

“PUBLIC OFFICIALS” AND “PUBLIC FIGURES”:
A COMPARATIVE STUDY OF U.S. AND TAIWAN DEFAMATION LAW

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I. Introduction

The United States and Taiwan have very different approaches toward defamatory speech. Although both nations recognize freedom of speech as a constitutional right, Taiwan’s legal system provides for more protections of individuals’ reputations and fewer protections of defamatory speech.

While civil liability regarding defamatory speech is limited in the United States in order to protect free speech, Taiwan maintains criminal sanctions for defamatory speech. In addition, name-calling is not actionable in the United States, as courts do not view the judicial forum as the proper arena for morality. However, name-calling and defamation to the dead are offenses under Taiwan’s criminal code, at least partially to promote and maintain good morals of the society.¹ Moreover, U.S. law provides less protection of public figures regarding their reputations in order to encourage public discussion, but some courts in Taiwan award higher amount of damages to public figures than private figures, on the grounds that public figures, because of their fame, suffer more damage from speeches damaging their reputations.

This paper will outline the defamation law of both the United States and Taiwan, and compare the two legal systems in the above-mentioned areas. The paper begins with a brief comparison of the two legal systems, in order to provide the readers with some basic understanding of Taiwan’s legal system. The paper will then discuss U.S. defamation law,

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¹ Taiwan Criminal Law § 309 (Offense of public insult); §312 (Offense of insult and defamation of the dead).

focusing on cases regarding defamatory speech that are touchstones of First Amendment jurisprudence. The paper will then discuss Taiwan's defamation law, including its legal norms and court decisions, and will compare and contrast it to U.S. law. In conclusion, this paper will point out the major differences between the two legal systems, and, based on this comparison, offer suggestions for possible improvements to each.

II. General Comparison of the Two Legal Systems

A. The Case Law System versus the Statutory Law System

Methodologically, the American legal system, like the English legal system, is primarily a case law system.² Originally, it consisted mainly of case law. However, statutory law increasingly has gained in importance since the end of the nineteenth century.³ Presently, the American legal system is a mixed system because of the increasing significance of case law, though its main emphasis remains the interpretation and development of the law through judicial decisions.⁴

Taiwan (Republic of China), on the other hand, adopted the statutory law system while modernizing its legal system. Most of Taiwan's basic legislation can be traced back to the Nationalist (Kuomintang, "KMT") government on Mainland China, and was codified prior to the Sino-Japan War, which preceded World War II.⁵ While modernizing China's legal system, the Nationalist regime borrowed heavily from Japanese law, which in turn was largely based on civil

² PETER HAY, AN INTRODUCTION TO U.S. LAW 3 (1976).

³ *Id.* at 2.

⁴ *Id.* at 2-3.

⁵ Drawing upon the unfinished efforts of the late Ching Dynasty, the Nationalist government codified all of the major civil, criminal, commercial laws of China before 1937: the Criminal Code (1928), the Code of Criminal Procedure (1928), the Civil Code (1929), the Code of Civil Procedure (1929), the Insurance Law (1929), Company Law (1929), Maritime Law (1929), the Negotiable Instruments Law (1929), Bankruptcy Law (1935), and the Trademark Law (1936). Hungdah Chiu & Jyh-Pin Fa, *Taiwan's Legal System and Legal Profession*, in TAIWAN TRADE AND INVESTMENT LAW 21, 23 (Mitchell A. Silk ed., 1994).

law states, especially Germany. The fragmentary nature of the common law system made it difficult for China to borrow.⁶ When the Nationalist government fled to Taiwan after its defeat by the Chinese Communist Party in 1949, it brought with it the civil-law based system that it had developed on Mainland China.⁷

Since the 1950's, Taiwan has enjoyed a close relationship with the United States, and thus American law has increased its influence on Taiwanese law. Taiwan's legislators have drawn heavily on American theory and practice, particularly in the area of commercial law.⁸ In the last few years, Taiwan's legislators further amended Taiwan's criminal procedures and administrative laws based on American legislation and legal theories.⁹ In some court decisions and judicial interpretations, American cases, laws and, theories are cited as persuasive authorities.¹⁰

B. Constitutional Grounds for Freedom of Speech

Both Taiwan and the United States have written constitutions as the foundations for their fundamental legal norms. Whereas the United States adopted its constitution in 1787,¹¹ the constitution of Taiwan (Republic of China) became effective in 1947, 160 years later.¹² The First

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Taiwan's Administrative Procedure Law, which came into effect in 2000, is mainly based on "due process of law" theory from U.S. law. In addition, in 2000, the cross-examination system was introduced into Taiwan's Code of Criminal Procedure, which used to be judge-centered, so the Code is more adversarial in nature. YUEH-SHENG WENG, IN PURSUIT OF JUSTICE: RECENT JUDICIAL REFORMS IN TAIWAN § I.B, *at* <http://www.judicial.gov.tw/b4/e6-1-1-1.htm> (last visited July 1, 2004).

¹⁰ *See* Taipei District Court 90 Chung Su Tzi 507 Civil Judgment (*quoting* New York Times v. Sullivan, 376 U.S. 256 (1964).) Besides American law, some judges also cite German law as a persuasive authority. Judicial Yuan Interpretation No. 509, Geng Wu (concurring).

¹¹ The U.S. Constitution was ratified in 1788 by the original 13 states in the union and is the oldest operating constitution in the world. HAY, *supra* note 2, at 15.

¹² The official name of Taiwan is the "Republic of China." The current government in Taiwan was originally the legitimate government representing China. However, it fled to Taiwan (Formosa) in 1949, after its defeat by the Communists in the civil war after World War II. Before the Nationalist (Kuomintang) government fled to Taiwan, the constitution of the Republic of China had come into effect. Although the government froze certain provisions through constitutional amendment procedures, it kept the constitution in large part, and it is still in

Amendment of the U.S. Constitution provides that: “Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”¹³ Article 11 of Taiwan’s Constitution also protects freedom of the press by providing that: “The people shall have freedom of speech, teaching, writing and publication.”¹⁴

Although the U.S. constitutional guarantee of freedom of speech appears absolute, the U.S. courts have never adopted such an interpretation.¹⁵ Instead, certain categories of speech are considered “low-level speech” and have thus received “less-than-full” constitutional protection under the U.S. law:¹⁶ (1) advocacy of unlawful conduct;¹⁷ (2) fighting words;¹⁸ (3) libelous and defamatory speech;¹⁹ (4) obscenity speech;²⁰ and (5) commercial speech.²¹

practice in Taiwan today.

¹³ U.S. CONST. amend. I.

¹⁴ CONSTITUTION art. 11 (Taiwan). “Freedom of publication” (Chu Ban Tzi Yio) can also be translated as “freedom of the press.”

¹⁵ CHOPER ET AL., CONSTITUTIONAL LAW 569 (9th ed. 2001) (*quoting* *Konigsberg v. Star Bar*, 366 U.S. 36, 61 (1961), Justice Black (dissenting)): “[T]he First Amendment’s unequivocal command ... shows that the men who drafted our Bill of Rights did all the ‘balancing’ that was to be done in this field.”)

¹⁶ LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8 (2d ed. 1988), *quoted in* Tzi-Yi Lin, *The Limitation of Free Speech and the Two-Track Theory*, in FREEDOM OF SPEECH AND THE PRESS 133, 158-60 (Angle Publishing 1999) (1993) [hereinafter *Two-Track Theory*].

¹⁷ “[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). See Sheldon L. Leader, *Free Speech and the Advocacy of Illegal Action in Law and Political Theory*, 82 COLUM. L. REV. 412, 414 (1982); Martin H. Redish, *Advocacy to Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1174-75 (1982).

¹⁸ This category of speech was aggressively narrowed in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Today, even hate speech is protected under the First Amendment.

¹⁹ See William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. OF COMP. L. 463, 480-81 (2002) (suggesting that the defamer would receive broader protection if the defamed person is a public official or public figure.) In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the court held that a civil action for libel, where the plaintiff is a public official, requires a showing that the plaintiff had actual malice, knowing that factual statements made about him were false or with reckless disregard of whether they were true. The damage is also limited.

²⁰ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) (concluding that the courts give the government more room in obscene speech control; regulations would be upheld if the government interest is legal and has rational relationship with the regulation.)

²¹ Commercial speech enjoys less-than-full protection. False or misleading advertising and advertising about unlawful activities are protected. Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 319 (1995).

In Taiwan, no categories of speech are specifically excluded from constitutional protection; the Constitution provides a general test for the limitation of freedoms and liberties. Article 23 provides that the government cannot limit people's liberties and freedoms by law except when such limitation is necessary for certain public interests.²² Based on Article 23, Taiwanese scholars and courts have borrowed the "principle of proportionality" (Grundgesetz der Verhältnismäßigkeit) from German jurisprudence to restrict the legislative power regarding the limitations of freedom and liberties.²³ Under this principle, a law is not constitutional unless it (1) achieves the legitimate purpose/government interests pursued; (2) uses the least restrictive means (would impose the least burden upon the subjects); and (3) yields benefits proportional to its costs (one should not burn a house to roast a pig or fire a cannon to expel small birds).²⁴ In practice, laws punishing or restricting advocacy of unlawful conduct, fighting words, obscenity speech, libelous and defamatory speech, or commercial speech are usually upheld by Grand Justices, the constitutional interpretation body in Taiwan.²⁵

C. The Power of Judicial Review

The power of judicial review, though not created in the U.S. Constitution, was nonetheless one of the most important features of the U.S. constitutional law. The U.S. Supreme Court, in

²² "All the freedoms and rights enumerated in the preceding Article shall not be restricted by law except by such as necessary to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare." CONST. art. 23 (Taiwan).

²³ PETER BADURA, STAATSLHRE 84 (1986); FRITZ OSSENBUHL, STAATSHAFTUNGSRECHT 42 (4th ed. 1991); *quoted in* Shih-Shian Hsieh, *Discussion on the Principle of Proportionality in the Public Law*, in GENERAL PRINCIPLES OF ADMINISTRATIVE LAW 117, 120-22 (Chung-Mo Cheng ed., 1994)

²⁴ GENG WU, THE THEORIES AND PRACTICES OF ADMINISTRATIVE LAW 10, 11 (2d ed. 1993); Hsin-Min Chen, *The Limitation of Basic Constitutional Rights*, in BASIC THEORIES OF CONSTITUTIONAL RIGHTS (I) 239 (3d ed. 1992). The test is similar to the "strict scrutiny" standard in U.S. law, which requires that the legislation be necessary and narrowly tailored to achieve a compelling government interest. The government interest is examined to determine whether it is proportionate to the cost in the balancing test.

²⁵ In Judicial Yuan Interpretation No. 407, the Grand Justices upheld legislation restricting obscenity publications. In Interpretation No. 414, the Grand Justices upheld the prior censorship to medicine advertisements under Medicine Law. In Interpretation No. 509, the Grand Justices upheld the criminal punishment of defamation, while adopting the "actual malice" test.

Marbury v. Madison,²⁶ per Justice Marshall, held that “the powers of the legislature are defined and limited...an act, which, according to the principles and theories of our government, is entirely void, is yet, in practice, completely obligatory...the principle that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument;²⁷” and thereby created the power of judicial review over the constitutionality of congressional legislation.²⁸

Unlike the U.S. model of judicial review, Taiwan followed European nations and adopted a centralized council to exercise judicial review. Taiwan’s Constitution grants the power of constitutional interpretation to the Grand Justices in the Judicial Yuan.²⁹ Because the Constitution states that laws contrary to it are void, such power of interpretation implies the power to invalidate unconstitutional laws.³⁰ Originally, only government organs and individuals whose constitutional rights had been infringed and who had exhausted regular legal remedies could petition the Grand Justices for constitutional interpretation.³¹ Many scholars criticized the procedure as too restrictive. Therefore, after a series of judicial reform measures, judges (within their discretion), and legislators (upon petition from more than one-third of the total number) also may petition the Grand Justices for constitutional interpretation.³²

²⁶ *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁷ *Id.* at 176, 179-80.

²⁸ See CHOPER, *supra* note 15, at 8-9.

²⁹ Based on the theory of by Dr. Sun Yat-Sen, who led the National Revolution and overthrew the late Ching Dynasty, Taiwan’s Constitution created five branches in the central government: Executive Yuan, Legislative Yuan, Judicial Yuan, Control Yuan (responsible for impeaching officials) and Examination Yuan (responsible for the personnel issues, e.g. government officials’ qualification exams, their benefits, promotion and honor systems). Above the five branches are the President and the National Assembly, whose primary function are to elect the President and amend the Constitution. See GOVERNMENT INFORMATION OFFICE, THE REPUBLIC OF CHINA YEARBOOK – TAIWAN 2003, available at <http://www.gio.gov.tw/taiwan-website/5-gp/yearbook/chpt04.htm#1> (last visited July 1, 2004).

³⁰ CONST. art. 78, 79, 171, 172, 173 (Taiwan).

³¹ LAW GOVERNING THE COUNCIL OF GRAND JUSTICES art. 4 (Taiwan). This law was abolished and replaced by the Law of Interpretation Procedure for Grand Justices on February 3, 1993.

³² LAW OF INTERPRETATION PROCEDURE FOR GRAND JUSTICES art. 5 (Taiwan). During the revision of the law, some scholars suggested that Taiwan should have followed the U.S. model. In other words, all judges should

D. Restrictions on Defamatory speech

In the United States, defamation is considered a civil liability issue rather than a criminal responsibility issue, as the constitutionality of criminal libel is questionable. In *Garrison v. Louisiana*,³³ the Supreme Court invalidated the Louisiana criminal libel statute since it incorporated constitutionally invalid standards for criticizing the official conduct of public officials by permitting punishment for true statements made with actual malice.³⁴ The court further held the statute unconstitutional for punishing false statements against public officials if they were made with ill will without regard for whether they were made with knowledge of their falsity, in reckless disregard of their veracity, or without reasonable belief of their truth.³⁵ Although the *Garrison* case concerned defamation against public officials, criminal libel is commonly considered unconstitutional, and in practice, is rarely invoked.³⁶

In Taiwan, unlike the United States, criminal libel is alive and active. In 2000, the Grand Justices, in Judicial Yuan Interpretation No. 509, confirmed the constitutionality of criminal libel, though it demanded the application of the “actual malice” test.³⁷ Furthermore, defamation suits

have had the authority to interpret the constitution and invalidate the laws or regulations held to be unconstitutional. But such a proposal was considered too radical because it would have affected the stability of the constitution. Under the new law, only the Justices of the Supreme Court and judges in the Administrative Court could hold trial proceedings and petition Grand Justices for constitutional interpretations, if the judge firmly believed that the laws or regulations applied in the case to be unconstitutional. In Judicial Yuan Interpretation No. 371, the Grand Justices, finding that judges in lower courts also had the obligation to apply the constitution, and not apply laws or regulations they deemed unconstitutional, nullified the article 5, paragraph 3 of the new law, and authorized judges in lower courts to petition for constitutional interpretations.

³³ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

³⁴ *Id.* at 77-78.

³⁵ *Id.* at 78.

³⁶ For example, the Model Penal Code has excluded criminal libel. See Jyh-Pin Fa, *The Constitutional Meaning of the U.S. Defamation Law*, in HUMAN RIGHTS PROTECTION AND JUDICIAL REVIEW 7, 10 (1994). Cf. *Colorado v. Ryan*, 806 P.2d 935 (Colo. 1991), cert. denied, 112 S. Ct. 177 (1991) (upholding a statute making it a criminal offense to publish statements “tending . . . to impeach the honesty, integrity, virtue, or reputation . . . of one who is alive” should it apply to purely private defamation). See also Robert D. Sack, *The Law of Defamation: Recent Developments 1992*, 346 PRACTICING LAW INST. 105, 115 (1991).

³⁷ Judicial Yuan Interpretation No. 509 (Taiwan). The Grand Justices, while upholding the criminal defamation

are common in both civil and criminal litigation. Since criminal proceedings are free from court fees and backed by the authority of district attorneys, they are even more preferable for the plaintiffs.³⁸ While public figures, especially officials, receive less protection in defamation cases in the United States, Taiwan's courts seem to prefer protecting political officials more than civilians and other public figures.

III. Public Figures under the U.S. Defamation Law

A. The *New York Times* Rule regarding Public Officials

In *New York Times v. Sullivan*,³⁹ the U.S. Supreme Court determined, as a matter of first impression, the extent to which constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct. The plaintiff-respondent, L. B. Sullivan, was one of three elected Commissioners of Montgomery, Alabama, supervising the Police Department, Fire Department, Department of Cemetery, and Department of Scales.⁴⁰ He brought the civil libel action against the *New York Times* and four African-American signatories to a public statement published as a full-page advertisement carried in the *New York Times* on March 29, 1960, alleging that the advertisement libeled him.⁴¹

The advertisement, "Heed Their Rising Voices," appealed for the support of the student

suit, broadened the "good will" elements in Articles 310 and 311 of the Criminal Code, and held that: 1) the defendants did not bear the burden of proving the truthfulness of the statement in order to raise the "truth" defense; 2) the defendants were not liable in the event that the defendants had reasonable grounds to believe the truthfulness of the statement. In other words, unless a defendant has "actual malice" when disseminating the defamatory statement, he is not liable for criminal defamation.

³⁸ In Taiwan, criminal proceedings are free, while plaintiffs in the civil suit pay the amount equal to one percent of the value of the object of litigation as a court fee. However, civil claims raised in the criminal proceedings are also free from court fees. This exemption encourages people to file criminal complaints, supplemented with civil claims in the criminal proceedings, so as to avoid court fees.

³⁹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁴⁰ *Id.*

⁴¹ *Id.*

movement, “the struggle for the right-to-vote,” and the legal defense of Dr. Martin Luther King, Jr., leader of the movement, against a perjury indictment then pending in Montgomery.⁴² It contained some false statements regarding the harassment and persecution of African Americans in Montgomery, Alabama. Although it did not refer to anyone by name, Sullivan, as supervisor of the local police, considered the false statements libelous and sued.⁴³

The court held that, “[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”⁴⁴ In addition, the court encouraged discussion of public issues: “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁴⁵ The court further concluded that even erroneous statements should be tolerated, holding, “that erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive.’”⁴⁶ The court then held that “[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions” would “lead to a comparable ‘self-censorship.’”⁴⁷ The court worried that “under such a rule,” not only false speech, but also “would-be critics of official conduct” may be deterred.⁴⁸

In the end, in order to balance the reputation of a public figure and the protection of free speech guaranteed by the First Amendment, the court created the “actual malice” test. Under the test, a public official is prohibited from recovering damages for a defamatory falsehood relating to

⁴² *Id.* at 257.

⁴³ *Fa, supra* note 36, at 22-23. *See also* Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 193 (1964).

⁴⁴ *Sullivan*, 376 U.S. at 269.

⁴⁵ *Id.* at 270.

⁴⁶ *Id.* at 271-72.

⁴⁷ *Id.* at 279.

⁴⁸ *Id.* at 279.

his official conduct, “unless he proves that the statement was made with ‘actual malice’--that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴⁹

This decision is magnificent not only because it held that civil defamation should be measured by standards that satisfy the First Amendment, but also because the “actual malice” test created by the decision shifted the burden of proof to the public figures—to have them prove that (1) the statement was false and (2) the defendant made the false statement knowingly or with recklessly disregard for the truth. This decision greatly restricted the potential for civil liability attaching to the statements concerning public officials and therefore expanded the scope of free speech.⁵⁰

B. *Curtis Publ’g Co. v. Butts*: Different standard for Public Figures?

In *Curtis Publ’g Co. v. Butts*, the U.S. Supreme Court considered the impact of the *Sullivan* decision on libel actions instituted by parties who are not public officials, but rather, “public figures” involved in issues in which the public has a justified and important interest.⁵¹

The case stemmed from an article published in the *Saturday Evening Post* (the “*Post*”) which accused Wally Butts, the University of Georgia Athletic Director, of conspiring to “fix” a football game between the University of Georgia and the University of Alabama.⁵² Since Butts had previously served as U.G.A.’s head football coach, he was a well-known and respected figure

⁴⁹ *Id.* at 279-80.

⁵⁰ It was suggested that one of the reasons the Supreme Court ruled against *Sullivan* is that the Supreme Court had noticed that certain Southern politicians were using judicial proceedings to suppress minorities who participated in the civil rights movement. Among the 84 people who signed the advertisement, only four black preachers, who were citizens of Alabama, were sued. It was obvious to secure the jurisdiction of Alabama. In addition, the \$500,000 in damages that were awarded to *Sullivan* made history in such libel cases. See Fa, *supra* note 36, at 28-29 (*quoting* C. LAWHORNE, *THE SUPREME COURT AND LIBEL* 28, 32 (1981)).

⁵¹ *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

⁵² *Id.* at 135.

among coaching ranks.⁵³ The article alleged that, before the University of Georgia played the University of Alabama, Butts gave to Alabama's coach Georgia's plays, defensive patterns—all of the significant secrets that Georgia's football team possessed. Butts sued Curtis Publishing Co., the owner of the *Post*, for libel. The Supreme Court affirmed the lower court's decision in favor of Butts,⁵⁴ concluding that the editors of the *Post* failed to conduct a thorough investigation regarding the statement.⁵⁵

The Supreme Court clarified that the guarantees for speech and press not only preserve “political expression or comment upon public affairs,” but “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”⁵⁶ However, the majority distinguished “public figure” from “public official,” and held that a public figure “who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of *highly unreasonable conduct* constituting an *extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*”⁵⁷

The majority reasoned that, in the *New York Times* case,⁵⁸ “the plaintiff was an official whose position in government was such ‘that the public [had] an independent interest in the

⁵³ *Id.* at 136.

⁵⁴ In the trial court, the jury returned a verdict for \$60,000 in general damages and \$3,000,000 in punitive damages. The trial court reduced the total to \$460,000 by remittitur. The Fifth Circuit affirmed the decision. *Id.* at 138-40.

⁵⁵ The evidence showed that the Butts story was in no sense “hot news” and the editors of the *Post* recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. The *Saturday Evening Post* knew that Burnett (the informer) had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael, who was supposed to have been with Burnett when the phone call was overheard, was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to determine whether Alabama had adjusted its plans after the alleged divulgence of information. *Id.* at 157.

⁵⁶ *Id.* at 147.

⁵⁷ *Id.* at 155.

⁵⁸ *Sullivan*, 376 U.S. 254 (1964).

qualifications and performance of the person who [held] it’...Such officials usually enjoy a privilege against libel actions for their utterances.” However, in the present case, Butts neither “has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy,” nor was he “entitled to a special privilege protecting his utterances against accountability in libel.”⁵⁹

Under *Butts*, the constitutional privilege created in the *New York Times* case, is still applicable to statements regarding non-political public figures, and the reputations of such public figures enjoy a higher degree of protection than that of public officials. Public figures need not prove that the defendant knowingly made false statements or recklessly disregarded the truth. They need only show that the defendant’s publication of the statement was “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”⁶⁰

C. *Gertz*: Protection for the Reputation of Private Individuals

In *Gertz*, the plaintiff was an attorney retained by the family of a victim in a murder case, which was investigated by a Chicago police officer, Nuccio.⁶¹ An article appearing in a magazine, owned by Robert Welch, Inc., alleged that Nuccio’s murder trial was part of a Communist conspiracy to discredit the local police. Moreover, the article falsely accused that Gertz arranged Nuccio’s “frameup,” implied he had a criminal record, and labeled him a “Communist-frontier.”⁶² Gertz filed a libel suit against Robert Welch. The Supreme Court reversed the decision of the appellate court, and held in favor of Gertz, reasoning that Gertz is not a “public figure” under the

⁵⁹ Butts, 388 U.S. at 153-54.

⁶⁰ Fa, *supra* note 36, at 36.

⁶¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁶² *Id.*

New York Times test.⁶³

In *Gertz*, the majority opinion listed three categories of public figures: (1) public officials and well-known figures to whom the *New York Times* test is applicable;⁶⁴ (2) voluntary, but limited, public figures, such as people who are voluntarily involved in the discussion of public issues, are only considered public figures under certain circumstances;⁶⁵ and (3) involuntary public figures, those private individuals involuntarily involved in public disputes (through no purpose of their own), also considered limited public figures.⁶⁶ The court, found that Gertz “has long been active in community and professional affairs...[and is] consequently well known in some circles, [but] he had achieved no general fame or notoriety in the community.” The court further held that, “We would not lightly assume that a citizen’s participation in community and professional affairs rendered him a public figure for all purposes.”⁶⁷

Moreover, the Supreme Court further ruled that state courts may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual, except “liability without fault.”⁶⁸ The decision also limited the award of damages – that is, unless the plaintiff can prove the “actual malice” of the defendant, the plaintiff is only entitled to “actual damages,” not “presumed damages.”⁶⁹

⁶³ *Id.* at 351 (“Respondent ... argues that petitioner's appearance at the coroner's inquest rendered him a ‘de facto public official.’ Our cases recognized no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the ‘public official’ category beyond all recognition. We decline to follow it.”).

⁶⁴ Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injuries to their reputations only after they present clear and convincing proof that the defamatory falsehoods were made with knowledge of their falsity, or with reckless disregard for the truth. *Id.* at 342.

⁶⁵ *Id.* at 336-37.

⁶⁶ *Fa, supra* note 36, at 46. See also, Tzi-Yi Lin, *The New Development of Free Speech and Reputation Protection, in* FREEDOM OF SPEECH AND THE PRESS 365, 376-77 (Angle Publishing 1999) (1993) [hereinafter *New Development*].

⁶⁷ *Gertz*, 418 U.S. at 351-52.

⁶⁸ *Id.* at 347-48.

⁶⁹ *Fa, supra* note 36, at 48.

D. *Time Inc. v. Firestone*: Are Celebrities Public Figures?

In this case, the plaintiff, Mary Alice Firestone, married Russell Firestone, the scion of one of America's wealthy industrial families, in 1961.⁷⁰ In 1964, they separated, and Mary filed a complaint for separate maintenance. Her husband counterclaimed for divorce on grounds of extreme cruelty and adultery.⁷¹ The court granted Russell's counterclaim, not based on his "extreme cruelty and adultery" claim, but on "the evidence of marital discord that neither of the parties has shown the least susceptibility to domestication."⁷² *Time*, however, based on limited information, published an item regarding this divorce in its "Milestone" section, stating that the court granted the divorce "on grounds of extreme cruelty and adultery."⁷³ Mary sued *Time* for civil libel, and the Supreme Court ruled in favor of Mary.

Although the Supreme Court considered Mary a local celebrity, it held that Mary was not a "public figure," as she "did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach society, and she did not thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."⁷⁴ The court further held that "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public."⁷⁵ The court also reasoned that Mary assumed no "special prominence in the resolution of public questions," and therefore was not a "public figure" for the purpose of determining the constitutional protection

⁷⁰ *Time, Inc. v. Firestone*, 424 U.S. 448, 450 (1976).

⁷¹ *Id.*

⁷² *Id.* at 451.

⁷³ *Id.*

⁷⁴ *Id.* at 453.

⁷⁵ *Id.* at 454.

afforded the petitioner's report of the factual and legal basis for her divorce.⁷⁶

Based on the decision, a local celebrity would not be considered a “public figure” if or she “assumed no special prominence in the resolution of public questions.”⁷⁷ In addition, personal issues of the celebrity, though resolved through a court proceeding, will not be considered a “public controversy” and therefore will not convert the local celebrity into a “public figure” referred to in *Gertz*.

E. *Hutchinson v. Proxmire*: Does a Professor who Receives Federal Funding Constitute a Public Figure?

Proxmire, defendant/respondent, was a United States Senator who initiated the “Golden Fleece of the Month Award” (the “Award”) to publicize what he perceived to be the most egregious examples of wasteful government spending.⁷⁸ The second such award was given to National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research, for spending almost half a million dollars during the preceding seven years to fund a research study of emotional behavior, conducted by Mr. Hutchinson, the plaintiff in this case.⁷⁹ The award and other critical comments were referred to in newsletters and press releases sent by the Senator, in a television interview program on which the Senator appeared, and in telephone calls made by the legislative assistant to the sponsoring federal agencies.⁸⁰ Hutchinson sued Proxmire in federal district court for defamation, alleging, *inter alia*, that in making the award and publicizing it nationwide, respondents had damaged him in his professional

⁷⁶ *Id.*

⁷⁷ Firestone, 424 U.S. at 453.

⁷⁸ *Hutchinson v. Proxmire*, 443 U.S. 111, 114 (1979).

⁷⁹ *Id.*

⁸⁰ *Id.* at 115-17.

and academic standing.⁸¹

On appeal, the Supreme Court reversed the decisions of lower courts, and held that Hutchinson was not a limited public figure prior to the Award.⁸² The court reasoned that Hutchinson's activities and public profile were much like those of countless members of his profession, and Hutchinson did not thrust himself or his views into public controversy to influence others.⁸³ The court further held that the concern about general public expenditures is not sufficient to make Hutchinson a public figure.⁸⁴ In addition, the court cited *Firestone*: “The ‘use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.’”⁸⁵

The *Proxmire* decision, coupled with *Firestone*, seems to demonstrate the new stance of the U.S. Supreme Court regarding the balance between free speech and private reputation. The Supreme Court seems to be more restrictive in its defining of “public figure” and the further application of the *New York Times* privilege. In *Proxmire*, though the defendant made the defamatory statement regarding his concern about the waste of public expenditures, the court nonetheless denied his contention that Proxmire should be deemed a “limited public figure.” Whether this decision also serves the purpose of *New York Times*—to encourage unlimited, robust discussion about public issues—is worthy of further consideration.

F. Summary

Based on the above cases, we can find that U.S. defamation law has achieved a good balance

⁸¹ *Id.* at 111, 118.

⁸² *Id.* at 134-35.

⁸³ *Id.* at 135.

⁸⁴ *Id.*

⁸⁵ *Id.* (quoting *Firestone*, 424 U.S. at 456).

between freedom of the press and private reputation. As the *New York Times* test applies to comments regarding public officials, the plaintiff must bear the burden of proving actual malice; thus discussion regarding public issues, even those relating to false statements, would not be discouraged. As for public figures, *Gertz* has provided a detailed definition to limit the scope of public figures, and therefore, to protect private individuals. Although plaintiffs still bear the burden of actual malice, the standard for public figures is “extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” This lower standard provides more protection to non-political public figures. However, the *Proxmire* test may restrict the discussions regarding public issues. As for pure private individuals, the U.S. Supreme Court has authorized each state to construe its own law, except liability without fault, while actual damages are available once proven; presumed damages are also available if actual malice can be proven.⁸⁶

IV. Public Figures under the Taiwan Defamation Law

A. Criminal Cases

Article 310(1) of Taiwan’s Criminal Code provides that “Any person who intends to disseminate to the public by originating or circulating defamatory statements is subject to imprisonment of one year or less, labor service, or a fine of 500 dollars or less.”⁸⁷ Article 310(2) further raises the punishment for the distribution of defamation statements in written or picture form.⁸⁸ While criminal libel is defined in Paragraphs 1 and 2 of Article 310, Paragraph 3 of

⁸⁶ SHELDON W. HALPERN, *THE LAW OF DEFAMATION, PRIVACY, PUBLICITY AND “MORAL RIGHTS”* 382 (1988); *quoted in New Development, supra* note 64, at 379.

⁸⁷ In addition to Article 310(1), Article 309(1), “The Offense of Public Insult,” punishes publicly insulting behavior, such as fighting words and name calling: “Any person who publicly insults others is subject to detention or a fine of 300 dollars or less.” CRIMINAL CODE art. 309, para. 1 (Taiwan).

⁸⁸ *Id.* art. 310, para. 2 (Taiwan): “Any person who commits the acts proscribed under Paragraph 1 in writing or

Article 310 and Article 311 provide several privileges to the offense: (1) Truth (used only in the context of public interest): The defendant is not liable for criminal libel if she can prove that the statement is true. However, the statement is not privileged, should the statement be purely about personal morality, but not related to public interests.⁸⁹ (2) Good will (available for statements made on the following occasions): (a) for the purpose of self-defense, exculpation, or protecting lawful interests; (b) reporting by civil servants as mandated by their duties; (c) expressing appropriate opinions in connection with public interests or affairs meriting public discussion; d) recounting minutes of any central or local councils, courts or public congregations.⁹⁰

Based on the above legal structure, it would be the defendant's burden to prove either the truthfulness of the statement, or, if the statement is false, it was disseminated in good will. The disseminator of defamatory information bears the burden of proving truthfulness or good will in the litigation. Such legislation has posed undue burden on the news media, which often disseminated statements which might be considered defamatory. The situation did not improve until 2000, when the Grand Justices promulgated Judicial Yuan Interpretation No. 509. In the interpretation, the Grand Justices, though not directly citing *New York Times v. Sullivan*,⁹¹ held that in order to protect the freedom of the press, the defendant in criminal defamation does not bear the absolute burden to prove the truthfulness of the defamatory statement. Instead, if the defendant is able to prove the reasonable grounds for her belief of truthfulness, she should be deemed to have made the statement with good will, and therefore will be found not guilty.⁹²

Although Interpretation No. 509 seemed to be a great improvement in the protection of free press, the actual practices of the courts appear less promising. In addition, though this

picture is subject to imprisonment of two years or less, labor service, or a fine of 1,000 dollars or less.”

⁸⁹ *Id.* art. 310, para. 3 (Taiwan).

⁹⁰ *Id.* art. 311 (Taiwan).

⁹¹ *Sullivan*, 376 U.S. 254 (1964).

⁹² Judicial Yuan Interpretation No. 509 (Taiwan).

interpretation was made regarding the constitutionality of criminal libel, whether it applies to a civil libel case is controversial.

1. 84 Shang Yee Tzi 1148: Is a Whistleblower-to-be a Public Figure?

Chen Man-Dee,⁹³ a lecturer/military officer at the National Defense Management College,⁹⁴ told the press that she had inside information about certain military scandals and would disclose it. Before Ms. Chen revealed such information, *Time Weekly*, a nationwide magazine, publicized two reports regarding Ms. Chen's personal life:⁹⁵

Rumors are always malicious; people criticize Chen Man-Dee perilously about her personal life. There are rumors that she has many boyfriends, with diversified backgrounds. There are also rumors saying that Chen Man-Dee had an affair with a general, Director Tang, and made Mrs. Tang very unpleasant.

In the other article, "The Inside Story of HuChungTian Case,"⁹⁶ *Time Weekly* further reported that "She [Chen Man-Dee] was a lecturer at FuHsingKung College⁹⁷, but she subsequently got involved in several affairs; therefore was transferred."⁹⁸ Ms. Chen, believing that these two reports had damaged her reputation, filed criminal charges against the publisher, president, editor-in-chief, editors and reporters of *Time Weekly*.

Time Weekly contended that, though Ms. Chen had not exposed any information regarding military scandals, she had become a "voluntary public figure," since most media had reported her

⁹³ This paper, when referring to the names of Chinese/Taiwanese people, follows the Chinese model, in which the family name appears first, and the given name appears second. However, this paper will still follow the bluebook format in the citations.

⁹⁴ National Defense Management College is a military college designed to train military officers for certain professions, such as the law and accounting.

⁹⁵ Shu-Ren Ge, *Chen Man-Dee holds Weapons in her Hands*, 814 TIME WEEKLY 49 (1993).

⁹⁶ Before Ms. Chen claimed to expose the military scandal, she was involved in another case, where she was sued for injury as she slapped another military officer in a restaurant named "HuChungTian." It was during the trial proceeding of the HuChungTian case when Ms. Chen threatened to expose some military scandals.

⁹⁷ FuHsingKun College is also a military college, designed to train "political officers" and officers serving non-combat positions, such as broadcasting, publishing, and public relations. More information is available at <http://www.fhk.edu.tw>.

⁹⁸ Tzeng-Yu Deng, *The Inside Story of HuChungTian Case*, 814 TIME WEEKLY 49, 53 (1993).

announcement about having such information. As a public figure, Ms. Chen's behavior was, by nature, related to public interests. In addition, as a public figure, Ms. Chen's education, conduct, and background were newsworthy, because they provided a reference for the scandals that Ms. Chen was about to expose, and consequently satisfy "the right to know" of the readers. *Time Weekly* further contended that the alleged reports were based on the interviews of its reporters, and were not fictitious. Further, *Time Weekly* argued that the reports were related to the image of the military, not merely to personal moral issues. Therefore, the reports should be protected under the statutory safe harbor of "public comment," under Article 311(3) of the Criminal Code. Moreover, *Time Weekly* contended that the reports did not focus on Ms. Chen's personal life, and had mentioned that those stories regarding her personal life were "rumors." Finally, *Time Weekly* argued that, because the reporters had no personal conflicts with Ms. Chen, the absence of libelous intention was obvious.

The court, however, found the reporters and chief editor guilty of defamation. The court first analyzed Article 310 of the Criminal Code, concluding that the defense of "truth" is not applicable when the remark is only related to a personal moral issue, not the public interest. The court concluded that the defendants failed to prove the veracity of the reports, and, even presuming the report to be true, the content of the reports only related to Ms. Chen's personal life, not the public interest.⁹⁹

The court also denied *Time Weekly*'s contention that a public figure's personal life may have been related to the public interest and therefore should have been within the protection given in Article 311(3). The court held that Ms. Chen was not a public figure because she only threatened

⁹⁹ Taiwan High Court 84 Shang Yee Tzi 1148 Criminal Judgment.

to expose the military scandals, and had not revealed anything.¹⁰⁰ This logic seemed problematic in two ways: (1) since Ms. Chen had exposed herself in front of the media by threatening to expose the scandal, she was already known to the public and had enjoyed the benefits of such exposure to the media; 2) Ms. Chen, as a military officer, was also a public official, who deserved less reputation protection.

While the High Court denied the public figure status purely because Ms. Chen had not revealed anything regarding the military scandal, the court seemed to forget that Ms. Chen was also a military officer, who should be subjected to a higher degree of supervision from the press. In *Garrison*, the U.S. Supreme Court extended *New York Times* to “anything which might touch on an official’s fitness for office,” even if the defamation did not concern official conduct in office.¹⁰¹ If the personal life of Ms. Chen was as messy as what had been reported, it should be related to her fitness for her position as a lecturer and military officer. In addition, as a whistleblower-to-be, her credibility was highly related to the truthfulness of the scandals she was about to expose. Since she had gained access to the media as a whistleblower-to-be, whether she could shield herself as a private figure or limited-purpose public figure, and avoid the examination of her credibility from the press, is questionable. As a whistleblower-to-be, Ms. Chen assumed an “influential role in ordering society,” and had “exposed [herself] to increased risk of injury from defamatory falsehood.”¹⁰²

2. 87 Shang Yee Tzi 7196: Inside Story of Famous Singer’s Tragedy

In April 1997, Bai Shiao-Yian, the only daughter of Bai Yuay-Oa, a famous female singer known as Bai Bing-Bing, was kidnapped. Bai Shiao-Yian was later found to be tortured, raped,

¹⁰⁰ *Id.*

¹⁰¹ CHOPER, *supra* note 15, at 624.

¹⁰² *See* Gertz, 418 U.S. at 345.

and killed in cold blood. However, this was not the end of Ms. Bai's suffering. In December 1997, *MeeHua Report* ("MeeHua"), a weekly magazine, published an article, "Inside Story of the Bai Case." In the article, *MeeHua* alleged that the reason for Bai Shiao-Yian's kidnapping was that Ms. Bai had financial disputes with the mafia. *Meehua* further alleged that Ms. Bai might have been responsible for her daughter's death, because she, worried about her own reputation, did not reveal her financial disputes to the police.

Sad and furious, Ms. Bai filed criminal libel charges against *MeeHua*'s president, chief editor, and editor, alleging that they jointly disseminated false and defamatory statements against her reputation.¹⁰³ Surprisingly, both the Taipei District Court, in the first instance, and the Taiwan High Court, on appeal, found the defendants not guilty.¹⁰⁴

The defendants contended that they published five stories regarding Ms. Bai's case, and only the "inside story," an analysis of the possible background of Bai's Case, could have been considered negative toward Ms. Bai. If the readers read through the five reports, they would not feel negatively about Ms. Bai. In addition, the defendants contended that there was nothing new in their inside story; they merely collected all the reports from other news media and combined them into the report at issue. Ms. Bai, on the other hand, argued that the three defendants, as professional journalists, did not fulfill their responsibilities to check the truthfulness of the article.

The court, while finding the three defendants not guilty, emphasized the importance of freedom of the press. The court, quoting Judicial Yuan Interpretation No. 364, reaffirmed the constitutional protection of freedom of the press. The court further reasoned that the "good will" defense under Article 311 of the Criminal Code should be interpreted in accordance with the

¹⁰³ In Taiwan, victims of crimes may file criminal charges against the defendants on their own behalf, without the consent or investigation proceedings of the District Attorney. In cases where evidence is not as sufficient or the defendant is unknown, victims usually file complaints with the police or district attorneys.

¹⁰⁴ Shilin District Court 87 Tzi Tzi 39 Criminal Judgment; Taiwan High Court 87 Shang Yee Tzi 7196 Criminal Judgment.

“actual malice test”—that is, unless the media intend to damage someone’s reputation, provided that the media have fulfilled their obligations of reasonable investigation and balanced reporting, the media should be found not guilty, so as to prevent “chilling effects.”¹⁰⁵

After reviewing the facts in the present case, the court held that the report was defamatory against Ms. Bai, since it falsely alleged that Ms. Bai had invested in a mafia business, and would give readers the impression that Ms. Bai’s financial disputes, and her incomplete cooperation with the police, caused her daughter’s death. However, the court found that the defendants lacked actual malice:

Though those statements were exaggerating, or based on guessing, such tones were made for stimulating readers’ desire to buy defendants’ magazine, and defendants had published Ms. Bai’s response for balances. The defendants’ intention was no more than business, but not based on personal issues with Ms. Bai; therefore no intention to harm Ms. Bai’s reputation could be found in this case. Though the statements were inappropriate, as defendants lacked intention to harm, they should be found not guilty of defamation.¹⁰⁶

This is the first time that the Taiwan High Court invoked the “actual malice” test. The judgment clearly points out the importance of freedom of the press and brilliantly invokes the “actual malice” test to balance freedom of the press and the reputation of public figures. However, it would be inappropriate to conclude that the defendants were not guilty based on the reason that they had no personal issues with Ms. Bai and were purely business-driven. If the High Court tough note of the *Butts* test—“highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers”¹⁰⁷—and applied it to the defendants’ behavior in the present case, perhaps the result

¹⁰⁵ Taiwan High Court 87 Shang Yee Tzi 7196 Criminal Judgment.

¹⁰⁶ *Id.*

¹⁰⁷ *Butts*, 388 U.S. at 155 (“[A] ‘public figure’ who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”).

would have been different.

3. 88 Shang Yee Tzi 1097: A News Anchor's Affairs

Prior to the *Bai Yuay-Oa Case*, *MeeHua* publicized a story regarding an affair between Ms. Ran Shu-Hsian, a news anchor, and a reporter in another television news agency, in 1996.¹⁰⁸ *MeeHua* detailed how Ms. Ran's husband and other relatives caught her and her boyfriend in bed. *MeeHua* also stated that Ms. Ran had been suspended by her news agency.¹⁰⁹ Other than these reports, *MeeHua* also publicized its interview with Ms. Ran, "The Other Version of the Affair: The First Time the Anchor Explains to the Media," without her consent.¹¹⁰ In addition, without her consent, *MeeHua* publicized photographs of Ms. Ran, who only wore sleepwear, with the comment, "Can it be Misunderstanding that having Them Caught together in the Same Room So Late in the Night?"¹¹¹

Ms. Ran filed a criminal complaint to the District Attorney of Taipei, alleging that the above articles constituted defamation. The District Attorney prosecuted *MeeHua*'s reporter and chief editor.¹¹² Both the Taipei District Court, in the first instance, and the Taiwan High Court, on appeal, found the defendants not guilty.¹¹³

In the judgment, the High Court made a very detailed clarification regarding the elements of defamation: (1) there must be an intention to damage the reputation of the victim; (2) defendant

¹⁰⁸ *The Exposure of TTV News Anchor Ran Shu-Hsian and [omitted]'s Affair*, 348 MEEHUA REPORT (1996); quoted in Taiwan High Court 88 Shang Yee Tzi 1097 Criminal Judgment.

¹⁰⁹ *Id.*

¹¹⁰ *The other Version of the Affair: The First Time the Anchor explains to the Media*, 349 MEEHUA REPORT (1996); quoted in Taiwan High Court 88 Shang Yee Tzi 1097 Criminal Judgment.

¹¹¹ *Id.* Other than this, *MeeHua* also quoted the content of an audiotape recorded by the wife and relatives of the anchor, regarding the anchor's telephone communication with his girlfriend. To these communications, the *Report* added comments such as "dating every other day is not enough," "feel him like a superman; exploded entirely," and "the affairs exposed; denied firmly."

¹¹² Taipei District Attorney Prosecution Brief: 85 Cheng Tzi 26649, and 86 Cheng Tzi 8143.

¹¹³ Taipei District Court 86 Yee Tzi 4713 Criminal Judgment; Taiwan High Court 88 Shang Yee Tzi 1097 Criminal Judgment.

must, with the intention to disseminate to the public, have originated or circulated defamatory statements, either orally, in writing, or in picture form. In addition, the defendant may raise the following defenses: (1) “truth,” which is limited to matters regarding public interests; and (2) “actual malice,” *based on U.S. precedent*, in which a commentator is not liable for her comments regarding public officials and public figures,¹¹⁴ unless having actual malice—that is, making defamatory statement with the knowledge that it was false or with reckless disregard of whether it was false.¹¹⁵

While the prosecution did not deny that the anchor was a public figure, the prosecution argued that her adultery related only to personal morality, not the public interest. The prosecution argued that, though Ms. Ran had received public funds to conduct research regarding journalism overseas, only the depth and accuracy of her news broadcast, and the content of her research report should have been worthy of public comments, not her personal life.

The High Court denied this argument. It first emphasized that freedom of the press is protected under the constitution. The High Court then stated that since such freedom is fundamental to democracy, constitutionalism, and a free society, one should be cautious in order avoid causing a chilling effect upon the media.¹¹⁶ To protect the news media from a chilling effect, the High Court further held:

In order to achieve the constitutional goal to protect freedom of the press, “the expression of statements with ‘good will’ should be illustrated in the broad sense; in other words, should the media, while publicizing statements, have no intention to harm other’s reputation, and believe the report to be true, even it learned the fact to be otherwise, the court should find the media with “good will,” and its publication not constituting defamation.¹¹⁷

¹¹⁴ Taiwan Television (TTV) was the most prestigious television station for news reports at that time; therefore, as a news anchor, Ms. Ran was very famous. For more information regarding TTV, please check www.ttv.com.tw.

¹¹⁵ Taiwan High Court 88 Shang Yee Tzi 1097 Criminal Judgment.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

In addition, by incorporating the “actual malice” test into the application of “good will,” the High Court shifted the burden of proof to the prosecution. The court held that it should be the prosecution’s burden to prove that the media publicized the statement with actual malice, but not the news agency’s burden to prove that it published the statement with “good will.”

The court further held that because well-known public figures enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to defend themselves, whether the media have actual malice in their reports regarding public figures or public related issues should be narrowly construed. Newspapers usually reserve certain pages for news regarding television and broadcast, and Ms. Ran had been named an “Excellent Practitioner of Journalism.” However, Ms. Ran could not take advantage of the media for accolades, but forbid the news media from issuing negative reports. In addition, the High Court held that, since adultery is still a criminal offense in Taiwan, committing such crime is not a purely personal moral issue. Finally, the court held that though *MeeHua* used an exaggerating tone to report the news, it would not presume the actual malice on the part of *MeeHua*.¹¹⁸

This decision is plausible, since it correctly points out that public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counter false statements than private individuals normally do. It is also important, since it pointed out that public figures may not enjoy the benefit of publicity while refusing the publication of negative reports. Although the court did not quote *Gertz* in the judgment, it was clearly influenced by *Gertz*. In addition, by affirming that news media would not be found to have shown “actual malice” purely because they used an exaggerating tone, this decision made more room for the freedom of the press.

¹¹⁸ *Id.*

4. 89 Shang Yee Tzi 1960: Commissioner of Urban Planning Commission

Li Wen-Cheng, a city councilor of Tainan City, published an article alleging that Wang Da-Chin, commissioner of Tainan City Urban Planning Commission, planned to make a windfall with his influence. The article suggested that Mr. Wang had acquired an estate, which was designated to be taken, and that he was to be compensated by the city in order to profit from the process. In the article, Mr. Li further alleged that “Wang Da-Chin had been involved in several bribery and corruption scandals; and moreover, there was rumor that the estate owner planned to spend 30 million NT dollars to buy off the City Council.” Wang Da-Chin filed against Li Wen-Cheng for defamation in Tainan District Court. Both Tainan District Court and the Tainan Branch Court of the Taiwan High Court found Li Wen-Cheng guilty of defamation. The courts recognized Mr. Wang as a local public figure, but not as a public figure with nationwide fame.¹¹⁹

Mr. Li’s major defense was that Commissioner Wang was a public official; in addition, he contended that his statement was based on petitions from his electorates, and was related to public interest (the public expenses). Therefore, Mr. Li argued that, even though he could not prove the statement to be true, he nonetheless should be privileged from defamation liability.

The court instead distinguished Mr. Wang from political public figures, and created a new category of “local public figure”:

Though Mr. Wang, due to his wealth and reputation in the construction business, is qualified as a public figure, his position as an Urban Planning Commissioner is only a consulting position, which makes him different from those political public figures, who enjoy better access to the media. Thus, it is inappropriate to conclude that all public figures should have higher degree of tolerance to other’s statements.¹²⁰

¹¹⁹ Taiwan High Court, Tainan Branch Court, 89 Shang Yee Tzi 1960 Criminal Judgment (“Urban Planning Commissioner Case”).

¹²⁰ *Id.*

Mr. Li also contended that his statement about Mr. Wang was related to the public interest and therefore should be protected under the safe harbor, “expressing appropriate opinions in connection with public interests or affairs meriting public discussion, based on ‘good will,’” provided in Criminal Code 311(3). The Tainan Branch Court denied this defense as well:

The defendant should at least have reasonable suspicions regarding the truthfulness of the defamatory statement. The defendant should be considered reckless, if he believed the rumors without examining the source of the statement. As the defendant has failed to prove the basis for his reasonable suspicion, he cannot be considered expressing opinions in connection with public interests or affairs meriting public discussion with “good will.”

This judgment differs from the *Anchor’s Affair* Case, since it, instead of shifting the burden of proving “actual malice” to the prosecution, demanded that the defendants satisfy an initial burden of proving the basis for his reasonable suspicion. However, whether the defendant may then be protected under the “actual malice” test was not mentioned in the judgment. In addition, this judgment erred in defining Mr. Wang as a non-political public figure. Although the Tainan Branch Court might be right that Mr. Wang enjoyed less access to the channels of effective communication than those national political figures, as a commissioner in Tainan City’s Urban Planning commission, Mr. Wang’s integrity was highly related to his fitness to his commissionership. Also, Mr. Wang, as a local official, was similar to Mr. Sullivan, who also had no access to the national media, in *New York Times*.

5. 90 Shang Geng (1) Tzi 533: Minister’s Decoration Expenditure

In 1996, Chu Hui-Liang, a legislator/congresswoman, in a congressional hearing session, questioned the Chief Personnel Officer of the Executive Yuan (Taiwan’s Cabinet, similar to the Department of State in the U.S.) whether a newly-appointed minister had spent 2.78 million NT dollars (about 79,429 U.S. dollars) of public funds to direct his official residence without

budgetary authorization.¹²¹ Considering this event newsworthy, *Business Weekly* interviewed an assistant of Congresswoman Chu and a resident in the minister's apartment building. Consequently, based on the two interviews, *Business Weekly* published two articles. One alleged that Tsai Chao-Yang, Minister of Transportation, was the one whom Congresswoman Chu referred to in the hearing. The other article described Minister Tsai as a mean and merciless person, who once issued five public news letters to humiliate his staff and often threatened reporters, stating that he could "fix" their employment.¹²²

Considering his reputation damaged, Minister Tsai soon sued *Business Weekly*'s reporter, Lin Ying-Chow, and its chief editor, Huang Hung-Jen, for defamation.¹²³ Both the Taipei District Court and the Taiwan High Court found the chief editor and the reporter guilty.¹²⁴ *Business Weekly* then petitioned the Grand Justices of Judicial Yuan for constitutional interpretation, contending that criminal punishment of defamatory speech was a violation of freedom of the press.¹²⁵ After the Grand Justices issued an opinion, Interpretation No. 509,¹²⁶ favoring *Business Weekly*, the Supreme Court, in an extraordinary appeal proceeding, remanded the case to the Taiwan High Court, based on this new issue.¹²⁷ However, the High Court, during its retrial,

¹²¹ *Committee Record*, 85:45 LEGISLATIVE YUAN REPORT 52 (1996).

¹²² Han-Yian Chin, *Tsai Chao-Yang took away Wang Tzi-Kung's favorite PR Staff*, 467 BUSINESS WEEKLY (1996).

¹²³ "Han-Yian Chin" is a pseudonym. *Business Weekly* refused to reveal the writer's true identity; therefore, only the chief editor and writer of the other report were prosecuted and punished for the defamation.

¹²⁴ Taipei District Court 85 Tzi Tzi 1158 Criminal Judgment (Taiwan); Taiwan High Court 86 Shang Yee Tzi 2617 Criminal Judgment, 3 TAIWAN HIGH COURT CRIMINAL JUDGMENTS REPORT 1855-71 (1997).

¹²⁵ As defamation is categorized as a minor offense, such cases cannot be appealed to the Supreme Court in Taiwan.

¹²⁶ In Judicial Yuan Interpretation No. 509, the Grand Justices held that, to the extent that the accused failed to demonstrate that the defamatory statement was true, as long as the accused had reasonable grounds to believe that the statement was true, and had proffered evidence to show such belief, the accused was not guilty of criminal defamation. The Grand Justices further declared that prosecutors, whether public or private, should bear the burden to prove the offense of deliberate intention defamation. The English translation of the Interpretation is available at <http://www.judicial.gov.tw/j4e/doc/509.pdf>.

¹²⁷ Supreme Court 90 Tai Fei Tzi 155 Criminal Judgment (Taiwan). Petitioner in the constitutional interpretation proceeding may file for a retrial (in civil procedure) or an extraordinary appeal (in criminal procedure) should a favorable interpretation be rendered. Judicial Yuan Interpretation No. 185 (Taiwan): In the case of a final and irrevocable judgment where the statute or ordinance or the interpretation of such statute or ordinance applied in rendering such judgment is deemed contrary to the Constitution

ignored the interpretation, and once again found the defendants guilty.¹²⁸

In Interpretation No. 509, the Grand Justices made it clear that, to the extent that the accused failed to demonstrate that the defamatory statement was true, as long as the accused had reasonable grounds to believe the statement was true, and had proffered evidence to show that belief, the accused must have been found not guilty of criminal defamation.¹²⁹ The High Court, instead of following this “actual malice” test provided under Interpretation No. 509, cited two judicial opinions,¹³⁰ which demanded that the news reporters conduct investigations regarding the truthfulness of the reports.¹³¹ The High Court then concluded that the defendants could not assert “good will” privilege, because they did not perform the most basic investigation—to interview the parties in the reports (Minister Tsai) prior to the publication of the reports.

If the High Court had followed the actual malice test provided in Interpretation No. 509, it would have found that the defendants made the statements at issue with reasonable grounds to believe that the statements were true. The defendants had interviewed Congresswoman Chu’s assistant and a resident living in the same building with Minister Tsai. Both interviewees made remarks which would have made the defendants believe that Minister Tsai was the one ordering

pursuant to an interpretation rendered by this Judicial Yuan upon an application by the interested person for such an interpretation, the party against whom such final and irrevocable judgment is entered shall be entitled to file for a retrial or an extraordinary appeal on the basis of said interpretation, and this should not be construed as mere differences in legal interpretations.

¹²⁸ The petitioners re-petitioned to the Grand Justices, but the petition was denied. Interview with Nien-Tzu Li, January 6, 2003 (Nien-Tzu Li represented the petitioners in the constitution interpretation application proceeding).

¹²⁹ *Id.*

¹³⁰ Judicial Yuan 32 Yuan Tzi 1143 Interpretation (1943); and Taiwan High Court Panel Conclusion (1975).

¹³¹ In Taiwan, the Grand Justices, the constitutional interpretative body, is not the highest court, but is independent from (or even above) the court system. As a result, Taiwan’s Supreme Court Justices and some judges in the lower courts are particularly sensitive when the Grand Justices accept petitions from parties of a final judgment and argue that the laws/regulations applied in that final judgment violated the constitution. These Justices and Judges believe that this kind of “judicial review” jeopardizes their authority and the independence of the court system, as the supremacy of the Supreme Court is diluted in such a proceeding. This might be the reason why Taiwan High Court, on the remand of this case, did not apply Interpretation No. 509.

the alleged renovations.¹³² This case exposed one problem of Taiwan's Constitution interpretation problem—lack of an enforcement mechanism. While the Grand Justices may make abstract constitutional interpretations favorable to the petitioner, which allows the petitioner to have a new trial based on the interpretation, the application of such interpretations is still at the mercy of judges.

6. 91 Shang Su Tzi 1083: First Lady Escaped after losing the Election?

On March 18, 2000, Taiwan had its second direct-vote presidential election.¹³³ It was the first time that the KMT, the longtime ruling party, lost its ruling status in Taiwan's central government. After the campaign result was announced, many KMT supporters gathered in front of the party's central office building. They demanded that KMT Chairman Lee Teng-Hui, who was also President of the Republic, face the crowd and be held accountable for the humiliating defeat.¹³⁴ In the gathered crowd, a rumor surfaced that the First Lady, Tseng Wen-Hui, had fled to the United States after the election, with tons of jewelry and cash. Ms. Hsieh Chi-Ta, legislator/congresswoman, participated in the demonstration and told the crowd such the rumor. She was told that the First Lady was shipping President Lee's personal property to the United States via Eva Airline. She asked the crowd to be mindful of the conspiracy and to not allow

¹³² While Lin Ying-Chow, the reporter, interviewed the assistant of Congresswoman Chu regarding the expenditure, the assistant suddenly laughed when Ms. Lin mentioned Minister Tsai's name, though he refused to reveal the identity of the minister. In addition, when Ms. Lin interviewed the resident living downstairs from Minister Tsai's official residence, the person also told Ms. Lin that there seemed to be some decorations in Minister Tsai's official residence. See Taiwan High Court 90 Shang Geng (1) Tzi 553 Criminal Judgment.

¹³³ Prior to 1996, Taiwan's President was elected by the National Assembly.

¹³⁴ The KMT divided into two campaigns during the election. James Soong, former governor of Taiwan Province, left the KMT and formed his own campaign, as Lee Teng-Hui supported his Vice-President, Lian Chan, to represent KMT in the election (KMT's does not have an independent internal nomination mechanism; consequently, the Chairman may designate the nominee). It turned out that Lian Chan was elected the third position with less than 20% votes in the election, while James Soong lost less than 2% to Chen Sui-Bian, the newly-elected president. Therefore, many of the KMT's supporters thought that Lee's arbitrary decision caused the party's split and defeat.

President Lee export his assets from Taiwan. Her remark was soon broadcast and distributed by the media networks.

Five days later, Mr. Feng Hu-Hsian, also a legislator, held a news conference in the Legislative Yuan (Taiwan's Congress), alleging that the First Lady tried to ship 85 million U.S. dollars in cash to the United States. Mr. Feng further pointed out that the cash shipped by the First Lady was returned by the U.S. Customs Service, due to a violation of customs filing regulations. Consequently, the money was returned to Taiwan via China Airline on March 22, 2000. His allegations were confirmed by Mr. Dai Chi, a Commissioner of Overseas Chinese Service Commission, who was in New York at the time. In the press conference, Mr. Dai made detailed descriptions regarding the time the money was shipped, whom the money was addressed to, and which airline shipped the money. Mr. Dai told the press that he received the information from three different sources.

The First Lady eventually re-surfaced on March 23rd, five days after the election. She denied the allegations and filed criminal libel complaints against Ms. Hsieh, Mr. Feng and Mr. Dai. The three defendants soon counter-sued her for fabricated charges. Although the District Court found both sides not guilty,¹³⁵ the Taiwan High Court, on appeal, found the three defendants guilty of defamation. Ms. Hsieh and Mr. Dai were sentenced to three months, while Mr. Feng was sentenced to four months. The imprisonment may be transformed into a fine.¹³⁶

The High Court, applying Interpretation No. 509, held that the defendants were not required to prove the truthfulness of the statements, but bore the burden of establishing the reasonable grounds for their beliefs. Based on the testimony of Eva Airline, China Airline, First Lady's daughter-in-law, security officers, and maids in the Presidential Residence, the High Court

¹³⁵ Taipei District Court 89 Tzi Tzi 305 Criminal Judgment.

¹³⁶ Taiwan High Court 91 Shang Su Tzi 1083 Criminal Judgment.

concluded that the First Lady did not leave Taiwan after the presidential election.¹³⁷ Although there was a huge amount of U.S. dollars shipped into Taiwan on March 24, the High Court concluded that the money was shipped to the Taipei Branch of Bank America, not the First Lady.¹³⁸ Consequently, the High Court concluded that the defendants' allegations were false.

Since Ms. Hsieh admitted that she did not begin to investigate whether the First Lady had shipped President Lee's property prior to her remarks in front of the KMT's central office building, the High Court concluded that she failed to meet her burden of providing reasonable grounds for her belief in the statement. The High Court held that Ms. Hsieh, as a legislator, should have investigated the rumor before she disseminated it to the public. As for Mr. Dai and Mr. Feng, the High Court weighed the evidence that their remarks were based upon, and concluded that it was insufficient to constitute reasonable grounds for their belief in their statements.¹³⁹ The High Court, therefore, reversed the judgment of the Taipei District Court, and found the defendants guilty.

Although the court found the defendants guilty, it applied Interpretation No. 509 and only required the defendants to provide reasonable grounds for their belief that their statements were true. Compared to the 90 Shang Geng (1) Tzi 533 criminal judgment, which bypassed the Interpretation, this judgment demonstrated some progress in free speech protection. However, this judgment seemed to pose a relatively high standard for reasonableness. After all, the

¹³⁷ The witnesses suggested that the First Lady visited her son's grave during the five-day period, so as to prove that she was in Taiwan during the five-day period. However, their testimony was inconsistent regarding the exact date of the visit and who accompanied the First Lady. The court, nonetheless, ruled in favor of the First Lady. *See* Taiwan High Court 91 Shang Su Tzi 1083 judgment (holding that the witnesses are creditable, despite the inconsistencies, because the court hearing was held two years and six months after the event, and minor inconsistencies were inevitable).

¹³⁸ On March 24, 2000, TVBS, one of Taiwan's major television networks, reported that 17 million U.S. dollars were shipped into Taiwan. The report demonstrated the packages of money shipped into Taiwan's customs office in the Chiang Kai-Shek International Airport.

¹³⁹ U.S. Customs refused to respond to the High Court's written deposition regarding whether there had been a huge amount of money shipped to the U.S. and returned to Taiwan in March 2000. Mr. Feng and Mr. Dai also failed to provide other more persuasive evidence.

integrity of the First Family, especially one that had just lost the ruling status, should have been subjected to higher degree of scrutiny. While Ms. Hsieh was rather hasty, Mr. Feng should have had reasonable grounds for his statements, which were based on the investigations of Mr. Dai, a creditable public official.

7. Summary

Given the above cases, we may find out that, after Interpretation No. 509, which incorporated the “actual malice” test into the consideration of “good will,” Taiwan’s news media have theoretically received better protection under the constitution. However, the High Court, which is the final instance for the criminal offense of defamation, seems divided in its application of the interpretation. In some cases, such as the news anchor case, the High Court held that the burden of “good will” and “lack of actual malice” should be shifted to the prosecution/plaintiff, while in some other cases, the High Court held that the defendant should bear such a burden.

In addition, it seems that the High Court gives the news media less free speech protection when the statements are related to public officials. While the defendants in the *Bai* case were found not guilty based on business intention,¹⁴⁰ the safe harbor was not observed when political public figures were involved. In the *Chen Man-Dee* case, the High Court denied her public figure status simply because she had not exposed military scandals. Disregard that Chen Man-Dee was also a military officer and that she already enjoyed better access to the media. In the case about the Urban Plan Commissioner, the High Court (Tainan Branch) concluded that Commissioner Wang was a “local political figure.” Disregard that Wang participated in the decision-making of the city’s real estate levying. In the case about Minister Tsai, the High Court

¹⁴⁰ Taiwan High Court 87 Shang Yee Tzi 7196 Criminal Judgment.

even intentionally ignored Interpretation No. 509.

Conversely, while the standard is of a “non-political public figure,” the High Court often observes the “actual malice” test and rules in favor of the press.¹⁴¹ Such differentiations, ironically, would cause chilling effects upon the news media, and make them less willing to publish negative reports about public officials, which is the essence of Interpretation No. 509 and the “actual malice” test—to encourage debate about public issues.

B. Civil Cases

In Taiwan, the basis for a civil libel claim is provided in Articles 18, 184, and 195 of the Civil Code. Article 18 of the Civil Code provides that:

(1) In the event of violation to right of personal dignity, the injured party may claim to remove the infringement; in the event that there is likelihood of infringement, the prevention measures may be pursued. (2) In the event given in Paragraph One, one may claim actual damage or presumed damage, if such relief is provided by law.¹⁴²

Article 184(1) of the Civil Code further provides that “[a]ny person who illegally infringes other’s rights, either deliberately or negligently, is liable for damages thereby incurred...”¹⁴³ Article 195(1), on the other hand, provides for a specific measure of reputation recovery other than monetary damages:

In the event of illegal infringement of other’s...reputation, credits..., the injured party may claim proper damages other than property losses. Those whose reputations were damaged, may further claim for appropriate means to restore the reputation.¹⁴⁴

¹⁴¹ The Taiwan High Court has four branch courts. Each Branch Court is composed of the Criminal Tribunal and the Civil Tribunal, and each tribunal is divided into many sub-tribunals, in order to deal with large quantity of cases. Currently, the Criminal Tribunal has 25 sub-tribunals. This might be one of the reasons for the differences in the application of Interpretation No. 509. See *Introduction to Taiwan High Court*, at <http://www.judicial.gov.tw/JYC/TTPH/tpha.htm#a1-3>. See also *Directory of the Judicial Branch* (English), at <http://www.judicial.gov.tw/b4/e4-1.htm>.

¹⁴² CIVIL CODE art. 18 (Taiwan).

¹⁴³ *Id.* art. 184, para. 1 (Taiwan).

¹⁴⁴ *Id.* art. 195, para. 1 (Taiwan).

1. 86 Tai Shang Tzi 3706: First Son-in-Law

In 1994, *Business Weekly* published a story, “Look into the First Family,” which made several negative comments regarding Lai Guo-Cho, the First Son-in-Law:

[H]is efforts in recent years have caused many criticisms, people, nonetheless, did not say much with the concern of his identity. However, the Department of Journalism, NCCU, had decided not to employ him (Mr. Lai) for the coming year, as he missed too many classes this year...Lai Kuo-Cho was among the first Ph.D. class of Journalism in the School of Journalism, NCCU; his thesis advisor was Chu Chi-Ying, the vice secretary general of the ruling party (KMT), and Cheng Chen-Min, the president of Hong Kong Times...Lai Kuo-Cho is the Director of the R.O.C. Citizen Opinion Survey Foundation...Lai Kuo-Cho is Lee Teng-Hui’s representative to fix media...Under Lai Kuo-Cho’s control, News Commentary Association and ‘News Bridge’¹⁴⁵ soon emerged...The relationship of Lai Kuo-Cho and Liberty Times is obvious as he visited the editorial office of Liberty Times very often, and he arranged a meeting of President Lee Teng-Hui and Lin Rong-San, the owner of Liberty Times, at Lin’s house.

Mr. Lai, considering that the above statements were false and had damaged his reputation, filed both criminal and civil charges against *Business Weekly* and received favorable decisions in both proceedings.¹⁴⁶ In the civil proceeding, the Supreme Court concluded that the above statements were untrue and defamatory, without detailed explanation. While measuring the damage (no actual damage was provided), the Supreme Court considered that Mr. Lai, son-in-law of President Lee, and who had been appointed to twenty positions in various entities, including some subsidiaries of the KMT, must have suffered more than laypeople. Thus, the Supreme Court ordered *Business Weekly* to compensate Mr. Lai one million NT dollars, and to publicize the criminal judgment in *Liberty Times*.¹⁴⁷

This judgment was issued in 1997, but even at the time, such a ruling was overly

¹⁴⁵ *News Bridge* is a television commentary program that covers news and reports. The program was jointly broadcast by three television stations.

¹⁴⁶ Taiwan High Court 85 Shang Yee Tzi 3001 Criminal Judgment; Supreme Court 86 Tai Shang Tzi 3706 Civil Judgment.

¹⁴⁷ Supreme Court 86 Tai Shang Tzi 3706 Civil Judgment.

conservative. The Supreme Court not only held that Mr. Lai, as a public figure, was entitled to claim presumed damages, but further held that he suffered more damages as a public figure. The Supreme Court did not observe that public figures, especially political public figures, such as Mr. Lai, should be subjected to supervision by the media. In addition, the Supreme Court failed to observe that Mr. Lai, as the only son-in-law of President Lee,¹⁴⁸ enjoyed better access to the media to defend himself. To award him presumed damages and demand that *Business Weekly* publish notices regarding the litigation would surely chill the media, and weaken their function as a check on government.¹⁴⁹

2. 88 Tai Shang Tzi 1262: Minister of Transportation Tsai's Renovations

Besides criminal proceedings, Minister of Transportation Tsai also filed a civil lawsuit against *Business Weekly* for damages regarding his reputation and demanded that *Business Weekly* publish a "Notice of Apology" in major newspapers as an appropriate measure to restore his reputation. The court held in favor of Minister Tsai, ordered *Business Weekly* to compensate Minister Tsai 600,000 NT dollars, and to publicize the apology.¹⁵⁰

The court found that *Business Weekly* made a false statement that Minister Tsai spent 2.78 million NT dollars to decorate his official residence, since the Ministry of Transportation provided a detailed budget and receipts from the alleged renovations, which cost 280,000 NT dollars. The court also found that *Business Weekly* failed to fulfill its obligation to investigate. The court held that the press has the duty to investigate prior to publishing. The press would be held liable if the report (1) is only related to a personal moral issue; or (2) is defamatory and the press cannot prove the truthfulness of the report.

¹⁴⁸ President Lee had one son, Lee Hsian-Wen, who died many years ago.

¹⁴⁹ See JOHN D. ZELEZNY, *COMMUNICATIONS LAW* 36 (3d ed. 2000).

¹⁵⁰ Supreme Court 88 Tai Shang Tzi 1262 Civil Judgment.

While *Business Weekly* contended that it had interviewed Huang Yi-Wen, the assistant of Legislator Chu, and Hsiao Cheng-Luen, a resident in Minister Tsai's residential building, regarding the renovations, the Supreme Court held that these investigations were not sufficient, since neither of the people made a statement that Minister Tsai spent 2.87 million NT dollars on his renovations.¹⁵¹ Although Minister Tsai provided no evidence regarding his actual damages, the Supreme Court nonetheless awarded him presumed damages. The court reasoned that Mr. Tsai had served in the government for a long time, "was appointed Minister of Transportation and is the current Executive Commissioner of Executive Yuan. Consequently, Mr. Tsai faces a higher demand for his moral standards from the public. Therefore, he cannot suffer any defamation to damage his reputation." Therefore he cannot suffer any defamation to damage his reputation." As for an "appropriate measure to restore reputation," the Supreme Court held that *Business Weekly* only had to publicize its apology in one of the three major newspapers in Taiwan, rather than all three major newspapers, as was requested by Mr. Tsai.

This decision, just like the case about the First Son-in-Law, failed to observe that political public figures should be subjected to closer monitoring by the media. It also erred in holding that the reputation of Minister Tsai, a politically appointed public official, could not suffer any damage. Since individuals lack resources to monitor governments' actions effectively, news agencies may form "a fourth institution outside the Government," and act as "an additional check on the three official branches."¹⁵² If courts deem the reputations of public officials even more valuable than those of civilians, and award higher damages, it would chill the media, and make them shift their

¹⁵¹ The Supreme Court held that as Mr. Huang refused to reveal the name of the minister in Legislator Chu's question during Ms. Lin's interview, and Mr. Hsiao, who pointed out that Minister Tsai was decorating, was only speculating, Ms. Lin did not fulfill her obligation of investigation. *Id.*

¹⁵² See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975); quoted in O. Marie Anderson, *Mine Accident Investigations: Does the Press Have a Right to be Present?*, 98 W. VA. L. REV. 1121, 1123 (1996). See also Tzi-Yi Lin, *The Notion of Freedom of the Press and Its Theory*, in FREEDOM OF SPEECH AND THE PRESS 61, 74 (Angle Publishing 1999) (1993) [hereinafter *The Press*].

focus from public officials to other public figures. Such a development would frustrate the purpose of protecting freedom of the press—a check on government.

The only positive decision in this judgment was that the Supreme Court denied the plaintiff's request to publish the apology in three major newspapers, and held that one newspaper would be sufficient. This decision mitigated the chilling effect upon the media.

3. 91 Shang Su Tzi 1083: Had the First Lady Fled with Her Fortune?

Along the lines of the case about Minister Tsai, the First Lady also filed civil claims against Ms. Hsieh, Mr. Feng, and Mr. Dai, demanded presumed damages of 200 million NT dollars and certain measures to recover her reputation.¹⁵³ The Taiwan High Court, while denying her damages claim, ordered the defendants to publicize an apology, along with the civil judgment on the front page of four major newspapers for three days; and broadcast a 30-second notice in TTV, CTV, CHTV, FTV, TVBS and ETV for three days.¹⁵⁴

Because this civil procedure was supplemented in the criminal procedure, the court simply referred to the criminal judgment regarding the defendants' defamation behavior and then found the defendants liable for the First Lady's reputation damages. Nevertheless, the court held that the First Lady failed to mitigate the damages. The court held that the plaintiff, as First Lady and wife of the KMT's Chairman, must have known of the supporters' anger toward the Chairman of

¹⁵³ This civil claim was supplemented to the criminal procedure. Under Article 487 of Taiwan's Criminal Procedure Code, the victims of a crime may raise civil claims in the criminal procedure, supplemented to the criminal litigation. While criminal tribunals often reject such claims and transfer them to the civil tribunal for further proceedings, the Criminal Tribunal of Taiwan High Court in this case shouldered the case and made the supplementary civil judgment. The advantage of such a system is that the victims would not have to suffer another trial proceeding for damage awards; in addition, the victims/plaintiffs do not have to pay procedural fees to the court under Article 504(2) of the Code of Criminal Procedure. The disadvantage is that the due process right of the defendant would be compromised.

¹⁵⁴ The content of the notice provides: "That Feng Hu-Hsian alleged Lee Tseng Wen-Hui had shipped a huge amount of U.S. dollars to the U.S. is a false statement, I hereby sincerely apologize." See Taiwan High Court 91 Chung Fu Min Shang Tzi 30 Criminal Supplementary Civil Judgment.

KMT. The KMT had just lost the presidential election, and the plaintiff should have been aware of the news broadcasts, especially the television broadcasts, after the election, and should have paid attention to the progress of the crowd movements in front of the KMT's central office building. If the First Lady issued a timely response to the allegations, the rumor would have been dispelled. Moreover, the damage to her reputation would not have escalated.

While this decision failed to apply the test from the case about Minister Tsai—that one news medium is enough for reputation recovery—it nonetheless made great progress in demanding that public figures shoulder certain social responsibilities, instead of ruling that their reputations are more valuable than those of civilians. However, since this decision was rendered by a criminal tribunal in a civil procedure supplemented in the criminal procedure, the considerations of civil tribunals deserve further scrutiny.

4. 90 Chung Su Tzi 507: Is Interpretation 509 Applicable in Civil Cases?

During Taiwan's presidential election in 2000, Lin Ray-Tu, a legislator/congressman, held a press conference in his congressional office, alleging that Lo Wen-Chia, of presidential candidate Chen Shui-Bian's core staff, had repeatedly requested and received bribes from corporations, and conducted money laundry through the Taipei Culture Foundation.¹⁵⁵ Mr. Lo filed both a criminal complaint to the Taipei District Attorney and a civil claim to the Taipei District Court against Mr. Lin, and has lost both so far.¹⁵⁶

In the lawsuit, Mr. Lo clarified that he did raise money from corporations while he was

¹⁵⁵ The foundation was established with Taipei City's public funds. Mr. Lo was Chief Executive Officer of the foundation. President Chen, who was the Mayor of Taipei, was President of the foundation. Pei-Shue Hsiao, *Lo Wen-Chia lost his 10 Million Defamation Claim against Lin Ray-Tu*, UNITED DAILY NEWS, Apr. 15, 2003.

¹⁵⁶ In the criminal proceeding, the District Attorney reached a non-prosecution decision, which was final. See Taipei District Attorney 89 Cheng Tzi 16103 Non-prosecution Decision. As for the civil judgment, Taipei District Court 90 Chung Su Tzi 507 Civil Judgment, Mr. Lo may appeal the present decision to the Taiwan High Court, or even the Supreme Court.

director of Taipei's City Information Office, though he conducted fund-raising on behalf of the Taipei Culture Foundation. He also claimed that every dollar raised for the foundation was used to fund government activities, and that he had followed the appropriate regulations. Mr. Lo further stated that, because funding government activities would benefit a corporation's public image, such fund-raising was common, but it did not amount to soliciting bribes.¹⁵⁷

The defendant, Mr. Lin, on the other hand, emphasized that he had completed a full investigation prior to his press conference. He interviewed corporate presidents who alleged the bribes, collected three copies of checks and receipts of the "donations," gathered the departure records of the plaintiff, checked an urban planning project allegedly related to the bribes, and found a Control Yuan Report, in which the Control Yuan¹⁵⁸ demanded that the Taipei city government return the funds that were raised from the corporations that had urban development projects under review by the city.¹⁵⁹

The Taipei District Court denied Mr. Lo's claim. In the decision, the court held that, although Interpretation No. 509 dealt with Articles 310 and 311 of the Criminal Code, it did not mean that civil procedure was excluded from the application of the Interpretation. The court further cited *New York Times v. Sullivan*:¹⁶⁰ "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."¹⁶¹ The decision considered Interpretation No. 509 to be an effort by the Grand Justices to balance freedom of speech and the right of reputation.

¹⁵⁷ See Taipei District Court 90 Chung Su Tzi 507 Civil Judgment.

¹⁵⁸ Control Yuan is one of the five branches in Taiwan's central government. The commissioners of Control Yuan are nominated by the President and approved by the Legislative Yuan, in order to encourage them to check on government officials, independent from outside influence.

¹⁵⁹ Control Yuan considered the timing for such fund-raising "sensitive," especially because some corporations, after making certain donations, received controversially favorable decisions on their real estate development projects from the city government. See Control Yuan (87) Yuan Tai Chiao Tzi 872400335 Notice.

¹⁶⁰ *Sullivan*, 376 U.S. 254 (1964).

¹⁶¹ *Id.* at 270.

Just as the U.S. Supreme Court stated in the *Sullivan* case, “That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive,’”¹⁶² Interpretation No. 509, by adopting the “actual malice” test, made the same determination to protect freedom of speech.¹⁶³

The decision further reasoned that Interpretation No. 509 should be applied in civil cases. Therefore, the defendant is not liable as long as he had reasonable ground to believe his statement to be true:¹⁶⁴

The freedom of speech should protect people, not only from criminal punishments, but also from the concerns of huge amount of civil liabilities, in a space created for freedom of speech after the interests balancing and proportionate reasoning. Because civil liability, though different from criminal responsibility in nature, could result in the same chilling effect resulted from criminal punishment. People might therefore exercise self-censorship. “[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”¹⁶⁵

The court then held that Mr. Lo, as former director of Taipei’s city Information Office and a core staff member of President Chen, was a voluntary public figure. Since Mr. Lin’s statements related to Mr. Lo’s integrity as a public official, which should be subject to public commentary, such statements should have received broader protection under the law. Mr. Lin’s allegations were not completely true, but were within reasonable bounds. Thus, the court denied Mr. Lo’s claims.

Although this is a district court decision and might be remanded on appeal, the judgment, nonetheless, marked a milestone in Taiwan’s defamation law. This decision, by confirming the application of Interpretation No. 509 in civil cases, made the “actual malice” defense available to

¹⁶² *Id.* at 271-72.

¹⁶³ Taipei District Court 90 Chung Su Tzi 507 Civil Judgment (decided April 14, 2003).

¹⁶⁴ *Id.*

¹⁶⁵ *Sullivan*, 376 U.S. at 279.

defendants in civil procedure. Defendants who made statements regarding public figures would not be held liable as long as they could provide reasonable grounds for their beliefs in the statement. It was a great step forward in Taiwan's protection of free speech.

5. Confirming the Application of Interpretation No. 509 in Civil Cases

In the end of 2001, there was a rumor alleging that President Chen had an affair with one of his staff members in the Presidential Office. The news media soon reported this rumor as Taiwan's version of "Lewinsky-gate."¹⁶⁶ Then, one publication, *Journalist*, suddenly released several articles alleging that the rumor was disseminated by the Vice President, Lu Show-Lian, as a conspiracy against the President.¹⁶⁷ *Journalist* further held a press conference, claiming that one of its editors, Li Chao-Chun, known as Yang Chao, personally answered a phone call from Vice President Lu, beginning with "Hey! Hey! Hey! There is an affair in the Presidential Office."¹⁶⁸

Vice President Lu, in response to *Journalist*, soon held a press conference and furiously denied such allegations. She then sued *Journalist*, along with its editors and chief editor, who were involved in reporting such news, demanding a public announcement of the court decision, and an apology in all major newspapers and television networks to restore her reputation.¹⁶⁹

¹⁶⁶ Shu-Mei Yang, *Manipulating by Black Hands behind the Scene, the Rumor of Affairs disseminated*, 715 JOURNALIST 31 (2001).

¹⁶⁷ Shu-Mei Yang, *Lu Show-Lian: There is an Affair in the Presidential Office. Hey! Hey! Hey!*, 715 JOURNALIST 28 (2001).

¹⁶⁸ *Time Line of the Hey! Hey! Hey! Case*, UNITED DAILY NEWS, Apr. 29, 2004.

¹⁶⁹ Vice President Lu claimed that, in honoring freedom of the press, she would not seek any damages. Ironically, to publish and broadcast the public announcement she requested (apology and the full text of the court decision) in major newspapers (first page for three days) and television networks (one minute long, two times per day for three days: one between 8:00 PM and 9:00 PM, the other between 9:00 PM to 10:00 PM) would cost, according to the defendants' estimate, more than 423 million NT dollars, which is much higher than the regular figure that the court would award for the presumed reputation damage. Cf. Wei-Rong Su, *Cost of Advertisements in the First Page of Four Newspapers: 1.91 Million in total*, UNITED DAILY NEWS, Apr. 30, 2004 (concluding that the total cost to publish and broadcast the clarification statements, according to District Court's ruling, would cost at

In its defense, besides the factual dispute about whether Vice President Lu made the phone call to editor Li, *Journalist* heavily relied on Judicial Yuan Interpretation No. 509, which created a safe harbor of a “reasonable ground for belief of truth” for defamatory statements regarding public figures. *Journalist* contended that, because its editors had reasonable grounds to believe the report to be true, the safe harbor should have applied, which would have absolved *Journalist* and its editors of liability. In addition, it also contended that Vice President Lu’s claim was not enforceable, because to publish and broadcast the public announcement would cost more than 423 million NT dollars, which would have caused even greater chilling effects upon the media than monetary damages.

The District Court ruled partly in favor of the Vice President.¹⁷⁰ It held that only Li Chao-Chun, the editor who claimed that he received the “affair” phone call from the Vice President, should be liable.¹⁷¹ The District Court, quoting Interpretation No. 509, held that *Journalist*, and its editors and reporters, other than Mr. Li, had reasonable grounds to believe Mr. Li’s remarks and, consequently, were not liable.¹⁷² On appeal, the Taiwan High Court, however, held that all of the defendants were liable. The court reasoned that Interpretation No. 509 only applied to criminal offenses. Therefore, *Journalist* could not assert the privilege of “reasonable ground for belief” created by Interpretation No. 509.¹⁷³ On the other hand, the High Court agreed with the defendants that the Vice President’s reputation recovery claim was unenforceable.¹⁷⁴ As a result, it reduced the defendants’ responsibility and ordered them to publish a half-page public

least 200 million NT dollars).

¹⁷⁰ Taipei District Court 89 Su Tzi 5548 Civil Judgment.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Taiwan High Court 91 Shang Tzi 403 Civil Judgment.

¹⁷⁴ *Id.*, reason, VII. (“[T]he decision of the lower court was unenforceable...To read the whole decision, which was 15,000 words long, will take at least two and half hours, even at the speed of a hundred words per minute. No television station will be willing to broadcast this public statement in their prime time. In addition, the public statement can only be broadcast as an advertisement. But current regulations forbid televisions to broadcast an advertisement longer than 12 minutes...”)

apology in the first page of Taiwan's four major newspapers for one day.¹⁷⁵

Journalist further appealed to Taiwan's Supreme Court, but the Supreme Court affirmed the High Court's decision.¹⁷⁶ For the first time in the last seven years, the Supreme Court heard oral arguments from both sides, which vigorously debated whether Interpretation No. 509 could be applied in civil cases.¹⁷⁷ The Supreme Court held that the "essence" of Interpretation No. 509 was applicable in civil cases, although the interpretation was made for criminal offense.¹⁷⁸ Consequently, the Supreme Court concluded that a news agency meets its duty of care as a good-will manager and therefore is not liable, if it, after reasonable investigations, has certain reasons to believe the truthfulness of its statements.¹⁷⁹

This decision is very important for Taiwan's freedom of the press. It finally confirms that Interpretation No. 509, which derives from *New York Times v. Sullivan*,¹⁸⁰ a civil dispute, in the United States, applies to Taiwan's civil cases. The Supreme Court, applying the "essence of Interpretation No. 509," concluded that:

News reports are highly related to public interest and should receive the broadest scope of protection from the state. Such protection is to enable journalists to check on the governments. The strict demand of absolute accuracy to news reports will limit the space of reportage and cause restrictive effects on the freedom of the press. Furthermore, it will hinder normal developments of a democratic, diversified society. Consequently, the standard of journalists' duty of care should be lowered...

¹⁷⁵ *Id.* ("It is enough to recover [Vice President Lu's] reputation that the defendants jointly publish the public statement of apology, along with the court order in the first page of United Daily News, China Times, Liberty Times, and Industrial & Commercial Times (the statement should be half-page big).")

¹⁷⁶ Supreme Court 93 Shang Tzi 851 Civil Judgment, Apr. 29, 2004 (The decision has not been published); Chin-Lan Huang, *Hey! Hey! Hey! Case: Journalist Lost; the Decision is final*, CHINA TIMES, Apr. 30, 2004.

¹⁷⁷ Che-Ming Huang & Chang-Sung Liu, *Hey! Hey! Hey! Case: Journalist Lost*, UNITED DAILY NEWS, Apr. 30, 2004, at 2.

¹⁷⁸ *Supreme Court: Constitutional Interpretation merged into Court's Ruling – Journalist lost because it failed to investigate*, CENTRAL NEWS AGENCY, Apr. 29, 2004 ("Interpretation No. 509 could not be fully applied to the present case, because civil tort liability includes both "intentional act," and "negligent act," which is different from criminal libel liability...").

¹⁷⁹ Huang, *supra* note 175.

¹⁸⁰ *Sullivan*, 376 U.S. 254 (1964).

However, the Supreme Court nonetheless concluded that the defendants failed to meet this “lowered duty of care,” because Li Ming-Chun was their only information source and no other concrete facts could prove that the Vice President made the “Hey! Hey! Hey!” phone call.¹⁸¹

Another significance of this decision is that it set a limit on the scope of reputation recovery. It confirmed the High Court’s decision that the defendant only needed to publish the statement of apology in four major newspapers. Although it did not observe single newspaper rule from the case of Minister Tsai, it nonetheless confirmed the High Court’s decision to reduce the defendants’ responsibility of recovering the Vice President’s reputation. From the District Court’s decision, which ordered Mr. Li to broadcast and publish clarification statements for three days in every major newspaper (first page) and television channel (during the prime time), to the final decision, which reduced defendants’ responsibility to publish a public apology statement in four major newspapers (half-page advertisements on the first page), the defendants’ liability had been greatly reduced.¹⁸²

6. Summary

Taiwan’s public figures, especially its political figures, are not used to supervision by the press.¹⁸³ Public officials, especially officers in the executive branch, tend to chill the media through a huge amount of civil liability cases or extremely burdensome public notices. Taiwan’s

¹⁸¹ Huang, *supra* note 175.

¹⁸² Su, *supra* note 168. Cf. Su-Ro Wu, *Magazines Association held Panel Discussion: The Journalist Case was the Focus*, CENTRAL NEWS AGENCY, May 5, 2004 (reporting that panelists considered the Supreme Court’s decision in the *Journalist* case have caused chilling effects upon news agencies).

¹⁸³ While the “Publication Law” was been abandoned in 1999 in honor of freedom of speech and the press, the Information Office (IO) of the Executive Yuan initiated a new law to regulate the publications. Meanwhile, the IO also decided to fund an “evaluation program” to examine the appropriateness of newspapers’ first four pages, where political and social news reports are laid out. The Director of IO described these projects as forming a “fifth power” to check on the “fourth power – news agencies.” Such measures elicited great criticism from the public. Eventually, the Executive Yuan chose to withdraw the projects. *Taiwan’s Executive Yuan discontinued the News Report Evaluation Project*, DAJIYUAN DAILY, Apr. 17, 2003.

civil tribunals, however, have not noticed the chilling effect such litigation might cause. Thus, most political figures have received favorable decisions from the court. While political figures turned from monetary damages to “appropriate measures to recover reputation,” the extraordinarily burdensome public notice requirement would cause an even more serious chilling effect upon the media. If the courts would follow the Supreme Court’s ruling in Minister Tsai’s case, which limited the public notice to one medium, it would be a better balance between freedom of speech and the right of reputation.

V. Conclusion

Public discussion is the foundation of democracy. Protecting freedom of the press encourages news media to become an institutional power to check on governments. In order to achieve this goal, the constitutional protections of free speech and free press must preserve the room for news agencies to comment on public officials without fearing subsequent punishment.

Although freedom of speech and freedom of the press is protected both in the United States and Taiwan, Taiwan’s practice of defamation law is too deferential to public officials and has limited the breathing space for public discussion. While the United States has basically abandoned criminal libel, Taiwan maintains criminal libel, which by nature exerts more pressure on the speaker. In addition, Taiwan’s courts tend to favor public officials in defamation cases, even though Interpretation No. 509 has adopted the “actual malice” test developed in the United States.

In order to provide better protection for freedom of speech and the press, Taiwan should decriminalize defamation. In addition, the court should preserve more space for commenting upon public officials in order to encourage the press to serve as a check on government. Also,

there should be a clearer rule regarding the award of damages. The current situation, that presumed damages are awarded while no proof of actual damage was provided, should no longer be tolerated. Finally, the “single newspaper rule” adopted in Minister Tsai’s case should be reaffirmed and followed, so that the public officials will not use excessive public notice to chill the media, under the pretext of honoring freedom of the press.