**Chapter 4 Beyond the Fourth Estate? Rethinking the privileges of ‘journalists’ in the era of new media**

Burke said there were Three Estates in Parliament; but, in the Reporters Gallery yonder

there sat a Fourth Estate more important far than they all. It is not a figure of speech or

witty saying; it is a literal fact- very momentous to us in these times.

Thomas Carlyle *On Heroes, Hero Worship, and the Heroic in History* ([1841] [[1]](#footnote-1)

…(A)nyone in the developed world can publish anything, anytime, and the instant it is

published, it is globally available and readily findable. If anyone can be a publisher, then

anyone can be a journalist.

C Shirky, *Here Comes Everybody: The Power of Organising Without Organisations* (2008, Allen Lane, London)

**Introduction**

Thus far, I have made a series of claims about the new media and newly-empowered speakers. The possibilities for ‘republican moments’ were explored in earlier chapters which alluded to the enticing prospect of the dissolving distinction between ‘speakers’ and ‘audience’ and the creation of a diversified sphere of public commentators, unconstrained by the editorial dictates of established media organisations’ corporate interests. The opportunities afforded to non-professional producers of content to give voice to marginalised and non-mainstream viewpoints might be thought to wrest a measure of control away from political and corporate elites who have hitherto dominated the production and dissemination of news and opinion. The current ‘republican moment’ allows for the airing of matters by speakers marginalised by the established mainstream media. In turn, as was seen in chapter 2, some of these non-traditional speakers can in fact quickly acquire a following among mainstream outlets. The latter may provide a link in their online content to favoured bloggers thereby ensuring a wider audience for this content. Separately, the apparent possibilities of anonymous communication have freed up speakers to articulate concerns that they may not have felt able to air for fear of adverse consequences from employers, neighbours or family members. Moreover, the inability of audience members to identify the speaker has reduced the frequency of *ad hominem* responses and encouraged other speakers to focus on the contents of online communication. The disembodied, asynchronous nature of such speech allows the audience to participate in a ‘conversation’ without the need to be physically and temporally in the same space as the speaker. Thus stated, the new media offers up exciting opportunities for active, engaged members of the polity to participate as politically virtuous citizens in republican self government. Groups of citizens can come together to work on common causes from all corners of the globe, using their pooled talents and contacts to create and disseminate campaign messages to a potentially worldwide audience.[[2]](#footnote-2)

The account given above is however incomplete and unjustifiably sanguine for a number of reasons. At the outset, the privately-owned intermediaries through which the online blogger communicates exerts overt and covert forms of control over the latter. The absence of a constitutionally protected right of access to digital audiences allows powerful, democratically unaccountable corporations to modify, censor or otherwise regulate the speech of others on criteria that ordinary citizens have no say over and which are, on the final analysis, dependent upon majority shareholder approval. The sole blogger is also much less likely to have the resources and/or expertise to engage in the sort of investigative reporting that mainstream media organisations have possessed in the past to expose wrongdoing in high places. From an audience perspective, doubts about the reliability of materials posted online by non-professional journalists may induce a degree of scepticism that may to lead wrongly to accurate accounts being dismissed. As more advertising revenue shifts to online media at a fraction of cost previously borne by advertisers, traditional and online versions of established media publications find themselves competing with newer media for much less remunerative advertising income streams. The damage thereby inflicted upon the business models of mainstream media may be thought to endanger the prospects of investigative reporting in the future and is likely see the prioritisation of more commercially viable content in these outlets, ahead of political news journalism. The resulting impoverishment of public discourse and diminished accountability of political and business elites cannot but damage informed self-government. Then there is the separate issue concerning the *sort* of activist Web 2.0 has helped to foster. As was seen in chapter two, variable intensities of online activism among users of social media allow supporters of causes to register their joining of the cause by such as minimal acts as clicking to ‘like’ or ‘friend’. Political activism among the digitally connected, sofa-based citizenry is rightly regarded as making less physical demands of the modern ‘activist’ as compared to previous generations’ cause-building efforts on the doorstep, at public meetings and via mailshot campaigns. It is also unlikely to help establish the more empathetic exchanges envisioned by deliberative democrats where political disagreements are resolved (or attempted to be resolved) by a mode of public reasoning in terms that are accessible and potentially persuasive to others who reasonably disagree.[[3]](#footnote-3) For conversations that occur in the same physical space, it is harder (though plainly not impossible) to assert *simpliciter*, talking past other participants without seeking at some point to engage with others’ perspectives. Such face to face interactions hold out the prospect of self-reflection and modification of starting positions that may be less forthcoming from virtual exchanges.

The blurring of previously clear-cut lines between producers and consumers of speech raises a number of pressing questions about the application of legal rules that in a number of instances predate the digital era and, in particular, Web 2.0 technology that enables user participation in the production of online content. The blunted application of certain domestic criminal law standards to crude instances of user-generated content on *Facebook* and *Twitter* was considered in chapter 3 of this book. The desire of deliberative democrats for inclusive and mutually respectful deliberative exchanges between politically virtuous citizens remains an aspirational, idealised endpoint against which the features of real-world exchanges between persons of different political persuasions may be measured. Chapter 3 offered a critique of deliberative democrats’ thinking that drew upon the exclusionary impact of rules of civility in political communication. The necessarily hegemonic notions of acceptable and unacceptable speech have been used in domestic law to criminalise crude outbursts from unsophisticated speakers. I argued that this privileging of ‘rational’ speakers and ‘measured discourse’ damages the polity’s claims to be a self-governing community.

The present chapter takes as its subject matter the constitutional treatment of the new media, namely online speakers and seeks to ascertain from an admittedly selective and hence unrepresentative sample of courts and legislatures, how judges and legislators have begun to comprehend the natures and functions of the new media. In some written constitutions for example, the issue is brought into sharp focus where separate, enumerated protection is provided for ‘journalists’ or ‘the press’. For example, new electronic forms of speech have re-ignited an earlier debate in the US concerning the First Amendment’s separate mention for ‘the press’. Is this reference capable of being read as conferring distinct constitutional protection upon unpaid bloggers and/or freelance, occasional online speakers? The 1972 ruling of a 5-4 majority of the Supreme Court in *Branzburg v Hayes* declined to craft a special privilege for mainstream ‘newsmen’ out of the First Amendment that would have given qualified immunity from grand jury subpoenas.[[4]](#footnote-4) Noting the fundamental function played by the grand jury in safeguarding ‘fair and effective law enforcement’, Justice White for the Court was unwilling to subordinate this interest to the ‘uncertain’ benefits for newsgathering’ that would flow from recognition of a discrete constitutional privilege for reporters.[[5]](#footnote-5) To this day, the narrow majority in *Branzburg* continues to deny distinctive First Amendment privileges for news gatherers and disseminators, despite regular calls for a form of qualified federal immunity.[[6]](#footnote-6) One reason why the Supreme Court has been unwilling to carve out a distinctive ‘press’ element to the corpus of First Amendment jurisprudence on speech is definitional.[[7]](#footnote-7) As West puts it, if the press clause is to amount to something other than the generalised protection for freedom of speech available to all citizens (and even corporations[[8]](#footnote-8)),then it is incumbent on the Court to tell us who or what constitutes the press. If an inclusive approach is adopted, the ‘press’ might include an office worker strolling in his/her lunch hour across a park or city square and opportunistically taking photos on a mobile phone of police officers forcibly moving on anti-globalisation protestors and sent via a social networking platform to the worker’s *Twitter/Facebook* followers/friends. Should such irregular, unplanned and unpaid and non-professional acts of news dissemination entitle their creators to claim the benefits (whatever they may be) of a free-standing press clause? Or ought occasional, amateur contributions to debates on matters of public interest have to fall back upon those generic safeguards for speech/expression that each citizen *qua* citizen possesses. The issues raised by such questions have a wider resonance extending beyond the jurisdictional reach of state shield laws or the First Amendment. In the UK for example (and leaving aside the statutory presumption against source disclosure in section 10 of the Contempt of Court Act 1981 which is not confined to ‘journalists’) other aspects of domestic law do rely upon notions of ‘journalistic purposes’ to determine immunity from aspects of data protection laws and police demands for access under the Police and Criminal Evidence Act 1984. More recently, the Criminal Justice and Courts Act 2015 creates a new offence of disclosing private sexual photographs of another without consent and with the intention to cause distress.[[9]](#footnote-9) Section 33(4) of the 2015 Act creates a defence for the publication of ‘journalistic material’ where publication was reasonably believed to be in the public interest. By what criteria are our courts and policymakers determining who/what comes under the protective umbrella of journalism? And what does this tell us about the extent of any underpinning republican commitments to a participative, politically-engaged citizenry?

**‘Lonely pamphleteers and the mass media’ - citizen journalists and the First Amendment**

At the time he published his classic statement of the values served by a free-standing press clause, US Supreme Court Associate Justice Potter Stewart’s “Or of the Press” did not have to confront the difficult questions that arise today concerning the identity of the clause’s beneficiaries.[[10]](#footnote-10) Nevertheless, his account of the historical origins of, and twentieth century functions played by, the press clause help throw light on some of the central issues that persist into the electronic era. Stewart’s analysis of the period between 1776 and the drafting of the federal Constitution recalled that, whilst an overwhelming majority number of those colonies‘ with written constitutions made express provision for freedom of the press[[11]](#footnote-11) (the colonial printing presses had been the targets of British prior restraint laws including licensing and lists of prohibited books),[[12]](#footnote-12) no generalised provision existed in those constitutions guaranteeing freedom of speech. The subsequent inclusion of both a press-specific clause and a generalised guarantee of free speech could therefore be taken as meaning that ‘the Founders quite clearly recognized the distinction between the two.’[[13]](#footnote-13) For Stewart, the ‘fourth estate’ was intended to serve as an institutionally autonomous check upon the three official branches of the Constitution and

meant organised, expert scrutiny of government. The press was a conspiracy of the

intellect, with the courage of numbers. This formidable check on official power was what

the British Crown had feared- and what the American founders decided to risk.[[14]](#footnote-14)

The educative, debate-enhancing functions fulfilled by the ‘organised press’ meant that its members were entitled to specific constitutional protection with regard to what should be published.

The accuracy of Stewart’s historical account about the Framers’ intentions has been doubted by some.[[15]](#footnote-15) More importantly for present purposes, his normative preference for discrete constitutional protection for the institution of the ‘organised press’ has also been disputed. [[16]](#footnote-16)A major difficulty in principle was articulated by Burger CJ in *First National Bank v Bellotti* where he drew attention to concerns about who, in Stewart’s scheme, would have the authority to define ‘the press’.

The very task of including some entities within the “institutional press” while excluding

others, whether undertaken by legislature, court, or administrative agency, is

reminiscent of the abhorred licensing system of Tudor and Stuart England - a system

that the First Amendment was intended to ban from this country. *Lovell v Griffin, supra,*

at 305 US 451-452. Further the officials undertaking that task would be required the

protected from the unprotected on the basis of such variables as content of expression,

frequency or fervor of expression, or ownership of the technological means of

dissemination. Yet nothing in this Court’s opinions supports such a confining approach

to the scope if the Press Clause protection [[17]](#footnote-17)

Burger’s objection to any system that relies upon official designation of who is/is not a member of the press rests upon the wholly reasonable premise that the state may be tempted to abuse its powers, treating supporters favourably and disadvantaging critics. He adopted the view of Hughes CJ in *Lovell v Griffin* that the press

comprehends every sort of publication which affords a vehicle of information and opinion

… (and) is … performed by lecturers, political pollster, novelists, academic researchers,

and dramatists. Almost any author may quite accurately assert that he is contributing to

the flow of information to the public.[[18]](#footnote-18)

a view later echoed by Justice White in *Branzburg v Hayes* when he wrote that

liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a

mimeograph just as much as of the large metropolitan publisher who utilizes the latest

photocomposition methods.[[19]](#footnote-19)

***Branzburg* in the Web 2.0 era - arguments for exclusive and inclusive notions of ‘the press’**

The divide between the Stewart and Hughes/Burger/White camps reflected sharply contrasting understandings of the press clause in the pre-Internet era. In today’s digitally-reframed context, the heirs to Stewart continue to advocate a narrowly defined ‘press’, one that is able to take the benefit of additional privileges that enable its members to fulfil their newsgathering function, thereby enhancing the quality of public discourse.[[20]](#footnote-20) West for example contends that, narrowly defined, press outlets ought to be to claim immunity from criminal prosecution in many cases where journalists refuse to disclose sources, documents and notes. Members of this select group should also enjoy certain protections from tortious actions in respect of trespass or privacy violation.[[21]](#footnote-21) She argues additionally for constitutionally protected rights of access to government information, noting that existing statutory protections under both federal and state freedom of information legislation are vulnerable to modification or curtailment. Adopting a functional view of the press, West would limit the beneficiaries of a digitally-refashioned press clause to those who have ‘repeatedly committed time, resources and advanced skills - to take advantage of their abilities to earn reputational trust’.[[22]](#footnote-22) On her view, the privileges of the new media need to be earned. Those that have shown themselves to be ‘more likely to use these protections responsibly and for the public good’ ought to be able claim membership of ‘the press’.[[23]](#footnote-23) In time, it is hoped that a more exclusive and reputable ‘new media’ will make it easier to persuade the courts to extend additional newsgathering rights under the First Amendment.

From a republican perspective that is desirous of promoting active engagement in day to day political discourse and decision-making with a view to making elite office holders more accountable, the foregoing arguments for an exclusive set of trusted journalists are unattractive for a number of reasons that resonate well beyond the jurisdictional reach of the First Amendment. The idea that providers of content would have to ‘earn’ the status of trusted news provider from a state-sanctioned ‘recognition’ agency might be thought, as a matter of practice, to encourage an anodyne form of coverage of political issues among prospective new entrants to the exclusive club (and cause existing members to take care not to antagonise the agency). In this regard, it is interesting to speculate whether, to take two examples from this side of the Atlantic - (i) the *Daily Telegraph* would have run its exposes of abuses by MPs and Lords of the expenses system; or (ii) the *Guardian* would have published the disclosures from Edward Snowden regarding US and UK government agencies extensive surveillance of citizens’ electronic communications - had either newspaper been required to demonstrate to some officially approved authority that it was ‘reliable’. It would also have the disquieting consequence that disfavoured outsiders (comprising both unsuccessful applicants and those perhaps understandably choosing not to seek approved status) who continued to provide news content to their viewers/readers could by the fact of their non-privileged status be more easily annexed as part of the investigative arm of the state. Finally, the underlying premise of West’s position that the censorial power lies in the hands of government over the people and not in the people over the Government manages to turn Madison on his head.[[24]](#footnote-24) Along with other Framers, Madison was convinced that British-style official suppression of speakers in cases where pamphlets made erroneous assertions offered a false security to citizens.[[25]](#footnote-25)

The republican aim of a politicized citizenry that places a high value upon active participation in the affairs of the community would seem then to favour a considerably less elitist model of the ‘press’ under which a broad range of speakers disseminating a blend of news and comment might be able to take advantage of press privileges that have hitherto been the exclusive preserve of older, mainstream news media. It chimes with the view of both Madison[[26]](#footnote-26) and Mill that truth is more likely to emerge from a free, unlicensed press.[[27]](#footnote-27) The ‘everyone a pamphleteer’ approach of Hughes CJ in *Lovell* has an obvious fit with the empowering, non-elitist speech of the electronic era. To update the Chief Justice’s 1938 observation, anyone with Web 2.0 capability and a desire to speak may be able quite accurately to claim that he/she is contributing to the flow of information to the public What objections might there be to such an inclusive approach to the ‘press’? Two arguments against extending press privileges more broadly may be identified that focus upon likely adverse consequences ultimately for informed self-government. First, the extension of constitutional/legal privileges to virtually anyone that has published their thoughts on a matter of public interest, regardless of how infrequently, and without the benefit or professional training and/or particular skill risks the encouragement of poorly researched, badly-argued, low quality contributions to debate. Some of these ‘amateur’ speakers (who may have self-censored in the knowledge that their contributions would not have been given presumptive protection from source/notes disclosure under narrower definitions of the ‘press’) would, under a more inclusive definition, be more bold in publishing material of dubious quality. The public interest in having informed debate on matters of public interest would accordingly be undermined by poorly researched, unverified material competing for readers’ attention alongside more professionally produced journalism. The second objection to a broadly defined idea of the press centres upon possible negative consequences for professional journalists (and ultimately the public) and may be put thus: If there is no proper distinction to be made between the citizen and the journalist and, further, that every communication that is published to the rest of the world on a matter of public interest constitutes ‘journalism’, courts and legislators may well be tempted to dilute the already qualified nature of protections from source/notes disclosure etc. This temptation might arise on the back of a perception that a sizeable proportion of bloggers/tweeters communications fall short of the ‘quality’ journalism from professional outlets that has in the past properly received protection. Where constitutional/legal thresholds for rebutting assertions of press/journalistic privilege are lowered, it follows that law enforcement agencies may more easily annex news disseminators as part of the investigative arm of the state. The self-censoring consequences for ‘new’ and ‘old’ journalists of any lowering of presumptive thresholds against the forced disclosure of sources and/or materials conferring are obvious.

The objection to extensions of journalistic privilege that is based upon an argument about preserving quality journalism and thus informed scrutiny of power holders is initially attractive. How on earth are we to make proper judgments about those in power if, alongside reputable and well-researched discussion, there sits competing for our attention an amalgam of half-truths, innuendos and lies that also enjoy the privileges of the press? Madison for one acknowledged this difficulty during the debates at the time of the adoption of the federal Constitution but remained a firm advocate of an inclusive approach to press freedom.[[28]](#footnote-28) He understood that inclusivity was vital to the instrumental justification for press freedom. Allowing every pamphleteer to claim membership of the press would ensure the widest possible range of information and opinion about the qualities of public office holders to circulate among the electorate. Since Madison’s time, the likelihood that some elements of the press would misuse the press freedom has come to be accepted as a necessary cost for guaranteeing the end objective of enlightened public opinion. In this regard, the observations of Justice Roberts for the Supreme Court in *Cantwell v Connecticut* are worth recounting:

To persuade others to his point of view, the pleader, as we know, at times resorts to

exaggeration, to vilification of men who have been prominent in church or state, and

even to false statement. But the people of this nation have ordained in the light of

history, in spite of the probability of excesses and abuses. these liberties are, in the

long view, essential to enlightened opinion and right conduct on the part of the

citizens of a democracy.[[29]](#footnote-29)

A similar theme prevailed a quarter of a century later in *NAACP v Button* when the Court rejected outright the view that extent of constitutional protection for speakers should rest upon ‘the truth, popularity or social utility’ of the speech in question.[[30]](#footnote-30) So, somewhat paradoxically, although it is right to say that serious journalism connects more directly with the First Amendment’s aim of promoting informed reflection by the electorate, it does not follow that journalism that signally fails to follow accepted journalistic practices is without constitutional protection.[[31]](#footnote-31) Take the ‘actual malice’ standard laid down in *New York Times v Sullivan*. The Supreme Court’s protection for false statements about public figures is lost when the publisher has a ‘high degree of awareness of probable falsity’. The actual malice standard is not however satisfied when a publisher makes limited efforts at verification or when there is no attempt to give the criticised party an opportunity to rebut the allegations.[[32]](#footnote-32) Consequently, First Amendment protection is extended to types of journalism which, whilst not malicious, would be deemed some to be ‘irresponsible’.

At the level of principle, the case for allowing ‘low-quality journalism’ constitutional protection alongside its higher calibre counterpart can be made in terms other than the desirability of tolerating of erroneous/unpopular/socially non-useful speech. To allow the state to assert control over the quality of contributions to public discourse (by denying some speakers the protections conferred upon others) attributes to state institutions a managerial role in public discourse that implies perfect knowledge about when to allow and when not to allow contributions. It cuts against the idea of a set of autonomous citizens coming together to decide the laws and rules by which they will live. The speaker who is disfavoured because a state body deems his/her speech irrational, disorderly or badly-researched may justly object to exclusion by denying the state the power to moderate in the first place. To permit the state to suppress speakers in the above scenario is by contrast to advocate the wresting of control over both the content and presentation of arguments in public discourse away from collective self-determination by the people acting as autonomous agents.[[33]](#footnote-33) Of course, there is a price to pay for this anti-managerial, truly collective form of public discourse; namely that it will often appear chaotic, fractious and possibly tumultuous.[[34]](#footnote-34) Post notes how, to those seeking ‘wise’ decisions or ‘rational’ debate, unregulated forms of discourse in which the very terms of debate are up for grabs ‘always appears intolerably formless and incoherent...’[[35]](#footnote-35) The sizeable gain is the participants’ sense of having joined with others in an act of self-determination, freed from the disciplining and discriminating reach of officials.

Aside from these theoretical concerns, a focus on the abuses by elements of the new media is also apt to deflect attention away in practical terms from the constitutionally vital work done by bloggers and other social media commentators. Benkler observes that internet-only publications such as *The Daily Beast* and Glenn Greenwald’s coverage of Edward Snowden’s disclosures have contributed significantly to informed democratic discourse.[[36]](#footnote-36) Given this proven record, it cannot be seriously argued those working in non-traditional media outlets should *by that fact alone* be denied the protections made available to their traditional media counterparts. As Benkler himself argues,

we cannot afford as a polity to create classes of privileged speakers and press

agencies, and underclasses of networked information producers whose products we

take into the public sphere when convenient.[[37]](#footnote-37)

To return for a moment to the caracticured representation of ‘Vinny’ the sofa-ensconced, pyjama-clad blogger in his one bedroom apartment in the introductory chapter, the claim that Vinny is undeserving of the status of journalist risks (i) as a matter of practice underplaying or ignoring altogether the beneficial outcomes of the digitized ‘lonely pamphleteer’ with specialist knowledge of his/her subject matter and access to highly-placed sources; and (ii) from a more theoretical perspective Vinny’s ability to identify with the outcome of the decision-making process having been cast as a disfavoured contributor.

**Form versus function - US State shield laws and lower federal court rulings**

As *Branzburg v Hayes* demonstrated however, the First Amendment falls short of conferring upon journalists special protection from grand jury subpoenas or other official demands for disclosure of sources/notes etc. Instead, as with non-journalists’ speech, federal law merely immunizes journalists’ expression from certain forms of liability at criminal law. What of state laws crafted before Web 2.0 some of which expressly provide ‘journalists’ with a protection from subpoena requests to disclose source information in the course of judicial proceedings and more broadly in administrative or legislative proceedings? Do these extend today to speakers that might be considered as belonging to the new media? Variable levels of protection are to be found in state law concerning both the *nature* of material protected (whether limited to the identity of the source or, more broadly, covering unpublished notes) and the *identity* of the protected party (whether limited to someone who is employed professionally as a journalist or more extensively, to persons connected with a newspaper, magazine and, further, to freelancers and occasionally published writers).[[38]](#footnote-38) Schroeder’s review of states’ case law over the period from 2001-12 reveals that the courts have tended to require proximity to traditionally understood journalistic forms and practices when assessing whether bloggers and other new media commentators are able to claim statutory protections for press members.[[39]](#footnote-39) The actual content of a blog or post has, on the other hand, has counted for less in determining this question as has the speaker’s intentions when communicating newsworthy information. New media speakers thus face considerable difficulties in claiming the benefit of shield laws that are difficult to reconcile with earlier constitutional pronouncements about the protection available to the ‘lonely pamphleteer’. Non-traditional speakers are more likely to succeed in claiming state ‘shield’ law immunities when they can demonstrate that they engage actively in the traditional processes of gathering, note-taking, writing-up, editing, fact-checking, verification and dissemination. This would seem to favour both (i) teams of news producers over individual authors and (ii) organized, pre-planned journalistic endeavours over spontaneous contributions to public debate. Teams after all are much more likely to be able to review, edit and verify the claims of an individual writer in ways that may be similar to a traditional newsroom.[[40]](#footnote-40) Schroeder also found an instance at state level of a court’s refusal to grant privilege on the constitutionally dubious ground of the speaker’s failure to retain ‘journalistic independence’ of which more will be said shortly.

A fairly typical example of the approach found in states courts’ showing (i) the importance attached to form and (ii) the irrelevance of both the content of the speech and the intent of the speaker is to be found in the 2011 ruling in *Too Much Media v Hale* where the New Jersey Supreme Court denied shield law protection to the defendant Hale who had posted material on a website message board that concerned the adult entertainment industry.[[41]](#footnote-41) Hale had used the message board to complain about the exploitative treatment of women by the adult entertainment industry and a defamation (and false light) action was commenced by the plaintiff company ‘TMM’, a provider of software used by adult entertainment sites to track access to affiliated websites for commission purposes. It argued that Hale’s posts had falsely accused TMM of breaching and profiting from the breach of customer confidentiality rules. Hale sought unsuccessfully to protect her sources from a disclosure action brought by TMM using the state shield law which is available to anyone ‘engaged in, connected with, or employed by “news media”’.[[42]](#footnote-42) The latter phrase is defined as

newspapers, magazines, press associations, news agencies wire services, radio,

television or other similar printed, photographic, mechanical or electronic means of

dissemination news to the general public.[[43]](#footnote-43)

The New Jersey Supreme Court refused to extend protection to Hale. Message boards allowed persons to post comments and read comments left by others and were comparable to ‘unfiltered, unscreened letters to the editor submitted for publication.’[[44]](#footnote-44) The ‘form’ of Hales’ communication was too far removed from the edited form of news/comment that finds its way into traditional newspapers.

This denial of shield law in *Too Much Media* is illustrative of an attachment of the part of courts to a traditional model of the forms of news production. Hale’s posts could without too much difficulty have been said to be on a matter of public interest and she had shown commitment in the past to airing concerns about the workings of the adult entertainment industry. She had previously created a website *Pornafia*  which had been intended to offer a forum where people could exchange information about the criminal side of the business. For some reason this site was never fully launched. Nonetheless, it is clear that Hale’s intention was to contribute to a discussion on a matter of public interest, something she pursued via the message board on a website concerned with the adult entertainment industry. Hale further argued in court that she had investigated a possible security failing in the data holding practices of TMM by usual journalistic means that included talking to sources having given an undertaking to respect their confidentiality. In these circumstances, it may be felt that the emphasis upon the form of her comments diverted the court’s eyes from her *bona fide* solo journalistic efforts to expose what she perceived as wrongdoing in the industry. *Too Much Media* may be faulted for its reliance upon models of traditional media news production to distinguish privileged from non-privileged discussion. From the perspective of new media outlets, the ruling sets out an unhelpful approach towards a much more diverse set of content providers, one that disfavours a politically engaged citizenry keen to participate in debates on matters of topical public interest.

Whilst typifying a strand of state level responses to the ambit of shield law protection, not all cases have followed *Too Much Media* in displaying a preference for form over content (and intent of the author) or for a collective of authors/editors over the lone author. A more inclusive basis of deciding who can claim journalist status is evident in other rulings (often in federal courts) that manage more faithfully to reflect the ‘everybody a pamphleteer’ approach of Chief Justice Hughes in *Lovell*. Consider *Bidzirk v Smith* for example where a question arose for the South Carolina District Court regarding the scope of the federal Lanham Act.[[45]](#footnote-45) The defendant had written a four part blog review of his experiences of using Bidzirk (a company offering a web-based auction listing service) to get his sale items listed on eBay. He had provided readers with a ‘checklist’ to work through when deciding whether to use a listing company. His blog had however incorporated Bidzirk’s logo without the latter’s consent and the company now sought a remedy for breach of its trademark rights. The Lanham Act makes a distinction between news/information sites on the one hand and commercially-driven sites on the other. A defence to those accused of trademark infringement exists if the use of the logo occurs for the non-commercial purposes of news, reporting or commentary. Smith was deemed able to rely upon the defence. In a stark contrast to *Too Much Media*, the court attached weight to the content of the blog and the writer’s desire to make publicly known the information about his experiences with Bidzirk - something which would have helped other members of the public decide whether to use Bidzirk’s services. Unlike *Too Much Media* the form in which the information was conveyed was dismissed as irrelevant. In passing the court noted that whilst ‘not all bloggers are journalists…. some bloggers are without question journalists.’[[46]](#footnote-46) The district court ruling was subsequently confirmed by the Fourth Circuit Court of Appeals.[[47]](#footnote-47)

A pre-Internet era preference for a functionally-based approach to this definitional question is evident in *Von Bulow by Auersperg v Von Bulow* where the Second Circuit of the Court of Appeals in 1987 endorsed the extension of journalistic privileges to individuals outside the institutionalized press who purposively engaged in activities ‘traditionally associated with the gathering and dissemination of news’.[[48]](#footnote-48) The Second Circuit did however confine this extension to those instances where the party claiming to be privileged could establish an intention to use the material that had been gathered for public dissemination and that this intention existed from the moment the author began to gather material.[[49]](#footnote-49) This qualification was endorsed by the Third Circuit in *In re Madden*.[[50]](#footnote-50) So, today, an environmental blogger who has regularly posted online material about multinational corporations’ failures to meet anti-pollution standards would be able to show without too much difficulty that, at the moment of receipt of ‘inside’ information about Megacorps plc breach of air pollution standards, the tests in *Von Bulow* have been satisfied. By contrast, in the case of an irregular commentator or someone who posts in the comments page of an online discussion board, it will be considerably more difficult to bring this speech within the ambit of privilege as set out in *Von Bulow*. However in both instances the purpose behind, and core message of, the speech may well be the same.[[51]](#footnote-51)

As Swartwout has cautioned however, *Von Bulow* does require the court to be satisfied that the material gathered by the party claiming privilege is ‘news’ content as opposed to its ‘non-news’ equivalent. This feature of the ruling permits the courts to apply a contents-based analysis to determine the availability of constitutional privilege. Where a blogger avoids a dry, factual tone and seeks in an unorthodox style to inform *and* amuse readers by blending opinion and information using gossip, satire and irony, the resulting publication risks being treated as having the intent primarily to entertain rather than disseminate hard news. Consequently the claim for journalistic privilege is likely to fail the *Von Bulow* criteria.[[52]](#footnote-52) And yet, with the pressures to attract an audience in an era of many more speakers competing for an audience, it is more likely that speakers (including traditional mainstream speakers with online incarnations) will resort to devices to entertain as well as inform. There may be a disparity at work here however adversely impacting in practice against elements of the newer media. It is by no means clear that traditional outlets’ attempts to entertain (as opposed to inform) their viewers/readers risks (or more accurately has been shown to risk) the loss of journalist privilege in the way that an almost identical piece of output by a blogger might be considered fatal to attempts to secure that privilege in the first place.

Perhaps the most serious threat to new media outlets ability to attain privileged status is the requirement of ‘independent journalism’ highlighted by the Second Circuit in *Chevron Corp. v Berlinger*.[[53]](#footnote-53) A filmmaker was held to have forfeited his privilege to withhold footage from the oil multinational Chevron who were defending an action brought by Ecuadorian citizens for damage to personal health and the environment. The court concluded that Berlinger had colluded with an environmental lawyer employed for the plaintiffs in making a film whose final version effectively endorsed the plaintiffs’ claim. The film was said by Chevron’s lawyers to have omitted certain other scenes that were unhelpful to the plaintiffs at the request of the plaintiffs’ lawyer. In making the journalist’s independence (or lack of it) a critical element in whether he could assert privilege against disclosure of unshown footage, the Second Circuit adopted a novel reading of the First Amendment. Since when, it may legitimately be asked, have traditional news reporters been required by the courts to show independence? Were the early pamphleteers noted for their balanced coverage of debates between the federalist and anti-federalist camps?[[54]](#footnote-54) The disturbing ruling in *Chevron* places a huge obstacle in the way of advocacy journalism on new media platforms. Bloggers may often be prompted to write on an issue having been contacted by an interested party or because they themselves hold partisan views. The‘independence’ criterion significantly diminishes the scope of journalistic privilege and makes it extremely doubtful that these types of blogger would subsequently be able to refuse requests for full disclosure of notes and other materials.

The aura surrounding the First Amendment and common perceptions of robust protection for a broad range of speech types conduce to expectations of strong presumptive protection for journalists. As *Branzburg* makes clear however, such expectations have long been wide of the mark. In the Web 2.0 era, it remains the case that elements of the new media face an uncertain time under both federal and state laws in seeking to bring themselves within the protective ambit of ‘press privilege’. Indeed, as long as courts attempt to apply ‘traditional’ (and sometimes misconceived) notions of news gathering and dissemination in order to discover who is entitled to privilege as urged by some commentators,[[55]](#footnote-55) the extent of any protection for bloggers and tweeters will remain precarious.

**Approaches to definition and standards in other common law, liberal democracies**

As indicated in an earlier section of this chapter, difficult questions around the definitions of ‘the press’ and ‘journalism’ are not the exclusive concern of the First Amendment and US states’ shield laws. Elsewhere, as in the UK, Canada, Australia and New Zealand, pre-existing statutory and common law protections for journalists or persons pursuing ‘journalistic’ purposes create their own pressing problems for legal systems. These include the determination of which, if any, of the existing privileges hitherto enjoyed by the ‘traditional’ media may also be available to elements of the ‘new media’ and under which circumstances. These privileges typically include rights of attendance at court proceedings closed to members of the public, exemption from aspects of data protection law imposing duties on data controllers and granting right to data subjects as well as certain procedural protections when faced with police demands to hand over ‘journalistic material’’ or pre-trial discovery, notices to produce witnesses/documents in civil litigation . Officially recognised media outlets may moreover enjoy non-statutory benefits such as privileged access to Parliament (in the UK as members of *Press Gallery*[[56]](#footnote-56)). In some jurisdictions (though not the UK), journalists enjoy express statutory protection from having to disclose the identity of their sources.

The section above on US materials showed an enduring attachment on the part of the federal and state judiciary in significant respects to traditional models of news production and dissemination that has proved unhelpful to new media in their efforts to be brought within the protective bounds of journalistic privilege. A more flexible approach was signalled by the Canadian Supreme Court in *Grant v Torstar Corporation* which concerned an action for defamation in respect of a conventional newspaper article in the *Toronto Star*. Chief Justice McLachlin acknowledged that many defamation actions in particular involved ‘blog postings and other social media...’[[57]](#footnote-57). Organisations and individuals outside established media outlets and professional journalists could also now be considered to be involved in communicating news and information on matters of public interest to the wider world. It followed as a matter of principle that defences available to the established media in defamation claims should also be available to the new media.[[58]](#footnote-58) So stated, the Canadian Supreme Court neatly sidestepped the troublesome definitional question of who is a ‘journalist’ or member of the ‘press’ in the electronic era and focused attention instead on the functional issue of the act of communicating news and information on matters of public interest.

*Grant* represents a considerable advancement for freedom of expression interests in Canadian defamation law.[[59]](#footnote-59) Modelling itself on *Reynolds* privilege doctrine in England and Wales, the Court expanded the defences available at common law to include a new defence of ‘responsible communication on matters of public interest.’[[60]](#footnote-60) For present purposes, the remarks of the Chief Justice on the standards by which communicators should be judged to have acted responsibly are especially noteworthy:

While established journalistic standards provide a useful guide by which to

evaluate the conduct of journalists and non-journalists alike, the applicable

standards will necessarily evolve to keep pace with the norms of new

communications media.[[61]](#footnote-61)

Though shedding no further light on the general direction of this evolution - the Court had no immediate pressing need on the facts of *Grant* so to do - the prompt to re-examine standards developed in an earlier era of few speakers and many listeners/viewers is perfectly appropriate. What lends heightened significance to this prompt is the Court’s departure from *Reynolds* on the division of responsibilities between judge and jury when assessing whether a publication is considered a ‘responsible communication’. In *Grant* the judge’s role is confined to deciding whether the statement concerns a matter of public interest. If the statement does satisfy this requirement, the jury’s role is to decide whether the communication was ‘responsible’.[[62]](#footnote-62) The latter constitutes a noteworthy departure from *Reynolds* in England and Wales where the trial judge also determines whether the publisher has acted responsibly and the jury is limited to a preliminary fact-finding role. This feature of *Reynolds* was criticised in *Grant* for introducing a ‘complex back and forth between judge and jury...’[[63]](#footnote-63) on interlocutory issues such as the reliability of sources which may in any event be appealed. According to Dearden and Wagner, *Grant* sends a signal to trial judges that they are not to send juries a set of questions regarding the diligence of the publisher. Instead, juries should now be required to respond to one question namely

Did the defendants act diligently in publishing (the communication in issue), taking into account the (publisher’s) overall conduct in trying to verify the allegations?[[64]](#footnote-64)

The expanded role for the jury under *Grant* has the effect of empowering ordinary citizens to decide where the boundaries will be drawn between constitutionally-protected expression under s.2(b) of the *Canadian Charter of Rights and Freedoms* and the countervailing individual and societal interests in protecting reputation. Over time, it may be expected that, as Canadian juries increasingly are drawn from regular communicators on social media platforms, an evolving set of norms about responsible conduct will emerge, perhaps moving towards a more relaxed attitude as regards the assessment of whether a speaker has behaved responsibly.

To appreciate better the liberating effect in *Grant* of a functional emphasis upon the act of communication (and its public interest content) rather than the profession/past activities of the communicator, it is instructive to consider the alternative scenario in which the legal test of privilege remains tied to the concept of a ‘journalist’. A good example of the constraining effects of the latter is provided by New Zealand’s Evidence Act 2006 which confers a measure of protection on ‘journalists’ from being compelled to disclose their sources or documents that would allow the identity of a source to be discovered.[[65]](#footnote-65) Section 68(1) of the Act puts the burden of proof upon the party claiming privilege to show each of the following elements: a prior promise to the source not to reveal his/her identity; that what is disseminated amounts to ‘the dissemination of news and observations on news’ to the public or a section of it, and finally that the person claiming privilege is someone ‘who, in the normal course of that person’s work, might be given information by informants in the expectation that it will be published in a news medium.’ In 2014 the New Zealand High Court in *Slater v Blomfeld* had to decide whether the author (and sole administrator) of a blog website “Whale Oil” was able to rely on the qualified immunity available to ‘journalists’ under s.68(1).[[66]](#footnote-66) The High Court’s interpretation of legislation that had been primarily designed with traditional, established media outlets in mind sheds some valuable light on emerging judicial attitudes in New Zealand towards elements of the new media and in the circumstances in which statutory protection may become available.

In *Slater*, the appellant was being sued for defamation in respect of claims made on ‘Whale Oil’ that the respondent, Blomfeld, had *inter alia* conspired to steal charitable funds, engaged in drug dealing, fraud, and had produced pornography. The appellant entered the defences of truth and honest opinion. In response, Blomfeld filed applications to get discovery of the appellant’s email correspondence with persons allegedly involved in supplying the appellant with the defamatory material. Slater refused to comply with the request for discovery, invoking the privilege under s.68(1).

In his analysis of the statutory protection, Asher J in the High Court in *Slater v Blomfeld* considered that the privilege was available to bloggers provided they were regular disseminators of news to a significant section of the public.[[67]](#footnote-67) The blogging activity did not have to be as frequent as would occur with equivalent acts of dissemination by employees of broadcast and print news journalism. On the facts on *Slater* however, a blogger who worked between 2-4 hours per day writing posts and much of the rest of the day doing research, interviewing, meeting and networking with others was able to satisfy the court that he was active in news production and publication. Notwithstanding the fact that his blog generated modest earnings, the degree of regular activity enabled the author to claim that material he received from sources was ‘in the course of his work’.

Used as a yardstick for assessing ‘in the normal course of work’, Mr Slater’s level of blog-related activity does seem nonetheless to set a fairly exacting standard. Less committed persons who post fewer blogs and/or spend a smaller proportion of their daily activities in blog-related work might struggle on this basis to satisfy a New Zealand court on this point. For example persons in other full time or part time occupations (such as ‘Nightjack’ discussed in chapter 3) might well have acquired valuable information through their employment that it would be in the public interest to disseminate to members of the public. Across the Tasman Sea, the denial of privilege to persons outside established mainstream news organisations and unable to commit to blogging on a full time basis appears to have been the intended result of reforms to New South Wales’ Evidence Act 1995.[[68]](#footnote-68) During parliamentary debates on reforms to the law on journalists’ privilege in 2011, the New South Wales Attorney General and Justice Minister made clear that his government wished to confine privilege to those persons employed by media organisations and working therein recognisably as journalists. The Attorney General was quoted as saying that he was opposed to the giving of privilege to bloggers who may be ‘ratbags’.

I think the problem is that there is very little sanction against those people and very little discipline, whereas a journalist can be sacked if he has a job with the Sun-Herald or the Daily Telegraph or something like that and he or she publishes something that is inappropriate or that has to do with the work of criminals.[[69]](#footnote-69)

Accordingly, s.126J of New South Wales’ Evidence Act 1995 (as amended) defines a journalist as someone who is ‘engaged in the profession or occupation of journalism in connection with the publication of information in a news medium’. This represents a narrower (and indeed more hostile) response to the question of who counts as a journalist. It is more confined than the equivalent Commonwealth legislation passed in 2010. The Evidence Act 1995 (Cth) as amended does not require a ‘journalist’ to be someone who is engaged in the publication of news *in the normal course of that person’s work*. The looser definition set out in Section 126G extends journalistic privilege to bloggers and others who are ‘engaged and active in the production of news and who may be given information by an informant in the expectation that the information may be published in a news medium.’

To deny what is already a limited degree of source protection by reference to the employment status of a speaker or upon an analysis of the frequency of posts and the daily/hourly workload of the speaker might well have the effect of obstructing the flow of public interest information and comment by a *broader* range of informed speakers, thereby diminishing the total spectrum of viewpoints available to the audience. The available evidence suggests that the ‘overwhelming majority of bloggers’ comprise hobbyists who blog as a spare time activity. This fact would seem to reinforce concerns on this point.[[70]](#footnote-70)

In the New Zealand High Court, Justice Asher also applied a contents-based quality threshold in *Slater* to discover whether the material posted within a blog post was capable of being treated as ‘news’. This is controversial for a number of reasons. The judge reasoned that persons who published articles ‘of such a low standard that they could not objectively be regarded as ‘news’’ or, consistently invented stories or regularly produced inaccurate accounts might not qualify as being engaged in the dissemination of ‘news’.[[71]](#footnote-71) The 2006 Act itself is silent on the question of what counts as news and so the creation of this supplementary, judge-made hurdle that must be overcome by non-traditional speakers merits closer examination. Justice Asher’s denial of statutory privilege to certain ‘low quality’ speakers might plausibly be said to reveal a Gradgrindian attachment to an idealized, empiricist account of professional journalism in which ‘good quality’ journalists are able to put aside their personal political leanings and, together with their sub editors, objectively identify the relevant facts that need to be put before the reader.[[72]](#footnote-72) On this view, the journalist’s own values and preferences play no role in the decision about what gets reported and how it is reported.

As an outsider, I can make no informed comment about the state of the New Zealand press. I would however claim to have a good passing knowledge of the aspects of mainstream news reporting in the UK and would therefore be utterly astonished if, having read any single day’s worth of political reporting in *The Sun*, *The Daily Telegraph, The Guardian, The Times The Daily Mail, The Daily Express, The Daily Mirror*  Justice Asher was able to pronounce himself satisfied that his sample of reading materials equated to value-free, balanced and factually accurate ‘news’ reporting. If contrariwise, some reports were found to be selective in the inclusion/exclusion of factual materials, would the judge actually be prepared to deny privilege in a source protection hearing to a newspaper on account of the lack of ‘quality’ journalism? The suspicion is easily formed and less easily dispelled that the test of objective reporting is being deployed against elements of the new media in a somewhat discriminatory manner with a view to ruling out protection under the 2006 Act. Lest this point be misunderstood, I am not arguing here for elements of the mainstream traditional media to be subject to judicial assessments of quality. Rather, my concern goes back to Chief Justice Burger’s objection in *First National Bank v Bellotti*.[[73]](#footnote-73) Any official system of designation as to who is or is not ‘the press’ must carry risks that the supporters of orthodoxy and the status quo will be treated favourably by state officials whilst critics will be disfavoured. As the Chief Justice remarked at the time, this objection stands whether the designation is carried out by legislature, court or administrative agency. Those strongly committed to the free flow of information and comment into the public domain and the holding thereby of elites to account must therefore baulk at the idea of judicial assessments of quality that might be predicted to privilege a limited and wholly orthodox conception of ‘good journalism’.

A year before the High Court ruling in *Slater,* the New Zealand Law Commission had proposed that a range of legal privileges enjoyed by the mainstream media be extended to new media speakers on condition that those elements of the new media wishing to take advantage of the extension sign up to (i) a ‘voluntary’ code of journalist ethics containing obligations of fairness and accuracy; and (ii) an accompanying complaints process.[[74]](#footnote-74) In the event, the Law Commission’s proposals were not taken any further by the government. It is not clear how many bloggers would have chosen to become registered under the proposed scheme but it is difficult to disagree with Barrett’s prediction that the numbers would not have been particularly high.[[75]](#footnote-75) The likely non-engagement by bloggers and others in the proposed scheme of course fits a broader narrative about the wild west frontierland that is cyberspace. The truth however, as recounted throughout this monograph, is that this is a mischaracterisation. Speakers (and audiences) in cyberspace are subject to a panoply of criminal and civil law restricting freedom of expression.

As far as the UK is concerned, source protection for speakers under s.10 of the Contempt of Court Act 1981 is, as was noted previously, not limited to ‘journalists’. It therefore remains to be seen to what extent, if at all, the apparently inclusive reference to a ‘person’ will be read as securing qualified privilege from compelled disclosure for speakers from outside traditional media organisations. The most protective approach open to the courts would be a functional one in which the ability to claim privilege rests upon the wider public interest served by having the *content* of the speaker’s communication placed in the public domain. As the section on US shield laws revealed however, a much less favourable stance is possible in which, largely the content of the communication, the availability of privilege is held to depend instead upon how proximate the non-traditional speaker’s form and production of speech is aligned to traditional media forms and processes.

The 1981 Act long pre-dated the modern era of digital communications. By contrast, the Defamation Act 2013 offered the UK Parliament a clear opportunity to act on the new landscape of newly empowered speakers. After all, in the case of *Grant v Torstar* in 2009[[76]](#footnote-76) the Supreme Court of Canada’s Chief Justice made reference to the House of Lords’ decision in *Reynolds v Times Newspapers*[[77]](#footnote-77)to indicate that the outmoded model of traditional news production and dissemination that had underpinned English defamation law in 1999 were no longer fit for the electronic era. *Reynolds*’ ‘responsible journalism’ test needed of recasting in ways that reflected the diverse forms of speaker and form of content delivery. The immediate prompts for the UK Parliament’s reforms were themselves multifarious. Chief among the concerns were perceived problems of forum shopping by claimants, the nature and scope for public interest defences, issues around internet publication (including the multiple publication rule) and procedural rules governing case management.[[78]](#footnote-78) For a piece of legislation that has been hailed by some leading defamation lawyers as providing a ‘significant overhaul’ of UK law,[[79]](#footnote-79) the Act does disappointingly little to clarify the position of bloggers and elements of the newer media under the statutory version of the *Reynolds* public interest defence. It does though succeed in further incentivising website operators to remove material from anonymous contributors.[[80]](#footnote-80)

In the period post-*Reynolds*, the House of Lords in *Jameel v Wall Street Journal (Europe)*[[81]](#footnote-81)and then the Privy Council in *Seaga v Harper*[[82]](#footnote-82) had declared that there was no valid reason why the *Reynolds* defence should be confined to traditional media publications. Instead, the defence should be available in Lord Carswell’s words to

publications made by any person who publishes material of public interest in any

medium, so long as the conditions framed by Lord Nicholls as being applicable to

"responsible journalism" are satisfied.[[83]](#footnote-83)

The problem with this seemingly inclusive stance is that, unlike Chief Justice McLachlin’s appreciation of the necessity for an incremental, evolutionary process of norm revision that keeps pace with the changing nature of new communications media, it pointedly fails to urge UK courts to be mindful of the imperative of re-calibrating the precepts as communications technologies develop. Lord Carswell’s nudge in the direction of greater inclusivity could well have been faithfully adhered to by a mechanical application of the Nicholls’ checklist factors to a blog post. The possibility that, in the case of newer communication forms, new norms might be needed altogether and/or that some of the existing factors on the checklist be struck out or modified does not appear to have occurred to his Lordship.

Section 4 of the 2013 Act provides an attempt by the legislature to render *Reynolds* in statutory form ‘in clear and flexible terms.’[[84]](#footnote-84) The two components of the statutory defence in s.4(1) are that

(a) the statement complained of was or formed part of a statement of public interest; and (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.[[85]](#footnote-85)

Following *Jameel* and *Seaga*, government ministers explained that the statutory defence would be available in ‘a wide range of circumstances beyond mainstream media cases.’[[86]](#footnote-86) During line by line scrutiny at Public Bill Committee proceedings, the Government resisted a proposal to insert a reference to editorial and journalistic judgements into s.4 as factors to be taken into account when assessing how much detail should have been published. The proposal had stemmed from passages in Supreme Court 2012 ruling in *Flood v Times Newspapers Ltd* that the courts needed to make proper allowance for editorial/journalistic judgements when a *Reynolds* privilege defence was entered. The Government’s initial rejection of this view was based in part on the legitimate worry that specific reference to ‘editorial/journalistic judgement’ might raise doubts over whether the statutory defence was truly available to non-traditional media outlets.[[87]](#footnote-87) Nonetheless, under pressure from peers at the Second Reading stage of the Bill in the House of Lords, the Government relented at Grand Committee stage and put forward amendments to the provision that became s.4(4) of the 2013 Act. This states:

In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest under s.4(1), the court must make such allowance for editorial judgement as it considers appropriate.

Lord McNally, Minister of State for Justice, insisted that the reference in this new formulation to ‘editorial’ was not intended by the Government to be limited editors or newspapers.[[88]](#footnote-88)

Despite such reassurances, the perpetuation of *Reynolds*-style notions of ‘responsible journalism’ fashioned in an era when traditional news media were more dominant is unhelpful to the expanded and more diverse set of Web 2.0 speakers. As Rowbottom has noted, a number of the Nicholls factors are ‘ill-suited to small-scale publications.’[[89]](#footnote-89) Citing the disparate level of resources between large-scale and small-scale publications, he rightly doubts whether there should be a requirement on a lone amateur blogger to seek out comment from a claimant in respect of defamatory allegations or whether the level of fact-checking conducted by a major newspaper is an appropriate standard by which to gauge the verification efforts of the sole blogger. Additionally, it is reasonable to speculate that the absence of a ‘measured tone’ in some online posts may well fall foul of ninth factor on the Nicholls checklist, a factor that has proved decisive in some litigation.[[90]](#footnote-90) Here a legitimate question for courts would be what degree of allowance to make for the cultural differences between on and offline expression. The latter is typically more direct, less respectful than its offline equivalent. Suler showed in a paper published in 2004 what he termed the disinhibiting effect of online expression particularly in relation to speech about or addressed to at authority figures.

People are reluctant to say what they really think as they stand before an authority

figure. A fear of disapproval and punishment from on high dampens the spirit. But

online, in what feels more like a peer relationship—with the appearances of authority

minimized—people are much more willing to speak out and misbehave.[[91]](#footnote-91)

There is uncertainty about whether the courts will modify/amend the Nicholls checklist (which were expressed to be non-exhaustive at the time of their promulgation) and, if they do, how responsive any modified criteria will be to the realities of newer media outlets and speakers. The interests of a more participative democracy in which power elites are held to account by a politically-active citizenry enjoying wide-ranging powers to express and receive information and ideas point clearly in the direction of a significant degree of modification. Unlike the position in Canada after *Grant*  where ordinary jury members will have the final say over whether the speaker has behaved diligently in publishing the statement complained of, any development in English law will be wholly judge-directed.

Before leaving the 2013 Act, it is also worth mentioning briefly that the new statutory defence for website operators in s.5 incentivises the removal of posts alleged to defamatory by complainant in a notice of complaint[[92]](#footnote-92) where the identity of the poster (who is not the same person as the operator) cannot be determined by the operator.[[93]](#footnote-93) Failure to remove such posts will lead to the removal of the statutory defence. The logic behind the removal of operators’ protection was stated in a Joint Parliamentary Committee Report on the Draft Bill in 2011. This stated ‘we expect, and wish to promote, a cultural shift towards a general recognition that unidentified postings are not to be treated as true, reliable or trustworthy.’[[94]](#footnote-94) This policy stance speaks to a cavalier disregard for countervailing arguments in favour of safeguarding anonymous online speech. Whilst it can be conceded that there might not have been a pressing case for protecting such communications under all circumstances, the Act’s wholesale rejection of arguments for protecting operators does a constitutional disservice to the values promoted by *bona fide* instances of anonymous speech.

**‘New media’ privileges and republican moments**

1. Available electronically at <http://yalepress.yale.edu/yupbooks/excerpts/Carlyle_excerpt.pdf>. On whether Carlyle was right to attribute the Three Estates quote to Burke see S Splichal, *Principles of Publicity and Press Freedom* (2002, Rowman and Littlefield, Maryland) at p.44 [↑](#footnote-ref-1)
2. H Jenkins, *Convergence Culture: Where Old and New Media Collide* (2nd edn) (2008, NYU Press, New York). C Shirky, *Here Comes Everybody: The Power of Organising without Organisations* (2008, Allen Lane, London). [↑](#footnote-ref-2)
3. A Gutmann & D Thompson, *Democracy and Disagreement* (1996, Harvard Univ Press, Mass.). [↑](#footnote-ref-3)
4. 408 US 665 (1972) and see dissent of Justice Stewart (joined by Justices Brennan and Marshall) at 775 arguing for a qualified privilege and separately Douglas J arguing for an absolute privilege at 771. [↑](#footnote-ref-4)
5. *Ibid*., at 690-691. [↑](#footnote-ref-5)
6. S Turner, ‘Protecting Citizen Journalists: Why Congress should adopt a broad federal shield law’ (2012) 30 *Yale L & Pol’y Rev.* 503 [↑](#footnote-ref-6)
7. See further S West, ‘Press Exceptionalism’ (2014) 127 *Harv.L.Rev.*2434 and by the same author ‘Awakening the Press Clause’ (2011) 58 *UCLA L.Rev.*1025; and also E Barendt, *Freedom of Speech* (1985, Clarendon Press, Oxford) at pp.69-72 pointing similarly to definitional problems and concluding that the case for discrete press rights remains ‘unproven’. [↑](#footnote-ref-7)
8. *Citizens United v Federal Election Commission* 558 US 310 (2010). [↑](#footnote-ref-8)
9. Section 33(1) tackling the issue of ‘revenge porn’. [↑](#footnote-ref-9)
10. (1975) 26 *Hast L Jo.* 631. [↑](#footnote-ref-10)
11. Of the original colonies, eleven had devised written constitutions. Only two states of the eleven (New Jersey and New York) failed to make express provision to protect the press, see F Abrams, ‘The Press is Different: Reflections on Justice Stewart and the Autonomous Press (1979) 7 *Hofstra L. Rev.* 563, 578-79 [↑](#footnote-ref-11)
12. See for example the Article XVI of the 1780 Massachusetts Constitution drafted by John Adams, ‘The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth.’ [↑](#footnote-ref-12)
13. (1975) 26 *Hast L Jo.* 631 at 634. [↑](#footnote-ref-13)
14. *Ibid*. Stewart’s autonomy-based justification for institutional protection for the press from governmental interference with content under the First Amendment led him at the same time to reject press claims for special constitutional rights of access to information held by prisons and other governmental agencies. Government, on Stewart’s view, must be allowed to assert legitimate privacy interests in respect of its own information subject to the *public’s* general interest in exercising informed scrutiny over office holders. See for similar positions A Bickel, *The Morality of Consent* (1975, Yale Univ Press, New Haven) at p.80 and C Edwin Baker, ‘The Independent Significance of the Press Clause under Existing Law’ *(2007) 35 Hofstra L.Rev*.955. [↑](#footnote-ref-14)
15. D Lange, ‘The Speech and Press Clauses’ (1975) 23 *UCLA L. Rev.*77 where it is argued that the Framers would have intended to confer protection on occasional, cheaply-produced and unsophisticated single pamphleteers. [↑](#footnote-ref-15)
16. For a helpful overview of the debate stirred up by his article see F Abrams at n.10 above., [↑](#footnote-ref-16)
17. 435 US 765 at 801-2 (1978). [↑](#footnote-ref-17)
18. 303 US 444, at 450 (1938). and see similarly Frankfurter J in *Pennekamp v Florida* 328 US 331, 364 (1946) ‘(T)he purpose of the Constitution was not to erect the press into a privileged institution, but to protect all persons in their right to print what they will as well as to utter it… the liberty of the press … is no greater than the liberty of every citizen of the Republic.’ [↑](#footnote-ref-18)
19. 408 US 665, 704 (1972). [↑](#footnote-ref-19)
20. S West, ‘Awakening the Press Clause’ (2011) 58 *UCLA L.Rev.* 1025. [↑](#footnote-ref-20)
21. *Ibid*., at 1043-5. [↑](#footnote-ref-21)
22. *Ibid*., at 1058. [↑](#footnote-ref-22)
23. *Ibid*. [↑](#footnote-ref-23)
24. The quote from Madison’s speech to Congress reads ‘The censorial power is in the people over the Government, and not in the Government over the people.’ *Annals of Congress* 934 (1793-95). [↑](#footnote-ref-24)
25. J Smith, ‘Prior restraint, original intentions and modern interpretations’ (1987) 28 *Wm & Mary L. Rev.* 439, 450-453. [↑](#footnote-ref-25)
26. *Annals of Congress* 934 (1793-95). [↑](#footnote-ref-26)
27. And see further Justice Learned Hand’s remarks in *United States v Associated Press* 52 F.Supp. 362, 372 (D.C.S.D.N.Y.1943) ‘The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.’ [↑](#footnote-ref-27)
28. ‘Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’ recorded in J Elliot, *The Debates in the Several State Constitutions on the Adoption of the Federal Constitution - Volume 4* (1876) and available electronically at http://memory.loc.gov/ammem/amlaw/lwed.html [↑](#footnote-ref-28)
29. 310 US 296, 310 (1938), [↑](#footnote-ref-29)
30. 317 US 415, 455 (1963) and see also *New York Times v Sullivan* 376 US 254 (1964). In *NAACP* Justice Brennan had spoken of the importance of tolerating erroneous statements if freedom of expression was to have the ‘breathing space’ needed for its survival at 433.. [↑](#footnote-ref-30)
31. W Marshall & S Gilles, ‘The Supreme Court, The First Amendment, and Bad Journalism’ [1994] *Sup.Ct.Rev.*169, 171 ‘both superficial and serious journalism are entitled to equal constitutional weight’. [↑](#footnote-ref-31)
32. *Ibid*. at 184-186. [↑](#footnote-ref-32)
33. This is an implication of Robert Post’s autonomy-based account of free speech see further R Post, ‘Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse’ (1993) 64 *Uni.Colo.L.Rev.*1109, 1117-1120. [↑](#footnote-ref-33)
34. See Harlan J in *Cohen v California* 403 US 15 (1971) cited in Post *ibid*. [↑](#footnote-ref-34)
35. ‘Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse’ (1993) 64 *Uni.Colo.L.Rev.*1109, 1119. [↑](#footnote-ref-35)
36. Y Benkler, ‘A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate’ (2011) 46 *Harv.C.R.-C.L. L. Rev.* 311, 358-360. [↑](#footnote-ref-36)
37. *Ibid.* at 362. [↑](#footnote-ref-37)
38. H Cohen *Journalists’ Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes* (2007, Congressional Research Service) at <http://fas.org/sgp/crs/secrecy/RL32806.pdf>, L Russell, ‘Shielding the Media: In an Age of Bloggers, Tweeters, and Leakers, Will Congress Succeed in Defining the Term “Journalist” and in Passing a Long Sought Federal Shield Act?’ (2014) 93 *Or. L. Rev.* 193, 197. [↑](#footnote-ref-38)
39. J Schroeder, ‘Focusing on How Rather than Whom: Constructing a Process-Based Framework for Interpreting the Press Clause in the Network Society’ (2014) 19 *Comm. L. & Pol’y* 509. [↑](#footnote-ref-39)
40. See for example *Johns-Byrne Company v TechnoBuffulo* 40 Med.L.Retr . (BNA) 2660 (Ill.Cir. Ct.Cook County 2012) and *O’Grady v Superior Court of Santa Clara County* 139 Cal. App. 4th 1423 (Cal.Ct.App.2006) discussed in Schroeder *ibid.* [↑](#footnote-ref-40)
41. 20 A.3d 364 (N.J. 2011). [↑](#footnote-ref-41)
42. N.J.S.A. 2A:84A-21 to 21.8. [↑](#footnote-ref-42)
43. *Ibid*. [↑](#footnote-ref-43)
44. 20 A.3d 364 (N.J. 2011) at para.5. [↑](#footnote-ref-44)
45. 6:06-109-HMH (D.S.C. October 22, 2007) [↑](#footnote-ref-45)
46. *Ibid*. at 11. [↑](#footnote-ref-46)
47. <http://cases.justia.com/federal/appellate-courts/ca4/06-1487/061487.u-2011-03-14.pdf?ts=1410930656> (decision of March 6, 2007). [↑](#footnote-ref-47)
48. 811 F.2d 136 (2nd Cir. 1987). [↑](#footnote-ref-48)
49. *Ibid*., at para 58. [↑](#footnote-ref-49)
50. 151 F.3d 125 (3d Cir.1998). For criticism of *Von Bulow* and *In Re Madden*, see D Swartwout, ‘In Re Madden: The Threat to New Journalism’ (1999) 60 *Ohio St. L.J.* 1589. For a defence of *Von Bulow* see K Baker, ‘Comment, Are Oliver Stone and Tom Clancy Journalists? Determining Who Has Standing to Claim the Journalist’s Privilege’ (1994) 69 *Wash. L. Rev.* 739. [↑](#footnote-ref-50)
51. *Von Bulow*  it will be seen denies privilege to those who, at the time they gather information, do so for a purpose other than public dissemination and only subsequently to the act of gathering develop the intention to publish. [↑](#footnote-ref-51)
52. As occurred in *In re Madden* 151 F.3d 125 (3d Cir. 1998) where an account of professional wrestling was held not to constitute ‘news’. [↑](#footnote-ref-52)
53. 629 F.3d 297 (2d Cir. 2011). [↑](#footnote-ref-53)
54. J Pasley, *“The Tyranny of the Printers” Newspapers Politics in Early American Republic* (2001, Univ of Virginia Press, Charlottesville). [↑](#footnote-ref-54)
55. ‘Awakening the Press Clause’ (2011) 58 *UCLA L.Rev.* 1025 and ‘Press Exceptionalism’ (1024) 127 *Harv.L.Rev.* 2434. [↑](#footnote-ref-55)
56. In the UK, the guidance provided by the *Parliamentary Press Gallery* states “Members of the Press Gallery are employed by their individual media organisations, each of which has been recognised by the Parliamentary authorities as reporting regularly on Parliament and the political process. The number of passes allocated to each organisation is a matter for the Parliamentary authorities.” See http://www.pressgallery.org.uk/?page\_id=220 [↑](#footnote-ref-56)
57. [2009] 3 SCR 640. [↑](#footnote-ref-57)
58. Citing with approval Lord Hoffmann in *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44at para 54. [↑](#footnote-ref-58)
59. R Dearden & W Wagner, ‘Canadian Libel Law Enters the 21st Century: The Public Interest Responsible Communication Defence’ (2009-10) *Ottawa L.Rev.*351 describing the decision as a ‘major advancement for freedom of speech in Canada...’ at 373. [↑](#footnote-ref-59)
60. Though Justice Abella did disagree with her colleagues’ position that the determination of whether a communicator has behaved responsibly is a matter for the jury at [2009] 3 SCR 640 at paras. 142-45. See further discussion on the text *infra*. [↑](#footnote-ref-60)
61. *Ibid*., at para.97. [↑](#footnote-ref-61)
62. At paras. 127-135. The judge retains a discretion to withdraw the issue of responsible communication from the jury where the proved facts cannot support a finding of responsible communication. [↑](#footnote-ref-62)
63. *Ibid*., at para 134. For English judicial criticism of the post *Reynolds* allocation of judge and juror roles, see Lord Phillips MR in the Court of Appeal in *Jameel v Wall Street Journal Europe SPRL* [2005] EWCA Civ 74, ‘The division between the role of the judge and that of the jury when *Reynolds* privilege is in issue is not an easy one.’ at para.70 where he doubts, contrary to McLachlin CJ, whether there is any role at all for jury trial in *Reynolds* qualified privilege litigation. See also the empirical analysis of Kenyon who points to the ‘complexities posed by a large number of jury questions’ in *Reynolds* litigation but argues, contrary to Phillips MR, for greater lay involvement in assessing the responsibility of the communicator, A Kenyon, ‘Lange and Reynolds Qualified Privilege: Australian and English Defamation Law and Practice’ (2004) 28 *Melb.U.L.Rev.* 406, 433-34. [↑](#footnote-ref-63)
64. R Dearden & W Wagner, ‘Canadian Libel Law Enters the 21st Century: The Public Interest Responsible Communication Defence’ (2009-10) *Ottawa L.Rev.*351, 372. [↑](#footnote-ref-64)
65. The protection is lost under s.68(2) where a party to civil or criminal proceedings can satisfy a High Court judge that the public interest in disclosure of the source’s identity outweighs (a) ‘any likely adverse effect’ on the source or any other person; and (b) ‘the public interest in communication of facts and opinion to the public by the news media and ...the ability of the news media to access sources of facts.’ [↑](#footnote-ref-65)
66. [2014] NZHC 2221. [↑](#footnote-ref-66)
67. [2014] NZHC 2221 at para 54. [↑](#footnote-ref-67)
68. Evidence Amendment (Journalist Privilege) Bill 2011 inserting Division 1C of Part 3.10 of Chapter 3 of the Evidence Act 1995 (NSW). [↑](#footnote-ref-68)
69. Evidence before the General Purpose Standing Committee No.4 (2011-12) October 26, available electronically at http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/909071f11707326eca25793500780881/$FILE/20111026%20Attorney%20General,%20Justice.pdf [↑](#footnote-ref-69)
70. J Barrett, ‘New Zealand’s proposed extension of media legal privileges to Web 2.0 media’ (2013) 19(1) *Web JCLI*. [↑](#footnote-ref-70)
71. *Ibid.*  at para. 61. [↑](#footnote-ref-71)
72. We saw earlier in this chapter the US Second Circuit of Appeals in *Chevron* take a similar line in order to deny privilege to a speaker deemed partisan. [↑](#footnote-ref-72)
73. 435 US 765, 801 (1978). [↑](#footnote-ref-73)
74. New Zealand Law Commission R 128 *The News Media Meets the ‘New Media’* - *Rights, Responsibilities and Regulation in the Digital Age* (2013, Wellington) at para. 3.92 &ch.7. [↑](#footnote-ref-74)
75. J Barrett, ‘New Zealand’s proposed extension of media legal privileges to Web 2.0 media’ (2013) 19(1) *Web JCLI*. [↑](#footnote-ref-75)
76. [2009] 3 SCR 640 at para 97. [↑](#footnote-ref-76)
77. [2001] 2 AC 127. [↑](#footnote-ref-77)
78. See for background J Price and F McMahon (eds.), *Blackstone’s Guide to The Defamation Act 2013* (2013, OUP, Oxford) pp.1-11. [↑](#footnote-ref-78)
79. *Ibid*., back cover. [↑](#footnote-ref-79)
80. Under s.1 of the Defamation Act 1996, website operators were unable to take advantage of the innocent dissemination defence once they had been given notice (usually by the claimant) of the ‘defamatory’ nature of the published statement, see further *Godfrey v Demon Internet* [2001] QB 201, and *Tamiz v Google Inc* [2013] EWCA Civ 68. The Law Commission of England and Wales in *Defamation and the Internet: A Preliminary Investigation, Scoping Study No.2* (2002,HMSO, London) at para 1.12 recognised that the 1996 law encouraged ISPs as a matter of the safest course to take down material that had been complained about, regardless of whether publication might be in the public interest. According to the Law Commission, the pressure to remove material was possibly in conflict with Article 10 of the ECHR. [↑](#footnote-ref-80)
81. [2006] UKHL 44 at para. 54 [↑](#footnote-ref-81)
82. [2008] UKPC 9 at para.11. [↑](#footnote-ref-82)
83. *Ibid.* [↑](#footnote-ref-83)
84. Lord Chancellor Rt Hon Kenneth Clarke MP (2012-13) HC Deb Vol. 546 Col.181 [↑](#footnote-ref-84)
85. Though see Rowbottom who argues that because the ‘reasonable belief’ standard does not expressly incorporate professional journalistic standards, there is room for doubt whether this new test will track factors listed on the *Reynolds* checklist,J Rowbottom, ‘In the shadow of the big media: freedom of expression, participation and the production of knowledge online’ [2014] *PL* 491, 500. [↑](#footnote-ref-85)
86. Jonathan Djanogly MP PBC (Bill 005) (2012-13) Col.73 [↑](#footnote-ref-86)
87. *Ibid.* [↑](#footnote-ref-87)
88. (2012-13) HL Grand Committee Vol. 741 Col.558. [↑](#footnote-ref-88)
89. J Rowbottom, ‘In the shadow of the big media: freedom of expression, participation and the production of knowledge online’ [2014] *PL* 491, 499. [↑](#footnote-ref-89)
90. See for example *Galloway v Telegraph Group Ltd* [2006] UKHL 13 [↑](#footnote-ref-90)
91. J Suler, ‘The Online Disinhibition Effect’ (2004) 7 *Cyberpsychology and Behavior* 321 at 324. [↑](#footnote-ref-91)
92. It is significant that the complainant need only show under s.5(6) that the statement in question is defamatory as opposed to unlawful. [↑](#footnote-ref-92)
93. If it is possible for the complainant to identify of the poster without the help of the operator then the operator will retain the statutory defence unless the complainant can prove that the operator has acted with malice. [↑](#footnote-ref-93)
94. (2011-12) HL Paper 203; HC 903-I at para.103. [↑](#footnote-ref-94)