

Indeed, the seminal Causby case speaks implicitly to the importance of the transfer of goods and people, as balanced against the interference with "normal" property rights.[84] It did so in explaining that the needs and rights of aircraft are not unlimited:

> [T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. We would not doubt that if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. While the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense, he does use it in somewhat the same sense that space left between buildings for the purpose of light and air is used.[85]

In other words, flight that intrudes into the property owner's rights such that it "subtract[s] from the owner's full enjoyment" of his property goes too far because the benefits do not exceed the costs.[86]

Bd. of Equalization & Assessment, 347 U.S. 590, 596 (1954). The relevant statutes "grant[s] any citizen of the United States 'a public right of freedom of transit in air commerce through the navigable air space of the United States.'" *Causby*, 328 U.S. at 260 (internal citation omitted) (quoting 49 U.S.C. § 403). The focus, then, is on moving *people* from place to place (or, at the least, on permitting people to move cargo from place to place). *See id.* Importantly, the Supreme Court did definitively establish that airspace—to some extent—is "property." *See* WRIGHT, *supra* note 79. And it did so on a national level, despite the fact that "property" is usually defined "'by reference to local law.'" *Causby*, 328 U.S. at 266.

[84] *See id.* at 257–68.

[85] *Id.* at 264–65 (citations omitted).

[86] *Id.* at 265. Indeed, even the cases that forcefully rejected the common law in composing the modern aircraft exception do not precipitate against this view of drones and trespass. *See, e.g,* Hinman v. Pacific Air Transp., 84 F.2d 755 (9th Cir. 1936). Take, for example, Hinman v. Pacific Air Transp. where the 9th Circuit explicitly and strongly discarded *ad coelum*, going so far as to say that the classical concept of air rights ownership is not possible because "[t]he air, like the sea, is by its nature incapable of private ownership, except in so far as one may actually use it." *Hinman*, 84 F.2d at 757–58. This is strong language, but, in truth, it is merely recasting what we know of the aircraft exception: the common law is not workable because the kinds of aircraft that transport people and goods "need" those air rights more—or "use" those air rights in a more real and tangible sense. In the context of surveillance drones, however, there is no such imbalance. Drones that spy do so at the very real cost of those being spied

And this is precisely what happens in the context of surveillance drones—particularly ones used by private commercial actors (as opposed to governmental entities, presumably acting in the public interest). These flying machines, used by insurance companies, do not (of course) carry passengers or freight, so they do not benefit society by moving people or goods. All they do is permit privately held companies to spy on other private individuals.[87]

Accordingly, the "aircraft exception" was meant to protect the right of useful air travel (i.e., manned flight transporting people or goods) over others' land. That was the purpose of the exception and commercially used surveillance drones do not "deserve" the application of this exception.[88]

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upon—that is, the victims of surveillance have very much lost a property right (privacy) that they previously enjoyed. One could just as easily state that owners "use" their air rights when they enjoy their property without surreptitious observation; that is, they "need" those air rights more than those who would like to use them for surveillance or sport.

[87] Now, there is an argument that any activity that permits insurance companies to more accurately assess the risks associated with their insureds allows said companies to more accurately underwrite insureds, from an actuarial standpoint. I am not insensitive to that argument. However, I think that is essentially irrelevant because it seems to me that this effectively accomplishes a transfer of value from one private party (the now-uninsured) to some other private party (the insurance company, or, if you are inclined to view this charitably, the body of still-insured for which the insurance company is effectively a proxy). There is no net social value, that I can discern, to counterbalance the rights (as argued herein) that are being infringed upon. At the least, even if there is some social value in this sort of spying, there is no real evidence that this value equals or exceeds the value associated with moving people and goods *or* the historical value property owners derive from their air rights.

[88] This is so, even though it may superficially appear that some of the theories regarding the "aircraft exception" are wide enough to encompass all types of drones. In particular, a number of the cases that adopt one or another of the theories discussed above speak of property owners' air rights in terms of whether an overhead aircraft disturbs the property owners. *See, e.g.,* Griggs v. County of Allegheny, 369 U.S. 84 (1962) (holding that, though a flight over another's land may be within statutorily defined navigable airspace, a landowner's property interest may nevertheless have been infringed upon due to a substantial interference with his use and enjoyment of the land itself); *Causby*, 328 U.S. at 256–68 (examining overhead flight in terms of whether it negatively affected the landowner's ability to use and enjoy the property). These cases, upon first consideration, perhaps seem sufficient to protect property rights. *See Griggs*, 369 U.S. at 84–90; *Causby*, 328 U.S. at 256–68. After all, they acknowledge the necessity of the aircraft exception but state that no aircraft (even when such a term is defined broadly enough to encompass drones) will be permitted to fly over property if it negatively affects property rights. *See Griggs*, 369 U.S. at 84–90; Causby, 328 U.S. at 256–68. The difficulty, however, is that there is far too much ambiguity in determining whether something "negatively" affects one's property rights. Some cases, for example, turn to nuisance to try to assess the "acceptable" level of negative impact. *See, e.g.,* Atkinson v. Bernard, Inc.*,* 223 Or. 624 (1960). For example, in *Atkinson v. Bernard, Inc.*, the Oregon Supreme Court stated:

> If the prime method for ascertaining the limits of the ownership-trespass zone in airspace is by determining whether the landowner's use and enjoyment of the surface have been subjected to unreasonable interference, it is apparent that the concept of nuisance is equally available with trespass as an analytical tool. In fact, some decisions range freely over both the trespass and the nuisance rationales—the airspace zone in which intrusion by aircraft would be a nuisance apparently being considered in certain opinions as coterminous with that in which it would constitute a trespass . . . while others which rely upon nuisance as the ground of decision might easily be interpreted in trespass terms . . . .

In short, "'[u]nmanned aircraft[s] are inherently different from manned aircraft[.]'"[89] They are by definition unmanned, and though they accomplish many different tasks, no surveillance drone does anything relating to the critical and primary task of transporting human beings or goods.[90] As such, drones are not "aircrafts," and arguing that they are is unnecessary and not faithful to the underlying purpose of the exception. Funny enough, this seems to primarily be a nomenclature issue, because the term "aircraft exception" is so broadly worded.

Given this, the law can, and should, protect the public. The public's privacy rights are eroding under the pressure of new technology because that new technology has been fundamentally misunderstood in the context of our common law traditions.[91] We have

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Id. at 630–31 (citing William B. Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313, 1315 (1958)). However, utilizing nuisance instead of the "cleaner" common law trespass cause of action is difficult because, "[a]t the point where 'reasonableness' enters the judicial process[,] we take leave of trespass and steer into the *discretionary* byways of nuisance. Each case then must be decided on its own peculiar facts, *balancing the interests* before the court." *Id.* at 631 (emphasis added). And that is precisely what the "aircraft exception" was intended to do. However, there is no reason to mimic that approach in the case of surveillance drones because such a proxy is not necessary here. In other words, there is no reason to rob property owners of their rights (by moving from a direct examination of those rights toward a moderated analysis of burdens) because, as stated above, *surveillance drones are not aircraft*. Treating them as such is a mistake and unnecessarily harms owners' property rights by essentially ignoring the immediate nature of property owners' interests and instead balancing the utility and harm of competing interests.

[89] Keith Laing, *FAA Chief: Drones 'Inherently Different,'* THE HILL (Nov. 7, 2013, 12:55 PM), http://thehill.com/policy/transportation/189587-faa-chief-drones-%E2%80%98inherently-different%E2%80%99-from-airplanes (quoting Federal Aviation Administration chief Michael Huerta, in a speech to the Aerospace Industries Association (the "AIA")).

[90] *See id.* (Unmanned aircraft "'run a very wide range, with a number of different physical and operational characteristics. Some are the size of a fist, and fly at low altitudes. Others have glider-like bodies with the wing span of a 737 and can fly above 60,000 feet.' 'Many can fly longer and hover longer than manned aircraft[.]' . . . 'They are also lighter and slower than traditional aircraft and have more lift and not as much drag. What unites them all is that the pilot is on the ground and not on aboard the aircraft.'"); *See also* AEROSPACE INDUS. ASS'N, UNMANNED AIRCRAFT SYSTEMS: PERCEPTIONS & POTENTIAL 1–16, https://cdpsdocs.state.co.us/coe/Website/Data_Repository/Unmanned%20Aircraft%20Systems--Perceptions%20%26%20Potential_Aerospace%20Industries%20Assoc..pdf (discussing the many different uses and functions of drones).

[91] *See, e.g.,* O.R.S. § 837.380(1) (providing that real property owners can bring "an action against any person or public body that operates an unmanned aircraft system that is flown over the property if: (a) The operator of the unmanned aircraft system has flown the unmanned aircraft system over the property on at least one previous occasion; and (b) The person notified the owner or operator of the unmanned aircraft system that the person did not want the unmanned aircraft system flown over the property.") This section later provides an exception for drones that are "lawfully in the flight path for landing at an airport, airfield or runway" and that are "in the process of taking off or landing." O.R.S. § 837.380(2). This is considered a progressive statute, but it is riddled with exceptions that lessen the impact of the common law. A number of other states are considering their own laws. *See Current Unmanned Aircraft State Law Landscape*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/transportation/current-unmanned-aircraft-state-law-landscape (last updated Mar. 27, 2023) (indicating that one-third of states have enacted or are attempting to enact some sort of legislation to regulate drone use). It is notable that none of the existing statutes return to the status quo of the common law. For instance, some states do not outright prohibit drone overflight but do punish flight accompanied by malicious intent. *See, e.g.*, Tex. Gov't Code Ann. §§ 423.002–003 (indicating that the use of a drone is illegal if there is "intent to conduct surveillance" but providing for 21 exceptions); Wis. Stat. Ann. § 942.10 (requiring a showing of "intent to photograph, record, or otherwise observe another" where there is a "reasonable expectation of privacy . . . ."); Idaho Code Ann. § 21–213 (indicating that observation requires a warrant or consent from the owner).

become entirely accustomed to ceding our property rights to flying machines because of the aircraft exception, but society and the law should no longer give drones a "pass" to trespass and thereby undermine reasonable expectations of privacy and property rights.

I previously argued that state and federal legislatures and the various responsible administrative agencies can prevent this simply by standing by traditional common law and not accepting the application of the aircraft exception to drone surveillance. Here, I go further: private citizens should have a private cause of action when they are spied on by surveillance drones. This is no strange flight of fancy, really, we need to simply view people as having a property right in the air above their tangible property (as measured by property lines), and they will thereafter be able to sue for trespass if someone uses a drone to survey them.[92]

This is particularly apt in the commercial context at hand in this Article. If we are to draw a line that decides the balance of rights between individuals, as private citizens, and business organizations, in the pursuit of commercial interests, I think it proper to at least put a thumb on the scales in favor of private interests, because of the importance of privacy to each of us as individuals. This is a basic part of being human, and a business entity's omnivorous need for ever-more profits is not an analogue. Whether one views privacy as being "based on the ideals of individual control, autonomy, and liberty from . . . intrusion,"[93] or the "importance of protecting human dignity and an 'inviolate personality[,]'"[94] it is clear that the need for privacy is a fundamental human need. As such, the law ought to take special care of it, particularly in situations where technology is quickly changing how people and organizations interact.

There is, moreover, a precedent to this sort of line-drawing elsewhere in the law, where we compare the rights and needs of individuals to the rights of business entities. Take, for example, speech.[95] Though beyond the scope of this Article, it is clear that "commercial speech" is subject to a lower standard of judicial review than other kinds

[92] This may be something of a pyrrhic victory for many property owners, as the kind of surveillance at issue is, by its very nature, surreptitious and therefore extremely difficult to recognize or address. But that is not the case when it comes to surveillance which leads an insurance company to terminate its contract.
[93] Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J. L. & TECH 12, 4 (2011) (citing Avner Levin & Mary Jo Nicholson, *Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground*, 2 U. OTTOWA L. & TECH J. 357, 360 (2005)).
[94] *Id.* (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890)).
[95] Which seems to me to be a pretty analogous example, given the humane nature of the rights and interests at issue.

of speech.[96] The reason for this lowered level of protection is that "[c]ommercial speech is considered to be different from other kinds of . . . expression because [the commercial actors] are particularly well-suited to evaluate the accuracy of their messages . . . and because commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not particularly susceptible to being crushed by overbroad regulation."[97] The same kind of thinking applies here. Whereas individual activity is susceptible to restrictions and is likely to be impacted by being, for instance, subjected to a cognizable claim for trespass, business activities are not. No insurance company is going to go out of business because it is held to a traditional property-rights based view of privacy. Indeed, even the very activity here at issue—the inspection of the insured's premises—will not be impacted. Insurance companies have contractual rights to inspection,[98] and continue to have the same economic incentive to exercise those rights. The only thing missing is the ability to do so in a relatively new and relatively unique way that is almost designed to offend an individual's sense of property and privacy. Given that we are not worried about "strangling" any reasonably desirable commercial activity and given the strong individualistic interests on the countervailing side, it makes sense, here, to favor the personal over the commercial.

But it need not be limited to situations where insurance companies (or, indeed, other contractual counterparties) use drone surveillance—any such overhead drone surveillance (which does not, by definition, involve the transport of people or goods) should be held to constitute a form of compensable trespass. Ultimately, what is important is that properly viewing air rights as an existing property right should rightly result in an increased level of protection of property and privacy.[99]

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[96] *See, e.g.,* Tara Kole, *Advertising Entertainment: Can Government Regulate the Advertising of Fully-Protected Speech Consistent with the First Amendment?*, 9 UCLA ENT. L. REV. 315 (2002). One Law Review article stated: "Commercial speech is defined as speech that 'does no more than propose a commercial transaction,' and applies primarily to advertisements and product information." *Id*. at 329 (quoting Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)). The Supreme Court has held that commercial speech "warrant[s] some First Amendment protection . . . but . . . less than that accorded core First Amendment speech, such as books, newspapers or film." *Id*. at 330; *see also* David O. Stewart, *Supreme Court Continues to Struggle with Commercial Speech Doctrine*, A.B.A. J., Sept. 1995, at 40, 40 (noting minimal constitutional respect for commercial speech).

[97] Ann K. Wooster, *Protection of Commercial Speech Under First Amendment – Supreme Court Cases*, 164 A.L.R. Fed. 1 § 2 (2000) (citing Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810, 2 Media L. Rep. (BNA) 2097 (1977), reh'g denied, 434 U.S. 881, 98 S. Ct. 242, 54 L. Ed. 2d 164 (1977), § 6[b]; Friedman v. Rogers, 440 U.S. 1, 99 S. Ct. 887, 59 L. Ed. 2d 100, 4 Media L. Rep. (BNA) 2213 (1979), reh'g denied, 441 U.S. 917, 99 S. Ct. 2018, 60 L. Ed. 2d 389 (1979) and reh'g denied, 441 U.S. 917, 99 S. Ct. 2018, 60 L. Ed. 2d 389 (1979), § 20; and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346, 1 Media L. Rep. (BNA) 1930 (1976), § 14.).

[98] *See infra* Part IV.

[99] This argument is supported, to some extent, by the rule favoring the common law over contradictory statutory schema. *See, e.g.,* United States v. Texas, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law."); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change."). "[T]his rule of statutory interpretation is particularly apt . . . when prior law reflected significant policy considerations of longevity and importance . . . ." Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 232 (3rd Cir, 1998) There is no question that the common law can be changed, but the law leans against it, requiring

B. State Law Constitutional Rights

Even aside from a revitalization of the common law in this area, I think individuals have privacy rights that they can stand on in the form of state constitutional guarantees—or at least I think there is an argument that they may have such a right.[100] Several states have state constitutional provisions that speak to their citizens' right to privacy. Washington State's constitution, for instance, states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."[101] Montana's constitution, similarly, provides that "[t]he right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."[102] And there are many others—some that are as expressive as these, and others that are not but have been interpreted as speaking to an individual's right to privacy.[103]

This seems spot on in terms of the acts that I have herein described as horrible invasions of privacy, but of course that is overly simplistic. All of these provisions have been interpreted as providing for a right to privacy as against the state. And that seems right to me—it is the state after all, that we need protection from, as we are free to strike contracts and agreements with our fellow citizens (and with business associations made up of fellow citizens) if we seek to protect ourselves therefrom.

Nevertheless, I argue that this is a reasonable foundation upon which to build a private cause of action in this context. Primarily, this is due to the fact that drone operations arguably arise due to governmental influence or government related activity. Though it is true that the government is not directly involved in the drone surveillance we examined herein, it is not true that the government—and more broadly, governmental interests—play no role in the situation. In particular, this kind of activity is only permitted due to the suspension of traditional property rights,[104] so that government-regulated activity (commercial flight) can take place. I think it is fair to describe the use of drones (surveillance and otherwise) as a kind of freeloading off of the suspension of traditional property rights. That is, the law has been modified to

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specificity and clarity to do so. In essence, that is all I am recommending here: that the law not be changed (or be allowed to change) without forethought, discussion, and specificity.

[100] For reasons that will become clear later on in this section, it may well be that this argument for the development of a state constitution private cause of action is alternative to the prior argument based upon common law property rights—that is, if the latter is, in fact, permitted, then this constitutional claim is likely unnecessary.

[101] WASH. CONST. art. I, § 7.

[102] MONT. CONST. art. II, § 10.

[103] *See*, *e.g.*, LA. CONT. art. I, § 5 ("Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy."); ILL. CONST. art. I, § 6 ("The people shall have the right to be secure in their . . . houses . . . against . . . invasions of privacy . . . ."); ARIZ. CONST. art. 2, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."); ALASKA CONST. art. 1, § 22 ("The right of the people to privacy is recognized and shall not be infringed."). There are still other provisions that speak to rights that have been associated with privacy by the courts thereof. *See, e.g.,* TENN. CONST. art. 1, § 8.

[104] See *supra* Part II.A.

accommodate important aviation interests, and drones—which do not fit within those interests—have been able to take flight, as it were, due to that suspension. Given then, that drones can operate only because our legal system has foreshortened traditional property rights in order to benefit the governmental and economic interests behind commercial flight, it seems reasonable that some of the restrictions attendant on governmental activity should apply to drone operations.

This would not necessarily mean that all aspects of constitutional guarantees would affect drone operators. But it does seem reasonable that certain, clearly applicable constitutional provisions (i.e., a provision about privacy) would apply to government-adjacent activity that (again clearly) implicates that provision. Simply put, any state that has a clear right to privacy enshrined within its constitutional framework should permit individuals who are spied on by drones—to the extent that they are not ultimately permitted to sue for trespass—to pursue the spying party for a violation of their privacy rights.

And this is particularly apt in this case due to the bureaucratic, one-sided nature of the relationship. Again, it is clear that this is not a direct governmental activity. The spying, here, is done by insurers (or consortia thereof), that is, by large corporatized private entities, not by federal or state governments. But there is a parallel, in that this is a one-sided activity in which the consumer has little-to-no agency. Homeowners either have to secure property insurance as a matter of contract or as a matter of economic self-interest. And the nature of that insurance—and the terms thereof—is effectively offered to them on a take-it-or-leave-it basis. This disparity in power means that the companies' behavior is almost governmental in scope (particularly when it is based upon a right that accrues to them due to the governmental concerns inherent in commercial aviation).[105] This sort of proto-governmental activity should be subject to the same sorts of restrictions that we apply to outright governmental activity because the underlying power dynamic is similar: one party has little to no power and must live with the decisions of the other party, which has most or all of the power.[106] If we do so, then parties will have another way in which to defend themselves from this sort of activity.

[105] This argumentative underpinning is echoed later on in addressing the putative justification for this kind of systemized spying. *See infra* Part IV.

[106] This argument is clearly susceptible to a slippery slope issue—after all, if insurance companies are *essentially* like governmental entities and so should be subject to constitutional provisions traditionally applied to governments, then why should we not treat any "fill-in-the-blank large corporation" the same way? I would respond to that, in a meta fashion, by pointing out that it is a slippery slope to dismiss an argument simply because it can be extrapolated to other situations in a problematic way. The answer is straightforward: simply assess every situation on its own terms, according to its own merits. Here, the disparity in power, and the government-related nature of the activity at issue, is, I think vanishingly rare. No other analogous situation occurs to me. That does not mean that this argument could never apply to any other corporate situation—it merely means that the argument is not unduly dangerous or unworkable by its very nature.

IV. Contract Claims and Reasonability

In thinking through the claims in this Article, the primary obstacle to the successful pursuit of the claims I envision (assuming they are judged to be cognizable claims in the first place) is the contract of insurance that governs the relationship between the parties. As detailed above, the terms of these contracts do seem to permit the kind of activity described herein—after all, surveillance is not a trespassory invasion of your property rights if you agree that the spying party has the right to be there, to do the spying at issue (i.e., if they are, in effect, an invitee).[107] However, I think this potential obstacle is relatively easily disposed of because of the nature of these contracts and because claiming the right to spy on someone, thereunder, is effectively insisting on a bizarre term that is generally unenforceable at law.

Firstly, the nature of these contracts is that they are long, complicated, difficult-to-read, and put to insureds on a take-it-or-leave-it basis. Insurance contracts are "contracts of adhesion." Contracts of adhesion are "'standard form printed contracts prepared by one party and submitted to the other on a "take it or leave it" basis.'"[108] Adhesion contracts are also characterized as contracts where there is no equal bargaining power between the two parties.[109] In the insurance context, the contract is drafted by the insurance company and the insured just "adheres" to it, so the insured has little choice or bargaining powers, which makes it a contract of adhesion.[110]

As such, insurance contracts are interpreted against the insurance companies that draft them.[111] The rule of construction that makes it so that any ambiguity in a contract is interpreted against the drafter is called *contra proferentem*.[112] This old common law concept comes from the concept that "the speaker assumes the risk of vagary in language . . . ."[113] Although contra proferentem was not a popular contract principle, it gained popularity in situations where agreements were one-sided and negotiations did not take place.[114] Contra proferentem started to be applied to insurance contracts by

[107] *See supra* Part II.B.
[108] Parker Smith, *Coping with the Death of the Bargain Without Burying the Spirit of the Law: A "Foundational" Approach to Comparative Law and Its Application to Adhesion Contracts in Louisiana*, 76 LA. L. REV. 1277, 1280 (2016) (quoting Standard Oil Co. v. Perkins, 347 F.2d 379, 383, n.5 (9th Cir. 1965)).
[109] Standard Oil Co. v. Perkins, 347 F.2d 379, 383, n.5 (9th Cir. 1965) (describing in FN5 the situation that creates adhesion contracts).
[110] Edwin W. Patterson, *The Delivery of A Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919) (one of the first academic resources that recognized insurance contracts as constituting a contract of adhesion).
[111] *See* Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, 449 Mass. 621, 628 (2007) (noting "any ambiguities in the language of an insurance contract are interpreted against the insurer who used them and in favor of the insured."); *see also* USAA Cas. Ins. Co. v. Carr, 225 A.3d 357, 360 (Del. 2020) (construing insurance contract language "'most strongly against the insurance company which has drafted it.'"); *see also* J.P. Morgan Sec. Inc. v. Vigilant Ins. Co., 37 N.Y.3d 552, 561 (2021) (following the rule that ambiguities in insurance contracts are "construed against the insurer and in favor of the insured . . . .").
[112] David Horton, *Flipping the Script: Contra Proferentem and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 440 (2009).
[113] *Id.* at 438.
[114] *See id.* at 439–40.

courts once insurance companies became incorporated, unilaterally drafted the terms of policies, widely popularized (thousands of people got the same standardized contract), and insurance started becoming an economic necessity.[115] The policy behind applying contra proferentem to insurance contracts was that the liability should be on the drafter since they had the control over the preparation of the contract.[116] However, it is not a strict rule.[117]

In New York law, contra proferentem may be applied once: (1) the court determines that a provision in the insurance contract is ambiguous as a matter of law and (2) there is no extrinsic evidence that sufficiently shows the intended meaning by the parties at formation.[118] Once there is no extrinsic evidence, then the court may use contra proferentem to interpret the ambiguities against the insurance company-drafter as a matter of law.[119] However, if there is any extrinsic evidence that raises the question of credibility or reasonable inferences of the meaning intended, then the court cannot use contra proferentem.[120] Additionally, even if there is no extrinsic evidence, the court may apply contra proferentem to the provision.[121] Lastly, the 2nd Circuit noted that contra proferentem may not apply if both parties are "sophisticated."[122] However, in this case, the 2nd Circuit held that even if both parties are sophisticated, contra proferentem applies because there was no negotiation of terms.[123]

In New Jersey law, the same mechanics apply, but the 11th Circuit describes the process of determining ambiguity in contract provisions.[124] Firstly, the plain and ordinary meaning of a provision is the first step to interpreting insurance contracts.[125] Second, the court can look to other canons like "last-antecedent" and "series-qualifier."[126] Lastly, a court can look to contra proferentem.[127] However, the court qualifies this rule by holding that contra proferentem only applies whenever there is unequal bargaining power, so it

[115] *Id.* at 440–42 (describing that the first SCOTUS case to establish contra proferentem in insurance contracts was *First National Bank v. Hartford Fire Insurance Co.*).
[116] *Id.* at 441–42.
[117] *Id.* at 443–44 (noting that restatements later made contra proferentem a "last resort" and "subservient" rule in contracts even in insurance contracts).
[118] Morgan Stanley Grp. Inc. v. New England Ins. Co., 225 F.3d 270, 279 (2d Cir. 2000).
[119] *Id.*
[120] *Id.*
[121] *See id.* (noting that all throughout the case, the court only uses "may" when it comes to whether courts should apply contra proferentem).
[122] *See id.* at 279–80 (noting that it is not settled law and this court did not have to resolve it because of the lack of negotiation made it so that contra proferentem applied regardless).
[123] *Id.*
[124] *See* ECB USA, Inc. v. Chubb Ins. Co. of New Jersey, 113 F.4th 1312, 1319 (11th Cir. 2024) (showing that although contra proferentem applies similarly to New York law where it interprets ambiguity in favor of the non-drafting party, it also adds more procedure on how a court should determine if there is ambiguity).
[125] *Id.*
[126] *Id.* at 1320 (noting a more extensive description of these canons that courts should go through before applying contra proferentem).
[127] *Id.*

cannot be applied between two sophisticated parties who negotiated.[128] This case shows the continuation of the historical reluctance to use this rule.[129]

This one-sidedness and the attendant balancing of scales in favor of insureds, only makes stronger the separate, but related, argument that these kinds of provisions should be redlined out of the contract because they are bizarre. This is a matter of state law of course, but this is a generally accepted concept, as case law and authority make clear. Under Texas law, for example, a contract or contract provision can be deemed unenforceable if it is found to be unconscionable or violates public policy.[130] Similarly, a term may be considered unenforceable if there is reason to believe it is bizarre or oppressive, if it contradicts explicitly agreed upon standard terms, or if it undermines the primary purpose of the agreement.[131] Unconscionability can be either substantive, relating to the fairness of the terms themselves, or procedural, concerning the circumstances under which the contract was formed.[132] Here, I think the substantive part of the analysis comes into play. The Restatement (Second) of Contracts §211, for example, states that a term will not be part of an agreement "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term . . . ."[133] This means that consumers—especially those situated like insurance purchasers—should not be bound by terms that extend beyond what a reasonable person would expect.[134] Similarly, public policy serves as another potential ground for finding a bizarre contract term unenforceability. Public policy prohibits the enforcement of a contract term that is so inequitable that it shocks the conscience.[135] Of course, the crux of this is that the contract provisions at issue here are "bizarre," "unconscionable," or "violate public policy." I think that case is not difficult to make, as discussed above. Taken altogether, these various concepts augur against enforcing these sorts of contract terms against consumers.

Another point to consider is severability—in determining the enforceability of a bizarre contract term, severability becomes important when deciding if an agreement can stand

[128] *See id.* at 1326–27 (describing that contra proferentem is typically used in favor of the insured within a contract of adhesion, so if it is a negotiated contract between sophisticated parties, then this rule does not apply).
[129] *See* Horton, *supra* note 112, at 443–44; *see also* ECB USA, Inc., 113 F.4th at 1326–27 (showing that from its beginnings contra proferentem was restricted and that is a continuing trend).
[130] In re Poly-America, L.P., 262 S.W.3d 337, 348 (Tex. 2008) (holding that a contract term may be deemed unconscionable when it is so one-sided or bizarre that it offends the court's sense of fairness in an extreme way).
[131] RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. f (1981).
[132] When a term is unusually strange or bizarre (i.e., it is substantively unconscionable), it raises legitimate questions about whether it was truly mutually agreed upon or if one party was unfairly taken advantage of or somehow taken by surprise. *See id.*
[133] *Id.* at § 211(3).
[134] *Id.* at § 211, cmt. f.
[135] *See* Maslowski v. Prospect Funding Partners LLC, 994 N.W.2d 293, 306 (Minn. 2023) (Moore, J., concurring) (noting the equitable doctrine grounded in public policy allows courts to invalidate contract provisions that are unfair and one-sided to the point of shocking the conscience); *see also* Sanchez v. Valencia Holding Co., LLC, 61 Cal. 4th 899, 911 (noting this court considers "shock the conscience" to encompass other standards like overly harsh, unduly oppressive, and unreasonably favorable terms, all reflecting the same concept of substantial unfairness).

despite unenforceable or unconscionable provisions.[136] In the *In re Poly-America* case, for example, the Supreme Court of Texas examined an arbitration agreement with a severability clause.[137] The Court granted mandamus relief to the employer, finding that although some terms were substantively unconscionable, they were severable from the rest of the agreement and that the balance of the contract was thus enforceable.[138] The unconscionable terms were not integral to the parties' intent to arbitrate, allowing the enforceable portions to remain intact.[139] The key inquiry then is whether the unenforceable provisions are essential to the agreement's purpose. If not, they can be severed, preserving the rest of the contract, thus precipitating in favor of a finding of unenforceability.[140]

Admittedly, this kind of extremity represents a relatively high bar, and the offending term or behavior must go beyond being merely distasteful or undesirable—it must reach the level of the truly shocking.[141] The term must be excessively one-sided and oppressive, resulting in a grossly unfair bargain in order for it to be deemed unenforceable.[142] And that is ultimately a question of law, meaning that the court has the authority to decide whether a particular term is enforceable by considering all the facts and circumstances surrounding the contract.[143] Indeed, in a way, this entire Article turns on the argument that this behavior is outrageous. A large corporation using unmanned aerial drones to spy on your house—to violate the sanctity of your personal space, at-will, and in an ongoing fashion—is a gross violation of your property rights and, concomitantly, a violation of every reasonable expectation one has for privacy.[144] I think this qualifies as "bizarre," particularly when one considers the contracts into which this "right" is inserted. Insurance contracts are lengthy, dense, and non-intuitive, as discussed above, such that it seems unlikely that anybody truly appreciates that they are signing away the right to go unobserved on their own property. Given the one-sided

[136] *See* Narayan v. Ritz-Carlton Dev. Co., 140 Haw. 343, 355 (2017) ("[T]he general rule is that severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable when the illegal provision is not central to the parties' agreement.") (citing Beneficial Haw., Inc. v. Kida, 96 Haw. 239, 311 (2001)); *see also* Ramirez v. Charter Commc'ns., Inc., 15 Cal. 5th 478, 516 (2024) (noting courts may sever illegal contract provisions when they are incidental, preserving the contract's core purpose).
[137] In re Poly-America, L.P., 262 S.W.3d 337, 359–60 (Tex. 2008).
[138] *Id.* at 360–61.
[139] *Id.* Here, the court found that a contract term may be deemed unconscionable when it is so one-sided or bizarre that it offends the court's sense of fairness in an extreme way. *Id.* at 348.
[140] *See e.g.*, *Narayan,* 140 Haw. at 355; *Ramirez,* 15 Cal. at 516; *Southland Nat'l Ins. Corp. v. Lindberg*, 289 N.C. App. 378, 386 (2023) (Determining if an unenforceable provision of a contract is a "main purpose" or "essential feature" of it by examining whether other provisions rely on it); *see* 1 CORBIN ON ILLINOIS CONTRACTS § 89.03 (2024); *see also* Diamond Hotel Co. v. Matsunaga, 4 N. Mar. I. 213, 220 (1995) (analyzing the severance of lease provisions by assessing whether they are integral to the agreement, whether the parties intended severance, and the existence of a severability clause).
[141] *See* Ridge Nat. Res., L.L.C. v. Double Eagle Royalty, L.P., 564 S.W.3d 105, 135 (Tex. App. 2018) (emphasizing that, for a court to intervene and void a contract on the basis of procedural unconscionability, the negotiation process must involve conduct that goes beyond distasteful and reaching the level of genuinely shocking).
[142] In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001) (citing TEX. BUS. & COM. CODE § 2.302).
[143] Smith v. Price's Creameries, 98 N.M. 541, 544 (2001).
[144] *See supra* Part II.A.

nature of the contracts, and the underlying gravity and frankly weirdness of the kind of spying at issue, I do not think it at all a stretch to classify any spying-permitting provision as unconscionable or against public policy.

The mere fact that this act is technically permitted in an insurance contract, then, does not obviate the problem or somehow excuse the insurance companies from culpability. Thus, the kinds of claims argued for herein should still succeed.

V. Conclusion

Insurance is not just inevitable—it is effectively compulsory, at least for anyone desiring to live in modern America. This raises a host of issues, but one of the more pressing, in recent years, is the availability and expense of homeowners' insurance. This has become problematic for consumers and homeowners, as outlined herein. This is only exacerbated by the use of commercial surveillance, a very modern phenomenon that would have been unthinkable under traditional common law—both in actuality but also in terms of the property rights people traditionally had to the airspace above their homes.

The simplest way to address this recent development is to stop permitting it. This makes sense because of the unique development of aviation rights—if we stop exempting drones from the traditional rules of property by not applying the aircraft exception to them, then this problem goes away. There are other ways to accomplish this end, such as through privacy provisions of state constitutions, but whatever road we take, the sought-after destination is the same: we do not want large commercial organizations to have the right to effectively free-range spying. This is so—and legally cognizable—despite the presence of broad inspection provisions in many insurance contracts of adhesion. The end result, then, is a robust right to stop big companies from spying on us—a good thing that the legal system ought to support.