

# Media Technology: The Evolution of Journalism and the Constitutional Complications of Drone Reporting

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The birth of the digital age brought with it a rapidly evolving news gathering and distribution process.<sup>[1]</sup> Instead of relying on the delivery of the local newspaper consumers are constantly connected to an international web of instant news dissemination. Retweeting content and posting ideas on a public forum have replaced clipping an article from the paper and writing a letter to the editor. The advancements of media technology produce complex legal issues, challenging precedent before a much more stagnant legal community.

The regulation of media technology requires analysis of both “media” and “technology.” The development of instant news dissemination via the Internet has altered our conception of what defines a journalist, making it difficult to determine who deserves exclusive press rights or protections.<sup>[2]</sup> Historical conceptions of newsgathering and journalistic integrity that guided legislation clash with the immediate, diverse, and technological field of modern media, drawing question to the reasonability and applicability of journalist distinction and specialization.<sup>[3]</sup>

Analyzing who is distributing the news is a problem that is only exacerbated by technological advancements to the newsgathering process. Riddled with controversy, drone use is becoming an increasingly standard tool of modern media. Drones bring with their flight a slew of complex constitutional claims that highlight the complications of protecting modern journalists, but also influence policy and regulatory concerns arising from technological newsgathering techniques. Courts and legislatures must balance the desire to protect newsgathering rights with potential privacy invasions beyond the scope of historical prescriptions.

This article traces the developments of media technology by highlighting the crucial drone controversies. First, it will trace the development of modern journalism and the use of drones in newsgathering. Next, it will discuss the policy and constitutional concerns resulting from the use of media technology in newsgathering and dissemination. Finally, it will analyze the theories of technological regulation, resting on a reformed approach to media technology law and litigation. The current state of affairs necessitates more relevant litigations and more malleable judges in order to progress more steadily into the future.

*"We keep asking ourselves: Is this a new ethical problem, or an old ethical problem with new technology?"<sup>[4]</sup>*

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# I. Development of Modern Journalism

## A. Timeline of Journalism

The first real newspaper in America, the *New England Courant*, was printed in 1721.<sup>[6]</sup> Printed by James Franklin, it discussed political concerns, published literary works, and offered philosophical musings.<sup>[6]</sup> The newspaper was a foundation of American culture for centuries, before enlightening technologies overtook the newsgathering and information dissemination processes. Modern journalism began to take shape in 1980 when the *Columbia Dispatch* became the first newspaper to be completely available online.<sup>[7]</sup> Although this first endeavor was expensive and time consuming, in the following decades online media boomed and old fashioned print media drastically dropped in consumer relevancy.<sup>[8]</sup> Online media has made news content easier, faster, and cheaper to obtain and distribute.<sup>[9]</sup> These modern tools resulted in a drastic overhaul of the journalistic profession that laws, precedent, and regulations have yet to overcome.

Newsgathering and distribution sources have taken on a new, vague form. Popular sources like the *Huffington Post* emit news solely online, forgoing any paper copies.<sup>[10]</sup> The *Huffington Post* has a news staff, but keeps it small, preferring instead to solicit news from third parties.<sup>[11]</sup> Sites like this obtain and provide content by linking to blogs, amateur sites, or other unpaid, unofficial sources.<sup>[12]</sup> Accordingly, social media outlets like *Twitter* and *Facebook* are becoming increasingly relevant in the world of journalism; the sites themselves are working to become more news oriented.<sup>[13]</sup> Studies show that more than half of social media users say that these sites serve as a news source for them, and the number has risen substantially in recent years.<sup>[14]</sup> People are nearly as likely to get news about government and politics from their local news or *CNN* as they were *Facebook*.<sup>[15]</sup> Breaking news stories grow from the immediate dissemination and user involvement that social media encourages. Journalists, like users, use the immediacy of social media to check for breaking news and recent developments.<sup>[16]</sup> This form of content research- using social media tools to track developing stories and gather new facts and sources- calls into question the distinctive line of where the amateur poster ends and the journalist begins.<sup>[17]</sup>

While isolating journalists from the general public may not have been a concern throughout history, it is increasingly imprudent in the modern era. A profession rooted in ethics and integrity, journalism has evolved into a larger but indistinct industry.<sup>[18]</sup> The modern journalist is difficult to define: in the digital age anyone with a blog or frequently updated site can be considered a “news source.”<sup>[19]</sup> Personal or amateur blogs may be indistinguishable from professional news sources, and more confusingly news sites may use these blogs and sites as contributors to their own publications. This is problematic because many protections offered to service providers or to journalists, such as state shield laws that protect them from disclosing information, are not available for bloggers.<sup>[20]</sup> As a result, amateurs who post news stories online are open to a variety of legal consequences that journalists or agencies doing similar work are protected for.<sup>[21]</sup>

## B. The Growth and Regulation of Drone Journalism

The term “drone” commonly refers to “unmanned aerial systems;” a simple device that navigates

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airspace by being remotely controlled from the ground by a pilot.<sup>[22]</sup> Historically, drones were most commonly used for military purposes, but are becoming increasingly popular for civilian use.<sup>[23]</sup> In recent years, one of their greatest influences has been on the increasing popularity of drone use among journalists in newsgathering process.<sup>[24]</sup> These devices are often fitted with innovative recording devices that can capture images and videos to gather a wide variety of news content.<sup>[25]</sup> Drones are increasingly subject to certain policies and restrictions so that they may operate “safely and efficiently.”<sup>[26]</sup> The new and proposed regulations are paramount for many journalists as they are some of the first federal regulations to accept that drones were a means of future communication.<sup>[27]</sup>

### **1. Utilizing Drones: The Modernization Of Newsgathering**

Modern journalism has flourished from the use of drones for newsgathering purposes. Compared to common newsgathering techniques, drones are cheaper and quieter than using a helicopter, more flexible/malleable than cable suspended cameras.<sup>[28]</sup> Drones often get views or images that would not otherwise be available of events where it would be unsafe, impractical or too expensive to send journalists.<sup>[29]</sup> For example, using drones is safer when reporting natural disasters or war carnage as they allow journalists to capture the content they desire without being at risk of physical injury.<sup>[30]</sup> Not limited to dire circumstances, drones can also be used to capture unique angles a variety of sporting events, including at the Olympics.<sup>[31]</sup>

The value of drone usage is apparent. While some journalists report being weary of drone use, most agree that they would use drones to report on matters of public interest, especially those that would otherwise be unobtainable.<sup>[32]</sup> Major news conglomerates like CBS have spent considerable money advocating for drones in addition to their traditional lobbying practices in media policy, and even social media platforms like Facebook are investing in drones in preparation for future technologies and growth.<sup>[33]</sup> The impact of drones on the news is not limited to professionals: recreational drone users can also create news with their findings. One user discovered that a meat processing plant was illegally dumping waste into a creek and contaminating it when using his drone, and went public with the information.<sup>[34]</sup>

Journalistic drone use is so successful that technology and research organizations are partnering with journalists and publishers to incorporate drones into modern journalism education.<sup>[35]</sup> For example, the University of Missouri initiated a Drone Journalism Program to teach and prepare new journalists for the digital age. The program advocates that drones are merely tools for gathering new information, expanding modern journalism.<sup>[36]</sup> These efforts provide training on drone operation to journalists and journalism students to encourage safe, effective and efficient drone newsgathering,<sup>[37]</sup> and ensure that drone technology will continue to drive media development.

### **2. Drone Regulations**

While tasked with controlling the airspace since 1958, the Federal Aviation Administration (the “FAA”) has only recently begun to adapt comprehensive laws for civilian drone usage.<sup>[38]</sup> In 2007 the FAA released a statement recognizing that drones fall into the “statutory and regulatory definition of aircraft as they are devices that are “used or [are] intended to be used for flight in the air with no onboard pilot.”<sup>[39]</sup> The agency asserted this jurisdiction over both simple, recreational model planes and larger, advanced drones that could be utilized in warfare.<sup>[40]</sup> Despite claiming responsibility for

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drone regulation, the FAA neglected their assumed duty; their regulations were largely viewed as inadequate.<sup>[41]</sup> Punishments were harsh, but few notable regulations were in place.<sup>[42]</sup> Concerned, Congress enacted the FAA Modernization Reform Act of 2012 (“FMRA”), requiring the FAA create rules for the use of drones in the U.S.<sup>[43]</sup>

The first FMRA efforts of drone regulations were announced in Fall 2015, and became active in December 2015.<sup>[44]</sup> Beginning in December, all UAS devices weighing more than .55 pounds must be registered with the FAA.<sup>[45]</sup> Registration is not a complex process: it can be done online by anyone over thirteen years of age, costs only \$5, and is good for three years.<sup>[46]</sup> The registry isn’t public, but proposed plans will eventually be made available to law enforcement agencies.<sup>[47]</sup> Users must provide the make and model of their aircraft, but the registration form does not ask for any information on whether a camera has been attached to the device.<sup>[48]</sup> Within two weeks of the new FAA registration program being implemented nearly two hundred thousand small drones were registered.<sup>[49]</sup> This number will only continue to grow: it is estimated that over one million drones that require FAA registration are expected to be sold in the United States this year.<sup>[50]</sup>

New regulations categorize private drone use as recreational or commercial.<sup>[51]</sup> Recreational flight is drone use for the pilot’s personal interest or enjoyment.<sup>[52]</sup> FAA guidelines specify that flight is beyond the scope of recreational if it is non-hobby, such as if the user sells the photos that the drone takes.<sup>[53]</sup> A commercial use is any that is in connection with business, such as professional photography for real estate, weddings or cinema.<sup>[54]</sup> The distinction between recreational and commercial use is crucial because each has its own flight requirements. Recreational use is only required the user register with the new online FAA system.<sup>[55]</sup> Comparatively, drones in flight for commercial use face more stringent regulations.<sup>[56]</sup> If the drone use falls outside the scope of recreational use then the user must obtain FAA authorization for commercial use of a drone.<sup>[57]</sup> Registration alone is not enough for commercial use; commercial users must also obtain a Certificate of Waiver or Authorization (“COA”) or a “Special Airworthiness certificate by the FAA.<sup>[58]</sup> Commercial exemptions are determined by the FAA on a case-by-case basis, and, unlike recreational registration, the approval and pending requests are publically available on the FAA website.<sup>[59]</sup> The FAA has authorized over 3,200 COAs for commercial drones, including one for Amazon, which is testing drone use for the Amazon Prime delivery service.<sup>[60]</sup> Some of these grants even allow major corporations special right rights.<sup>[61]</sup> Disney World, for example, has requested permission to operate drones outside of the confines of laws that would otherwise ground them.<sup>[62]</sup>

The FAA places additional prohibitions and limitations on the use of drones based on geographic location and cultural significance.<sup>[63]</sup> No Drone Zones are in place around the United States and strictly prohibit or restrict any drone flight within their parameters, such as Washington D.C., for security and safety reasons.<sup>[64]</sup> Event specific limitations are imposed by Temporary Flight Restrictions, where flight is restricted due to weather conditions or special events, such as the Super Bowl.<sup>[65]</sup> Organizations can bypass these restrictions, however, if they are granted an explicit exemption by the FAA.<sup>[66]</sup>

Despite recent administrative progress, the FAA has failed to fully comply with the Congressional mandate to integrate drones into navigable airspace.<sup>[67]</sup> The FAA’s drone regulation task has only just begun. Operationally, drones remain largely unregulated. The FAA promotes many procedures for safe drone use, such as refraining from flight while intoxicated and remaining 25 feet away from individuals and valuable property.<sup>[68]</sup> These are only suggested guidelines, however, and do not bind

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drone operators as other restrictions do.<sup>[69]</sup> Proposed regulations incorporate many of these ideals, such as prohibiting users from flying over persons not involved in the operation, but firm FAA regulations aren't expected until summer. In the meantime there is growing public concern about drone use and regulation from both those who want more stringent restrictions and those who want less.<sup>[70]</sup> This dissonance bleeds into the courtroom, highlighting the inefficient and inconsistent judicial approach to modern technology.

## II. The Legal Consequences Of Modern Journalism

### A. Protecting "Journalists"

Amateur journalists are potentially open to a variety of legal liability issues involving intellectual property, defamation, and constitutional concerns.<sup>[71]</sup> The protection of journalists in media regulation is historically grounded in the notion that journalistic integrity ensures proper and effective news dissemination.<sup>[72]</sup> In the digital age some argue that these privileges are still deserved, as the average person may not be concerned with ethical reporting, while others believe that modern technology makes the distinction for reporter's rights impractical and unfair.<sup>[73]</sup>

Many judicial complications arise from the blurred line between journalists and amateurs that have resulted from the expansion of technology. For example, shield laws are generally consistent across states, courts disagree, sometimes even within the same jurisdiction, on how to best apply these laws to nontraditional news sites, like blogs.<sup>[74]</sup> A California court offered shield law protections to online journalists who leaked data about Apple's future releases,<sup>[75]</sup> but a New Jersey court refused to grant a blogger similar protections.<sup>[76]</sup> The New Jersey court, upon rejecting the shield law protection, did theorize that a newsperson with direct ties to traditional news media would be entitled to this protection, but does not define a traditional news source, leaving this precedent open to interpretation, to the detriment of bloggers.<sup>[77]</sup> In the digital era, where so much communication occurs online, this precedent raises more questions about what constitutes a new source than it answers. In light of these questions, there is interest in some state legislatures in updating Shield Laws to address modern concerns, but in the meantime the protections remain at the mercy of the court.<sup>[78]</sup>

FAA regulations mirror the judicial uncertainty in structuring modern media. While courts try to afford rigid labels to journalists the FAA applies similar categories to drone registration.<sup>[79]</sup> The FAA doesn't use media classifications- but commercial and recreational. In doing so they ignore amateur journalists that qualify as "recreational" users because they did not directly earn an income from the flight. But, many blogs and web-platforms allow the writer to derive income from their personal sites, such as through advertisements.<sup>[80]</sup> In these circumstances FAA regulations have the opposite effect that many other media laws have: instead of burdening the amateur with an uneven playing field, they provide them with the gift of freedom by allowing easier drone registration. By categorizing users this way the FAA is perpetuating antiquated standards of media regulations.

The impractical categorization of journalists and civilians also creates constitutional concerns. Courts have refused to grant investigative journalists exemptions from the law, and have held them accountable to any civil or criminal laws they may break while reporting.<sup>[81]</sup> As a result, it is generally accepted that the press does not have any special constitutional protections that the generally public



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does not benefit from.<sup>[82]</sup> Despite this, recent drone regulations treat reporters and lay persons are treated differently.<sup>[83]</sup> Notably, the FAA has different regulations for individuals and reporters, granting “restricted” commercial use that allows certified reporters into otherwise drone free zones.<sup>[84]</sup> Opening up drone rights for journalistic purposes may not be a “speech” issue under the First Amendment but could potentially turn it into a “press” issue, despite years of precedent disavowing the division of press and civilian rights.<sup>[85]</sup>

## **B. First Amendment “Speech:” The Right to Record**

The right to gather news is a constitutionally protected function under the first amendment.<sup>[86]</sup> Courts have held that the right to news dissemination is a right of the freedom of speech, and reasoned that the ability to gather the news is an essential element of this act.<sup>[87]</sup> Consequently, protection must be afforded to newsgathering in order to respect the right to news dissemination.<sup>[88]</sup> The protections and constitutional analysis of speech regulation becomes increasingly challenging in technology-induced litigation.<sup>[89]</sup>

The “right to record,” or the right to take photos and videos, is a recently recognized right that is relatively underdeveloped.<sup>[90]</sup> Circuit courts have consistently recognized the right to record, such as by allowing individuals to record police conduct that is a matter of public interest.<sup>[91]</sup> Similar first amendment claims have resulted from the police prohibiting private citizens from filming the aftermath of a car accident.<sup>[92]</sup> The Seventh Circuit has elaborated that the American people had the right to observe their government.<sup>[93]</sup> In *ACLU v. Alvarez* they held that a law prohibiting the recording of police officers in public spaces was a restriction on the use of expressive media that was a violation of speech and press dissemination rights.<sup>[94]</sup>

Navigable airspace has only recently become a First Amendment issue.<sup>[95]</sup> This right to record has historically been applied to the recording from securely on the ground.<sup>[96]</sup> However, similar first amendment concerns arose in August 2014 when the FAA created a no-fly zone over Ferguson, Missouri during the Michael Brown protests, prohibiting newsgathering agencies from obtaining footage.<sup>[97]</sup> Theories and opinions on determining the constitutional protection of newsgathering drone issues vary and apply precedent differently.

First amendment protections are applied to the “expression” of someone’s speech. In analyzing constitutional issues courts may have to determine if there is sufficient “expression” in an action to benefit from first amendment protections.<sup>[98]</sup> The right to record rests on the concept that *process of producing speech* is what is protected by the first amendment.<sup>[99]</sup> “Purely recreational” photography, as opposed to professional or artistic photography, is not inherently expressive, and thus is only provided expression when courts find a “communicative purpose.”<sup>[100]</sup> Drones pose a problem for this standard. While flight is intentional, the actual recordation of photos or video may not be.<sup>[101]</sup> For some courts, the actual recordation of an event is the “expression” that the first amendment protects because the act of recording is essential to their “speech.”<sup>[102]</sup> Just as you cannot protect expression in art without tangentially protecting the paint and brushes, the documenting of an action, such as police conduct, requires the protection of the recording process.<sup>[103]</sup> Similarly, some have argued that using video recording devices to capture and communicate facts or ideas is much the same as recording it with the written word, which would be afforded protection as “speech.”<sup>[104]</sup> Other courts have doubted drone protections under the right to record, claiming that the recordings do not contain

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sufficient “expression” to qualify as speech.<sup>[105]</sup> This concrete approach faces a number of its own challenges, such as that there are often reasons for taking less artistic shots, or it can be difficult, if not impossible, to determine what exactly “expression” is to the individual.<sup>[106]</sup> Most significantly, in deducing that drones are not protected these courts fail to differentiate drone footage from protectable cell phone video, exhibiting the confusion and inconsistencies that result from technology in the courtroom.<sup>[107]</sup>

Protecting drone footage under the first amendment would potentially effect both reporters and recreational drone users.<sup>[108]</sup> The extent to which drone images and videos are protected under the first amendment is important for non-journalists because many news stories break from the videos and photos captured by the average citizen, requiring that users have the right to gather the news so that they can disseminate it.<sup>[109]</sup> A comprehensive approach that treats all news-gatherers the same under the first amendment would address some of the discrepancies resulting from modern journalism practices.

### ***C. Privacy In Digital Journalism***

Around the world, as drones became more popular, a heightened awareness on safety, security and privacy issues that stem from drone usage has emerged.<sup>[110]</sup> Unfortunately, many of the drone privacy concerns are closely tied with excessive government surveillance, resulting in media regulation based police, not newsgathering, concerns.<sup>[111]</sup>

#### **1. How Fourth Amendment Concerns Will Effect the Media**

A Congressional Research report worries that drones will spy on Americans in a way that interferes with the Fourth Amendment.<sup>[112]</sup> The Fourth Amendment protects against unreasonable searches, an intrusion on a reasonable “expectation of privacy,”<sup>[113]</sup> and seizures, the “meaningful interference” of an individual’s possession of their property.<sup>[114]</sup> The Court has interpreted privacy laws regarding police investigations to mirror laws regarding the private person, establishing that courts permit law enforcement or the government to act how a private person does.<sup>[115]</sup> For example, it has been held that if private persons repeatedly trespass on private property, the same trespass by the police is valid under the Fourth Amendment.<sup>[116]</sup>

In terms of surveillance, First Amendment limitations that bind private parties will dictate the rules of police conduct.<sup>[117]</sup> As a result, “wide-scale use of drones by private actors would make it harder to argue that the police- and only the police- should have to overcome specific hurdles” when using the technology.<sup>[118]</sup> The relationship between the First and Fourth amendment make it pertinent to analyze privacy law for media drone use under the lens of government restrictions.

The Supreme Court has found “flyover” surveillance of individuals to be Constitutional.<sup>[119]</sup> In fact, many surveillance techniques have not been harshly scrutinized. It is constitutional for police to use a hidden radio transmitter to track a car when there are visually surveying it, but it is not constitutional to merely attach a GPS device to a suspect’s car for a month for general surveillance.<sup>[120]</sup> The difference in these cases is whether the police were actively involved, or whether the technology was replacing the officer,<sup>[121]</sup> a question that likewise arises from recording images and pictures with drones.<sup>[122]</sup>

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The First Amendment effect on privacy precedent is problematic in terms of newsgathering. While many citizens may be ok with news sources using drones for newsgathering, they may fear the government having the same access.<sup>[123]</sup> Privacy fears of government involvement will dictate or rely on the first amendment restraints of the media's newsgathering right.<sup>[124]</sup> If news broadcasters and government agencies are going to be treated the same, there may be a greater desire to more closely regulate media's use, even if benign.<sup>[125]</sup>

## **2. The Third Party Doctrine**

The Third Party Doctrine provides another means of concern in the balance of media and government drone use.<sup>[126]</sup> The standard holds that if someone knowingly shares information with a single third party than they lose all reasonable expectations of privacy to that information in regards to government access.<sup>[127]</sup> The unknown citizen being recorded may have no fourth amendment right, regardless of whether the footage was turned over willfully or with force, as long as the recording company was not required to gather the content. Thus, information randomly, accidentally, or unknowingly obtained by the media can have drastic, constitutional effects on innocent parties. As a result, First Amendment insufficiencies bleed into privacy concerns, meaning that the use of drones for newsgathering purposes may be unfairly burdened by limited free speech<sup>[128]</sup> because "law enforcement access... depends on private access, and... [thus] upon the First Amendment."<sup>[129]</sup>

The Third Party Doctrine is criticized for application to technologically based cases, and has been called into question by Justice Sotomayor.<sup>[130]</sup> When applied to drones, if the government obtains drone recordings the Third Party Doctrine could prevent any fourth amendment claims even if the individual did not know they were being recorded. Accordingly, an anonymous drone user posting photos online is providing the government with an investigatory tool, and subjecting the unknowing, non-consenting person being recorded, to a forfeiture of fourth amendment protections. There is no reasonable expectation of privacy for content posted publically online.<sup>[131]</sup> This includes not only news sites, but blogs, social media, and other tools for modern news consumption. A drone user posting online makes his content susceptible to government searches, affecting the rights of anyone they secretly record. The drone user's First Amendment rights thus directly implicate privacy concerns of private third parties.

## **3. Property and Safety Concerns**

Excessive surveillance,<sup>[132]</sup> data collection<sup>[133]</sup> and privacy invasion only begin the list of safety privacy concerns stemming from drone use.<sup>[134]</sup> There are few regulations on flying drones over someone's property, and there is no way of knowing if something has a camera on their device, leaving citizens vulnerable to privacy infringement by journalists and amateurs alike. The controversial nature of drones has resulted in persons shooting down drones on their property out of concern for their safety.<sup>[135]</sup> In January 2016 a Kentucky court cleared a shooter of any criminal charges in the event, and the drone operator subsequently sued the FAA seeking a declaratory judgment that FAA regulations surpass state privacy and trespass laws.<sup>[136]</sup> In this instance the drone user claims he was photographing the rooftops and horizon, but the shooter claims the drone was over his property photographing his daughter.<sup>[137]</sup> Cases like this highlight the privacy concerns that grow from drone usage, but most importantly highlight the unbalanced relationship between information gathering and personal privacy. Until regulations change, it seems that one must either come to peace with their loss of privacy, or shoot down the drones above them.



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### III. Modern Regulations For Technological Innovation

#### A. Theories of Regulation

Regulating technology and the interconnectivity of the Internet poses a number of considerations and complications.<sup>[138]</sup> There are a number of theories proposing methods of control or restraint varying in intensity and focus. On one end of the spectrum, the concept of “Technology Governance” relies on “the idea of technology as a neutral and general tool to solve the problems of information in the age of global communications.” Under this concept, technology, as it grows and faces legislation around the world, will develop its own solution for regulation, instead of forcing legislation to mold it.<sup>[139]</sup> Notably, the FAA subscribes to this approach, arguing that drone privacy concerns are not in their realm of regulation, and going so far as requesting privacy complaints against them be dismissed.<sup>[140]</sup> The agency asserts that privacy issues will be addressed in an ongoing process that collaborates within the government and with third party stakeholders.<sup>[141]</sup>

Other government agencies disagree with this approach, such as the National Telecommunications and Information Administration (“NTIA”), which believes more focus should be placed on potential public safety and public privacy concerns.<sup>[142]</sup> NITA is attempting to draft its own drone guidelines that would be non-binding, but “best practice,” although there is considerable disagreement about what the guidelines should entail.<sup>[143]</sup> Some state governments follow this approach and have adopted their own drone security laws to supplement the sparse federal regulations.<sup>[144]</sup>

Beyond this scale of regulation severity, other, use-specific policies have been suggested. Many in the media have advocated for journalist-only access, allowing a wider range of drone use for professional media outlets. The rationale to this approach is that professional journalists abide by a strict code of ethics that would prevent them from misusing the privilege. This standard, however, is nearly unobtainable in an era where “journalist” cannot be clearly defined.<sup>[145]</sup> The Professional Society of Drone Journalists (“PSDJ”) was founded in 2014 in order to aggregate tech-savvy journalists who hold themselves to rigorous professional standards, requiring that members use drones only when necessary.<sup>[146]</sup> Members are award winning journalists, and consultants, free lancers, and hobby journalists alike.<sup>[147]</sup> The establishment of the PSDJ itself exemplifies why a journalist-only approach is impractical: anyone and everyone can be a journalist, leaving it only for the FAA to decide who is worthy of journalism credentials.

Others debate whether drones should be applicable to only reporting on government activities, but this could potentially prevent the gathering of content that is otherwise exceedingly useful.<sup>[148]</sup> Proponents of this approach believe that the general public may be more accepting of drone use if it is used to monitor the government, the opposite of many common fears.<sup>[149]</sup> However, this standard may incentivize the government to more stringently impose regulations on drones in order to prevent excessive regulations of their own activities.<sup>[150]</sup> This standard also assumes that the content can only be useful or newsworthy if it is of government or political interest, which is untrue.<sup>[151]</sup> This highly specific content-based use policy would result in more restrictive results than societal surveillance fears.

While each theory of regulation and policy focuses in a different direction, they each recognize a crucial fact of modern technology: it’s going to have drastic impacts on legal culture. With such an

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inevitable change approaching media technology the theories preferring minimal regulations falter. With an ever-changing field, ground breaking technologies and constitutional concerns we cannot merely hope the conflicts will self-regulate.

## **B. Moving Towards A Comprehensive Solution**

Justice Alito stated his concern in the contradiction that technology driven privacy questions are being unjustly decided based on wholly incomparable 18th Century tort laws.<sup>[152]</sup> While insightful, Alito's observations of how technology impacts the judiciary are not the first of this kind. For decades courts have noted that new technologies blur the understanding and application of longstanding judicial principles.<sup>[153]</sup> But, over those decades courts have been hesitant to embrace the new legal theories and concepts that derive from technological advancement.

The first step in modernizing the regulation of media technology is to address who is the "media" that is using the technology. The complex web of privacy concerns and interrelated first amendment concerns that are confused by changes to journalism and newsgathering practices cannot merely be ignored. There must be a greater recognition for changes in media regulations. Our laws and practices must reflect the reality that we can no longer afford principles or protections to a journalist class. Whether these protections are positive or negative is largely irrelevant as their greatest injustice derives from the seemingly random, case-by-case basis in which they are utilized. As courts often claim that there are no constitutional protections that they offer exclusively to journalists, standardizing treatment relies on state legislatures amending their laws and on government agencies like the FAA assuring equal treatment. This regularity would relieve one of many layers of inconsistency in media technology.

Next, reform is needed in the regulation of technology use. The first amendment constraints on newsgathering and inconsistent protection across the district courts will further poison privacy rights by forcing privacy regulation in fear of potential government surveillance. Action needs to be taken before media regulations falter and constitutional rights are infringed.

Legislative reform would provide consistent treatment of technology use.<sup>[154]</sup> Revised regulations would have to take into account both the positive and negative effects of drone use, and find a way to protect both privacy and first amendment rights. Other nations have attempted to achieve this balance. The UK has passed privacy-focused laws that make strict restrictions on drone use, such as prohibiting the use of drones with cameras within 50 meters (roughly 164 feet) of people, cars, buildings and crowded places.<sup>[155]</sup> Because the FAA has no interest in protecting privacy rights, regulations currently more heavily favor first amendment protections. New regulations would need to lean more heavily on privacy rights to protect not only personal privacy, but to protect first amendment restraints that result from fourth amendment concerns.

While legislative and regulatory action will be necessary to prevent the imminent destruction of Constitutional rights, it would be impossible to draft legislation dictating categorically precise media processes. As media technology evolves the legislation will have to be interpreted for the modern facts of the case. Thus, although new regulations are needed, their effectiveness relies heavily on the modernization of the judiciary. The frustration in the current standards expressed by Justices Sotomayor<sup>[156]</sup> and Alito<sup>[157]</sup> indicate that the new regulations would be eagerly applied in the courtroom. Constitutional focused legislation, analyzed by modern, forward thinking judges, considers both present and future needs.

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## Conclusion

The irregular regulation of media technology will become increasingly problematic if not addressed. The media and broadcast industry is wholly unrecognizable compared to its state just a few decades ago. The drastic changes resulting from technological innovation require comprehensive reform. Addressing regulation of just the concept of the “media” or only technological complications will further complicate precedent. The efficiency of media technology regulation and judicial treatment is reliant on reforming both of the interconnected concepts.

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[1] Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, *The New Yorker* (Mar. 31, 2008) available at: <http://www.newyorker.com/magazine/2008/03/31/out-of-print>.

[2] Lisa George, *Digital Technology, Disruption and the Market for News*, in *Handbook on the Economics of the Media* 262, 259-276 (Robert G. Picard et al. eds., 2015).

[3] Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 47 *Wm. & Mary L. Rev.* 49, 103 (2015).

[4] Matt Wate, *quoted in* David Wolfgang, *Droning On*, *Quill* (Mar. 2013) (discussing the application of journalism ethics to drone use).

[5] See Alterman, *supra* note 2.

[6] *Id.*

[7] David Shedden, *New Media Timeline (1980)*, *Poynter* (Dec. 16, 2004), available at: <http://www.poynter.org/2004/new-media-timeline-1980/28725/>.

[8] *Id.* It took two hours to receive a complete newspaper online in 1980, and cost more than \$5 while the print version was only twenty cents. *Id.*

[9] George, *supra* note 2.

[10] See Alterman, *supra* note 2.

[11] *Id.*

[12] *Id.*

[13] Michael Barthel et al., *The Evolving Role of News on Twitter and Facebook*, *Pew Research Center* (Jul. 14, 2015), available at: <http://www.journalism.org/2015/07/14/the-evolving-role-of-news-on-twitter-and-facebook/>.

[14] See Barthel, *supra* note 13.

[15] Elaine C. Kamarck & Ashley Gabriele, *The News Today: 7 Trends in Old and New Media*, *Center for Effective Public Management at Brookings* (Nov. 2015), available at <http://www.brookings.edu/~media/research/files/papers/2015/11/09-kamarck-gabriele-listicle-media/new-media.pdf>.

[16] Andrea Peterson, *Three Charts That Explain How U.S. Journalists Use Social Media*, *The Washington Post* (May 6th, 2014).

[17] See Barthel, *supra* note 13.

[18] See *generally* Ethics Case Studies, *Society of Professional Journalist* (last visited Apr. 14, 2016), available at: <http://www.spj.org/ethicscasestudies.asp>.

[19] See Blitz, *supra* note 4 at 103.

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[20] Latecia Thomas, *The Blogger's Cliché: The Imperative Demand for Blogging Regulations*, Law School Student Scholarship, 1 (2016).

[21] *Id.*

[22] They are also known as an unmanned aerial vehicle (UAV) or remotely piloted aircraft (RPA), but can also signify devices or vehicles in other terrains, such as an autonomous underwater vehicle (AUV). *Resources*, Know Before You Fly (last visited Apr. 14, 2016), available at: <http://knowbeforeyoufly.org/resources/>

[23] Leah Marie Davis, *Not Without a Pilot: Navigating the Space Between the First Amendment and State and Federal Directives Affecting Drone Journalism*, 49 Ga. L. Rev. 1159 (2015).

[24] *Id.* at 1164.

[25] Know Before You Fly, *supra* note 23

[26] H.R. 658-62, § 331(9) (2015).

[27] See Blitz, *supra* note 4 at 86.

[28] Rachel Feltman, *The Future of Sports Photography: Drones*, The Atlantic (Feb. 18, 2014), available at: <http://www.theatlantic.com/technology/archive/2014/02/the-future-of-sports-photography-drones/283896/>.

[29] Davis, *supra* note 24 at 1180.

[30] Colleen Curry, *Drones Eyed by Paparazzi, J-School Teaching Reporters How to Fly Them*, ABC News (Mar. 22, 2013), available at: <http://abcnews.go.com/US/drones-eyed-paparazzi-school-teaching-reporters-operate/story?id=18782432>.

[31] Feltman, *supra* note 28.

[32] Davis, *supra* note 24 at 1181.

[33] *AT&T, T-Mobile Spent More on Lobbying in Q4*, Washington Internet Daily (Dec. 21, 2016).

[34] Curry, *supra* note 31.

[35] *Researchers to begin work with news organizations in an effort to advance aerial journalism*, Virginia Tech (Feb. 5, 2015) available at: <http://www.vtnews.vt.edu/articles/2015/02/020515-research-maapmedia.html>.

[36] Curry, *supra* note 31.

[37] Virginia Tech, *supra* note 35.

[38] The Federal Aviation Act of 1958 established the FAA to oversee and regulate the navigable airspace within the United States. *Navigable Airspace System Overview*, Federal Aviation Administration, available at: [https://www.faa.gov/air\\_traffic/nas/nynjphl\\_redesign/documentation/feis/media/Appendix\\_A-National\\_Airspace\\_System\\_Overview.pdf](https://www.faa.gov/air_traffic/nas/nynjphl_redesign/documentation/feis/media/Appendix_A-National_Airspace_System_Overview.pdf) (last visited Mar. 1, 2016).

[39] *Model Aircraft Operations*, Federal Aviation Administration, available at: [http://www.faa.gov/uas/model\\_aircraft/](http://www.faa.gov/uas/model_aircraft/) (last visited Apr. 14, 2016). Some states have also implemented drone regulation statutes to supplement FAA requirements.

[40] *Id.*

[41] See Davis, *supra* note 24.

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[42] Blitz, *supra* note 4 at 84.

[43] Know Before You Fly, *supra* note 23

[44] *Id.*

[45] *Id.*

[46] *FAA Has 181,000 Drone Regulations so Far, but Privacy Concerns Emerge*, Washington Internet Daily (Jan. 7, 2016).

[47] *Id.*

[48] *UAS Registration Q&A*, Federal Aviation Administration, available at: <https://www.faa.gov/uas/registration/faqs/> (last visited Apr. 17, 2016). If adding a camera to the model makes it above the allowable weight than it would require registration under FAA law. *Id.* (described in chart listing examples of weight requirements).

[49] *Id.*

[50] *Id.*

[51] A third FAA category of drone use is that of public entities, and it includes it's own registration requirements and restrictions.

[52] *Id.*

[53] *Id.*

[54] *UAS Registration Q&A*, *supra* note 50.

[55] *Id.*

[56] *Id.*

[57] *Model Aircraft Operations*, Federal Aviation Administration, available at: [http://www.faa.gov/uas/model\\_aircraft/](http://www.faa.gov/uas/model_aircraft/) (last visited Apr. 14, 2016).

[58] *UAS Registration Q&A*, *supra* note 48.

[59] *Id.*

[60] *Id.*

[61] Matt McFarland, *Disney loved its no-fly zone- until it wanted to fly its own drones*, The Washington Post (Jan. 22 2016), available at: <https://www.washingtonpost.com/news/innovations/wp/2016/01/22/disney-loved-its-no-fly-zone-until-it-wanted-to-fly-its-own-drones/>.

[62] *Id.*

[63] *See generally No Drone Zone*, Federal Aviation Administration, available at: [https://www.faa.gov/uas/no\\_drone\\_zone/](https://www.faa.gov/uas/no_drone_zone/) (last visited Apr. 17, 2016).

[64] *Id.*



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[65] *Id.*

[66] *Id.* See also 14 C.F.R. §91.37 (2015) (establishing FAA No Drone Zone policies).

[67] Linda Chiem, *Air Traffic Reform To Dominate FAA Reauthorization Debate*, Law 360 (Jan. 1, 2016).

[68] Know Before You Fly, *supra* note 23

[69] *Id.*

[70] Brad Hughes & Andrew Emerson, *Drone Regulation: Federal, State and Local Efforts to Eyeball Those Eyes in the Sky*, 55 *Infrastructure* 2 (2015). Other proposed regulation include allowing use during daylight hours only, instituting maximum speeds, requiring pilots pass a test and be approved by

the Transportation Security Administration, and requiring that users make drones available for inspection upon request. *Id.*

[71] Thomas, *supra* note 21.

[72] Blitz, *supra* note 4 at 102.

[73] *Id.*

[74] Similar questions arise as to what constitutes a source. An Indiana court refused to extend source protection to the online commenters of a new site, stating the protection is only applicable if the source was heard by a news agency. In *Re: Indiana Newspapers Inc. d/b/a Indianapolis Star*, 2012

WL 540796 (Ind. Ct. App. 2012).

[75] *Apple v. Does*, 139 Cal.App. 1423 (Cal. 2006) (frequently cited as *O'Grady v. Superior Court*).

[76] *Too Much Media, LLC v. Hale*, 20 A.3d 364 (NJ 2011).

[77] *Id.*

[78] Doug Matconis, *Bloggers, Media Shield Laws, And The First Amendment*, *Outside the Beltway*, (May 28, 2013) available at:

<http://www.outsidethebeltway.com/bloggers-media-shield-laws-and-the-first-amendment/>.

[79] The new rules proposed by the FAA were welcomed by journalists, as they were some of the first federal regulations to accept that drones were a means of future communication. See Blitz, *supra* note 4 at 86.

[80] See Matconis, *supra* note 75.

[81] See, e.g., *Brazburg v. Hayes*, 408 U.S. 665 (1972) (journalist privilege not extended to a criminal matter); *Dietmann v. Time, Inc.*, 449 F. 2d 245 (9th Cir. 1971) (journalist privilege not extended to a civil matter).

[82] See Matconis, *supra* note 75.

[83] Davis, *supra* note 24 at 1185.

[84] *Id.*

[85] See Matconis, *supra* note 75.

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[86] Davis, *supra* note 24 at 1184. It is not a right necessarily distinct from the press clause, but is more generally included in the free speech clause. *Id.*

[87] Allen v. Combined Communications Corp., 528 P.2d 247 (Colo. 1974). Moreover, the court noted that modern technology blurs the distinction of newsgathering and dissemination in such a way that they may be impossible to wholly distinguish the acts from one another. *Id.*

[88] *Id.*

[89] Blitz, *supra* note 4 at 105 (discussing how to defined “community” in first amendment cases).

[90] *Id.* at 85.

[91] *Id.* at 85-86.

[92] Davis, *supra* note 24 at 1177

[93] ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012), cert. denied.

[94] *Id.*

[95] See Blitz, *supra* note 4 at 80.

[96] Blitz, *supra* note 4 at 85.

[97] Len Niehoff, *Cover Storyethics for Media Lawyers; The Lessons of Ferguson*, 31 Comm. Lawyer 4 (2015).

[98] *Id.*

[99] *Id.* at 87.

[100] *Id.* at 96.

[101] *Id.*

[102] Blitz, *supra* note 4 at 85.

[103] *Id.*

[104] *Id.* at 98.

[105] *Id.* at 89.

[106] *Id.* at 96.

[107] *Id.* at 89. One district court, for example, held that the right did not extend to drones, but did not elaborate on the differences between cell phone video, which is protected, and the content captured by drones. *Id.*

[108] *Id.* at 87.

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[109] *Id.* at 88.

[110] “Privacy” includes both the desire for both bodily autonomy and Informational privacy. Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 Miss. C. L. Rev. 227, 231-232 (2012). Informational privacy is loosely defined. *Id.* It may include the perceived right to private communication, or the ability to control information about your own identity. *Id.*

[111] Blitz, *supra* note 4 at 64.

[112] *Id.* at 65. Notably, the First Amendment indirectly affects privacy rights as it is extended to include protection to anonymous speech. Henderson, *supra* note 108 at 231.

[113] See *Katz v. United States*, 389 U.S. 347 (1967).

[114] Henderson, *supra* note 108 at 237 (citing *US v. Jacobsen*, 466 U.S. 109, 113 (1984)).

[115] Blitz, *supra* note 4 at 77.

[116] *Id.* at 78. (citing *Oliver v. United States*, 466 U.S. 170, 179 (1984)).

[117] *Id.* at 74.

[118] *Id.* at 78.

[119] *Id.* at 67

[120] *Id.* at 69 (comparing precedent cases).

[121] *Id.* (citing *Riley v. California*, 134 S. Ct. 2473 (2014)).

[122] Jacon Gershman, *Sotomayor: Americans Should Be Alarmed by Spread of Drones*, *The Wallstreet Journal* (Sept. 12, 2014), available at: <http://blogs.wsj.com/law/2014/09/12/justice-sotomayor-americans-should-be-alarmed-by-spread-of-drones/>.

[123] Blitz, *supra* note 4 at 85.

[124] *Id.* at 77-79.

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[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Riley v. California*, 134 S. Ct. 243 (2014) (Sotomayor, J. concurring).

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[131] Henderson, *supra* note 108 at 239.

[132] Excessive surveillance can be the doing of public or private entities. Excessive surveillance could result in public figures being under constant surveillance beyond the general paparazzi, burdened by being in the public eye. Curry, *supra* note 31.

[133] Companies can use drones to collect data, and in LA a foreign corporation was caught collecting cell phone data using drone technology. *NTIA-Driven Best Practices Drone Guide Progress Good, But Stick Points Remain*, Washington Internet Daily (Jan. 19, 2016).

[134] Blitz, *supra* note 4 at 65.

[135] *Kentucky Man Asserts Drone Downing Invokes FAA Rules*, 1-0 Mealy's Data Privacy Report 5 (2016).

[136] *Id.*

[137] *Id.*

[138] See generally James Grimmelmann, *Internet Law: Cases & Problems*, 139 (5th ed. 2015).

[139] *Id.*

[140] Linda Chiem, *Transportation Cases To Watch in 2016*, Law 360 (Dec. 24, 2015). The proposed rules alone sparked a lawsuit alleging that the draft regulations on commercial drone use were not mindful of privacy concerns. *Id.* The FAA argues that the rule was not meant to address privacy

concerns and that the lawsuit is premature. *Id.*

[141] *Id.*

[142] *NTIA-Driven Best Practices Drone Guide Progress Good, But Stick Points Remain*, Washington Internet Daily (Jan. 19, 2016).

[143] *Id.*

[144] Blitz, *supra* note 4 at 84,

[145] *Learn*, Professional Society of Drone Journalists, available at: <http://www.dronejournalism.org/learn/> (last visited April 10, 2016). The PSDJ developed a code of ethics "hierarchy" for member journalists: traditional journalism ethics being of most importance, followed by privacy, sanctity of

law & public spaces, safety, and concluding with newsworthiness. *Id.* Their privacy guidelines suggest strict drone use practices, encouraging property

rights and personal autonomy. *Id.*

[146] *Id.*

[147] *Id.*

[148] Blitz, *supra* note 4 at 86.

[149] Davis, *supra* note 24 at 1182-11832. In other countries with stringent government control on regulation drone technology is used to overcome





[150] Blitz, *supra* note 4 at 77-78.

[151] *Id.* at 106.

[152] United States v. Jones, 132 S. Ct. 945 (2012) (Alito, J. concurring).

[153] See, *supra* note 84 and accompanying text.

[154] United States v. Jones, 132 S. Ct. 945 (2012) (Alito, J. concurring) (suggesting that legislation, not case law, is what is needed for such drastic change).

[155] *Flying Drones*, Civil Aviation Authority, available at <http://www.caa.co.uk/drones/> (last visited Apr. 17, 2016).

[156] See, *supra* note 122 and accompanying text.

[157] See, *supra* notes 152, 154 and accompanying text.

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