

**LAW ENFORCEMENT LIGHTNING: NORTH
DAKOTA POLICE DEPARTMENTS AND
WEAPONIZED DRONES**

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INTRODUCTION

At 3:00 AM in Grand Forks, North Dakota, a local police officer receives a call that a large fight is occurring at a bar on the outskirts of town. Reportedly, one man has already been stabbed. Knowing that a squad car would arrive too late to provide any assistance, the officer dispatches one of his departments new multirotor drones in an attempt to control the situation. Upon arrival, the drone observes two men engaged in a violent fist fight, but is unable to spot any weapons. The two men ignore the drone, and one gains the upper hand, knocking the other to the ground where he continues to pummel him. Out of options, the police officer fires the TASER X26C attached to the drone, leaving the target motionless and unresponsive.

Every year, policing in the United States becomes subject to increasing scrutiny by the public.¹ With the broadcasting of lethal force used by officers being commonplace on national news, it is easy to see why this trend is occurring.² However, the perceived

¹ Michael S. Schmidt & Matt Apuzzo, *F.B.I Chief Links Scrutiny of Police With Rise in Violent Crime*, N.Y. TIMES, Oct. 23, 2015, http://www.nytimes.com/2015/10/24/us/politics/fbi-chief-links-scrutiny-of-police-with-rise-in-violent-crime.html?_r=0 [<https://perma.cc/D8XY-6MJG>].

² See, e.g., *In the News: Excessive Force*, CHI. TRIB., <http://articles.chicagotribune.com/keyword/excessive-force> [<https://perma.cc/FUT9->

issue with policing does not extend beyond the use of unreasonable deadly or excessive force. What society has yet to notice in the world of policing is a novel issue that has been progressively developing for years. This issue is technology.

Perhaps the most visible technological advancement in law enforcement is the unmanned aerial vehicle (UAV), more commonly known as the “drone.”³ The United States military already uses drones for surveillance purposes and in seek and destroy operations.⁴ Similarly, the United States border patrol has used drones to surveil the border for years.⁵ However, until very recently, drones were not used by any type of local law enforcement, especially not to collect information on American citizens.

Currently, the Federal Aviation Administration (FAA) oversees the regulation of drone usage.⁶ For state agencies to use drones, they must first receive approval from the FAA.⁷ However, the FAA has not yet passed any regulations that are specific to drone usage by civilians or local public agencies.

Local law enforcement agencies are increasingly beginning to use drones to gather intelligence and assist in policing.⁸ As technology improves, this natural progression is foreseeable, and somewhat expected. However, through the passing of House Bill 1328 (H.B. 1328), North Dakota has taken the implementation of

S7RJ] (last visited Feb. 20, 2017). Here, the Chicago Tribune lists many articles about events of excessive force.

³ Kaveh Waddell, *Few Privacy Limitations Exist on How Police Use Drones*, NAT'L J. ONLINE (Feb. 5, 2015), <http://www.nationaljournal.com/daily/2015/02/05/few-privacy-limitations-exist-how-police-use-drones> [https://perma.cc/7JQF-RTUG].

⁴ *Drones: What Are They and How Do They Work?*, BBC NEWS (Jan. 31, 2012), <http://www.bbc.com/news/world-south-asia-10713898> [https://perma.cc/3VSZ-LPCN].

⁵ *Federal Report Says Border Patrol's Drone Program Doesn't Fly*, FOX NEWS (Jan. 13, 2015), <http://www.foxnews.com/us/2015/01/13/federal-report-says-border-patrol-drone-program-doesnt-fly.html> [https://perma.cc/3QYQ-V7JG].

⁶ Justin Bachman, *The FAA Stakes Out Its Turf in the Drone Wars*, BLOOMBERG BUS. WEEK (Dec. 27, 2013, 11:31 AM), <http://www.bloomberg.com/bw/articles/2013-12-26/who-regulates-drones-federal-aviation-administration> [https://perma.cc/LZ9W-F2PE].

⁷ *Id.*

⁸ *Law Enforcement Agencies Using Drones List, Map*, GOVERNING (2013), <http://www.governing.com/gov-data/safety-justice/drones-state-local-law-enforcement-agencies-license-list.html> [https://perma.cc/5AJ8-AMT3].

technological advancements into policing far beyond what the average United States citizen could have fathomed.

This Comment will focus on drone regulation in the United States, primarily in North Dakota. Since H.B. 1328 is the first real piece of legislation in North Dakota concerning drones, a large portion of the discussion will be in relation to it. This Comment will effectively be the first to tackle exactly what H.B. 1328 is, what it does, and why it was passed.

Part I outlines and defines the bill and its provisions. Every provision of the bill will be outlined, but only the controversial parts of the bill will be discussed, particularly those related to drone loadout. FAA regulations will be discussed slightly in this section as well.

Part II discusses the many ways in which the bill may, and will be implemented. The limitations and exceptions in H.B. 1328 are numerous and can be confusing. This section will break them down to their most basic form, and discuss what they mean.

Part III discusses the problems created by the bill, which are chiefly legality and classification. This section will discuss the legality of H.B. 1328 in North Dakota and under federal regulations. This section will also address drone classification and policy issues.

Part IV explains the lobbying and politics behind the passing of the bill. The process of modifying and passing H.B. 1328 was fairly lengthy. This section will explain why the bill was introduced, modified, and eventually passed.

Part V shifts gears from North Dakota to the federal government, and will discuss what regulations the FAA has put into place that affect the bill. The FAA is essentially the ruling government body in regards to drone regulation. This section will explain the regulations passed by the FAA that affect H.B. 1328.

Part VI will offer possible solutions to the issues outlined in Part III. H.B. 1328 was only recently passed, so no tangible issues have emerged. This section aims to offer solutions that will prevent possible issues from occurring.

I. WHAT IS HOUSE BILL 1328?

A. H.B. 1328 Defined

Law enforcement in fourteen states have obtained or applied for approval by the FAA to use drones.⁹ These drones are used mainly for surveillance purposes, such as border patrol and natural disaster response. In order for a governmental agency to use drones, the agency must request that the FAA issue that agency (or state) a Certificate of Waiver or Authorization.¹⁰ North Dakota obtained this certificate prior to the adoption of H.B. 1328.¹¹

North Dakota H.B. 1328 was passed on April 14, 2015, and was codified in Chapter 29.4 of the North Dakota Century Code.¹² Essentially, 1328 is a bill that permits the usage of drones by local law enforcement agencies to assist in executing search warrants.¹³ The bill substitutes the term “drone” with “unmanned aerial vehicle,” which the bill defines as “any aerial vehicle that is operated without the possibility of direct human intervention within or on the aerial vehicle.”¹⁴ In order to deploy a drone owned by law enforcement, the standard North Dakota warrant requirements must be met.¹⁵ A search warrant in North Dakota must be issued “upon probable cause, supported by oath or affirmation, [and must] particularly describ[e] the place to be searched and the persons and things to be seized.”¹⁶ Additionally, the warrant must contain a data collection statement that includes the persons with the authority to operate the drone, where the drone will operate, the maximum period for which the

⁹ *Id.*

¹⁰ See *Request a Waiver/Airspace Authorization—Small Unmanned Aircraft System (sUAS)*, FAA.GOV, https://www.faa.gov/uas/request_waiver/ [<https://perma.cc/WL9G-5H46>] (last visited Feb. 20, 2017); see also *Certification of Waiver or Authorization Application—Privacy Act*, FAA.GOV, https://www.faa.gov/documentLibrary/media/Form/7711-2_%5B08-08%5D.pdf [<https://perma.cc/S54Y-8NF6>] (last visited Feb. 20, 2017).

¹¹ See *supra* note 8.

¹² H.B. 1328, 64th Legis. Assemb., Reg. Sess. (N.D. 2015); N.D. CENT. CODE ANN. § 29-29.4-02 (West 2015).

¹³ See generally H.B. 1328.

¹⁴ *Id.* § 1(4).

¹⁵ *Id.* § 3.

¹⁶ N.D. CONST. art. 1, §8 (West, Westlaw through Nov. 2014 amendments).

drone will be deployed, and whether the drone will collect information or data about an individual or a group of individuals.¹⁷

H.B. 1328 places several limitations on how these drones may be operated once deployed. First, any information obtained from these drones will be inadmissible in court unless said information was obtained “[p]ursuant to the authority of a search warrant [or] [i]n accordance with exceptions to the search warrant requirement.”¹⁸ Second, information collected by the drone may not be used to establish probable cause to obtain a search warrant unless one of the previous requirements is met.¹⁹ Finally, H.B. 1328 strictly prohibits certain uses of the drones. These drones cannot be used domestically in private surveillance, used for the surveillance of a citizen’s lawful exercise of constitutional rights, or be armed with any *lethal* weaponry.²⁰ The use of these drones must also be documented through their flight data.²¹ This flight data must be verified as accurate and must be kept by the agency for five years.²²

However, in addition to its limitations, H.B. 1328 also provides multiple exceptions to the warrant requirement needed to deploy the drones. They may be deployed to patrol within twenty-five miles of the national border, when exigent circumstances exist, when an environmental or weather-related catastrophe has occurred, or for research/education purposes in conjunction with a school or institution of higher education.²³

On its face, H.B. 1328 appears to be straightforward. The drones will only be deployed to assist in executing search warrants or in emergency situations. The drones will not be armed, and everything they see or hear must be documented. This information will only be admissible in court if it is obtained through the lawful execution of the search warrant for which the drone was deployed. When read in this manner, H.B. 1328 is a positive, non-controversial piece of legislature that achieves the noble goals of

¹⁷ H.B. 1328 § 3.

¹⁸ *Id.* § 2(1).

¹⁹ *Id.* § 2(2).

²⁰ *Id.* § 5.

²¹ *Id.* § 6.

²² *Id.*

²³ *Id.* § 4.

assisting law enforcement officers and keeping them safe. However, H.B. 1328 is actually a bill created through fancy political footwork that allows more freedoms than restrictions, contrary to what the bill implies. Thus, the implementation of H.B. 1328 is likely to be far different than the face of the bill suggests.

B. Bill Tracking: How H.B. 1328 Came to Pass

Although the structure of H.B. 1328 gives rise to multiple issues, it is imperative to keep in mind the original intention of the bill. In 2016, fifty-seven North Dakota law enforcement officers were killed in the line of duty.²⁴ H.B. 1328 was partly intended to assist police officers in executing search warrants, a very dangerous aspect of police work.²⁵ By the time law enforcement has obtained a search warrant, the target suspect has likely engaged in illegal activity. When the police forcibly enter his or her domicile, the suspect's reaction will be unpredictable. If H.B. 1328 saves even one officer's life in executing a search warrant, the bill has done tremendous good. To the casual reader, officer safety is what H.B. 1328 was designed to promote. However, after discovering the motivation behind the bill's modifications, officer safety was clearly not the reason for the bill's passage.

1. Representative Rick Becker and the Original Draft

Representative Rick Becker, the author of H.B. 1328, originally wrote the bill to ban the arming of drones with any and all weapons.²⁶ Somewhere between his original draft and the

²⁴ *North Dakota Line of Duty Deaths*, OFFICER DOWN MEM'L PAGE, <https://www.odmp.org/search/browse/north-dakota> [<https://perma.cc/RM34-QFNX>] (last visited Feb. 22, 2017).

²⁵ See Jeff Hamburger, *Officer Shot While Executing Search Warrant*, WGNO ABC (Jan. 26, 2016, 6:25 AM), <http://wgno.com/2016/01/26/officer-shot-while-executing-search-warrant/> [<https://perma.cc/XV4Z-HS3L>]; Tak Landrock & Web Staff, *Officer Shot While Executing Search Warrant in Northglenn; Suspect Killed*, FOX 31 DENVER (May 29, 2015, 5:00 PM), <http://kdvr.com/2015/05/28/officer-shot-while-executing-search-warrant-in-northglenn/> [<https://perma.cc/EGH6-MCL7>].

²⁶ Justin Glawe, *First State Legalizes Taser Drones for Cops, Thanks to a Lobbyist*, DAILY BEAST (Aug. 26, 2015, 12:15 AM),

passage of the bill, the weapon provision was added to the bill. In fact, when asked to give his thoughts on the bill, Becker said, “This is one I’m not in full agreement with. I wish it was *any* weapon. In my opinion there should be a nice, red line: drones should not be weaponized. Period.”²⁷ Becker pointed out how the use of drones could depersonalize law enforcement and affect their ability to make decisions.²⁸

Specifically, Becker’s original draft of H.B. 1328 prevented the arming of drones with “any lethal or nonlethal weapons, including firearms, pepper spray, bean bag guns, mace, and sound-based weapons.”²⁹ Clearly this provision was stricken when the bill was passed, and only lethal weapons were prevented.³⁰ Oddly enough, the provision in Becker’s original bill that provided remedies to parties who were aggrieved by a violation of the bill was removed as well.³¹ Thus, H.B. 1328 was intended to provide for law enforcement use of drones while preventing their arming. To further protect citizens from these police drones, remedies were put into place in case the law enforcement agency overstepped its bounds.

2. Economic Motivations

In reality, the modification of H.B. 1328 to permit the arming of drones was fueled by economics. The drone market is a booming enterprise, especially in the expanses of North Dakota. So much so, drone related organizations are already established across the nation. The Association for Unmanned Vehicle Systems International is one such organization that tracks legislation involving drones, according to Keith Lund of the Grand Forks Regional Economic Development Corporation.³² Lund opined that

<http://www.thedailybeast.com/articles/2015/08/26/first-state-legalizes-armed-drones-for-cops-thanks-to-a-lobbyist.html> [https://perma.cc/NQK4-VPEN].

²⁷ *Id.*

²⁸ *Id.*

²⁹ H.B. 1328, 64th Legis. Assemb., Reg. Sess. § 5 (N.D. 2015) (as introduced by Rep. Rick Becker, Jan. 13, 2013).

³⁰ H.B. 1328, 64th Legis. Assemb., Reg. Sess. § 5 (N.D. 2015) (as passed by House, Jan. 6, 2015).

³¹ Compare H.B. 1328 § 6 (as introduced by Rep. Rick Becker, Jan. 13, 2013), with H.B. 1328 (as passed by House, Jan. 6, 2015).

³² Glawe, *supra* note 26.

if there was a law that “somehow limit[ed] commercial, law enforcement development . . . that is a negative in terms of companies looking and investing in opportunities in the state of North Dakota.”³³ In fact, Northrop Grumman, a drone developer, began advertising their predator drones in January of 2015.³⁴

3. Law Enforcement, Compliance Committee, and the University of North Dakota

Law enforcement agencies have already shown they are prepared to use drones and will fight legislation to allow them to do with them as they please. Becker stated that the first introduction of the bill in 2013, the version which prevented any weapon armament, was strongly opposed by parties with ties to law enforcement.³⁵ These law enforcement lobbyists prevented the passage of the bill until it allowed for the arming of drones with non-lethal weapons.³⁶ In Grand Forks, the leader for law enforcement drone usage, a compliance committee is in charge of regulating law enforcement’s drone usage.³⁷ This committee, which has no legal authority, is comprised of eighteen people, nine of which are former or current law enforcement or emergency services members.³⁸

Six of the members of this committee come from the University of North Dakota,³⁹ which would appear to be an unbiased party. However, the University offers a Bachelor’s of Science in Aeronautics with a Major in Unmanned Aircraft Systems Operation.⁴⁰ The University has also had a large hand in creating the program “Grand Sky,” which is essentially a drone research and development facility.⁴¹ Grand Sky is located a short

³³ *Id.*

³⁴ *Id.*

³⁵ Telephone Interview with Rick Becker, Representative, N.D. Legislative Branch (Nov. 24, 2015).

³⁶ *Id.*

³⁷ Glawe, *supra* note 26.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *B.S. in Aeronautics with a Major in Unmanned Aircraft Systems Operations*, UND AEROSPACE, <http://aviation.und.edu/prospective-students/undergraduate/uas-operations.aspx> [https://perma.cc/7CSK-FNW6] (last visited Feb. 22, 2017).

⁴¹ Glawe, *supra* note 26.

distance west of Grand Forks, home to the University of North Dakota, and is advertised as the “United States’ first commercial UAS Business and Aviation Park.”⁴² The Grand Sky website even points out that the University of North Dakota is “the nation’s most respected school for training pilots and one of the frontrunners in unmanned aviation studies.”⁴³ Grand Sky is a wholly owned subsidiary of Infinity Development Partners LLC, a multi-billion dollar organization.⁴⁴ Needless to say, having this amount of money invested in North Dakota is a big economic factor. Thus, the University clearly has a vested interest in the promotion of drone usage.

4. FAA Test Site Selection

The passage of H.B. 1328 and its modifications were compelled by an economic interest. Although H.B. 1328 does provide protection to law enforcement, their protection was not the primary motivating factor behind the bill’s passage. By creating a bill that governs drone usage but making said bill lenient, North Dakota has welcomed all companies interested in drone production and research into their borders. Further, North Dakota legislatures did not pass H.B. 1328 with only “high hopes” that businesses would begin to invest in their state. In 2013, the FAA began a process to select six test sites for the usage and development of unmanned aircraft systems.⁴⁵ Michael Huerta, the FAA administrator in charge of selecting the test sites, made his decision based on geographic and climate diversity, and the location of ground infrastructure and research needs.⁴⁶ North Dakota was the first test site selected by the FAA.⁴⁷ The FAA

⁴² GRAND SKY, <http://grandskynd.com> [<https://perma.cc/U8GF-BG29>] (last visited Feb. 22, 2017).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Michael Huerta, *Selection of Six Unmanned Aircraft Systems Test Sites in Accordance with FAA Modernization and Reform Act of 2012, PL-112-95*, FED. AVIATION ADMIN. (Dec. 30, 2013), http://www.faa.gov/uas/media/order_selecting_six_uas_test_sites.pdf [<https://perma.cc/BSM5-WHD6>].

⁴⁶ *Id.*

⁴⁷ Press Release, *FAA Announces First UAS Test Site Operational, North Dakota Department of Commerce Ready to Start Testing*, FED. AVIATION ADMIN. (Apr. 21, 2014), http://www.faa.gov/news/press_releases/news_story.cfm?newsid=16154 [<https://perma.cc/ND4J-G4LM>].

made this selection on April 21, 2014.⁴⁸ Although H.B. 1328 was first introduced in 2013 (preventing any kind of drone armament), it was not passed until 2015.⁴⁹ Some may chalk this delay up to political complications. However, North Dakota lobbyists intentionally delayed the bill in order to receive the benefits of the FAA test site.⁵⁰ Representative Becker stated that the lobbyists were afraid restricting drone usage would prevent the FAA from selecting their state as a test site.⁵¹ Though there is absolutely nothing wrong with delaying the bill, the delay does show that the bill is not primarily concerned with officer safety, but with economic reasons.

II. POSSIBLE IMPLEMENTATION OF H.B. 1328

Since H.B. 1328 was passed so recently, there is no documented instance of law enforcement equipping drones with non-lethal weaponry. This delay is understandable, because purchasing and outfitting the drones, along with training officers to fly them, would likely require a significant amount of time and money. Thus, law enforcement's use of drones under H.B. 1328 has not been significant enough to fully demonstrate how H.B. 1328 will be implemented. Therefore, the only way to determine how the drones will be used is to look to the language of H.B. 1328.

Although H.B. 1328 superficially appears to be an airtight bill that will prevent law enforcement from using drones in any manner other than search warrant execution, an in-depth examination reveals the many ways H.B. 1328 could be exploited. The most glaring of these ways is the permitted gearing of the drones. H.B. 1328 prevents the drones from being armed with *lethal* weaponry, but conveniently avoids the issue of non-lethal armaments.⁵² Since the bill does not define lethal or non-lethal weaponry, presumably law enforcement agencies are permitted to equip the drones with common non-lethal weapons like Tasers, pepper spray, and even concussion weapons. The remaining

⁴⁸ *Id.*

⁴⁹ H.B. 1328, 64th Legis. Assemb., Reg. Sess. (N.D. 2015).

⁵⁰ See Telephone Interview with Rick Becker, *supra* note 35.

⁵¹ *Id.*

⁵² See H.B. 1328 § 5.

implementation issues of H.B. 1328 lie with the exceptions in § 29-29.4-04.

A. Exigent Circumstances

One of the exceptions provided for drone usage in H.B. 1328 permits them to be used when exigent circumstances exist.⁵³ The exception defines the existence of exigent circumstances as “when a law enforcement agency possesses reasonable suspicion that absent swift preventative action, there is an imminent danger to life or bodily harm.”⁵⁴ This open definition technically permits the drones to be deployed *any time* exigent circumstances exist. Under this exemption, every time a North Dakota citizen dials 911, the nearest law enforcement agency is permitted to deploy one of its drones when an officer in a squad car would be too slow of a response. Furthermore, once a drone is deployed, any action it takes is lawful, provided that action is not outside the scope permitted to an “in-the-flesh” officer.⁵⁵ These actions include exercising force through a non-lethal weapon.

B. Environmental or Weather-Related Catastrophes

The same issues with the exigent circumstances exception apply to environmental catastrophes. Any information obtained by a drone deployed during a natural catastrophe is admissible in court. The primary issue with this section is the failure of the legislature to define what an “environmental or weather-related catastrophe” is.⁵⁶ Certainly, the drones should be used in a state of emergency to assist in the protection and rescue of civilians, but the failure to define what a catastrophe is leaves this exception incredibly ambiguous. It could be argued that lightning striking a residence is a weather-related catastrophe. In that scenario, drones could be deployed to provide aid to victims of the catastrophe. While providing this assistance, according to § 29-29.4-02(2), any information obtained in the course of the

⁵³ N.D. CENT. CODE ANN. § 29-29.4-04(2) (West 2015).

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *Compare* N.D. CENT. CODE ANN. § 29-29.4-01, *with* § 29-29.4-04(3).

assistance could be used in an affidavit for probable cause.⁵⁷ However, the bill does not mention whether use of force would be authorized since the bill so skillfully avoids the issue of drone armament. Of course, this hypothetical is extreme, but the ambiguity created by this exception is glaringly obvious upon closer inspection.

C. Patrol of National Borders

The national borders exception permits drones to be deployed within twenty-five miles of the border for purposes of preventing or deterring the illegal entry of any person, illegal substance, or contraband.⁵⁸ Although this exception appears to be mild in comparison to the previous exceptions, it may be the most egregious. The northern border of North Dakota is approximately 340 miles.⁵⁹ As a result, law enforcement agencies would have free reign to survey 8,500 miles of the state. H.B. 1328 effectively permits drones that are operating in this area to ignore all prohibitions and limitations the bill previously placed on them. Although the drones are not intended to survey American citizens in this area, these drones could very likely come into contact with citizens. The resulting encounter may entail using force.

When North Dakota law enforcement agencies begin to implement drones under H.B. 1328, it is doubtful any of these exploits will be immediately used. Most likely, law enforcement will use unarmed drones to survey a search warrant location before executing the warrant. This section merely highlights the ways in which H.B. 1328 *could* be implemented and the ways in which law enforcement agencies will likely exploit the loose language of the bill in the near or distant future. The problem that lies with H.B. 1328's implementation is not what it permits, but what it does not prevent. Since it is very unlikely that the drafters of H.B. 1328 did not simply "overlook" the armament provision,⁶⁰

⁵⁷ N.D. CENT. CODE ANN. § 29-29.4-02(2).

⁵⁸ *Id.* § 29-29.4-04(1).

⁵⁹ *The Geography of North Dakota*, NETSTATE, http://www.netstate.com/states/geography/nd_geography.htm [https://perma.cc/ZG6X-JLB6] (last visited Feb. 22, 2017).

⁶⁰ *See supra* Part I.

it can be safely assumed that H.B. 1328 intends to allow law enforcement agencies to arm drones.

III. PROBLEMS CREATED BY H.B. 1328

Although H.B. 1328 creates a variety of issues, this Comment will be limited to the legality of drone armament, drone classification, and penalties imposed by tampering with drones.⁶¹ It is important to note that since H.B. 1328 has not yet been implemented by law enforcement, these issues have not yet occurred. However, the construction of H.B. 1328 allows these issues to become material in the near future.

A. *H.B. 1328 Toes the Line of North Dakota and Federal Law*

1. Definition of “Aircraft,” Permitted Use, and *Expressio Unius Est Exclusio Alterius*

Before delving into North Dakota law concerning drone operation, it is important to understand how drone usage is regulated by the federal government. Since 1946, airspace in the United States has been likened to a public highway.⁶² Aircraft are essentially permitted to fly over any public or private property at an altitude which the owner cannot use the property.⁶³ As Joseph Vacek, an Aviation professor at the University of North Dakota, said, “the present state of affairs [regarding drones] resembles an aeronautical Wild West.”⁶⁴ Basically, although regulations are in place governing drone usage, they are not fully developed so a mix of “constitutional jurisprudence and administrative regulation” governs drones.⁶⁵

Currently, the FAA has limited the operation of “aircraft” in congested and rural areas.⁶⁶ “Aircraft” is defined as “a device that

⁶¹ Though surveillance is perhaps the largest public concern in the world of drones, this Comment does not address any possible surveillance issues created by H.B. 1328.

⁶² *United States v. Causby*, 328 U.S. 256, 261 (1946).

⁶³ *Id.* at 264.

⁶⁴ Joseph J. Vacek, *Big Brother Will Soon be Watching—or Will He? Constitutional, Regulatory, and Operational Issues Surrounding the Use of Unmanned Aerial Vehicles in Law Enforcement*, 85 N.D. L. REV. 673, 675 (2009).

⁶⁵ *Id.* at 677.

⁶⁶ 14 C.F.R. § 91.119 (2016).

is used or intended to be used for flight in the air.”⁶⁷ The FAA has apparently made a policy decision to ignore different aircraft types,⁶⁸ such as drones, due to their emerging and evolving market. Therefore, drones are generally governed by the same laws as other aircraft.⁶⁹ When flying aircraft over towns, settlements or cities, an operator must maintain an “altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.”⁷⁰ In uncongested areas, the aircraft must be operated above 500 feet of the surface, unless the area is sparsely populated, in which case it may not be operated within 500 feet of “any person, vessel, vehicle, or structure.”⁷¹ Helicopters and weight-shift-control aircraft may be operated lower than the previous limitations if the operation is conducted without hazard to persons or property on the surface.⁷² The FAA permits public safety agencies with a certificate of waiver or authorization to operate a drone within the line of sight of the operator, less than 400 feet above the ground, and during daylight conditions.⁷³

H.B. 1328 is superficially legal and self-explanatory. However, the maxim *expressio unius est exclusio alterius*⁷⁴ has been recognized as valid by North Dakota courts.⁷⁵ Indeed, North Dakota courts have recognized that “[t]here exists a principle of statutory interpretation that the mention of one thing implies the exclusion of another.”⁷⁶

When viewing H.B. 1328 in this light, an immediate and glaring issue with the bill is apparent. H.B. 1328 prevents the

⁶⁷ 14 C.F.R. § 1.1.

⁶⁸ Vacek, *supra* note 64, at 678.

⁶⁹ *Id.* at 678-79.

⁷⁰ 14 C.F.R. § 91.119(b).

⁷¹ *Id.* § 91.119(c).

⁷² *Id.* § 91.119(d).

⁷³ FAA Modernization and Reform Act of 2012, Pub. L. No. 112-95, § 334(c)(2)(C), 126 Stat. 11, 76-77.

⁷⁴ The expression of one thing in a class implies exclusion of all things not expressed. *Expressio unius est exclusio alterius*, DUHAIME.ORG, <http://www.duhaime.org/LegalDictionary/E/ExpressioUniusEstExclusioAlterius.aspx> [<https://perma.cc/L2HQ-YULF>] (last visited Feb. 22, 2017).

⁷⁵ *Park View Manor, Inc. v. Hous. Auth. of Stutsman*, 300 N.W.2d 218, 225-26 (N.D. 1980).

⁷⁶ *Little v. Tracy*, 497 N.W.2d 700, 705 (N.D. 1993) (citing *In re Township 143 N., Range 55 W., Cass Cty.*, 183 N.W.2d 520, 529 (N.D. 1971) (internal quotation marks omitted)).

arming of drones with lethal weapons.⁷⁷ The word “non-lethal” is not used in the bill.⁷⁸ Thus, according to *expressio unius est exclusio alterius*, the drones referenced in H.B. 1328 are permitted to be armed with non-lethal weaponry. In reality, legal dictum is not required to understand H.B. 1328’s scope. If the drafters of H.B. 1328 wanted to prevent drones from being armed at all, they simply would have written such a provision into H.B. 1328.

2. Weaponry Definitions under North Dakota Law

The wording of H.B. 1328 was no accident. The drafters fully understood that by preventing the drones from being armed with lethal weapons, they were permitting the drones to be armed with non-lethal weapons.⁷⁹ They were also aware that had the bill read “drones may be armed with non-lethal weaponry,” the public would have taken much more notice, and their outcry would have destroyed the bill before it reached the state legislature. The intention of the drafters is demonstrated more clearly upon inspection of North Dakota statutes dealing with weapons.

Currently, North Dakota law does not use the terms “lethal” or “non-lethal” when defining weapons. Title 62.1 of the North Dakota Criminal Code uses the terms “dangerous” and “firearm” when defining common weaponry.⁸⁰ Not surprisingly, a “device that uses a projectile and may be used to apply multiple applications of voltage during a single incident,” like a TASER, is considered a dangerous weapon.⁸¹ Title 62.1 places TASERS in the same category as switchblades and crossbows, which are often mentioned in conjunction with firearms.⁸² The drafters of H.B. 1328 intentionally used the undefined term “lethal” instead of the established term “dangerous,” since North Dakota code does not define “lethal” weaponry. Furthermore, TASERS, the most likely weapon to be outfitted on the drones, are commonly placed in the category of “non-lethal” weaponry. Had H.B. 1328 prevented the

⁷⁷ H.B. 1328, 64th Legis. Assemb., Reg. Sess. § 5 (N.D. 2015); N.D. CENT. CODE ANN. § 29-29.4-05 (West 2015).

⁷⁸ See H.B. 1328 § 5.

⁷⁹ See discussion *supra* Part I.

⁸⁰ N.D. CENT. CODE ANN. § 62.1-01-01(1), (3).

⁸¹ *Id.* § 62.1-01-01(1).

⁸² *Id.*

drones from being equipped with “dangerous” weapons, they would likely not be permitted to have any weaponry at all. By preventing the drones from simply being equipped with lethal weaponry, H.B. 1328 intentionally circumvents North Dakota weapon classifications.⁸³

The ramifications of the inclusion of the word “lethal” and the exclusion of the word “non-lethal” are enormous. Not only is H.B. 1328 attempting to address an issue that the FAA has not yet ruled on, but it is effectively defying current FAA regulations.

3. Using Weaponry under Current FAA Regulations

As previously discussed, the FAA requires drones to remain at least 500 feet from any person, structure, or vehicle in uncongested areas.⁸⁴ However, very few, if any, non-lethal weapons can be efficiently operated 100 feet away from their intended target (aside from perhaps chemical agents). The TASER X-26 (law enforcement model) has a maximum effective range of fifteen feet.⁸⁵ Although H.B. 1328 does not expressly permit law enforcement drones to engage in personal contact with civilians, these police drones are intended to be within at least 100 feet of civilians. If the legislature intended for the drones to simply patrol 500 or more feet over a structure where a search warrant was being executed, the inclusion of the armament requirements would have been pointless and arbitrary, as no non-lethal weapons could conceivably be used “effectively” from 500 feet above ground.

Further, even if the drones used by law enforcement are classified as “helicopters” or “weight-shift-control aircraft,” they would still be in violation of FAA regulations.⁸⁶ The FAA specifically says that these types of aircraft may not be operated within 500 feet of the nearest person if they pose a hazard to that person or the property.⁸⁷ An aircraft armed with *weapons* most

⁸³ See H.B. 1328 § 5; N.D. CENT. CODE ANN. § 29-29.4-05.

⁸⁴ 14 C.F.R. § 91.119(c) (2016).

⁸⁵ *Taser X26C*, TASER INT'L, INC., <https://buy.taser.com/about-the-taser-x26c/> [https://perma.cc/2AV3-23CZ] (last visited Feb. 20, 2017).

⁸⁶ See 14 C.F.R. § 91.119.

⁸⁷ *Id.* § 91.119(d).

certainly poses a hazard to any individual it comes into contact with, particularly if that person is suspected to be dangerous.

4. Standard to Determine Excessive Force

All of these examples give rise to the primary issue: drones are going to be operated by law enforcement agencies, and law enforcement agencies are going to arm drones with weapons. Since no precedent addresses the duty of care a police officer must use when operating a drone, the same standards must apply as if the officer was engaging in the conduct in person.

When determining whether law enforcement officers have used excessive force during “an arrest, investigatory stop, or other ‘seizure’ of a free citizen,” the Fourth Amendment’s reasonableness standard is applied.⁸⁸ This level of reasonableness “must be judged from the perspective of a reasonable officer on the scene.”⁸⁹ To determine whether the force used was reasonable, the specific facts of the encounter are important, such as, the severity of the crime committed, whether the suspect poses a threat to the officer or others, and whether he is resisting arrest or fleeing.⁹⁰ Essentially, the court must balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.”⁹¹ A drone’s encounter with a civilian would obviously not pose a threat to the officer operating the drone, making that element of the analysis useless.⁹² However, inherent difficulty arises in determining the appropriate amount of force in scenarios where a drone stands in place of an officer.

Assume a drone is patrolling the North Dakota/Canada border during daylight at an altitude of 650 feet. While on this patrol, the drone spots what appears to be a violent domestic dispute on private property between a man and woman. This dispute gives the operating officer reasonable suspicion that without intervention, one or both of the parties could be in imminent danger to life or bodily harm (granting him an exception

⁸⁸ *Graham v. Connor*, 490 U.S. 386, 395 (1989).

⁸⁹ *Id.* at 396.

⁹⁰ *Id.*

⁹¹ *United States v. Place*, 462 U.S. 696, 703 (1983).

⁹² *See id.*

to investigate). Once the drone reaches the disputing parties, they stop fighting and turn their attention to the drone. The woman appears to be beaten, but the man refuses to submit to the drone's authority. The drone is armed with a standard police model TASER, which can deliver a maximum of 50,000 volts.⁹³ At this moment, the only amount of force the drone can administer is through the TASER.

In this hypothetical scenario, the determination of whether the use of the TASER would be excessive is almost impossible. Though the crime committed is severe, an immediate danger to a civilian no longer exists, and the suspect is not attempting to flee. On the other hand, if the man and woman leave the drone's presence or the drone departs, the crime could continue. If an actual officer was present, he could handcuff and detain the offender, talk with the offender and victim to deescalate the situation, or use physical force to apprehend the offender. The drone has only two options. It can fire the TASER, or not fire the TASER.

This lack of choice makes the Fourth Amendment "reasonableness" standard difficult to apply. Although arguments can be advanced for both sides, without an officer on scene, a lesser extent of force that is perhaps "more reasonable" than a TASER shock cannot be applied. As previously mentioned, the level of reasonableness must be judged from the perspective of a reasonable officer on the scene.⁹⁴ Therefore, had an actual officer been present on scene and had that officer determined a lesser use of force was necessary, the firing of the TASER would be deemed excessive. The use of force in situations like this one will lead to difficult litigation that is inevitable until the legislature establishes substantial rules that govern weaponized police drones.

⁹³ Michael Brave, *TASER® X26—Electrical Demonstrations*, ELECTRONIC CONTROL DEVICES: LEGAL RESOURCES (Oct. 24, 2006), <http://www.ecdlaw.info/outlines/TASER%20X26%20demos%2010-24-06%20005.pdf> [<https://perma.cc/E3AQ-QSBM>].

⁹⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

5. Willingness of North Dakota Law Enforcement to Implement Drones

Coincidentally, North Dakota was also the first state to use a drone to assist local law enforcement.⁹⁵ In 2011, prior to the passing of H.B. 1328, police officers confronted Rodney Brossart for refusing to return six cattle that had wandered on his property to their owner.⁹⁶ Brossart refused to allow the police to enter his property and threatened them if they were to come onto his land.⁹⁷ A SWAT team was called, and the Department of Homeland Security's Customs and Border Patrol loaned the team a Predator drone.⁹⁸ The drone was used to locate Brossart (who was armed), which allowed police to arrest him.⁹⁹ At trial, the court determined the usage of the drone was proper, and the issue of the drone was not brought up on appeal.¹⁰⁰ This case occurred before the passing of H.B. 1328, and shows that North Dakota law enforcement is ready and willing to use drones in manners that are beneficial to them. However, the drone in *Brossart* was used strictly for surveillance purposes, and this Comment does not deal with surveillance issues. Nevertheless, H.B. 1328 has effectively allowed drones to be armed with non-lethal weaponry,¹⁰¹ and if law enforcement is willing to use drones for surveillance before receiving express permission, one can imagine what agencies will do now that they have been explicitly permitted to arm and use drones.

6. Implementation of Drones under H.B. 1328's Exceptions

H.B. 1328 permits the use of the drone in essentially any capacity when exigent circumstances exist, as seen in § 29-29.4-

⁹⁵ Jason Koebler, *North Dakota Man Sentenced to Jail in Controversial Drone-Arrest Case*, U.S. NEWS & WORLD REP. (Jan. 15, 2014, 11:55 AM), <http://www.usnews.com/news/articles /2014/01/15/north-dakota-man-sentenced-to-jail-in-controversial-drone-arrest-case> [<https://perma.cc/QE2J-478U>].

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See *State v. Brossart*, 858 N.W.2d 275 (N.D. 2015); *State v. Brossart*, No. 32-2011-CR-00049, 2012 WL 10716031, at *5 (D.N.D. Aug. 1, 2012); Koebler, *supra* note 95.

¹⁰¹ See N.D. CENT. CODE ANN. § 29-29.4-05 (West 2015).

04(2) referencing exceptions.¹⁰² “Exigent circumstances” are said to exist “when a law enforcement agency possesses reasonable suspicion that absent swift preventative action, there is an imminent danger to life or bodily harm.”¹⁰³ Exigent circumstances are not incredibly common in daily policing, but they certainly arise. A drone flying 100 feet in the air will be able to see more “situations” than an officer in a patrol vehicle. It is possible, even likely, that a drone operator will “see” something that may constitute exigent from a distance, but upon closer inspection, the circumstances do not exist at all. In fact, the approach of the drone to the situation could have the undesired effect of escalating the situation, creating a paradox where the drone is allowed to use nonlethal force.

Similar issues arise with the environmental and weather-related catastrophe exception. Since H.B. 1328 fails to define this term, law enforcement agencies could theoretically deploy a drone anytime a tornado hits.¹⁰⁴ When acting in this capacity, not only could the drone effectively disregard the FAA regulations, but could also ignore the warrant requirement placed on the using of the drones.¹⁰⁵

The same problem lies with the border patrol exception. In this exception, the drones are given an enormous berth to run free along the North Dakota border.¹⁰⁶ At some point during border patrol, a drone will likely leave the line of sight of its operator. Additionally, anything the drone sees or does while patrolling the entirety of the North Dakota border will be deemed lawful and admissible under H.B. 1328.¹⁰⁷

The amount of leeway given to drone operation in the exceptions of H.B. 1328 undermines the true goal of the bill. The bill was intended to assist in the execution of search warrants for the purpose of protecting the lives of police officers. The exceptions, however, permit the drones to run free as agents of law enforcement and establish a quasi-police state.

¹⁰² *Id.* § 29-29.4-04(2).

¹⁰³ *Id.* It is worth noting that the bill requires only reasonable suspicion that imminent danger to life or bodily harm exists, not probable cause. *Id.*

¹⁰⁴ *See id.* § 29-29.4-04(3).

¹⁰⁵ *See id.* § 29-29.4-03.

¹⁰⁶ *See id.* § 29-29.4-04(1).

¹⁰⁷ *See id.*

B. Civilian Interaction Necessitates a Special Classification for Police Drones

A novel issue raised by the passing of H.B. 1328 is the classification of the drones authorized by the bill.¹⁰⁸ Certainly drones designed to carry weaponry will be expensive, and the time spent training the officers to pilot them will be extensive. As a result, when a civilian damages or destroys one of these drones, should the drone be treated as an officer, K-9, or equipment?

The idea that a drone should be treated as an actual, human police officer is ludicrous, even though an officer is operating a drone. Thus, the only two classifications left are K-9 and equipment. In North Dakota, killing or injuring a law enforcement support animal is a class C felony.¹⁰⁹ A single purpose K-9 can cost \$2,500-\$4,000 before training even begins.¹¹⁰ Similarly, the price of operating a drone can range from as cheap as the \$100 cost of the drone, to up to \$30,000 an hour in the case of Predator drones.¹¹¹ Though North Dakota law enforcement would not likely arm and use a drone this expensive, the destruction of any drone by a civilian would certainly cause some amount of property damage, and would be seen as an aggressive act against law enforcement. Because of this comparison, it would not seem outlandish to treat the drone as a “law enforcement support animal.” After all, the monetary value of support animals is surely a significant reason behind the punishment for harming them. However, drones are still machines, not animals requiring years of training with which officers have developed an attachment.

There are numerous possible classifications for drones other than that of a support animal. When a civilian commits an offense

¹⁰⁸ It should be noted that law enforcement use of drones in the past was mainly for surveillance, and these drones never made actual contact with humans. The novelty of this issue comes from H.B. 1328’s allowance of non-lethal armaments, which implies the drones will be making contact with humans.

¹⁰⁹ N.D. CENT. CODE ANN. § 12.1-17-09.

¹¹⁰ *K-9s—The Cost of Starting a K-9 Unit*, POLICEONE.COM (Jan. 20, 2004), <https://www.policeone.com/K-9/articles/77178-K-9s-The-cost-of-starting-a-K-9-unit/> [<https://perma.cc/DR5N-ZBG8>].

¹¹¹ *The US Drone: A Fact Sheet*, CONG. PROGRESSIVE CAUCUS, http://cpc-grijalva.house.gov/uploads/Drones_Fact_Sheet_FCNL1.pdf [<https://perma.cc/FJJ3-YXC9>] (last visited Feb. 22, 2017); Alan Perlman, *17 Cheap Drones for Beginners (Under \$150)*, UAV COACH (July 3, 2016), <http://uavcoach.com/cheap-drones-for-beginners/> [<https://perma.cc/HN94-ZNCY>].

resulting in damage to a police drone, he or she could be charged in multiple ways. In North Dakota, intentionally obstructing, impairing, impeding, hindering, preventing, or perverting the administration of law or a government function is a class A misdemeanor.¹¹² Destruction of a police drone could also plausibly be considered tampering with evidence. A civilian who alters, destroys, mutilates, conceals, or removes a record or document when he or she believes an official proceeding is pending or about to be instituted, is guilty of a class C felony.¹¹³ A civilian interaction with a drone could likely result in the civilian damaging or destroying the drone.

If law enforcement use of drones were commonplace and the punishments were well understood, civilians would be aware of the punishment associated with tampering with a police drone. However, when the drones are first implemented, they will be an enormous aberration. Many United States citizens are already wary of law enforcement. When the police begin to use machines to carry out their work, this distrust is likely to grow. If H.B. 1328 was more specific with its language and was explicit about what drones can and cannot do, this issue would not exist. As previously mentioned, since the drones are permitted to be equipped with non-lethal weaponry,¹¹⁴ they will also be permitted to come into close contact with civilians, resulting in these types of encounters. Otherwise, any evidence obtained by the drone would be beyond the reach of citizens, because the drones would not enter a range in which the citizen could interact within them. If H.B. 1328 were written based on the FAA regulations already in place preventing drones from being within 500 feet of any person,¹¹⁵ these issues would never have a chance of arising.

If a controlling North Dakota statute was attached to civilian interference with police drones, it would most likely be §12.1-21-06.¹¹⁶ This section of the criminal code deals with tampering or damaging a public service.¹¹⁷ If a person causes a substantial

¹¹² N.D. CENT. CODE ANN. § 12.1-08-01.

¹¹³ *Id.* § 12.1-09-03.

¹¹⁴ See discussion *supra* Part I.

¹¹⁵ 14 C.F.R. § 91.119(c) (2016).

¹¹⁶ N.D. CENT. CODE ANN. § 12.1-21-06.

¹¹⁷ *Id.*

interruption of a public communication, transportation, supply of water, gas, power, or other public service, he or she has violated the statute.¹¹⁸ If said person engages in this conduct knowingly or recklessly, the actor is guilty of a class A misdemeanor.¹¹⁹ If the actor engages in the conduct intentionally, the offense is a class C felony.¹²⁰ The language of this statute seems to be a better fit for the nature of police drones. However, police drones would not fit perfectly into this category either. Without simply throwing police operated drones into the category of “other public services,” drones cannot be placed into an outlined category. Drones are not a source of power, cannot be used for transportation, and are not a means of public communication. Additionally, the issue of novelty mentioned in the previous paragraph is present here as well. It would be unreasonable to charge a confused and frightened civilian with a class C felony for destroying a weaponized drone of whose origin he or she is unaware.

Another possible charge for tampering with police drones is criminal mischief. Criminal destruction of property in North Dakota is considered criminal mischief.¹²¹ To be convicted of criminal mischief, an actor must willfully tamper with the tangible property of another so as to endanger person or property or willfully damages the tangible property of another.¹²² If the loss amounts to more than ten thousand dollars or the damage is caused by an explosive or destructive force, the offense is a class B felony.¹²³ If the lost amount is between two and ten thousand dollars, the offense is a class C felony.¹²⁴ If the lost amount is between two thousand and one hundred dollars, the offense is a class A misdemeanor.¹²⁵ Otherwise, the offense is a class B misdemeanor.¹²⁶ The issue with criminal mischief regarding police drones is how to assess the damage caused by the civilian. Not only will the actual value of the drone be charged, but the

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ N.D. CENT. CODE ANN. § 12.1-21-05.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

department may have multiple other costs invested into the drone. These costs may include, but are not limited to, training the officers to use the drones, additional equipment attached to the drone, and outfitting a new drone to be used for police work. It is possible that destroying a simple \$100 drone could cost a law enforcement agency thousands of dollars in total investment.

For these reasons, destroying or tampering with a drone should be viewed as interfering with authorized police equipment. The FCC prohibits the use of radar and radio jammers because they interfere with authorized police equipment.¹²⁷ Using a jammer or scrambler is considered an infraction in California, and a class 2 misdemeanor traffic offense in Colorado.¹²⁸ Tampering with a drone is much more akin to radar jammers than attacking K-9s or damaging a public service. However, police radio and radars are commonplace in law enforcement and, for the most part, were fully implemented long ago. Therefore, the penalty for tampering with an expensive police drone must lie somewhere between the two. Of course, if a civilian acted unreasonably, he or she would be required to pay the property damages to replace the drone, but additionally charging that civilian with a felony would be outrageous.¹²⁹ On the other hand, issuing a citation to the civilian would not serve as an effective deterrent, especially if the cost of the drone is insignificant. Paying the cost would certainly help the law enforcement department replace the drone, but they still must either repair or replace the damaged drone. As a result, simply forcing the civilian to pay for the repairs or replacement would not be sufficient. A system similar to speeding citations would be appropriate, in that for every additional charge, the perpetrator is imposed a harsher penalty. This system implementation would be a sufficient temporary fix until police drone legislation becomes more thorough.

C. Policy: Does the Good of H.B. 1328 Outweigh the Harm?

As previously discussed, if the drones partake in any semblance of regular police work, the trust between the

¹²⁷ Rocky Mountain Radar, Inc. v. FCC, 158 F.3d 1118, 1120 (10th Cir. 1998).

¹²⁸ CAL. VEH. CODE § 28150 (West 2016); COLO. REV. STAT. ANN. § 42-4-1415 (West 2016).

¹²⁹ See N.D. CENT. CODE ANN. § 12.1-21-05.

community and the department could deteriorate. “Since 2001, more than 500 people have died following [a] TASER stun[.]”¹³⁰ If one of these drones administers a TASER stun and the civilian or suspect has an unforeseen negative reaction, no officer would be on site to attempt to save the civilian or suspect. Even one instance similar to this hypothetical would potentially create an overwhelming distrust in one’s own police department. Additionally, the use of machines to administer justice would undoubtedly promote a “police state” in the eyes of many civilians. H.B. 1328 was certainly not drafted to allow these sort of events to transpire, but it definitely does not prevent them. Though events similar to these hypotheticals may not happen within five, ten, or twenty years of the passing of H.B. 1328, at some point they likely will.

IV. FEDERAL INSIGHT: FAA REGULATION OF DRONES

Of course, if the federal government outlawed the arming of drones, no issues would exist under H.B. 1328. Since H.B. 1328 only prevents drones from being armed with lethal weapons, the bill would still be lawful were the federal government to pass such a regulation.¹³¹ Strangely, the FAA has yet to pass any regulations that control the loadout of drones.

A. Austin Haughwout’s Drone

Although the drone market is new and constantly evolving, H.B. 1328 was not the first instance of drones being armed with weaponry. In July 2015, a video of a handgun being fired from a drone surfaced.¹³² The pilot of this drone was eighteen-year-old Austin Haughwout, who created the drone with one of his professors for a school project.¹³³ No one was harmed through the

¹³⁰ Jennifer Edwards Baker & Janice Morse, *American Heart Association: Tasers Can Cause Death*, USA TODAY (May 2, 2012, 12:05 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-05-02/taser-study-deaths/54688110/1> [https://perma.cc/88Z6-CWVR].

¹³¹ See H.B. 1328, 64th Legis. Assemb., Reg. Sess. (N.D. 2015).

¹³² Michael Martinez, Rene Marsh, & John Newsome, *Handgun-firing Drone Appears Legal in Video, but FAA, Police Probe Further*, CNN (July 21, 2015, 8:15 PM), <http://www.cnn.com/2015/07/21/us/gun-drone-connecticut/> [https://perma.cc/2VUX-5H9E].

¹³³ *Id.*

use of the drone, and Haughwout was not arrested or charged.¹³⁴ In fact, the only possible charge law enforcement could offer was reckless conduct since no law specifically prevents the mounting of firearms on drones.¹³⁵ Drone legislation in Connecticut, like North Dakota, is slow to regulate drones leaving their operation in a gray area.¹³⁶

Haughwout's drone is important because no criminal charges were brought against him. The original draft of H.B. 1328 provided for remedies if law enforcement abused the power it granted.¹³⁷ It is possible Haughwout could have been charged with a conventional crime, but this solution is unavailable against North Dakota police departments.¹³⁸ It is unlikely a prosecutor would charge a police department with criminal mischief for arming one of their drones with weapons, especially with H.B. 1328 specifically allowing this armament.¹³⁹

B. 2015 FAA Task Force and New Regulations

Undoubtedly the FAA is aware of instances such as Haughwout. In October of 2015, the agency charged a task force made up of multiple companies and individuals with an interest in drones to come up with recommendations to make drone operation by the public safer.¹⁴⁰ This task force was charged with making recommendations on a streamlined drone registration process, along with requirements on which unmanned aircraft should be registered.¹⁴¹ After taking the recommendations of the task force into consideration, the FAA released a brand new set of

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ H.B. 1328, 64th Legis. Assemb., Reg. Sess. § 6 (as introduced by Rep. Rick Becker, Jan. 13, 2013).

¹³⁸ Martinez, *supra* note 132.

¹³⁹ See H.B. 1328, 64th Leg. Assemb., Reg. Sess. § 4 (N.D. 2015) (as passed by House, Jan. 6, 2015).

¹⁴⁰ Michael P. Herta, *UAS Registration Task Force Aviation Rule Making Committee*, FED. AVIATION ADMIN. (Oct. 20, 2015), http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/uasrtfarc-102015.pdf [<https://perma.cc/9EYT-KLWP>].

¹⁴¹ *Huerta Announces UAS Registration Task Force Members*, FED. AVIATION ADMIN. (Oct. 29, 2015, 9:54 AM), <https://www.faa.gov/news/updates/?newsId=84125> [<https://perma.cc/N3XX-JBNX>].

regulations that became effective on December 21, 2015.¹⁴² These regulations primarily deal with the process of registering drones, obviously, in an attempt to make their operation safer.¹⁴³

The new regulations require all drones that weigh less than fifty-five pounds and are flown by public companies or individuals to be registered.¹⁴⁴ This registration requirement is certainly a step in the right direction, as drone operators should be held accountable when they break a law while flying a drone. The FAA created this requirement to increase drone safety for good reason. On June 17, 2015, a wildfire erupted in California.¹⁴⁵ By June 24, the fire had destroyed 20,875 acres, and the fire was only 26% contained.¹⁴⁶ Even though the FAA had placed a flight restriction on the area, an “unmanned aircraft penetrated the airspace and grounded all airborne firefighting efforts.”¹⁴⁷ The failure caused by the drones cost between \$10,000 and \$15,000.¹⁴⁸ In September of 2015, debris from a drone that had fallen near bystanders cut and bruised an eleven-month-old girl who received injuries to her head.¹⁴⁹ In January of 2015, a drone even crashed on the lawn of the White House.¹⁵⁰

Clearly, the FAA realized allowing the public to freely fly drones with no regulations would result in disastrous results. These specific events were used as examples by the FAA in their newest regulations to support the decisions they were making. In order to prevent instances like the previous examples from occurring, the FAA established restrictions on drones and methods by which they must be registered.

First, the FAA requires that any drone weighing between .55 pounds and 55 pounds on takeoff must be registered.¹⁵¹ The

¹⁴² See generally 14 C.F.R. Parts 1, 45, 47, 48, 91, 375 (2016); see also Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. 78, 593, 78,594 (Dec. 16, 2015).

¹⁴³ See 14 C.F.R. § 45.1 (2016).

¹⁴⁴ 14 C.F.R. § 1.1.

¹⁴⁵ Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. at 78,597.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 78,598.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 14 C.F.R. §§ 1.1, 47.1, 48.15 (2016).

reasoning behind this regulation is clear: by limiting the maximum weight, damage caused by falling drones that fall from the sky will be minimized. The FAA also requires that drone operators apply for a registration number, and this registration number will be affixed to all drones flown by that operator.¹⁵² This requirement is the same for U.S. registered aircraft, and the FAA considers drones to be aircraft.¹⁵³ The registration number would assist law enforcement in identifying the operator of a drone that has broken the law and would make drone operators accountable for their actions.¹⁵⁴ Since drones are flown without human intervention on the aircraft, a method of finding a law-breaking drone operator is imperative.

In addition to the registration process, individuals registering drones will be required to read and acknowledge some basic safety information during the process.¹⁵⁵ The FAA stated that this ruling would increase the education of drone operators by making them aware of the regulatory and safety requirements affecting their activities.¹⁵⁶

C. Loadout Limitations in 2015 Regulations

The FAA plainly realizes that the future of drone operation is uncertain and presents multiple dangers. When the FAA ruled on the weight requirement for drone registration, they decided to include the weight of any “payload” or “equipment” such as “camera[s]” and “GPS.”¹⁵⁷ Undoubtedly, the FAA is aware of the various things that can, and are, being attached to drones. Yet, when they release regulations meant to make drone operation safer, they fail to mention the attachment of any sort of weaponry

¹⁵² 14 C.F.R. § 47.15.

¹⁵³ 14 C.F.R. § 1.1.

¹⁵⁴ See *Unmanned Aircraft Systems (UAS) Registration Task Force (RTF) Aviation Rulemaking Committee (ARC): Task Force Recommendations Final Report*, FED. AVIATION ADMIN., 6 (Nov. 21, 2015), http://www.faa.gov/regulations_policies/rulemaking/committees/documents/media/uasrtfarc-102015.pdf [<https://perma.cc/9EYT-KLWP>] [hereinafter *Task Force Recommendations*].

¹⁵⁵ Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. at 78,642.

¹⁵⁶ *Id.*

¹⁵⁷ *Task Force Recommendations*, *supra* note 154, at 6, 9.

to drones. Whether this omission is an oversight by the FAA or something they simply do not wish to address currently, it is nonetheless unacceptable. The FAA clearly stated that their goal with this regulation was to make drone operation safer.¹⁵⁸ To overlook the single most dangerous method in which a drone can be outfitted is preposterous.

Granted, the task force was assigned only with developing weight-based requirements and a registration system for registering drones.¹⁵⁹ However, preventing the arming of drones with weapons in the interim final ruling that established weight requirements would have been very simple. The FAA has indeed made drone operation safer by requiring they be registered, marked, and under a certain weight, but the ruling certainly leaves something to be desired when students in Connecticut are taking videos of drones firing handguns.

V. SOLUTIONS TO ISSUES CREATED BY H.B. 1328

A. Federal Solutions: The FAA's Response to H.B. 1328

The first and most obvious solution to H.B. 1328's problems is to either repeal the bill or modify it to exclude non-lethal weaponry. Now that North Dakota has been selected as an FAA test site, politicians no longer need to fear the stigma that would be attached to strict drone regulations. However, it is incredibly unlikely the North Dakota Congress will touch the bill, especially after the arduous process of getting it passed.

A more plausible solution comes in the form of FAA regulations. The FAA has recognized that the "rapid proliferation of small unmanned aircraft" is constantly generating new problems.¹⁶⁰ Hopefully this recognition will cause the creation of a new task force charged with governing the loadout of drones. Even though the FAA has failed to govern the loadout aspect of drone

¹⁵⁸ Registration and Marking Requirements for Small Unmanned Aircraft, 80 Fed. Reg. at 78,595.

¹⁵⁹ *Task Force Recommendations*, *supra* note 154, at 2.

¹⁶⁰ *Id.* at 1.

usage, the agency is fairly quick in passing new regulations.¹⁶¹ Since the FAA is so efficient and prompt with enacting new legislation, the drone loadout regulations could be in the works already. If it is not something the agency is looking into currently, they definitely should be.

B. State-Based Solutions: Limited Use and Education

Until legislation is enacted, be it by North Dakota or the FAA, two solutions remain. The first is that law enforcement agencies simply do not arm their drones with weapons until more thorough legislation is released. Of course the agencies could still use the drones in accordance with current FAA regulations, but they would refrain from arming them with weaponry for the time being. This solution, however, is unlikely in light of North Dakota's willingness to use drones.¹⁶² The second solution is to educate citizens in North Dakota about the changes to law enforcement concerning drones.

If law enforcement agencies truly plan on arming drones and using them in the methods permitted by H.B. 1328, North Dakota citizens need to be aware of the ways in which they will be used. Although H.B. 1328 went through an extensive process before being passed, the majority of citizens are most likely completely oblivious to its existence. If the general population is not taught how these drones will be used, their spontaneous arrival will confuse, scare, and likely anger those who are subject to the drones' usage. Alerting the general population will not only temper their reaction, but will also prevent them from carrying out any sort of illegal action against the drones, whether it be flight or destruction. To throw police drones onto citizens and then punish them for an uneducated reaction would not only be incredibly irresponsible, but a mockery of the criminal justice system.

¹⁶¹ See *supra* notes 140-42 and accompanying text. The most recent task force began research in October 2015, and the resulting regulations became effective the following December.

¹⁶² See *State v. Brossart*, 858 N.W.2d 275 (N.D. 2015); *State v. Brossart*, No. 32-2011-CR-00049, 2012 WL 10716031, at *5 (D.N.D. Aug. 1, 2012); Koebler, *supra* note 95.

C. Court Decided Solutions: Conventional Claims

When a citizen is harmed in some manner by a police drone, their only remedy will be that of conventional means. As previously discussed, H.B. 1328 does not provide remedies to private parties in the event law enforcement acts illegally.¹⁶³ In light of the new technology, bringing a claim of excessive force that arises from a police department's use of a drone will be novel, difficult, and confusing.

CONCLUSION

The world of drones is constantly evolving. Technological advances are allowing drones to be used in ways not thought possible twenty years ago. North Dakota has clearly embraced these advances through the passing of H.B. 1328.

H.B. 1328's language has given great deference to law enforcement agencies. The exceptions allow too much, and the limitations prevent too little. By allowing law enforcement to use armed drones, the North Dakota legislature has taken a clear stance on how the state will handle future drone regulation.

The lack of existing legislation will create multiple problems for North Dakota courts. The court will be tasked with classifying the drones, determining what criminal charges will be brought against those who damage the drones, and what remedies will be available to those harmed by the drones. This responsibility should be handled by the FAA.

However, the FAA appears to be unaware of the problems armed drones can create. Though the agency claims its goal is to make drone operation safer, it has yet to pass any regulations concerning drone loadout. Until either North Dakota or the FAA properly regulate drones, North Dakota citizens will be at their mercy.

When law enforcement agencies begin to arm drones, it will likely come as a shock to North Dakota citizens. Unless these citizens are properly educated on how the drones will be used, the possibilities are endless. Citizens may unknowingly find

¹⁶³ Compare H.B. 1328, 64th Legis. Assemb., Reg. Sess. (N.D. 2015) (as passed by House, Jan. 6, 2015), with H.B. 1328, 64th Legis. Assemb., Reg. Sess. § 6 (as introduced by Rep. Rick Becker, Jan. 13, 2013).

themselves at the mercy of a machine that is meant to protect and serve.

What are the repercussions for the officer's actions mentioned in the Introduction? Was the drone's presence at the scene of the fight even lawful? Unfortunately, there are no answers to these questions. Even if the suspect suffers bodily harm or death, it can be argued the officer acted reasonably. If the other man engaged in the fight damaged the drone, he may be held criminally liable. This hypothetical highlights only a few of the problems created by H.B. 1328, problems that have not yet been addressed by either the state or federal government.

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