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New Media and the News Media: Too Much Media, LLC v. Hale and the Reporter's Privilege in the Digital Age

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NEW MEDIA AND THE NEWS MEDIA: *TOO MUCH MEDIA, LLC V. HALE* AND THE REPORTER'S PRIVILEGE IN THE DIGITAL AGE

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Rooted in the U.S. Constitution and state statutes known as shield laws, the reporter's privilege has long guarded news gatherers who wish to keep their sources secret. The majority of states have codified shield laws. These statutes support the First Amendment, whose free-press provision allows journalists to act without government control. But the boundaries of the reporter's privilege have become blurred. Who, in this electronic era of citizen journalism, qualifies as a reporter for the purposes of shield-law protection? Can a blogger enjoy the same benefits that a typical print, radio, or television journalist receives? This Comment examines the case of Too Much Media, LLC v. Hale*, in which the Supreme Court of New Jersey took an early step toward answering those questions. In holding that the state's shield law did not protect a woman who posted her reporting on an Internet message board, the court was among the first to apply the reporter's privilege in cyberspace. But it should have done more in order to preserve the vitality of shield laws—and of the democratic values that underpin the First Amendment—in the age of new media.*

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I. INTRODUCTION

Shellee Hale wore many hats in her professional career. An apparently accomplished woman, she earned certificates as a nursing assistant, a digital-forensics practitioner, and an antiterrorism specialist.[1] She once worked for Microsoft.[2] She ran a computer consulting company.[3] And she did it all while raising five children in Washington State.[4]

Then, in 2007, she tried a new hat on for size. On her own initiative, Hale embarked on an investigation of a computer company.[5] During the endeavor, Hale published her findings—including several inflammatory statements—on an Internet message board.[6] The subject of her posts eventually sued her and sought to depose her.[7] Hale, in response, said that she was a journalist and invoked the reporter's privilege, the traditional shield that protects journalists.[8] But in the decision that followed, the Supreme Court of New Jersey determined that Hale's latest hat—that of a reporter—did not fit.[9]

The reporter's privilege protects journalists who wish to keep their sources secret.[10] The majority of states have codified this privilege in statutes known as shield laws.[11] These statutes vary in scope, but a typical shield law protects members of the news media from having to reveal their sources to any legal, legislative, or investigative body with subpoena power.[12] Consequently, shield laws

1. *Certifications*, SHELLEE HALE, http://shelleehale.com/about/certifications (last visited Jan. 4, 2012).

2. Too Much Media, LLC v. Hale, 20 A.3d 364, 369 (N.J. 2011).

3. *Id.*

4. MaryAnn Spoto, *Court Rules Blogger Not Covered by Shield Law*, STAR-LEDGER (N.J.), Apr. 23, 2010, at 13.

5. *Too Much Media*, 20 A.3d at 369.

6. *Id.* at 369–70.

7. *Id.* at 370–71.

8. *Id.* at 371.

9. *See id.* at 368.

10. Carol J. Toland, Comment, *Internet Journalists and the Reporter's Privilege: Providing Protection for Online Periodicals*, 57 U. KAN. L. REV. 461, 461–62 (2009). The concept of the reporter's privilege is similar to that of the attorney-client or doctor-patient privileges. *Id.* at 461.

11. *Id.* at 468.

12. *See, e.g.*, N.J. STAT. ANN. § 2A:84A-21 (West 2010) ("[A] person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf

both draw on and promote the values of the First Amendment, whose free-press provision allows journalists to gather and retain information without government control.[13] Proponents of the reporter's privilege reason that it enhances the First Amendment's grant of freedom of the press by maximizing the free flow of information: certain vital pieces of information would not enter the public discourse if journalists could not promise anonymity to their sources.[14]

However, the privilege is not absolute.[15] There is no federal shield-law statute,[16] and the U.S. Supreme Court has rejected the notion that the First Amendment protects reporters' sources.[17] Thus, federal courts often refuse to grant the privilege to journalists.[18] As a result, news gatherers tend to turn to state shield laws to avoid disclosure in both criminal and civil arenas.[19]

Definitions are not fully clear here. Traditionally, terms like "journalist" and "reporter" have identified a broad range of news gatherers—newspaper and radio employees, book authors, and more.[20] And some courts have ruled that certain people may invoke the reporter's privilege even though they might not be traditional news-media members.[21] State legislatures have also clarified

news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere[,] . . . [t]he source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and . . . [a]ny news or information obtained in the course of pursuing his professional activities whether or not it is disseminated."); CAL. CONST. art. I, § 2(b); ALA. CODE § 12-21-142 (2010); KY. REV. STAT. ANN. § 421.100 (West 2010); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2010); MICH. COMP. LAWS § 767.5A (2000); N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2009); OR. REV. STAT. § 44.520 (2003).

13. Toland, *supra* note 10, at 465.

14. *See id.* at 480.

15. *Developments in the Law—The Law of Media: II. Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, 120 HARV. L. REV. 996, 998 (2007) [hereinafter *Developments in the Law*].

16. Too Much Media, LLC v. Hale, 20 A.3d 364, 374 (N.J. 2011); *see Struggling to Report: The Fight for a Federal Shield Law*, SOC'Y OF PROF'L JOURNALISTS, http://www.spj.org/shieldlaw.asp (last visited Jan. 4, 2012).

17. Branzburg v. Hayes, 408 U.S. 665, 703–04 (1972).

18. *See In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 968–73 (D.C. Cir. 2005).

19. *Developments in the Law*, *supra* note 15, at 1000–01.

20. *See id.* at 996–97.

21. von Bulow v. von Bulow, 811 F.2d 136, 144–45 (2d Cir. 1987) ("[T]he protection from disclosure may be sought by one not traditionally associated with the institutionalized press

definitions to an extent.[22] But the issue has become particularly vexing in the digital age, where news gathering and disseminating have evolved into increasingly electronic pursuits characterized by blogs and so-called citizen journalists, any of whom may reasonably claim the title of "reporter."[23] Nevertheless, despite the tremendous growth of Internet news publication, courts and legislatures have yet to fully clarify whether bloggers and other web denizens deserve shield-law protections.[24]

In *Too Much Media, LLC v. Hale*,[25] the Supreme Court of New Jersey took a tentative step toward resolving that question. The court held that the state's expansive shield law did not protect Shellee Hale because the Internet message board on which she published her reporting was not similar to the traditional news outlets that the state legislature had enumerated in the statute.[26]

Part II of this Comment details the facts of *Too Much Media*. Part III first examines the reasoning of New Jersey's intermediate appellate court in its ruling on Hale's invocation of the shield law; Part III then looks at the state supreme court's decision. Part IV goes on to chronicle how the reporter's privilege has evolved to buttress the First Amendment's free-press right. Part V then analyzes the reporter's privilege as it applies in cyberspace and argues that, while *Too Much Media* offers an important early ruling on whether Internet news gatherers are journalists who merit shield-law protection, further clarification is necessary to preserve the vitality of the reporter's privilege—and of the democratic values that underpin the right to free speech—in the age of new media.

because 'the informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists.'" (quoting *Branzburg*, 408 U.S. at 705)).

22. *See Developments in the Law*, *supra* note 15, at 1002.

23. Too Much Media, LLC v. Hale, 993 A.2d 845, 856–57 (N.J. Super. Ct. App. Div. 2010), *aff'd and modified*, 20 A.3d 364 (N.J. 2011).

24. Anne M. Macrander, Note, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075, 1096 (2008).

25. 20 A.3d 364 (N.J. 2011).

26. *Id.* at 367–68.

II. STATEMENT OF THE CASE

In 2007, Shellee Hale began working as a life coach, a job that involved long-distance consulting via webcam.[27] Before long, however, she encountered several "cyber flashers"—people who masqueraded as potential clients and then exposed themselves through their webcams.[28] Upset, Hale started investigating what she believed to be illegal conduct in the online pornography business.[29] Planning "'to inform the public on scams, fraud, [and] technological issues' in the adult entertainment industry,"[30] she established a website called Pornafia, which she described as an "information exchange" and a "bulletin board to deliver news to the public."[31] She also issued a press release stating that Pornafia "came about . . . with the aim of providing a cost free information resource for victims, potential victims, legitimate industry players, and pertinent government agencies worldwide."[32] Hale said that Pornafia employed journalists, but the site never fully launched.[33]

Nonetheless, Hale continued her investigation.[34] She conducted interviews with porn-business participants and visited six adult-entertainment trade shows.[35] She also used industry-oriented blogs—notably, Oprano, which fashions itself as the "Wall Street Journal for the online adult entertainment industry"—to both gather and report information.[36] Prior to publication, her Oprano posts were neither filtered nor subjected to editorial review.[37]

Over time, Hale's posts zeroed in on a New Jersey company called Too Much Media (TMM), which sold software to adult

27. *Id.* at 369.

28. *Id.*

29. *Id.*

30. Too Much Media, LLC v. Hale, 993 A.2d 845, 849 (N.J. Super. Ct. App. Div. 2010), *aff'd and modified*, 20 A.3d 364 (N.J. 2011).

31. *Too Much Media*, 20 A.3d at 369.

32. *Id.*

33. *Id.* She did not support her claim that she had "hired journalists to write for Pornafia," and although Pornafia's "news magazine" evidently existed, it "was still being worked on, and was not live." *Id.* Thus, it published no reports. *See id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 379.

websites.[38] TMM had recently experienced a security breach that "potentially exposed personal information of thousands of customers who believed they had signed up anonymously for pornographic websites."[39] Hale conducted "a detailed probe of the breach," including conversations with "sources on a confidential basis."[40] Her investigation uncovered several potentially harmful allegations about TMM.[41] But she never asked TMM for its side of the story.[42]

Hale then published several posts on Oprano that suggested "that TMM had threatened people who questioned its conduct and had profited from the breach."[43] On one occasion, she wrote that one of TMM's owners "personally contacted me to let me know he 'has not threatened anyone[,]' but I was told something different from someone who . . . [is] a reliable source."[44] In other posts, Hale suggested that TMM had engaged in fraud and had caused a deluge of spam and malware to flood its customers' e-mail inboxes.[45] She said that she intended for her posts "to inform the public about the misuse of technology and to facilitate debate."[46] Although her postings on Oprano were "small brief parts" of longer stories that she meant to publish on Pornafia, she said "that she took Pornafia offline because her life was threatened by a customer of TMM and because of the pending lawsuit."[47] So she never produced complete news articles.[48]

TMM sued Hale for defamation, false light, and trade libel.[49] During discovery, TMM announced its intention to depose Hale.[50] Hale then invoked New Jersey's shield law[51]—which she claimed

38. *Id.* at 368 (explaining how TMM's product allowed website proprietors to determine the appropriate commissions to give to "affiliate" sites that directed traffic to them).

39. *Id.* at 369. TMM was also "involved in unrelated litigation with a competitor" during that time frame. *Id.*

40. *Id.* (internal quotation marks omitted).

41. *Id.* at 369–70.

42. Too Much Media, LLC v. Hale, 993 A.2d 845, 851 (N.J. Super. Ct. App. Div. 2010), *aff'd and modified*, 20 A.3d 364 (N.J. 2011).

43. *Too Much Media*, 20 A.3d at 369.

44. *Id.* at 370 (quoting *Too Much Media*, 993 A.2d at 851). Later, Hale testified that a confidential source had told her that the TMM co-owner had "threatened their life." *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (internal quotation marks omitted).

48. *Id.*

49. *Id.* at 370–71. It later withdrew the trade libel claim. *Id.* at 371.

50. *Id.*

51. N.J. STAT. ANN. § 2A:84A-21 (West 2010).

protected her because she was a reporter—and sought a protective order.[52] After an evidentiary hearing on the issue, the trial court judge denied Hale's protective-order application, deciding that the shield law did not protect her.[53] In doing so, the judge pointed to the fact that Hale's comments had appeared only on an Internet message board, "which was not 'similar' to the types of 'news media'" that the state's shield law listed.[54] After the judge also denied her motion for reconsideration, Hale appealed.[55]

III. REASONING OF THE COURTS

On appeal, the case moved through the Superior Court of New Jersey, Appellate Division,[56] and the Supreme Court of New Jersey[57] in turn. Together, the opinions of both courts illuminate many nuances of the reporter's privilege doctrine.[58] Moreover, the supreme court's ultimate decision relied heavily on the lower appellate court's ruling.[59] Thus, this Part examines each court's opinion in detail.

A. The Intermediate Appellate Court's Broad Opinion

In ruling on Hale's appeal, the Superior Court of New Jersey, Appellate Division, considered whether the state's shield law protects a website operator from having to reveal sources of information that he or she posted on web message boards.[60] The court held that, although New Jersey's shield law broadly defined "news" and "news media," Hale had shown "*none* of the recognized qualities or characteristics traditionally associated with the news process, nor [had] she demonstrated an established connection or affiliation with any news entity."[61] In reaching this decision, the

52. *Too Much Media*, 20 A.3d at 371.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Infra* note 60 and accompanying text.
57. *Infra* note 81 and accompanying text.
58. *See infra* Part III.A–B.
59. *See infra* Part III.B.
60. Too Much Media, LLC v. Hale, 993 A.2d 845, 848 (N.J. Super. Ct. App. Div. 2010), *aff'd and modified*, 20 A.3d 364 (N.J. 2011).
61. *Id.* at 860. The court also quickly resolved whether the First Amendment "provides an independent basis for avoidance of [Hale's] obligations under [New Jersey's] discovery rules,"

court analyzed the rules surrounding the state's shield law, examining cases where people invoked the reporter's privilege even though they were not under the cover of the conventional journalism umbrella.[62]

The court recognized that New Jersey's shield law "affords newspersons an absolute privilege not to disclose confidential sources"[63] and that the legislature intended for courts to apply the statute very broadly.[64] The legislature also sought to protect source confidentiality, the court said, because a failure to do so could limit the amount of information that reaches the public.[65] Nonetheless, the court noted that the Internet age complicates the inquiry into who may be entitled to shield-law protection because any citizen with a computer connection could potentially fit the definition of a newsperson.[66] Accordingly, the court made clear that a party invoking shield-law protection must do more than merely call himself or herself a journalist; the party bears the burden of proving that the statute applies to him or her.[67] As a result, the court recognized two guides by which a blogger might prove that he or she is a journalist to whom shield-law protection applies.

The first guide came from *von Bulow v. von Bulow*.[68] There, the Second Circuit held that a person who is not "a member of the institutionalized press" may successfully invoke the reporter's privilege after showing that he or she intended "to use the material in order to disseminate information for the public, and such intent must have existed at the inception of the newsgathering process."[69] In focusing on the "intent behind the news-gathering process rather than the mode of dissemination," the Second Circuit sought to protect investigative reporting of any citizen, traditional journalist or not.[70]

stating that "the First Amendment underlies the protections of [the state's] Shield Law." *Id.* at 861. Thus, it viewed the shield law as inseparable from the constitutional right to a free press. *See id.* The court further suggested that state shield laws possibly offer even more protection than the First Amendment does. *Id.*

62. *See id.* at 854. The court also addressed procedural issues related to TMM's defamation claim. *Id.* at 862–66.

63. *Id.* at 852 (quoting Maressa v. N.J. Monthly, 445 A.2d 376, 383 (N.J. 1982)).

64. *Id.* (citing State v. Boiardo, 414 A.2d 14, 20 (N.J. 1980)).

65. *Id.* at 858–59.

66. *Id.* at 856.

67. *Id.* at 853.

68. 811 F.2d 136 (2d Cir. 1987).

69. *Too Much Media*, 993 A.2d at 854–55 (citing *von Bulow*, 811 F.2d at 144–45).

70. *Id.* at 854 (citing *von Bulow*, 811 F.2d at 142–43).

The second guide came from the only prior case to address whether bloggers are journalists, *O'Grady v. Superior Court*.[71] In *O'Grady*, the California Court of Appeal held that bloggers could receive shield-law protection if the websites with which they were affiliated resembled traditional printed periodicals.[72] Factors bearing on this inquiry include the "frequency of publication, quantity of articles published per week, permanency of web address and number of visitors per month."[73]

Applying *von Bulow* and *O'Grady*, the intermediate appellate court determined that Hale's actions did not merit coverage under the state's shield law.[74] It reasoned that she lacked the intent to disseminate news under *von Bulow* because she failed to produce notes from her reporting, never asked TMM for its version of events, never hired employees for Pornafia, and neither told her sources that she was a reporter nor granted them confidentiality.[75] And without having promised confidentiality, Hale could not then invoke a privilege meant to preserve confidentiality.[76] The court also ruled that she failed to satisfy the *O'Grady* standard for news-publication affiliation because the press release that announced Pornafia was vague and Hale "never actually published anything."[77] Moreover, the court noted that Hale exercised no editorial control over Oprano and never stated in her posts that she was a journalist.[78] Indeed, the court said that her contributions were like letters to the editor that simply comment on articles.[79] The court reasoned that extending the reporter's privilege to anyone who comments on message boards would defy the legislature's intent and weaken the shield law.[80]

71. 44 Cal. Rptr. 3d 72 (Ct. App. 2006).
72. *See id.* at 105.
73. *Too Much Media*, 993 A.2d at 857–58 (citing *O'Grady*, 44 Cal. Rptr. 3d at 97–105).
74. *Id.* at 858.
75. *Id.* at 859–60.
76. *Id.* at 859.
77. *Id.* 859–60.
78. *Id.* at 861.
79. *Id.*
80. *See id.* at 860 (asserting that the legislature did not mean for the shield law to cover "anyone with an email address").

B. The State Supreme Court's Narrower View

Hale then appealed to the Supreme Court of New Jersey, which affirmed the intermediate appellate court's ruling but modified that court's judgment "to clarify how courts should assess whether the privilege applies in future cases."[81] Indeed, the supreme court's decision was as much a response to the lower court's analysis of shield-law jurisprudence as it was to the merits of Hale's claim.[82] In ruling on "whether the newsperson's privilege extends to a self-described journalist who posted comments on an Internet message board,"[83] the supreme court simply focused on interpreting New Jersey's shield law and on determining whether Hale had met the requirements for protection that the statute established.[84]

The supreme court, like the lower court,[85] initially made clear that the state's shield-law statute "is among the broadest in the nation" and that it "cloak[s journalists] with an absolute privilege."[86] And yet the high court then parted ways with the lower court by engaging in a narrow, plain-meaning interpretation of the statute, rather than by pinning its analysis to the *von Bulow* and *O'Grady* guides.[87] The supreme court determined that the shield law has three requirements that claimants must satisfy in order to merit protection: (1) "a connection to the news media"; (2) "a purpose to gather, procure, transmit, compile, edit, or disseminate news"; and (3) "that the materials sought were obtained in the course of pursuing professional newsgathering activities."[88] But it limited its focus to the first element—"the meaning of 'news media'"—because it said that the legislature meant for the reporter's privilege to only apply to people who "have some nexus to 'news media'" as that term is

81. Too Much Media, LLC v. Hale, 20 A.3d 364, 368 (N.J. 2011).

82. *See id.*

83. *Id.* at 367.

84. *Id.* at 375–80. Like the lower appellate court did, the supreme court first determined that "no independent federal source governs this case," noted that the state's uncommonly broad shield law might "exceed[] First Amendment limits," and moved on. *Id.* at 375; *see supra* note 61.

85. *See supra* notes 63–64 and accompanying text.

86. *Too Much Media*, 20 A.3d at 374–75.

87. *Id.* at 378 ("To determine who qualifies for the privilege, courts must look to the statute.").

88. *Id.* at 380.

defined in the law.[89] Consequently, it whittled the case down to a simple question that it derived from the statute's definition of "news media": "whether an online message board is *similar* to 'newspapers, magazines, press associations, news agencies, wire services, radio, [or] television.'"[90]

The court's answer was clear: Hale's "use of a message board to post her comments is not covered under the Shield Law."[91] It held that "message boards are little more than forums for conversation" and that they are "actually one step removed from letters [to the editor of] a newspaper because letters are first reviewed and approved for publication by an editor or employee whose thought processes would be covered by the privilege."[92] On the contrary, the court said that Hale's comments are akin to a "pamphlet full of unfiltered, unscreened letters to the editor submitted for publication" and that they are, therefore, "not the functional equivalent of the types of news media outlets outlined in the Shield Law."[93]

Still, the court held the door open for other Internet denizens who might invoke the reporter's privilege. It allowed that "[c]ertain online sites could satisfy the law's standards."[94] It endorsed the *O'Grady* court's notion that the reporter's privilege could extend to websites that are created and used for the publication of news.[95] As an example, it said that a site like Drudge Report,[96] which "contains breaking news items and links to various articles," is a kind of "forum that shares similarities to traditional media."[97] And it held that a "single blogger might qualify for coverage under the Shield Law provided she met the statute's criteria."[98]

But it drew the line at Pornafia, whose news magazine never launched and thus never published the articles that Hale claimed to be preparing during her investigation and activity on Oprano.[99] The

89. *Id.* at 377–78. Again, it is not enough for someone to simply call herself a journalist; she must prove it. *Id.*; *see supra* note 67 and accompanying text.

90. *Id.* at 378 (emphasis added) (quoting N.J. STAT. ANN. § 2A:84A-21a(a) (West 2010)).

91. *Id.* at 379.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 379–80.

96. DRUDGE REPORT, http://www.drudgereport.com (last visited Jan. 4, 2012).

97. *Too Much Media*, 20 A.3d at 380.

98. *Id.*

99. *Id.*

court also eschewed an "intent test" like the one that the Second Circuit used in *von Bulow*, holding that the legislature clearly crafted a shield-law statute that demands that a person who invokes the privilege prove more than a mere purpose to report the news.[100] And it ruled that the criteria that the lower court identified as helpful in determining whether someone should merit shield-law protection—if the person identified herself as a reporter, promised confidentiality, adhered to professional journalistic standards, and produced notes of her investigation[101]—are not requirements of the statute.[102]

In closing, the court acknowledged that, "[i]n the case of a newsperson with ties to traditional news media, a straightforward certification could readily make out a prima facie showing" that the person is a journalist whom the shield law protects.[103] But, the court cautioned, "self-appointed journalists" such as the "millions of bloggers who have no connection to traditional media" need closer attention: "Any of them, as well as anyone with a Facebook account, could try to assert the privilege."[104] Therefore, the court invited the legislature, "[i]n an era of ever-changing technology, with new and rapidly evolving ways of communicating, . . . to reconsider who is a newsperson and add new criteria to the Shield Law."[105]

IV. HISTORICAL FRAMEWORK

Stemming from the First Amendment, the reporter's privilege has existed in some jurisdictions for more than a century.[106] It owes its long life to the oft-repeated rationale that it is essential to democracy because it allows journalists to act as "watchdog[s]" free from government control.[107] Indeed, without a guarantee of anonymity, some sources would not divulge information to reporters, thus frustrating the kind of free discourse that has proven vital to the nation.[108]

100. *Id.* at 381; *see supra* note 88 and accompanying text.
101. *See supra* notes 75–78 and accompanying text.
102. *Too Much Media*, 20 A.3d at 381–82.
103. *Id.* at 383.
104. *Id.*
105. *Id.*
106. Macrander, *supra* note 24, at 1078.
107. Toland, *supra* note 10, at 479.
108. *Id.* at 478–79.

Despite such a rich tradition, the reporter's privilege doctrine has been the subject of much debate[109] since the 1972 Supreme Court decision in *Branzburg v. Hayes*.[110] *Branzburg* concerned a journalist who, while writing a newspaper article, promised anonymity to two drug dealers.[111] The journalist was subpoenaed to testify before a grand jury and then invoked the reporter's privilege.[112] In an opinion by Justice White, the Court held that requiring the journalist to testify did not abridge the freedom of the press.[113] Yet the Court stated in dicta that, "without some protection for seeking out the news, freedom of the press could be eviscerated";[114] that only a "compelling" state interest in a reporter's testimony may trump First Amendment protection;[115] and that state courts are free to grant an absolute reporter's privilege.[116] Moreover, in his concurrence, Justice Powell made clear that the Court's holding was limited and hardly foreclosed a constitutionally mandated reporter's privilege.[117]

The Court has not revisited the issue,[118] and in light of such ambiguous precedent from a case where the Court refused to recognize the reporter's privilege, lawmakers and commentators have expressed uncertainty about how far the privilege extends under the Constitution.[119] As a result, several state legislatures have enacted shield-law statutes granting journalists an absolute privilege beyond the scope of the First Amendment.[120] Such is the case in New Jersey, which boasts a notably broad reporter's privilege statute[121] and whose legislature has repeatedly amended and expanded that shield law in response to judicial constrictions.[122] The result is a

109. *Id.* at 462.
110. 408 U.S. 665 (1972).
111. *Id.* at 667–68.
112. *Id.* at 668.
113. *Id.* at 667.
114. *Id.* at 681.
115. *Id.* at 700.
116. *Id.* at 706.
117. *Id.* at 709–10 (Powell, J., concurring).
118. RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 25:23 (2010).
119. Toland, *supra* note 10, at 462.
120. *See Developments in the Law*, *supra* note 15, at 998.
121. *See id.* at 1002.
122. Maressa v. N.J. Monthly, 445 A.2d 376, 381–82 (N.J. 1982). The state's shield law dates to 1933. *In re* Woodhaven Lumber & Mill Work, 589 A.2d 135, 139 (N.J. 1991).

codified reporter's privilege that the state's supreme court has deemed to be at once "absolute" and "comprehensive."[123]

Nevertheless, the state supreme court's holding in *Too Much Media* shows that the New Jersey reporter's privilege may not be so sweeping.[124] It also reveals how the new-media age blurs the lines of many supposedly broad state shield laws, and it encourages lawmakers to better define the limits of the reporter's privilege.

V. ANALYSIS

In *Too Much Media*, the Supreme Court of New Jersey correctly determined that someone who is not a traditional journalist may still qualify for shield-law protection, but it failed to conclusively clarify when a person who disseminates news on the Internet might successfully invoke the reporter's privilege. Several courts have rightfully recognized that the reporter's privilege potentially protects a wide array of news gatherers.[125] Their holdings have found footing in Justice White's opinion in *Branzburg*, where, in dicta, he averred that "[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."[126]

But could Justice White have meant to include publications housed in a digital universe that he could have barely foreseen? The *O'Grady* court was the first to confront whether the reporter's privilege extends to the Internet,[127] a medium whose reach and importance has grown exponentially since *Branzburg*.[128] In granting shield-law protection to the proprietor of an online magazine, the *O'Grady* court reasonably analogized certain types of Internet

123. *Maressa*, 445 A.2d at 382.

124. *See supra* notes 86–87 and accompanying text (noting how the court called the state shield law "among the broadest in the nation" in one breath and how it opted to narrowly construe the statute in the next).

125. Too Much Media, LLC v. Hale, 993 A.2d. 845, 854–55 (N.J. Super. Ct. App. Div. 2010), *aff'd and modified*, 20 A.3d 364 (N.J. 2011).

126. Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell v. Griffin, 303 U.S. 444, 452 (1938)). Justice White elaborated: "The informative function asserted by representatives of the organized press in the present cases is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.* at 705.

127. *See Too Much Media*, 993 A.2d. at 857.

128. Having originated with the U.S. government's creation of the Advanced Research Projects Agency Network (ARPANET) in 1969, the Internet was in its infancy when the Court decided *Branzburg* in 1972. *Birth of the Internet: Internet History*, EXPLORE THE INTERNET, http://smithsonian.yahoo.com/internethistory.html (last visited Jan. 10, 2012).

publications to their print counterparts.[129] Four years later, when it evaluated a defendant who did not operate a magazine-like website, the intermediate appellate court in *Too Much Media* wisely built on *O'Grady* by incorporating into its reasoning the *von Bulow* intent test for traditional news gathering.[130] Then, the state supreme court avoided including in its opinion a reporter's purpose to collect and disseminate news[131]—a regrettable decision because gathering information with the intent to report it is a key characteristic that separates a traditional journalist from a lay letter-to-the-editor writer or message-board commenter.[132]

Nonetheless, viewed along with *O'Grady*, *Too Much Media* lends an initial burst of clarity to the question of whether Internet reporters may successfully invoke shield laws. State courts that choose to follow the Supreme Court of New Jersey's holding in *Too Much Media* will now likely grant the reporter's privilege to a person who operates an Internet site that resembles a traditional news publication.[133] Still, a vast population of Internet writers resides somewhere between a message-board poster like Shellee Hale and a web-magazine publisher like the one in *O'Grady*. Who among those people in the middle merit shield-law protection?[134] Given the continued growth of and reliance on the Internet and web-based news media,[135] that question must be answered, lest speech be chilled in cyberspace and beyond.

Like Justice White in *Branzburg*,[136] commentators have noted that shield laws, the reporter's privilege, and the First Amendment's

129. O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 103 (Ct. App. 2006) ("[P]etitioners' Web sites are highly analogous to printed publications: they consist . . . of text on 'pages' which the reader 'opens,' reads . . . and 'closes.'").

130. *See supra* Part III.A.

131. *See supra* Part III.B.

132. *See supra* notes 69–70 and accompanying text; *see also* Jonathan Askin, *New Jersey's "Too Much Media" Opinion Might Mean Too Little New Media*, HUFFINGTON POST (June 9, 2011, 1:30 PM), http://www.huffingtonpost.com/jonathan-askin/new-jerseys-too-much-medi_b_874021.html ("It shouldn't really matter where a journalist posts comments—all that should matter is the intent of the commenter to expect protection as a journalist.").

133. *See supra* notes 89–90.

134. *See* Benjamin J. Wischnowski, Note, *Bloggers with Shields: Reconciling the Blogosphere's Intrinsic Editorial Process with Traditional Concepts of Media Accountability*, 97 IOWA L. REV. 327, 336 (2011) (noting that, in the wake of *Too Much Media*, there is an "absence of judicial consensus over what constitutes [online] journalism worthy of protection").

135. *See* Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1448–50 (2006).

136. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

freedom of the press apply equally to the corporate journalist and the "lonely pamphleteer."[137] The latter celebrated folk archetype calls to mind Thomas Paine, whose frank and widely circulated *Common Sense* pamphlet helped ignite the American Revolution.[138] In the Internet age, commentators argue, web reporters such as bloggers may well be the latest bearers of Paine's mantle.[139] Truly, the free flow of ideas now exists in cyberspace, where, as the Supreme Court has noted, any person with an Internet connection may become a publisher.[140] If the press is an adjunct to this nation's way of government, then democracy today lives, in large part, on the Internet.[141]

Indeed, digital news outlets, particularly blogs, are increasingly present and vital in contemporary society.[142] Their rise has been swift and staggering. For example, the word "blog" first appeared in 1999.[143] By 2004, it had become Merriam-Webster's "number one" word of the year.[144] In 2005, the White House first issued a press pass to a blogger.[145] In 2006, an estimated sixty million blogs populated the Internet.[146] And by that time, bloggers and other web-based citizen journalists had broken landmark stories like President Clinton's affair with Monica Lewinsky and Dan Rather's reliance on forged documents regarding President Bush's military tenure[147]—efforts that mirrored the *Washington Post*'s Watergate investigation and the *New York Times*'s publication of the Pentagon Papers.[148] Today, the barriers between new media and traditional news media have all but disappeared: leading mainstream news organizations

137. *See, e.g.*, Macrander, *supra* note 24, at 1088.

138. *See* DANIEL J. BOORSTIN & BROOKS MATHER KELLEY, A HISTORY OF THE UNITED STATES 78–79 (David R. Zarowin ed., 1990).

139. *See, e.g.*, Macrander, *supra* note 24, at 1088–89. Because the term "blogger" is commonly used as a shorthand identifier of an Internet-based journalist, this Comment uses the word freely.

140. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 853 (1997).

141. *See* John Doe No. 1 v. Cahill, 884 A.2d 451, 455 (Del. 2005).

142. *See* Troiano, *supra* note 135, at 1448–50.

143. *Blog*, MERRIAM-WEBSTER 133 (11th ed. 2008), *available at* http://www.merriam-webster.com/dictionary/blog.

144. *Merriam-Webster Announces 2004 Words of the Year*, MERRIAM-WEBSTER (Nov. 2004), http://www.merriam-webster.com/info/pr/2004-words-of-year.htm.

145. Katharine Q. Seelye, *White House Approves Pass for Blogger*, N.Y. TIMES, Mar. 7, 2005, http://www.nytimes.com/2005/03/07/technology/07press.html.

146. Troiano, *supra* note 135, at 1448.

147. *See* Toland, *supra* note 10, at 481.

148. *See* BOORSTIN & KELLEY, *supra* note 138, at 706–08.

boast elaborate websites with an impressive number and variety of blogs and other features.[149] Certainly, Internet news forums are no longer outlets that lawmakers can dismiss.[150]

Nonetheless, while *Too Much Media*'s holding clearly demands shield-law protection for a blog housed on the *Los Angeles Times*'s website—or, more to the point, the Newark *Star-Ledger*'s—its application elsewhere is less obvious. What about a blog on a website operated by a lay citizen who is devoted to reporting the latest news in dog care?[151] What if a story with a historical value akin to that of the Lewinsky scandal were first reported on such a site?[152] What if Shellee Hale's Pornafia had published a story or two? Would the reporter's privilege have eluded her under those circumstances?[153] Maybe not.

Because bloggers are increasingly important members of the press and because different types of bloggers exist, the scope of shield laws must be broadened and better defined. But several obstacles stand in the way of reaching that goal. First, there exists a persistent popular perception that bloggers are pajama-clad pranksters who write from dingy basements.[154] To many, blogging thus remains a less noble pursuit than traditional journalism is.[155] Second, what many blogs consider "news" is often what fans of

149. *See, e.g.*, *Blog Directory*, N.Y. TIMES, http://www.nytimes.com/interactive/blogs/directory.html (last visited Jan. 9, 2012) (offering scores of different blogs). Notably, in 2010, the *New York Times*'s blog roster grew when the old-media institution started hosting the popular political blog FiveThirtyEight.com, which had gained fame for the accurate computer-generated election predictions that it had produced as a stand-alone site for more than two years. *See* Nate Silver, *Welcome (and Welcome Back) to FiveThirtyEight*, N.Y. TIMES (Aug. 25, 2010, 11:25 AM), http://fivethirtyeight.blogs.nytimes.com/2010/08/25/welcome-and-welcome-back/.

150. *See* O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 100 (Ct. App. 2006).

151. *See, e.g.*, DOG BLOG, http://funstufffordogs.wordpress.com (last visited Jan. 9, 2012).

152. To be sure, in response to the Supreme Court of New Jersey's *Too Much Media* decision, one commentator wondered whether real-time Twitter reports about 2011's Arab Spring uprisings would come under New Jersey's shield law and determined that the court's "opinion suggests that they would not." Askin, *supra* note 132.

153. The Supreme Court of New Jersey explicitly refused to decide "whether Pornafia might some day fall within the Shield Law." Too Much Media, LLC v. Hale, 20 A.3d 364, 380 (N.J. 2011).

154. *See* Macrander, *supra* note 24, at 1088–89; *see also In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005) (referring to "the stereotypical 'blogger' sitting in his pajamas . . . posting on the World Wide Web").

155. As a former longtime print journalist for a major media corporation who once conducted an important interview while wading in an ocean and wearing a bathing suit, I stand up in my swim trunks to say that traditional reporters in fact may not be substantially more sophisticated than bloggers are. *See* Joshua Rich, *Gentlemen Don't Prefer Bonds*, ENT. WKLY., Aug. 19, 2005, at 98.

conventional media outlets view as trivial or illegitimate.[156] Third, traditional journalists may wonder if expanding the scope of shield laws to encompass the aforementioned pajama-clad pranksters would devalue the reporter's privilege.[157] Finally, some skeptics fear potential abuse: conceivably, a person who does not want to testify before a grand jury could simply spend three minutes setting up a blog and then invoke a shield law.[158]

Such concerns may only be alleviated by a clearer description of the scope of the reporter's privilege. But as long as courts fail to concretely define the actions that merit shield-law protection, legislatures will have to do as the Supreme Court of New Jersey suggested[159]: update their statutes to cover Internet reporters in the digital age.[160] As one commentator has noted, "only affirmative legislation could ever truly assure bloggers of coverage."[161] Failure to enact statutory protections may silence citizen journalists who bear information that could prove vital to democracy.[162]

So where should legislatures draw the line between bloggers who deserve shield-law protection and those who do not? As both the intermediate appellate court and the state supreme court in *Too*

156. *See* O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 97 (Ct. App. 2006); *see also* Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 406 (2006) (reporting that Sen. Richard Lugar, who once cosponsored a federal shield-law bill, said that bloggers are probably not "real journalists"). *But see* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1062–63 (2009) (noting that courts have routinely deferred to media defendants' determinations of newsworthiness).

157. Mary Pat Gallagher, *Blogger Sued for Defamation Can't Invoke Shield Law, Says N.J. Judge*, N.J. L.J., July 13, 2009, at 177.

158. *See* Macrander, *supra* note 24, at 1088–89; *see also* Toland, *supra* note 10, at 462–63 (discussing how the Bush administration worried that if anyone connected to the Internet could possibly be deemed a journalist, a shield law encompassing bloggers might unwittingly protect "spies or terrorists").

159. *Supra* note 105 and accompanying text.

160. Historically, state legislatures have been flexible in that regard: they clarified the reporter's privilege to include radio and television journalists at a time when many considered journalism to be strictly a print medium. *Developments in the Law*, *supra* note 15, at 1002. Today, while many statutes enumerate traditionally protected entities—like newspapers, magazines, journals, and broadcasters—they are also open to others. *Id.* Thus, determining whether a shield law covers an online-only news outlet depends on whether a court deems the site to be sufficiently similar to a conventional newspaper, magazine, journal, or broadcaster. *Id.*

161. *Id.* at 1004.

162. *See generally* M.P. McQueen, *Bloggers, Beware: What You Write Can Get You Sued*, WALL ST. J., May 21, 2009, at D1 (discussing that, while Shellee Hale's personal umbrella insurance policy covered her litigation expenses, bloggers facing an ever-increasing number of lawsuits must now purchase special coverage to handle mounting legal costs).

Much Media aptly held, shield-law protection should not extend to bloggers who simply identify themselves as journalists.[163] Thus, legislatures should start by incorporating the guidelines that the intermediate appellate court employed—the *von Bulow* news-gathering intent test and the *O'Grady* factors for when a website resembles a traditional news outlet[164]—because the state supreme court's opinion and its plain-meaning interpretation of New Jersey's shield law were far too narrow.[165]

Then, lawmakers should go even further. State legislatures should specifically define the term "journalist" and thereby clarify laws that have grown confusing in the Internet age. To do so, they would be wise to invoke certain commonly held practices that stand as hallmarks of professional journalism. A useful guide is the 103-year-old Society of Professional Journalists' "Code of Ethics."[166] Under that lengthy list of rules, reporters must give their news subjects the chance to "respond to allegations of wrongdoing," they must evaluate their "sources' motives before promising anonymity," and they must "[d]istinguish between advocacy and news reporting."[167] A blogger who follows these standards should fall under the definition of a journalist who merits shield-law protection. But a message-board commenter like Shellee Hale, who fails to give his or her subject the opportunity to respond to attacks—among other journalistic failures—should not qualify for the privilege.

Distinguishing between protected and unprotected Internet reporters offers several benefits. It can alleviate many of the aforementioned obstacles associated with bringing bloggers into the journalistic fold, it would codify a difference between bloggers who work in their figurative pajamas with no journalistic purpose and those who at least act as if they wear business attire, it would protect the reporter's privilege against devaluation, and it would remove the risk that someone may set up a blog in three minutes and evade a subpoena. It might also improve the public's opinion of web-based journalists and the news that they convey. Most importantly,

163. *See* SMOLLA, *supra* note 118, § 25:27.50; *see supra* notes 67, 89, and accompanying text.

164. *See supra* Part III.A.

165. *See supra* Part III.B.

166. SOC'Y OF PROF'L JOURNALISTS, SPJ CODE OF ETHICS 1 (1996), *available at* http://spj.org/pdf/ethicscode.pdf.

167. *Id.*

clarifying the lines between different types of online newspersons would help courts apply the reporter's privilege in Internet-based actions, which will undoubtedly increase in number as the digital era progresses.[168]

VI. CONCLUSION

The Supreme Court of New Jersey's decision in *Too Much Media* was a tentative step toward expanding and clarifying the scope of the reporter's privilege in the digital age. But as bloggers who adhere to standard journalism practices and intend to report information on websites that resemble traditional news outlets become more vital to the gathering and disseminating of news, courts and legislatures must grant them the same privileges that traditional journalists enjoy. Legislatures must also use specific language to delineate the differences between Internet-based reporters who merit shield-law protection and those who do not. Failure to clarify the law

168. Predictably, some online journalists disliked the Supreme Court of New Jersey's *Too Much Media* decision. *E.g.*, Mike Masnick, *NJ Supreme Court Can't Comprehend That Everyone* Can *Be a Journalist*, TECHDIRT (June 8, 2011, 8:27 AM), http://www.techdirt.com/articles/20110607/19192414597/nj-supreme-court-cant-comprehend-that-everyone-can-be-journalist.shtml (arguing that the supreme court "tragically upheld the lower court rulings" and that it should have focused on the process of reporting rather than on the venue where the news was published). But others saw the high court's opinion as "mak[ing] it easier for individuals associated with online publications and traditional media to invoke the protections of the state's shield law." Aaron Mackey, *N.J. Shield Law Not Limited to Professional Journalists*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (June 7, 2011, 6:04 PM), http://www.rcfp.org/node/98283. Still, others noted that *Too Much Media* was only the first part of a longer discussion regarding this issue. *E.g.*, Ian Tennant, *New Jersey Supreme Court Rules Shield Law Does Not Apply to Blogger*, JOURNALISM IN THE AMERICAS BLOG (June 9, 2011, 10:59 AM), http://knightcenter.utexas.edu/blog/new-jersey-supreme-court-rules-shield-law-does-not-apply-blogger (quoting New Jersey Press Association representative Bruce Rosen as saying that "[t]his conversation is going to go on for years, but it's a good place to start"). Indeed, a judge on the U.S. District Court for the District of Oregon added fuel to the fire in November 2011 when he ruled that a blogger was not a journalist who merited the protection of Oregon's shield law in part because, "although defendant is a self-proclaimed 'investigative blogger' and defines herself as 'media,' the record fails to show that she is affiliated with any newspaper, magazine, periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." Obsidian Fin. Grp., LLC v. Cox, No. CV-11-57-HZ, 2011 U.S. Dist. LEXIS 137548 (D. Or. Nov. 30, 2011). That decision prompted the online edition of *The New York Times* to publish a feature in which scholars and practitioners debated whether bloggers are journalists who merit shield-law protection. *Are All Bloggers Journalists?*, N.Y. TIMES (Dec. 11, 2011), http://www.nytimes.com/roomfordebate/2011/12/11/are-all-bloggers-journalists. Clearly, the conversation continues. *See* Shellee Hale, *Let's Add the Context*, Comment to *NJ Supreme Court Can't Comprehend That Everyone* Can *Be a Journalist*, TECHDIRT (June 11, 2011, 4:58 PM), http://www.techdirt.com/articles/20110607/19192414597/nj-supreme-court-cant-comprehend-that-everyone-can-be-journalist.shtml ("I believe this will be debated for years.").

in this area would muffle the public discourse, undermine the expansive protections of the First Amendment, and threaten the freedom of the press that has always served as a bedrock of American democracy.