

The Fourth Estate and the Fake Estate: Brexit, Trump and the rise of Populism

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What do recent political developments mean for the press and democracy in Europe and America? Why has it been so difficult to cover - predict - Trump, Brexit and other populist movements? How should the press and judiciary respond to the problem of fake news?

Introduction

Everyone is talking about fake news in our “post-truth” world; in fact, “fake news” and “post-truth” have been used so often that each was voted “Word of the Year” in 2016 by the Macquarie² and Oxford³ dictionaries.

The initial problem for the press and judiciary is that populists like Nigel Farage⁴ and President Trump⁵ claim that the institutions of power and indeed the press itself – the “fourth estate”⁶ – are the fake news peddlers, and that it is the populists who are the ones telling the truth in our brave new world.

The question of the role “fake news” played in the traditional media’s failure to predict the Brexit and Trump results has been much commented upon⁷, but many people, including Brexit and Trump supporters, made the same mistake. The bigger issues for the traditional media are now loss of market, as well as of authority, to these new sources, with the advance of what Megan McArdle calls “the online mobs”⁸ as the purveyors of what the news is or should be.

There are different issues for the judiciary, which is faced with not merely populist criticism but even outright attack. One example was Nigel Farage calling for 100,000 people to march

¹ An earlier version of this discussion paper (“Freedom of speech, fake news and alternative facts in a post-truth world”) was given for the Law Council of Australia on 30 March 2017 and published by the *Gazette of Law and Journalism*. I have also included material from “Judges, Tabloids and Trial by Media”, which I presented at the 56th Annual Congress of the Union Internationale des Avocats in 2012.

² ““Fake news” named word of the year in Australia by Macquarie Dictionary”, *the Guardian*, 25 January 2017, <https://www.theguardian.com/australia-news/2017/jan/25/fake-news-named-word-of-the-year-by-macquarie-dictionary>. The runner-up was “halal snack pack”.

³ <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>. (Runners-up included “Brexiteer” and “alt-right”).

⁴ Nigel Farage calls a report in the Guardian “fake news” <http://time.com/4801025/nigel-farage-donald-trump-russia-brexit/> (1 June 2017).

⁵ To quote President Trump: “We are fighting the fake news, it is fake, phoney, fake...the enemy of the people”: <http://www.telegraph.co.uk/news/2017/02/24/donald-trump-says-fake-media-enemy-people-have-no-sources/>.

⁶ Edmund Burke foreshadowed the power of the traditional print press when he referred to them as the “a Fourth Estate more important far than they all”. (Oscar Wilde later complained that the fourth estate “has eaten up the other three”: “The Soul of Man under Socialism”, 1891

⁷ For one of many articles on this issue, see Andrew Grice, “Fake news handed Brexiteers the referendum – and now they have no idea what they’re doing”, *the Independent*, 18 January 2017.

⁸ Megan McArdle, *Bloomberg*, 22 August 2017, “We live in fear of the online mobs”, <https://www.bloomberg.com/view/articles/2017-08-22/we-live-in-fear-of-the-online-mobs>

on the Supreme Court, warning that failure by those judges to give what he called “the right answer” would result in “political anger the likes of which none of us in our lifetimes have ever witnessed”⁹. President Trump similarly upped the ante with his sneers at “so-called”¹⁰ judges. Similar language occurs in tabloids such as the *Daily Mail*, which called the Brexit judges “enemies of the people”, but not at the same attack level. For these are, in fact, attacks: populist or tabloid, the language used is not the language of debate, but of war.

The battle is about being seen as the party in possession of the truth. References by Nigel Farage and President Trump to “fake news” are only the surface issue; the real challenge is to the professionalism and code of ethics which underpin the media and, for that matter, the courts and the law.

The trouble is that, to these “online mobs”, truth and falsity are not black and white, but now come in fifty shades of grey. They operate outside a code of ethics based upon a responsibility to report the news objectively. The new populist spokespersons will not be stopped by something as simple as a second Leveson inquiry, legislation or adverse court rulings.

The first question is how to define truth and falsity in our post-truth world.

What is “true”?

In “The Importance of Being Earnest”, Algernon Moncrieff warns Ernest Worthing that “the truth is rarely pure and never simple”¹¹. That is certainly borne out by some of the newly-minted language used to describe truth in political debate. Here are some examples:

a. **Inconvenient truth:** “An Inconvenient Truth” is the title of former Vice President Al Gore’s Oscar-winning documentary on environmental issues, but it has now come to be used more widely, with the inference that an opponent is dishonestly trying to hide from or avoid information known to contradict his/her position¹². Perhaps by reason of its climate-change history, this epithet seems to be thrown by those to the Left at those to the Right.

b. **Alternative truth and alternative denial:** In mathematics, an alternative truth refers to those rare questions for which there are two equally valid answers, for example the second solution of a quadratic equation, or Schrodinger’s Cat¹³. In propositional calculus, alternative denial is a term used to refer to the connective “NAND” (not = and) where the answer yielded is true when it should be false, or vice versa. In law, an alternative denial plea is a rare (but impermissible) method of not admitting and denying as alternatives: *Hunter Helicopter Charters Pty Ltd v ACN 133 019 093 Pty Ltd & Ors* [2017] QDC 62 at [14] –

⁹ “Farage to lead 100,000 strong march”, *the Telegraph*, 7 November 2016, <http://www.telegraph.co.uk/news/2016/11/06/nigel-farage-to-lead-100000-strong-march-on-supreme-court-on-day/>.

¹⁰ David Cole, “‘So-called’ judges trump Trump”, 10 February 2017, *Washington Post*.

¹¹ Oscar Wilde, “The Importance of Being Earnest”, 1895, Act 1.

¹² For an example of the use in a political context see *the Guardian*, 29 March 2017: <https://www.theguardian.com/politics/2017/mar/28/scottish-parliament-votes-for-second-independence-referendum-nicola-sturgeon>.

¹³ Schrodinger’s cat is a paradox where it is unknown whether a cat (inside a locked box with poisonous material) is alive or dead. Until the box is opened, the cat could be either alive or dead, although the cat clearly cannot be both at the same time. The question is when does a quantum system stop existing as a superposition of states and become one or the other (the answer, according to the Copenhagen interpretation, is when observation takes place).

[15], citing *Green v Pearson* [2014] QCA 110. In politics, could these legal and mathematical concepts be the inspiration for politicians to try out self-justifying labels like “alternative facts” and “alternative truths” (see (c) below)?

c. **Alternative facts:** This was the term used by Kellyanne Conway’s to resolve Sean Spicer’s estimate of the numbers of persons at the Presidential Inauguration when it clearly conflicted with photographic evidence¹⁴. The degree of ridicule which followed has reduced this term to a form of insult, generally from Left to Right¹⁵.

d. **Post-truth:** “Post-truth” is defined by the Oxford Dictionary as something “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”. Wikipedia defines “post-truth” in a political world as being a debate framed in emotional terms disconnected from policy, reinforced by repetition ignoring fact-based rebuttal and where the expert must share the floor with the amateur in a “Doctor Google” world.

e. **Truthiness:** A word the Oxford Dictionary notes was invented by Stephen Colbert in 2005, it means going on one’s gut instinct rather than doing any research. “Truthiness” was voted Word of the Year in 2005 by the Dialect Society and in 2006 by the Merriam-Webster Dictionary, but in recent years appears to have fallen into disuse. It was cited in the free speech case *Susan B. Anthony List v. Driehaus*, 573 U.S. (2014) where a pro-life politician brought proceedings following publication of claims he supported abortion. In a subsequent Supreme Court decision (*Susan B. Anthony List v. Ohio Elections Commission*), Black J stated: “We do not want the government (i.e., the Ohio Elections Commission) deciding what is political truth”.

f. **Ministry of Truth:** The oldest of these terms is George Orwell’s “Ministry of Truth”¹⁶. In a truly scary example of life imitating art, “Ministry of Truth” has become a term of art in China, where netizens have developed an entire vocabulary to avoid bureaucratic censure. The “Ministry of Truth” (真理部)¹⁷ is a sarcastic reference to the many directives journalists receive from the Chinese government about how to report news (sometimes referred to as “mini-trues”).

g. **The war on truth:** The term “the war on truth” received wide currency after a book of this name outlined conspiracy theories about 9/11. In her 2017 account of the 2016 Presidential election,¹⁸ Hillary Clinton describes what she calls President Trump’s “war on truth.” “War” references of this kind are often found in the language of populism because of the cult of the hero and the “disagreement is treason” elements in populist thought.

¹⁴ Here is Ms Conway’s explanation of alternative facts in a political context:

<http://edition.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/>. Whether Ms Conway was in fact intending to refer to the mathematical principles relevant to quadratic equations is unknown, but Mr Spicer’s estimates of the number of persons at the inauguration suggest he is not very good with numbers

¹⁵ There is already at least one book at Amazon about life after Trump which is called “Alternative Truths”

¹⁶ George Orwell, “Nineteen eighty-four”, London, 1949. Sales have increased since Donald Trump was elected, according to the *New York Times*.

¹⁷ “Ministry of Truth” is one of the “Word of the Week” series in the China Digital Times, which records these neologisms: <http://chinadigitaltimes.net/2012/08/word-of-the-week-ministry-of-truth/>.

¹⁸ Hillary Clinton, “What happened”, New York, 2017.

What these new words, and their meanings, show is that the shift in meaning as to what is “true” is contextual, in that the speaker chooses the facts he or she wants to believe, rather like a true innuendo meaning in defamation.

For example, what is true for United States Press Secretary Sean Spicer, in terms of how many people he says attended the Presidential Inauguration, may not be true for another person, such as anyone who saw the photographs of the inauguration. The question is not merely whether one is “truer” than the other, but whether, like Schrodinger’s Cat¹⁹, both can exist at the same time in some alternate world or worlds.

Another variation on this theme is the “you can’t handle the truth”²⁰ approach, where the truth is withheld from lesser persons not entitled to know it because they would not understand.

Small wonder that fact-checking sites are now some of the most consulted sites on the internet²¹.

This is only the beginning of the question of what is true (or false) under this new regime of populist thought. The bigger question is what is false, or “fake news”?

What is “fake news”?

According to *Opensources*²², fake news sources are “sources that entirely fabricate information, disseminate deceptive content, or grossly distort actual news reports”. There is even a *Fake News Show* on YouTube²³.

Calling a political opponent a liar (or worse) is nothing new in politics. While the term “fake news”, may be new, politicians have long been adept at finding ways of dismissing opponents’ arguments with a variety of similar pithy phrases, the best known of which is probably the Churchillian phrase “terminological inexactitude”.²⁴

Fake news comes in different flavours. Fake news had for some time been known to be published by online entrepreneurs to cash in on advertising revenue from clicks on the site²⁵, but it was then more controversially used to spread false stories about political opponents, particularly in the 2016 United States Presidential election. One example is the completely

¹⁹ For an explanation of this simile in popular usage, see <http://www.independent.co.uk/news/uk/home-news/schr-dingers-cat-walks-into-a-bar-and-doesnt-the-experiment-explained-and-topical-jokes-on-126th-8757514.html>.

²⁰ This is a quotation from the 1989 film “A Few Good Men”, where the General (played by Jack Nicholson) presciently warns a military legal officer played by Tom Cruise: “You can't handle the truth! Son, we live in a world that has walls. And those walls have to be guarded by men with guns. Who's gonna do it? You? You, Lt. Weinberg? I have a greater responsibility than you can possibly fathom...”

²¹ See the Hewlett Foundation’s 2015 report: <https://www.hewlett.org/truth-in-politics-misinformation-and-the-fact-checking-movement/>.

²² Cited in the list of definitions at the University of Toronto website, which also lists the top five fake news stories for 2016: <http://guides.library.utoronto.ca/utmlacadfakenews>. For a list of fake news websites see Wikipedia, https://en.wikipedia.org/wiki/List_of_fake_news_websites.

²³ The Fake News Show” can be accessed on YouTube at: <https://www.youtube.com/watch?v=eTMhPkaF1z0>.

²⁴ Winston Churchill’s use of this phrase is noted in *the Guardian*, “Alternate facts and qualified truths”, 26 January 2017: <http://www.bbc.com/news/uk-scotland-scotland-politics-38764003>.

²⁵ BBC, “The city getting rich from fake news”, 5 December 2016, <http://www.bbc.com/news/magazine-38168281>.

false “Pizzagate” reports, where grave allegations of child sex rings were made against Democrats²⁶, but these allegations, such as the “birther” controversy concerning President Obama, were spread in the two previous US elections.

However, the most common use of the term “fake news” is as a standard non-response from all sides in politics and, as a result, the value of this pejorative term has changed from connoting a falsehood to being an attempt not to answer an opponent’s charge.

Although there are not yet any judgments offering a legal definition of “fake news”, the concept of “false news” is already known to the law by reason of its use in criminal law legislation, principally in relation offences aimed at racial hatred and to Holocaust denial.

“Fake news” is, however, better known in journalism in recent years, thanks to tabloid journalists who, well before Trump and Brexit, used “dark arts” and/or fake news to write sensational and/or fake stories. Some of the tabloids even made up fake journalist names to go with these stories²⁷. There has been very little consideration given to whether fake news spreaders learned their skills from tabloid excesses of the kind outlined by Nick Davies in “Flat Earth News” (London, 2009).

The question is whether the methods of dealing with these issues in the past, such as inquiries and legislation, will be able to work in the age of populism.

What is “populism”?

Attempts to define “populism” involve buying into an ongoing heated debate, mostly between American academics, as to whether it describes a genuine political movement (such as the US People’s Party of the late nineteenth century)²⁸ or is an illustration of the “paranoid style” seen throughout America’s conspiracy-fuelled political history.²⁹

In the first chapter of his book (“The Populist Monster”), Walter Nugent describes populism as a trend that “has adhered in American culture” and populists as simple folk who have been misdescribed as monsters just because they have “no respect for elites” or “fancy people”³⁰.

²⁶ For one of many lists of the top fake political news stories, see https://www.buzzfeed.com/craigsilverman/top-fake-news-of-2016?utm_term=erR4kIPxQ#.unyv7OI5m.

²⁷ Entire books about fake news at *News of the World* include Ian Cutler’s “Camera Assassin” series of exposés, which included fake stories about immigrants and dole bludgers (see *Camden New Journal*, <http://www.camdennewjournal.com/letters/2011/jul/forum-rupert-murdoch-he-was-real-card>) and Stuart Grayson’s account of the Beast of Bodmin in “Don’t Ask, Don’t Get”, published in 2008. Fake journalists include *News of the World*’s ‘Edward Trevor’ (see *Media Matters*, 5 April 2012), *The Star*’s “Tony Leonard” (outed by the *Sun* in 2003) and a series of other fakes outed by *the Telegraph* in an article dated 18 December 2003, including the amusingly named Imogen Faux.

²⁸ Walter Nugent, “The Tolerant Populists”, 2nd edition (2013), Chicago University Press, decrying attempts to connect populism with “Ross Perot or the Tea Party” (at pp 19 – 20) (“Walter Nugent”; Charles Postel, *The Populist Vision*, 2007, Oxford University) (“Charles Postel”) at 12.

²⁹ Richard Hofstadter, “The Paranoid Style in American Politics”, 1964, Harvard University Press (“Hofstadter”); this publication can be read in its entirety here: <https://blog.lix.cc/wp-content/uploads/2011/05/Hofstadter-Paranoid-Style-American-Politics.pdf>.

³⁰ Nugent, at p. 56. To carry forward Nugent’s “monster” analogy, in horror film social structure, this would make the idle and dinner-suited rich the vampires while their victims are the zombies at the bottom of the heap. This may sound ridiculous, but it should be remembered that Trump’s targeted advertising in zombie television shows was an important factor in his electoral success: Peter Bradshaw, “It’s official: *The Walking Dead* helped

Charles Postel helpfully adds that populism, although at first blush appearing to be based on religious fundamentalism, in fact is “an unusual coalition of religious belief and nonbelief”.³¹

However, the extraordinary prescience of Richard Hofstadter’s explanation of the role of paranoia in American political history must, in my view, explain populism in general and Trump in particular. Hofstadter’s opening paragraph warns that although American political life has rarely been the subject of significant conflict, “it has served again and again as an arena for uncommonly angry minds”, especially on the part of the extreme right, which has shown “how much political leverage can be got out of the animosities and passions of a small minority”. The question is how that angry minority came to capture the debate and to dictate what truth and falsity was to the rest of the population, in circumstances where obviously false or irrelevant material was very widely circulated on the internet not only by that angry minority but by vested interests, including vested interests in other countries.

Do the election of President Donald Trump and the Brexit referendum owe their success to populism and, if so, what drove it?

However populism is defined, the answer to the first of these questions must be “yes”. The answer to the second of these questions is, however, more problematic. According to R F Inglehart and P Norris, the authors of “Trump, Brexit and the Rise of Populism: Economic Have-Nots and the Cultural Backlash”³², there are two main theories:

- (a) the “economic insecurity perspective”, which identifies the losers in the post-industrial and technology revolution, and
- (b) the “cultural backlash” theory that populism is a reaction by the once-dominant group (whites, coalmines) to regime change and/or loss of status.

Inglehart and Norris go for (a). However, others, such as Sara B Hobolt, prefer the economic “losers” theory, at least in relation to the Brexit vote.³³

Populists have not confined their anger to the political process. The courts are increasingly a target. How will populism interact with the court process of fact finding, to which findings of truth and falsity are integral?

Populism and the courts

The responses of representatives of the populist movement to the Brexit judgment in the United Kingdom and of President Trump to a series of judges in the United States have been the subject of wide discussion which does not need repetition here.

How can judges deal with populist attack for being soft on terrorism (or crime), or of being judicial activists (or too passive), or of otherwise being out of touch with the community?

elect Donald Trump”, *the Guardian*, 24 November 2016, <https://www.theguardian.com/commentisfree/2016/nov/23/walking-elect-dead-trump-immigration-zombies>.

³¹ Postel, at p. 78. Fareed Zakaria’s analogy of football fanaticism is insightful: <http://edition.cnn.com/2017/07/31/opinions/why-trump-won-zakaria/index.html>; see also http://cf.linnbenton.edu/artcom/social_science/clarkd/upload/Populism%20on%20the%20March.pdf.

³² R F Inglehart and P Norris, accessible at <https://mail.google.com/mail/u/0/#inbox/15e744df0f6f89c4?projector=1>.

³³ Sara B Hobolt, “The Brexit vote: a divided nation, a divided continent”, (2016) *Journal of European Public Policy* 1259.

Two of Australia's most senior judges have considered these issues in some detail and, rather than set out at length what they say, I attach links to their articles in the footnote below³⁴.

A recent Australian example of judges responding to political pressure can be seen in the Court of Appeal of the Supreme Court of Victoria's response to social media criticisms by members of parliament concerning sentencing patterns for terrorism offences. It is not possible to do justice to these events in detail in this discussion paper but, after the Court of Appeal judges summoned the offenders (now informally referred to as "The Yarra Three") to court for an apology, harmony was restored – for now.³⁵

The principal problems that judges have with the "populist" approach to the courts arise from the reporting of news, not by journalists, but by members of the public on social media, now seen as a right by any member of the public with access to a computer or phone. As a result, the role of the fourth estate in reporting court proceedings is increasingly eroded by what I call "the fake estate" – persons with a vested interest in the outcome, such as the litigants, PR firms, blog gurus and social media stars – the standards for court reporting will inevitably drop.

What should courts do in response? Should they have their own social media pages? How about live streaming of trials? Are any of these problems solved by e-courts? Will judges be replaced by artificial intelligence machines?³⁶ These are complex issues falling outside the ambit of this discussion paper, but I particularly note the retirement speech of the Chief Justice of the Supreme Court of Victoria, her Honour Justice Marilyn Warren on 28 September 2017. Her Honour recommends that courts eschew politicians and media alike, and speak directly to the public through social media. Will courts express views on populist issues in the future, such as appropriate legislation?

This brings me to one of the biggest items on the populists' "to do" list, namely calls for legislation aimed at discouraging racial and religious vilification to be repealed. I see this as significant because language likely to attract this kind of penalty is generally at the extreme right wing end of the political spectrum and would not feature in responsible mainstream journalism. Some recent Australian judgments (*Toben v Jones* [2009] FCAFC 104; *Toben v Nationwide News Pty Ltd*; *Toben v Mathieson* [2015] NSWSC 1784; *Toben v Nationwide News Pty Ltd* (2016) 338 ALR 329) are an illustration of the difficulties courts face where determined litigants seek to express views that would otherwise be caught by this kind of legislation.

Fake news and the law: "spreading false news" and s 18C *Racial Discrimination Act* 1975 (Cth)

Fake news has a long history; one of the earliest examples is the so-called "blood libel", where attacks on Jewish communities were sparked by claims of using the blood of Christian

³⁴ The Hon Robert French AC, "Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence", 2017 Sir Ronald Wilson Lecture, 1 August 2017, <https://mail.google.com/mail/u/0/#inbox/15e748386a0a359d?projector=1> "Chief Justice attacks government's xenophobic populism", *Yahoo 7 News*, 2 February 2017.

³⁵ For a quick summary, as well as photographs of the offenders, see *Buzzfeed*, 23 June 2017, at https://www.buzzfeed.com/markdistefano/more-like-yarra-free-to-go?utm_term=.arZekGbR5N#.srzKvOW6n2.

³⁶ Chris Johnson, "Artificial intelligence 'judge' developed by UCL computer scientists", *the Guardian*, 24 October 2016, <https://www.theguardian.com/technology/2016/oct/24/artificial-intelligence-judge-university-college-london-computer-scientists>.

children as part of Jewish ritual meals. The offence defined as “spreading false news” has been the basis of prosecutions for race hate in several countries, such as Canada and Germany. Unsurprisingly, given the blood libel history, many of these criminal proceedings have been based upon the spreading of false news about the Holocaust³⁷. These cases are of particular interest to defamation and media lawyers because changes in response to dealing with these claims – both by the legislation and the courts – underlie much of the frustration of those who want to repeal this legislation.

The best known of these trials was in Canada, where a Mr Zundel’s denial of the Holocaust resulted in his being convicted³⁸ of “spreading false news” under s 181 *Criminal Code*, which provided:

"Every one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment".

Legislation of this kind appeared to operate as some kind of brake. Then, in 1996, the author David Irving ingeniously sought to use of the court system to prove the truth or falsity of the Holocaust. This was unsuccessful, but nevertheless resulted in a long and expensive trial (*Irving v Penguin Books Ltd & Anor* [2000] All E R (D) 523; [2001] All E R (D) 275).

In Australia, Dr Toben, a historian who had written extensively about the Holocaust, made another attempt to raise these issues by bringing a defamation action pleading similar imputations. Dr Toben was already the subject of orders not to publish this material; he has even received a term of imprisonment. However, if he commenced defamation proceedings, he would be able to publish with impunity.

The matter complained of was a newspaper article (“Split in Greens over Holocaust denier”) containing statements were made by Senator Milne following Dr Toben being denied a visa to come to Australia to give a lecture. The imputations he pleaded were that he was a Holocaust denier and an anti-Semite.

The media defendant (“News”) sought a stay or dismissal of the defamation proceedings as an abuse of process, on two bases. The first was that the proceedings were not brought to vindicate his reputation, but to use the proceedings as a soapbox for his views about the Holocaust. The second was yet another attempt to strike out proceedings on the basis of proportionality (*Bleyer v Google Inc* (2014) 88 NSWLR 670), on the basis that any damages award would be nominal.

The proceedings were struck out at first instance by McCallum J on the first of these bases, but not the second: *Toben v Nationwide News Pty Ltd; Toben v Mathieson* [2015] NSWSC 1784. Dr Toben appealed the striking out of his claim on the basis that he denied the truth of the imputations pleaded, asserting that he was an enquirer into these events, rather than a denier. He conceded that he wanted to use the defamation proceedings as a forum, but contended that this was not an improper purpose, much less an abuse of the court’s process.

³⁷ See the history of legislation set out in Wikipedia at “Holocaust denial”.

³⁸ He appealed and, in *R v Zundel* [1992] 2 S.C.R. 731, the Canadian Supreme Court struck down the conviction. The majority held that, while Mr Zundel breached s 181 in that he "misrepresented the work of historians, misquoted witnesses, fabricated evidence, and cited non-existent authorities", his conviction should be set aside because s 181 violated section 2(b) of the *Canadian Charter of Rights and Freedoms*, as the phrase "likely to cause injury or mischief to a public interest" was too broad.

News also (unsuccessfully) relied upon a notice of contention challenging McCallum J's findings on issues of proportionality, arguing that the gap between the cost of the proceedings and any interest Dr Toben had in vindicating his reputation warranted the claim's dismissal. (The absence of a serious harm test in Australian defamation law is one of its principal failings).

Ward JA, with whom Meagher and Payne JJA dismissed the appeal: (2016) 338 ALR 329. Dr Toben's predominant purpose was not to vindicate his reputation or to achieve redress, but for a collateral advantage, and one which would have traversed the Federal Court orders. That collateral advantage was to have his Holocaust theories aired in public and for findings to be made in this regard, as David Irving had done.

However, it is the history behind Dr Toben's litigation, rather than the result, which demonstrates what I will call the "fake news" problem for courts and the media, as well as the issue of how to regulate publication of so-called "fake news" on the Internet.

Ward JA noted (at [7] and [22]) that Dr Toben had been ordered to remove material from his website with substantially similar content on a number of occasions but went on publishing until being sentenced to imprisonment: *Toben v Jones* [2009] FCAFC 104. Dr Toben had been convicted and sentenced in 1999 to a term of imprisonment in Germany under s 130 of the German Criminal Code for similar publications.

Ward JA particularly put weight (at [28]) on evidence that, after publication of the matters complained of the subject of this appeal, the plaintiff continued to make similar statements, allegedly in the context of supporting the Attorney-General's proposals to repeal or water down s 18C *Racial Discrimination Act* 1975 (Cth), and to statements on websites by Dr Toben about wanting to test the truth about the Holocaust in a court of law, something David Irving had famously done in defamation proceedings he brought against the author Deborah Lipstadt.

This long history of courts attempting to halt the spread of Dr Toben's views is an illustration of the difficulties faced by legislators and courts in dealing with determined publishers using online and social media resources – means of publication unknown at the time of enactment of provisions such as s 18C - to publish material of this nature. At a time when proposals to water down s 18C are before the Parliament – but, interestingly, opposed by up to 80% of Australians³⁹ – the question of how courts would otherwise deal with publications of the kind Dr Toben was putting onto the Internet is not one of easy resolution.

This brings me to what I see as the real problem with fake news and alternate truths: the Internet.

Truth, lies and the Internet

Thanks to technology, the methods of incitement to acts of racial and/or political hatred have come a long way since the Rwanda massacre organisers were obliged to use the radio⁴⁰. However, is the Internet a publisher in the traditional sense of the word, where the usual balance can be maintained in the same way?

³⁹ See the Fairfax/Ipsos poll of 27 March 2017: <http://www.smh.com.au/federal-politics/political-news/fairfaxipsos-poll-eight-in-10-voters-oppose-turnbull-governments-18c-race-hate-law-changes-20170327-gv7dlq>.

⁴⁰ http://www.ppu.org.uk/genocide/g_rwanda4.html.

I consider that the Internet is more than just a publisher. The Internet is market force rather than as a “market of ideas”. Its features resemble product advertising rather than information provision. The features that rule out there being any level playing field are:

- The module costs of publishing can now be close to zero. The “zero market cost phenomenon” has meant that millions of consumers have become “prosumers” and share knowledge and entertainment, bypassing the traditional market altogether⁴¹. The Internet is primarily an advertiser rather than the provider of correct information; one of the major incentives to post fake news is the advertising revenue these false stories generate.
- The Internet may be addictive in nature, possibly even similar to cigarettes or drugs. Researchers have observed that with the growth of the Internet, youth drug addiction has dropped, and suggested that there may be a link between the two⁴².

The potential for misuse of the Internet, especially social media, has been well known for some time. Legislation to prevent activities such as revenge porn and trolling has been introduced, but with limited success due to the anonymity and borderless nature of the world wide web. Defamation law is not a satisfactory remedy either: *French v Fraser*[2014] NSWSC 1937.

Twitter trolling is in fact so widely accepted by the public that it has featured in mainstream television programs without complaint. To give one example, as long ago as 2011, the US television series “The Good Wife” broadcast an episode where the female protagonist, who was defending a defamation action brought against her client, successfully defeated a UK superinjunction by borrowing a political party’s Twitter troll squad to publish the subject matter of the superinjunction. As the trolls create 100,000 tweets in one night, the effect of the injunction is destroyed and the evidence goes in⁴³. These events were presented without explanation or criticism, as were her opponents’ complaints of her “News of the World” tactics (another event occurring in 2011, but involving what now looks like tragically out-dated technology).

What are the problems?

I see the following difficulties in treating the Internet as just another publisher:

- Part of the problem is that what appears on the Internet appears to be real and reliable, no matter how crazy. Human beings are reluctant to accept even clearly presented truthful facts which do not accord with what they want to believe. For example, there have been extensive studies of the refusal of those who lived through the war in the former Yugoslavia to accept the findings of the International Criminal Court on ethnic cleansing in the region⁴⁴.

⁴¹ Jeremy Rifkin, “The Fall of Capitalism and the Internet of Things”, YouTube,

<https://www.youtube.com/watch?v=3xOK2aJ-0Js>.

⁴² M Richtel, “Are teenagers replacing drugs with smartphones?” *New York Times*, 13 March 2017:

https://www.nytimes.com/2017/03/13/health/teenagers-drugs-smartphones.html?smprod=nytcoring-ipad&smid=nytcoring-ipad-share&_r=0.

⁴³ “The Good Wife”, Series 3, episode 2, broadcast 2 October 2011 in the United States.

⁴⁴ See the list of articles on this topic collected by Marko Milanovic in “Post Truth and International Criminal Tribunals”, *EJIL Talk!*, 20 February 2017; <http://www.ejiltalk.org/post-truth-and-international-criminal-tribunals/>.

- Another problem is the 24-hour media cycle and limitations on journalism, resulting in “churnalism”, where recapitulations from PR handouts form the basis of the stories⁴⁵.
- The potential for misuse of the Internet is much greater than from tabloids, but in both kinds of publications one can see “witch hunts” in the form of “targeting” of individuals for sensational purposes, such as the McCann family saga⁴⁶. This is augmented by the rise in “uncivil political discourse”⁴⁷ which has been a feature of American politics for decades and which is magnified by the “road rage” style of discourse the Internet appears to encourage.

And the future?

Inquiries into media practices such as the Leveson Inquiry⁴⁸ have only proposed a self-regulatory body⁴⁹ for the fourth estate; for the “fake estate” of untrained bloggers, activists and trolls who increasingly dominate the Westworld of the internet, no such regulation seems possible, which may fulfil the nightmare predictions Rodney A Smolla had about tabloidism.⁵⁰

⁴⁵ This complaint was also raised in relation to tabloid journalism. In 2001 Clara Zawawi (Queensland University of Technology) published a study which showed that 47% of mainstream news stories were created by press releases and other PR activity: “Feeding the Watchdogs – An Analysis of Relationships between Australian Public Relations Practitioners and Journalists”; unpublished PhD thesis, QUT, 2001, referred to by Nick Davies, “Flat Earth News”, London 2009 (p.98), where a 2006 study of “quality” news in the UK found 54% of print stories and 58% of television stories were PR-based.. This figure is actually an improvement on earlier studies which gave figures of up to 80%; see Jim Macnamara, “The Impact of PR on the Media”, <http://www.pria.com.au/sitebuilder/resources/knowledge/files/1172/primpactmedia.pdf>. See also the 2008 Bond University study: http://epublications.bond.edu.au/hss_pubs/228/.

⁴⁶ For a review of the media vilification of Mrs McCann, see C Bainbridge, “They’ve taken her!”, *Studies in the Maternal*, 2(1) 2010, www.mamsie.bbk.ac.uk.

⁴⁷ T M Massaro and R Stryker, “Freedom of speech, liberal democracy, and emerging evidence on civility and effective democratic engagement”, (2012) 54 *Arizona Law Review* 375; R Hofstadter, “The Paranoid Style in American Politics”, Harvard University Press, 1964, <https://blog.liv.cc/wp-content/uploads/2011/05/Hofstadter-Paranoid-Style-American-Politics.pdf>.

⁴⁸ The Leveson Inquiry (<http://www.levesoninquiry.org.uk/>) was set up in the United Kingdom in July 2011. The Independent Inquiry into the Media and Media Regulation (“the Finkelstein Inquiry”) was set up in Australia by terms of reference on 14 September 2011: (http://www.dbcde.gov.au/_data/assets/pdf_file/0006/146994/Report-of-the-Independent-Inquiry-into-the-Media-and-Media-Regulation-web.pdf).

⁴⁹ See the proposed models for a revised PCC discussed by Damian Carney, “Media Accountability After the Phone Hacking Inquiry”, *Meejalaw* 30 August 2012. For media commentary, see “Self-regulation of the press is flawed, but reform is no easy matter”, *the Guardian*, 20 July 2011.

⁵⁰ Perhaps “tabloid” journalism practices and ethics is more accurate: Rodney A Smolla, “Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?”, 1998 symposium, “Privacy and Publicity in a Modern Age: A Cross-Media analysis for the First Amendment: (1998 – 9) 9 DePaul LCA J. Art & Ent. L 1.14/09/2017



Illustration (copyright of the *Sun* acknowledged): Front page of the *Sun*, 23 March 2011, complaining about “soft justice” meted out by English judges, including Lord Justice Leveson, who “introduced proposals to let 4,000 assault [sic] convicts [sic] a year go free rather than face jail.”