An Analysis of the "Two-Sided Theory"-- A New Perspective of Taiwanese Civil Defamation Law

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I. Introduction

All countries that place a high value on democracy struggle to balance the conflicting interests of protecting free speech and protecting individual reputation interests. The rapid growth of democracy in Taiwan has caused its people to face the same difficulties.[1]

Defamation law that has been developed under the United States constitution (constitutional defamation law) has balanced free speech and individual reputation interests well.[2] It provides an excellent example for the development of civil Taiwanese defamation law for three reasons. First, as a leading democratic country in the world, the United States has had a constitutional defamation law that has been well established for decades and thus provides the best example to study. Second, Interpretation No. 509, by which the Taiwanese Grand Justice Council placed free speech into criminal defamation law, creates a significant beginning with regard to constitutional defamation law in Taiwan. This holding has been widely recognized as having been influenced by American constitutional defamation law.[3] Third,

[1] Yu-Hsiung Lin, *Fei pang tsui chin shih ti yao chien yu su sung cheng ming-chien ping ta fa kuan shih tzu ti 509 hao chien shih* [The Substantial Requirements and the Litigation Proof in Defamation - Comments on Interpretation No.509 of the Grand Justices Council], 32(2) TAIDA FAXUE LUNCONG [National Taiwan University Law Journal] 67, 68-69 (2003).

[2] The term "constitutional defamation law", both in American law and Taiwanese law, in this paper refers to adding a constitutional right of free speech into defamation law.

[3] Shi-Tsung Lin, *Ming yu fei pang yu hsin wen yen lun tzu yu chin chieh hsien -*

decriminalizing defamation law is also a popular subject in Taiwanese society. To punish speakers through criminal defamation law is not the best way to proceed in a well-developed democratic country.[4] As a mature democratic country, the sedition libel criminal law in the United States is seldom applied now. Instead, the developed constitutional law of defamation is the law that currently protects the reputations of individuals in the United States[5]. If Taiwan decriminalizes defamation law, the civil defamation law in Taiwan will become more important. The development of defamation law in the United States, focusing on the line of civil law cases, thus can provide a proper example to explore.

My proposed defamation law, however, will not entirely follow the United States constitutional defamation law due to the differences in the legal systems that exist in the United States and in Taiwan. I propose a new suitable Taiwanese civil defamation law by creating a "two-sided theory" to balance the freedom of speech and individual reputation interests. To achieve this goal, I first summarize the background of current Taiwanese civil defamation law and the related issues in Section II. This

chan shih ta fa kuan shih tzu ti 509 hao chien shih chih fa li yu shih yung [The Line between Defamation and Freedom of Press - The Application to Interpretation No.509 of the Grand Justices Council from the Perspective of Jurisprudence], 6(6) LUSHI ZAZHI [Taiwan Bar Journal] 4, 6 (2002).

[4] Chih-Bin Fa, *Fei pang tsui chu tsui hua shih tsai pi hsing* [The Absolute Way to Decriminalize Defamation Law], 221 LUSHI ZAZHI [Taiwan Bar Journal] 2, 3 (1998).

[5] Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN L. REV. 661, 661-765 (1985). See also Abrams v. United States, 250 U.S. 616, 630-631 (1919) (Holmes, J. dissenting).

section discusses the importance of building a new civil defamation law in Taiwan. In Section III, combing the theories of freedom of speech in American law and other important theories under defamation law, I generate a two-sided theory as a fundamental construction for the proposed Taiwanese civil defamation law. In Section IV, I propose two specific rules derived from the analysis of the two-sided theory to create a new perspective of Taiwanese civil defamation law. Finally, in section V, I discuss the achievements of this paper and take a glance into the future.

II. The Need to Create a New Perspective of Civil Defamation Law

In 2000, the Grand Justices Council of Taiwan implemented the protection of free speech in Interpretation No. 509. Before Interpretation No. 509, speakers had to prove that their statements were true to avoid liability for defamatory speech in the Criminal Code. Interpretation No. 509, however, permits a defendant to avoid liability, even if his statement was false, if he can show that he had considerably believed the truthfulness of his statement before disseminating it after a prudent investigation of the source of his information. This interpretation has been well-recognized as the beginning of constitutional defamation law by interpreting a defamatory statute in a way that provides more protection to free speech.

However, Interpretation No. 509 leaves two significant issues open to debate: first, whether Interpretation No. 509 should be applied to civil

defamation law; and, second, whether Interpretation No. 509 is based on American constitutional law. By exploring these two issues, one can find that creating a new perspective of Taiwanese civil defamation law is timely and necessary.

A. The Doubt about Whether Interpretation No. 509 Applies to Civil Defamation Law

It has been debated whether civil defamation law should apply the rule of Interpretation No. 509 since the Grand Justices Council made Interpretation No. 509.[6] Some argue that the content of Interpretation No. 509 focuses only on criminal defamation law and that, thus, it does not specifically include civil defamation law. In addition, they assert that civil defamation law has different goals and elements that should be clearly distinguished from criminal defamation law.[7] As a result, the protection of free speech in Interpretation No. 509 should not be applied to civil defamation law. In contrast, some have argued that this constitutional

[6] Zuigao Fayuan [Sup. Ct.], Civil Division, 93 Tai-Shang No.851 (2004) (Taiwan). This Lu case (Lu vs. The Journalist), decided by the Supreme Court in 2004, drew attention to the question of whether civil defamation law should apply Interpretation No. 509. This case is important, because it was the case in which the Supreme Court considered the protection of free speech in civil defamation law. This case also received a great deal of attention in Taiwan, because it was the first time that a Taiwanese Vice President brought a defamation lawsuit against the media.

[7] In the Lu case, the Court stated that Interpretation No. 509 was not applicable to civil defamation law, because civil defamation law utilizes a negligence standard, whereas criminal defamation law relies upon an intentional standard.

protection should be applied to civil defamation law. They believe that the Constitution is the highest authority in the legal system. Therefore, they argue, the holding by the Grand Justices Council that criminal defamation law should be provided greater constitutional protection should also apply to civil defamation law.[8]

The Grand Justices Council has exhibited a new perspective regarding whether Interpretation No. 509 should be applied to civil defamation law. In 2009, the Grand Justices Council mentioned in Interpretation No. 656 that civil defamation law is not the subject that Interpretation No. 509 planned to cover. This statement may be interpreted as a rejection by the Grand Justices Council of the possibility of applying Interpretation No. 509 in civil defamation law. However, two Grand Justices, Justice Tzu-Yi Lin & Justices Yu-hsiu Hsu, seemed to accept the application of Interpretation No. 509 to civil defamation law in their dissenting opinions regarding Interpretation No. 656. In their dissenting opinions, the justices addressed such critical issues as the burden of proof and public factors that apply to civil defamation law. I will discuss those issues in more detail later in this paper.

In addition, the Taiwanese Supreme Court specifically stated in 92 Taiwanese Supreme Court No. 1408 that courts should apply Interpretation No. 509 to civil defamation law. However, one year later, the Court stated in 93 Taiwanese Supreme Court No. 2331 that courts should not apply

[8] Yuan-Chiuan Wu, *Meiguo feibang fa suo chen "zhenzheng eyi" faze zhi yanjiu* [The Actual Malice Rule as Applied under American Defamation Law], 15 ZHONGZHENG DAXUE FAXUE JIKAN [National Chung Chen University Law Journal] 1, 80-81 (2004).

Interpretation No. 509 to civil defamation law. Despite the fact that the Supreme Court has not reached final agreement on whether to apply the rule of Interpretation No. 509 in civil defamation law, it is clear that the Supreme Court has gradually increased protection of free speech in civil defamation law after Interpretation No. 509.[9] Freedom of speech has become an important issue that the Court cannot avoid in civil defamation cases. Therefore, it is necessary and important to ask two questions. First, if courts apply Interpretation No. 509 to civil defamation law, should they apply it as it was enunciated in the context of criminal defamation law, or should they adapt Interpretation No. 509 to the context of civil defamation law? Second, if courts do not apply Interpretation No. 509 to civil defamation law, should they adapt civil defamation law to achieve the goal of protecting free speech? Due to the absence of an advanced theoretical analysis, courts still cannot answer these two important questions in a consistent and appropriate way. Therefore, Taiwan must create a new perspective of civil defamation law that will resolve these important issues.

B. The Vagueness about Whether Interpretation No. 509 Is Based upon U.S. Constitutional Defamation Law

Another issue that causes confusion and should be made clear to avoid misunderstanding is the uncertainty of whether the rule set out in Interpretation No. 509 is based on American constitutional defamation

[9] Zuigao Fayuan [Sup. Ct.], Civil Division, 94 Tai-Shang No. 2000 (2005) (Taiwan). See also Zuigao Fayuan [Sup. Ct.], Civil Division, 95 Tai-Shang No.766 (2006) (Taiwan).

law. The concurring opinion of Interpretation No. 509 explicitly states that "speakers are liable if they know the statements they made were false or they were reckless to know they were true or false." A careful reading of this statement shows that the content of this concurring opinion is the well-known "actual malice rule" enunciated by the United States Supreme Court.[10] Therefore, it seems that Interpretation No. 509 adopted the American actual malice rule.

However, the concurring opinion does not reflect the content of Interpretation No. 509, which did not mention the actual malice rule. More importantly, Interpretation No. 509 and the actual malice rule are essentially different. Interpretation No. 509 protects free speech mainly by changing the defense of truth. Before Interpretation No. 509, speakers were obliged to prove that the statement they made was true. As the result of Interpretation No. 509, speakers can defend on the ground that they considerably believed that their statements were true ("the considerably believed truth" standard). In contrast, the United States Supreme Court does not treat the actual malice standard as a defense. Actual malice is a fault requirement that plaintiffs have the burden to prove in defamation cases. Moreover, the considerably believed truth standard set out in Interpretation No. 509 is close to negligence in terms of a fault requirement,

[10] "Actual malice" as defined by the U.S. Supreme Court means knowledge of falsity or a reckless disregard for the truth. This constitutional protection dramatically increases the freedom of speech in defamation law. See W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER TIMES V. SULLIVAN 2 (1989).

while the actual malice rule is close to intentional.

Indeed, some courts in Taiwan occasionally apply both the actual malice rule and Interpretation No. 509 in civil defamation cases at the same time.[11] Those cases obviously have caused much more serious confusion in light of the differences between Interpretation No. 509 and the actual malice rule. Interpretation No. 509 was inspired by, but did not follow, the same approach as has been applied in the constitutional defamation law in the United States. Therefore, we cannot simply apply the rules from American constitutional defamation law in interpreting Interpretation No. 509 and, more importantly, in building a new Taiwanese civil defamation law. We must learn from the experiences of American constitutional law and develop our own model Taiwanese civil defamation law.

C. The Importance and Necessity of Creating a New Perspective of Taiwanese Civil Defamation Law

In addition to the issues discussed above, creating a new Taiwanese civil defamation law is important and necessary in terms of the current legal condition of defamation law in Taiwan. First, civil defamation law has become significant in Taiwan in light of the increase in the number of civil defamation cases. However, unlike criminal defamation law, which has been discussed in Taiwan as the result of Interpretation No. 509, civil

[11] Zuigao Fayuan [Sup. Ct.], Civil Division, 93 Tai-Shang No.1979 (2004) (Taiwan); Zuigao Fayuan [Sup. Ct.], Civil Division, 95 Tai-Shang No.2365 (2006) (Taiwan).

defamation law has generated comparatively less discussion. Consequently, this paper is significant, because it is practical and timely.

More importantly, if civil defamation law does not protect free speech, plaintiffs can simply abandon criminal defamation actions in favor of civil defamation lawsuits. As mentioned above, in the *Lu* case, Vice President Lu chose to pursue a civil defamation action to recover for the harm to her reputation and abandoned taking a criminal defamation action at the same time. It is obvious that Lu wanted to avoid the face-to-face challenge posed by the criminal defamation law, because it would not have been easy for her to win the case after Interpretation No. 509 was determined to apply to criminal defamation law. As a result, there is little to be gained by changing criminal defamation law in favor of free speech by applying the Interpretation No. 509 standard, because the chilling effect on speech could also occur through civil defamation law. Therefore, the creation of a new civil defamation law is not only important, it is necessary.

Finally, the protection of individual reputation interests has become more important in current Taiwanese society. For example, according to Taiwan Judicial Yuan, in 2008, 42% of cases involving the injury of personal rights were appealed. This is the highest rate of appeal among all civil lawsuits in the Taipei District Court.[12] The judicial statistic

[12] Taiwan Taipei Difang Fayuan [Taiwan Taipei District Court], Qin hai ren shen quan zhi min shi cai pan sun hai pei chang qian xi [A Brief Comment on Damages Awarded in Violation of Personality Rights in Civil Cases], http://www.judicial.gov.tw/juds/research/3_96-2.pdf, at 2 (last visited Dec. 2, 2008).

specifically emphasizes that the majority of these appealed cases were civil defamation cases. According to this research, protecting reputation interests has become a pressing need in Taiwan, because the person who has lost his reputation interest is determined to seek fairness and ask for his esteem back.[13] This message shows that people in Taiwan turn to civil defamation law very frequently and rely on the law to achieve justice in their mind. Therefore, we should refine the law to offer the best way to deal with civil defamation cases.

To create a new Taiwanese civil defamation law, in the next section, I will analyze a two-sided theory to achieve the best balance of free speech and individual reputation interests.

III. The Analysis of the Two-Sided Theory to Balance Free Speech and Reputation Interest

Traditionally, defamatory speech was absolutely exempt from any kind of freedom of speech protection in both the United States and Taiwan. Defamation law, therefore, existed outside of the protections of free speech. Nowadays, however, the freedom of speech is a significant right that the Constitution protects both in the United States and Taiwan. If we plan to incorporate freedom of speech into defamation law, we must draw a precise line between these two competing interests: free speech and individual reputation interests. Utilizing the balancing approach, I

[13] *Id.* at 4.

will propose a two-sided theory to accomplish this division by examining these two conflicting interests separately.

A. From the Side of Freedom of Speech

Before discussing the relationship between free speech and defamation, I will first discuss the boundaries of the freedom of speech[14] to help determine how we can accurately draw a line between free speech and individual reputation interests.

Freedom of speech is not an absolute right.[15] Whether we should protect particular speech depends upon the value of that speech. If we value the speech highly, then that kind of speech deserves protection. In contrast, speech of low value does not deserve as much protection. Thus, the question raised here is how to determine which speech has high-value and which has low-value. To solve this problem, we need to identify the reasons why we protect the freedom of speech. Three theories, the "truth-seeking theory", the "self-government theory" and the "self-expression theory", have long been recognized in discussing the freedom of speech and explain why we protect that freedom. More importantly, they help us recognize which speech deserves protection.

[14] Here, I will rely principally upon American theories of freedom of speech, because those theories have been well-developed in the constitutional rationale of the United States. Also, Taiwanese theories regarding the freedom of speech follow most closely the theories of the United States. See ZU-YI LIN, YEN LUN TZU YU YU HSIN WEN TZU YU [FREEDOM OF SPEECH AND FREEDOM OF THE PRESS] 65 (1999).

[15] *Id.* at 6.

1. Three Theories under Freedom of Speech

The first theory that defines freedom of speech is the truth-seeking theory. Under this theory, the purpose of the freedom of speech is to promote truth-seeking through the free exchange of ideas in the marketplace.[16] This theory holds that truth, the ultimate good, emerges only through the challenge and examination that comes with the exchange of speech, regardless of the truth or falsity of the speech itself.[17] Since speech can help discover truth, this theory argues that even false speech has value and deserves protection.

The self-government theory is the second theory that justifies the protection of free speech. The democratic process is at the core of this theory. Through the democratic process, people enjoy the power to deal with public affairs in a society. Protecting freedom of speech, therefore, is fundamental to enabling people to share ideas and to decide public issues.[18] Accordingly, this theory argues that "public speech" deserves protection to provide an "uninhibited, robust, and wide-open" environment for discussion in a democratic society.[19]

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[16] Abrams v. United States, 250 U.S. 616, 630 (1929).

[17] JOHN STUART MILL, ON LIBERTY 16 (1859). Without the exchange of speech, Mill states, "If the opinion is right, they are deprived of the opportunity of exchanging error for the truth; if wrong, they lose, what is almost as great as a benefit, the clearer perception and livelier impression of truth produced by its collision with error." *Id*. at 630.

[18] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 13-15, 94 (1948). See also Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253-254 (1961).

[19] New York Times v. Sullivan, 376 U.S. 254, 270 (1964). The Court stated that

Both of the above theories represent utilitarian values. We protect speech, because it either helps people seek the truth or helps the public participate in the democratic process. The speakers themselves are thus treated as "tools".[20] The third theory, however, differs from the first two.

The third theory is the self-expression theory, which is a "rights-based theory".[21] According to this theory, protecting freedom of speech allows people to obtain self-fulfillment and to realize their autonomy.[22] Thus, under this theory, freedom of speech is not for the public interest, as the first and second theories contend, but is rather for the interest of the speakers themselves.[23]

Through the course of the development of the constitutional defamation law, the United States Supreme Court appears to have embraced the self-government theory as a major justification for providing the greatest protection of free speech.[24] In Taiwan, Interpretation No. 509

"debate on public issues should be uninhibited, robust, and wide-open … it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

[20] William H. Rehnquist, *The First Amendment: Freedom, Philosophy, and the Law*, 12 GONZ. L. REV. 1, 7 (1976).

[21] JOHN RAWLS, A THEORY OF JUSTICE 112 (1971).

[22] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 897 (1963). See also Howard Owen Hunter, *Problems in Speech of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L. J. 59, 67 n. 36 (1986).

[23] Gillette v. United States, 401 U.S. 437, 479 (1971).

[24] William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 18 (1965).

decided by the Grand Justices Councils and several holdings in defamation cases decided by the Supreme Court seem to employ all three theories vigorously to protect free speech.[25] Indeed, scholars continue to debate the theoretical advantages and disadvantages of each theory. Each theory has strengths and weaknesses. Speech that does not harm the interests of other individuals deserves protection.[26] However, when speech does conflict with the individual interests of others, each of these three theories suggests a different answer as to when we should protect speech at the expense of those interests. Thus, these theories can serve a line-drawing function. Scholars, however, rarely discuss how each theory balances freedom of speech against other competing interests. While scholars may argue amongst themselves about which theory provides the best reason to protect the freedom of speech, that debate often ignores the more important goal of determining how to create the best balance between freedom of speech and other interests. Moreover, the United States Supreme Court and the Taiwanese Supreme Court have not further

[25] Interpretation No. 509 states: "Only under the purview of the constitutional protection can we fully realize and express ourselves, pursue the truth, and take part in all manners of political and social activities." See also Zuigao Fayuan [Sup. Ct.], Civil Division, 93 Tai-Shang No.1979 (2004) (Taiwan).

[26] Usually, characterizing speech as "low-value" implies that this speech obviously conflicts with other interests. For example, courts consider defamatory speech as low-value speech. The competing interest for free speech in this case is the protection of an individual's reputation interest in defamation law. Mill in his famous book "On Liberty" also addressed that "[T]he only purpose for which power can be rightful exercised over any member of a civilized community, against his will, is to prevent harm to others." Mill, *supra* note 17, at 9.

analyzed any of the three theories in defamation cases. Therefore, in the following section, I will consider all three of these different theories (an "all-considerations approach") to balance the competing interests between free speech and reputation.

2. Connecting These Three Theories with Defamation Law under the "All-Considerations Approach"

While the self-government theory is almost exclusively discussed, further consideration of the truth-seeking and self-expression theories for the development of constitutional defamation law is rare. Under my all-considerations approach, I will make room for these two theories in my proposed defamation law to strengthen the justification for free speech in defamation law.

First, a connection exists between the truth-seeking theory and falsity. The most important message from the truth-seeking theory is that we must accept the possibility of false speech so that we may determine ultimate truth. This concept provides a basic foundation and room for freedom of speech in defamation law, because it may not be appropriate to hold speakers liable for all false defamatory statements.[27] "Defense of truth" thus becomes less important when speakers try to escape liability

[27] In theory, that false speech deserves protection also flows from the theories of self-government and of self-expression. However, the truth-seeking theory offers the most comprehensive justification for protecting "false speech," since false statements are a vital part of the important process that leads to achieving the ultimate truth under the truth-seeking theory.

for defamation. As a result, speakers enjoy a broader freedom of speech, because some false defamatory speech (*i.e.*, without actual malice in the United States) may deserve protection under the truth-seeking theory.

Second, the self-government theory assures that freedom of speech should exist when speech involves public issues. Under the self-government theory, the greater protection of freedom of speech applies only to speech involving matters of public concern. The underpinning rationale for this theory is the promotion of democracy. Encouraging people to discuss public issues is the most important way to promote democracy. This is the core value of freedom of speech under the First Amendment.[28] Therefore, courts should provide greater protection to public speech, even though it may be defamatory. It is clear that constitutional defamation law in the United States adopts this public/private distinction regarding the content of speech as the major approach to provide public speech greater protection in defamation law. In other words, courts should permit greater latitude for speech that involves matters of public concern to guarantee democracy, because, under the self-government justification for freedom of speech, the public interest should prevail against private individual reputation interests. Weakening the protection afforded to the reputation interests of public figures, therefore, demonstrates that freedom of speech deserves more protection.

Finally, the self-expression theory expresses a significant message that speakers should be liable for defamation for fault. As mentioned before,

[28] Pickering v. Broad of Education, 391 U.S. 563, 573 (1968).

only the self-expression theory focuses on the speakers themselves. Disavowing utilitarian values, this theory argues that the protection of freedom of speech is for speakers' interests in their own self-development.[29] Since courts protect freedom of speech for the sake of speakers, the self-expression theory imposes a duty of care on speakers under defamation law: speakers should verify their statements to a degree before making their statements. If speakers breach this duty, then they are at fault for their statements. The rationale is that speakers should act without fault in their statements in return for the protection of their right to free speech, because this protection is beneficial to them. As a result, courts might tolerate speakers who make false defamatory statements, as we discuss under the truth-seeking theory, but they should not protect speakers who make false defamatory statements dishonestly or negligently. Therefore, under the self-expression theory, the fault requirement will provide speakers in defamation cases with a standard that will define the extent to which courts will protect their speech.

B. From the Side of Individual Reputation Interests

Similar to freedom of speech, the protection of individual reputation

[29] Most scholars who consider the self-expression theory focus mainly on the concept of "human right." On the basis of this idea, they argue that courts should also protect other interests if those interests refer to human rights. As a result, when freedom of speech conflicts with other human right interests, such as individual reputation interests, it is difficult to weigh these competing interests. They admit that this is the most serious weakness of the self-expression theory and are unable to offer a solution to this problem.

interests is not absolute. When the protection of freedom of speech is weighed against the protection of individual reputation interests, we must determine how much of an individual's reputation interest we should protect. When answering this question from the side of individual reputation interests, there are two approaches to consider. The first approach is to analyze the essence of defamation. Defamation means that speakers make defamatory statements that injure a person's reputation interest. Thus, defamation is directly related to the injured person (the plaintiff in a defamation lawsuit). Analyzing the essence of defamation is fundamental to the injured person from the side of his or her reputation interest. The second approach is to categorize the status of the plaintiff, since the status of the plaintiff as a public or a private figure makes a significant difference in terms of the protection of his or her reputation interest.

1. Analyzing the Essence of Defamation

As mentioned above, under the truth-seeking theory, speakers are not libel for some false defamatory speech (without fault) in order to protect free speech. However, if someone is liable for defamation, the speech he made must be false. More specifically, in analyzing the essence of defamation, falsity is required to prove defamation. Speakers are not liable for any true defamatory speech.

According to Black's Law Dictionary, defamation is "the act of harming the reputation of another by making a false statement to a third

person."[30] Professor Langvardt has stated that "A defamatory statement is not, by itself, enough for the imposition of defamation liability. The defendant's statement must have been false in addition to being defamatory." He went on to say that "Even a true statement may fall within the meaning of the term defamatory, as set forth above, but the truth of a defamatory statement absolves the maker of the statement from defamation liability."[31] Therefore, it is clear that defamatory statements can only be false and never be true in the American defamation law.

The same is not true of defamation in some civil law countries. The laws of Germany, France, Japan, Korea, and Taiwan all permit speakers to be held liable even for true defamatory speech.[32] These countries recognize that, even true statements can be defamatory, in that the statements harm the plaintiff's reputation in the eyes of ordinary people in society. Indeed, an old British saying recognized as much: "The greater the truth, the greater the libel."[33]

In Taiwan, even false statements can be defamatory; speakers can be liable even for true statements that harm another's reputation. The Supreme Court has stated that speakers can avoid liability by proving that

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[30] Bryan A. Garmer, Black's Law Dictionary (2004), http://international.westlaw.com (last visited Oct. 12, 2010)

[31] Arlen W. Langvardt, *Free Speech versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 909 (1989).

[32] Wu, *supra* note 8, at 64-65, 69, 72, 79.

[33] TOM WELSH & WALTER GREENWOOD, MCNAE'S ESSENTIAL LAW FOR JOURNALISTS 203 (1999).

the statement they made was true (the truth defense) only when the statement implicates matters of "public concern" to promote free discussions on public issues.[34] This indicates that speakers cannot use the defense of truth when the speech involves matters of private concern. This result might originate from criminal defamation statutes. Article 310 (3) in the Criminal Code provides that "A speaker is not guilty for a defamatory statement when he can prove that the statement he made was true. However, this defense does not apply to statements that involve matters of private concern."[35] According to this article, speakers are liable for false defamatory speech and also for true defamatory speech when this speech involves matters of private concern.

However, speakers should not be liable in a civil defamation lawsuit for making true defamatory statements. The purpose of civil defamation law is different from the purpose of criminal defamation law. Compensation for the injury to a person's reputation is the main goal of the civil defamation law; whereas, the main purpose of the criminal defamation law is to punish a person's ill will to injure another's reputation. As far as civil defamation law is concerned, there is the saying "no loss, no compensation."

[34] Zuigao Fayuan [Sup. Ct.], Civil Division, 93 Tai-Shang No. 2253 (2004) (Taiwan); Zuigao Fayuan [Sup. Ct.], Civil Division, 91 Tai-Shang No. 2405 (2002) (Taiwan).

[35] Nevertheless, true defamatory speech that implicates matters of private concern should be liable for an invasion of a person's privacy. If speakers are found guilty for true defamatory speech with speech involving matters of private concern, it might create a risk that the law crosses from the area of defamation to that of privacy.

To be defamatory, speech must be false and cause harm to someone's reputation. However, defamatory speech is simply the mirror that honestly reflects the plaintiff's true image, and thus, the plaintiff does not have any loss. As a result, true speech should not be considered defamatory.[36] There is no legal violation for which the subject of such speech can be compensated in a civil defamation law. In contrast, the objective of criminal defamation law is to punish a person's ill will in making defamatory speech. If the speaker has ill will, then this speech is criminally defamatory. This ill will exists regardless of whether the defamatory speech is true or false.

In addition, if a speaker were liable for true defamatory speech, such liability would impose a chilling effect upon free speech. First, protection of the freedom of speech should be extended as much as possible. If true defamatory speech is exempt from liability in defamation law, speakers are more likely to win defamation lawsuits. As a result, potential plaintiffs will be less likely to commence such suits, which will increase the protection of freedom of speech. Second, under the truth-seeking theory of the First Amendment, true speech should deserve more protection than false speech, because true speech helps the public accurately and directly perceive the real world. Moreover, the truth-seeking theory justifies that the goal for which we protect free speech is to achieve truth. Accordingly, it does not make sense to punish true defamatory speech, especially when we are considering how to encourage more free speech in defamation law. Third, if,

[36] Duen-Ho Yang, *Lun fang hai ming yu chih min shih chai jen* [The Exploration of the Civil Liability on Injuring a Person's Reputation], 3 FUREN FAXUE [Fu Jen Law Review] 127, 142 (1984).

under the autonomy theory of the First Amendment, we protect some false defamatory statements to provide breathing space for self-government, we necessarily also provide additional space for true speech to flourish. In furtherance of encouraging free discussions, therefore, it should also be clear that speakers should not be liable in civil defamation law for making true defamatory statements under any circumstance.

Accordingly, falsity and truth are important concepts in defamation law.[37] Falsity should be an element of civil defamation.

2. Categorizing the Status of the Plaintiff

The development of American constitutional defamation law demonstrates that categorizing the status of the plaintiff is also significant in determining how to balance the conflict between freedom of speech and individual reputation interests. The United States Supreme Court has recognized a distinction between public plaintiffs and private plaintiffs and ruled that public plaintiffs, such as public officials and public figures, have less protection of their reputation interest than do private plaintiffs.[38] However, the major challenge for the Supreme Court in constitutional defamation law is determining who the public plaintiffs are. I will address this difficult problem and show why public plaintiffs must yield more to

[37] Wu, *supra* note 8, at 79-80. See also Tian-Gui Gan, *Yen lun tzu yu yu fang hai ming yu* [Freedom of Speech and the Harm to Reputation], 14 TAIWAN FAXUE ZAZHI [Taiwan Law Journal] 112,114 (2000).

[38] The term “public plaintiffs” in this dissertation refers to public officials and public figures, unless I specifically mention them separately.

speakers' rights of free speech.

In *New York Times v. Sullivan*,[39] the Supreme Court held that a public official can recover damages for false defamatory statements related to his official conduct only when he can prove that the statement was made with actual malice.[40] Furthermore, in *Curtis Publishing Co. v. Butts*,[41] the Court extended the actual malice standard to plaintiffs who are public figures.[42] Moreover, in *Gertz v. Robert Welch, Inc.*,[43] the Court expressly stated that the status of the plaintiff as a public or a private person is the key factor that triggers the protection of freedom of speech. The Gertz Court provided two reasons to support this distinction between public figures and private figures.[44] First, public figures have easy access to the media to clear their names. Second, public figures voluntarily become public figures, thus assuming the risk of public criticism.[45] Therefore, courts should provide public figures less protection of their individual reputation interests.

[39] 376 U.S. 254 (1964).

[40] The New York Times Court created "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to 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." *Id*. at 279-280.

[41] 388 U.S. 130 (1967).

[42] *Id*. at 163-164.

[43] Gretz. v. Robert Welch, Inc., 418 U.S. 323 (1974).

[44] The Gertz Court's ruling that public nature of a plaintiff is a decisive factor for the protection of freedom of speech included public officials. *Id*. at 344.

[45] Gretz. v. Robert Welch, Inc., 418 U.S. 323, 344-345 (1974).

The Gertz Court not only recognized public figure status as the decisive factor when it applied the actual malice standard, it set out three categories of public figures: all-purpose public figures, limited public figures, and involuntary public figures.[46] However, even though the Supreme Court has created these three categories to classify public figures, some confusion has emerged in real cases. For example, in *Time Inc. v. Firestone*,[47] the Court held that a wealthy woman whose divorce was the subject of a newspaper article was not a public figure. The Court asserted that she had no special prominence in society that qualified her as a public figure.[48] However, the Court may have analyzed the question incorrectly. The Court should have held that she was a public figure, because the speaker's audience considered her to be so. Even though the speech involved an ordinary matter of private concern, like divorce, the media's interest in the story shows that she was a public figure even before the story broke. She thus obtained easy access to the media to tell her side of the story to clear her name. It is difficult to imagine how a famous person in any society would not be considered a public figure in court.

Indeed, it is not an easy task for courts to determine which plaintiffs are public plaintiffs in the sense of constitutional defamation.[49] To solve

[46] *Id*. at 345.

[47] Time Inc. v. Firestone, 424 U.S. 448 (1976).

[48] *Id*. at 449-453.

[49] Diane L. Borden, *Invisible Plaintiffs: A Feminist Critique on the Rights of Private Individuals in the Wake of Hustler Magazine v. Falwell*, 35 GONZ. L. REV. 291, 296 (2000). Borden stated: "[T]he Court struggled to clarify the amorphous distinctions between public officials and private individuals, a process one judge

this problem, I propose another approach by setting three conditions to recognizing public figures in defamation lawsuits: (1) whether the plaintiff voluntarily becomes a public figure and hence subject to public criticism; (2) whether the plaintiff has easy access to the media to clear her name; (3) whether the plaintiff has persuasive power and the ability to influence society.

For the first and second conditions, since the Gertz Court has clearly explained the reasons for providing the speaker with greater protection when the plaintiff is a public figure, I will not discuss it again here. I will, however, discuss the third condition in more detail to explore why public figures should bear more defamatory statements than private figures, because more power comes with more responsibility. As the result of their public status, public officials or public figures usually have more power to influence the public than do private figures. As a result, people expect these influential public plaintiffs to be role models in order to impact society in a positive way instead of a negative way. Therefore, they have responsibility not to behave below the general standard and to accept more public scrutiny of their actions than private plaintiffs should bear. They thus must bear more defamatory speech than private figures. Moreover, public officials or public figures who hold persuasive power and influence in society likely enjoy greater resources that they can use to win their defamation lawsuits. For example, influential public plaintiffs usually can afford a group of outstanding lawyers to help them win a defamation

lamented was 'much like trying to nail a jellyfish to the wall.' " *Id*. at 449-453.

lawsuit. Due to the notoriety of representing public plaintiffs and the financial prosperity that is likely to follow, those lawyers who help public plaintiffs will likely invest greater effort to win the case.[50] In contrast, private plaintiffs without significant influence or power in society may not have enough money to afford even one lawyer and may not even be able to support the lawyer's research expenses for the case. For those reasons, more power requires public plaintiffs to bear more defamatory statements.

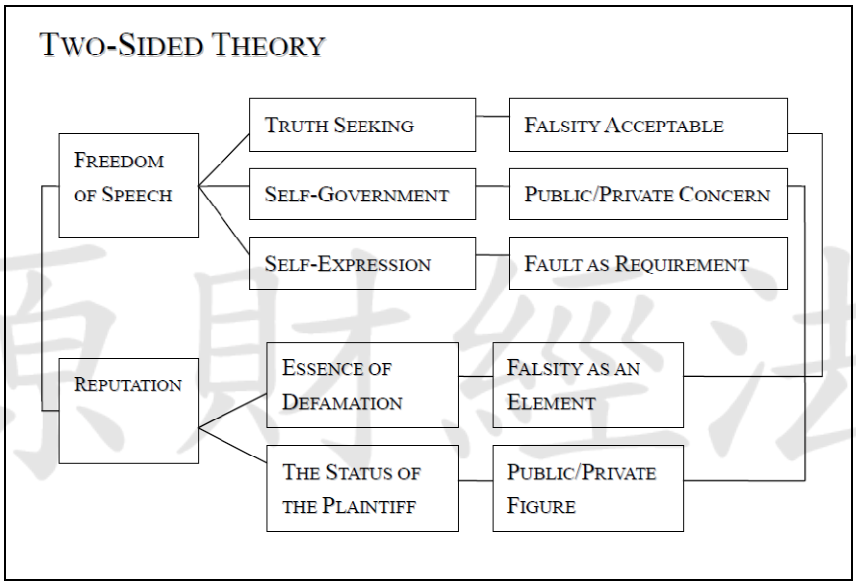
The approach that I propose is a "conditionally sufficient approach", which means that, as long as one of the conditions is sufficient, then courts should recognize the injured party as a public plaintiff in a defamation lawsuit. This conditionally sufficient approach will help courts to recognize a public plaintiff in defamation cases in a more precise and broad way and to avoid mistaking a public plaintiff as a private plaintiff. In sum, a person who is recognized as a public plaintiff in a defamation lawsuit under the conditionally sufficient approach will have less protection of the person's reputation interests than a private plaintiff.

IV. Creating a New Perspective of Taiwanese Civil Defamation Law under the Two-Sided Theory

In section III, I introduced the two-sided theory and discussed issues

[50] In the American legal system, juries often award large damages to public figures in defamation lawsuits. In terms of contingency fees, therefore, lawyers are more likely to make their best efforts on public plaintiffs in defamation cases.

related to drawing the line for constitutional defamation law. The dividing line between free speech and defamation is not fixed and may vary depending on the needs of different societies. Based on this two-sided theory, in this section I will develop a new Taiwanese defamation law in a way that differs from the American constitutional defamation law. Below is a chart that explains how I connect the two-sided theory with my proposed law.



For further exploration, I will first address the public factor, because it is the key point for the development of a new Taiwanese defamation law.

A. Public Factors Play a Key Role

Generally speaking, the more that speech implicates a public matter or the more that the plaintiff is a public figure, the more protection the speech deserves.[51] Under the two-sided theory, public can be considered in the balance between free speech and reputation interests in two ways. One is from the content of the speech-under the self-government theory from the side of freedom of speech. The other is from the status of the plaintiff-public plaintiffs have less protection of their reputation interests from the side of the individual reputation interests. Since American constitutional defamation law has long recognized this public distinction, I will first re-evaluate the critical issue on the public factors. Is the key factor that triggers the protection of the freedom of speech the content of speech (public speech) or the status of the plaintiff (public plaintiff)? In answering this question, I will develop the best strategy for the public/private distinction in my proposed Taiwanese civil defamation law.

1. Two Roles Theory in U.S. Constitutional Defamation Law

The most serious problem in the American constitutional defamation law today is the ambiguity regarding which factor, the content of speech or the status of the plaintiff, will trigger constitutional protection in defamation cases. Three approaches may resolve the problems: (1) use public concern as the only factor that will trigger the protections of

[51] Borden, *supra* note 49, at 293. She states that "The more public the issue and the more public the plaintiff, the more likely the harmful speech will be protected by the First Amendment." *Id*.

constitutional defamation law; (2) use public plaintiff as the only factor that will trigger the protections of constitutional defamation law; and (3) consider both public plaintiff and public concern as factors that will trigger vigorous constitutional protection in defamation law. For (1) and (2), it is difficult to explain why the Court ignores the other factor. As a result, (3) is the best approach.[52] In *Philadelphia Newspapers, Inc., v. Hepps*,[53] the Court expressly stated that there were two factors under the First Amendment that should be considered when evaluating defamation liability: "The first is whether the plaintiff is a public official or figure, or instead a private figure. The second is whether the speech at issue is of public concern." Through this two-by two matrix, however, the Court created only three categories: (1) public plaintiff and a matter of public concern; (2) private plaintiff and a matter of public concern; and (3) private plaintiff and a matter of private concern.[54] The Court obviously

[52] Eric Jan Hansum, *Where's the Beef? A Reconciliation of Commercial Speech and Defamation Cases in the Context of Texas's Agricultural Disparagement Law*, 19 REV. LITIG. 261, 277 (2000). Hansum argues that "A court must determine whether the person allegedly defamed was a public figure or a private individual, and from that different standards would follow." He went on to say that "yet, eleven years after Gertz, a plurality of the Court announced in Dun that the nature of the defamatory statement should also be examined, *i.e.*, whether the topic covers a public or private concern and not just whether the person at issue is a public figure or private individual." *Id.* See also Borden, *supra* note 49, at 296.

[53] 475 U.S. 767 (1986).

[54] *Id*. at 775. The Court described three results from combing these two factors. "When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised

failed to mention the category of public plaintiff and a matter of private concern. As a result, the Hepps Court seems to resolve the ambiguity of which public factor will trigger constitutional protection in defamation cases by taking approach (3). In actual fact, however, approach (3) creates a problem with the logical gap.

In response to this logical gap, I have devised a two roles theory with which to interpret American constitutional defamation law. By recognizing that public plaintiff and public concern serve different roles, my two roles theory provides a way for the Supreme Court to solve this confusing problem. Under the two roles theory, the content of speech is the main factor that triggers protection of free speech.[55] On the other hand, the plaintiff's status determines how much protection speakers can enjoy after courts determine that the content of speech involves matters of public concern: When the plaintiff is a public plaintiff, courts impose the

by the common law." The Court went on to say that, when speech is of public concern about a private figure, "As in Gertz, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern." Finally, the Court stated: "When the speech is of exclusively private concern and the plaintiff is a private figure, as in Dun & Bradstreet, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Id.*

[55] Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759 (1985). The Court stated: "We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' " *Id.*

actual malice standard on speakers.[56] When the plaintiff is a private plaintiff, courts impose a negligence standard on speakers.[57] The following section will present my view of American constitutional defamation law and further explore the two roles theory.

a. Public Concern as the Core Value for the Protection of Free Speech

The content of speech that involves matters of public concern should be the most critical factor to explain why the U.S. Supreme Court protects freedom of speech in defamation law.[58] After Professor Meiklejohn

[56] New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964).

[57] Gertz v. Robert, 418 U.S. 323, 347. About the negligence standard, in his concurring opinion in Gertz, Mr. Justice Blackmun stated: "Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to join." *Id.* at 353-354. See also W. Robert Gray, *Public and Private Speech toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1, 28 (1994) (noting that liability for private figure/public concern will usually be based upon negligence). Gray explains that the Gertz Court "placed the emphasis for determining constitutional protection for the defendant in a defamation suit squarely on the public or private status of the defamed figure." The Court went on to say that "A private figure as plaintiff -- whose interest in reputation would carry greater weight than a public figure's similar interest when balanced against the value of protecting the speech -- would have to prove only 'fault' (usually negligence) by the defendant, not *New York Times* malice, to recover." *Id.* at 279-280.

[58] Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 758-759 (1985). The Court stated: "We have long recognized that not all speech is of equal

asserted the self-government theory in his famous book, "Free Speech and Its Relation to Self-Government," the Supreme Court adopted this theory as the core value of freedom of speech.[59] Even when speech is defamatory, if the content of the speech implicates public issues, then the self-government theory requires that we protect the speech.[60]

In addition, in *Chaplinsky v. New Hampshire*, Justice Murphy developed a two-level theory to determine whether speech should receive First Amendment protection.[61] When speech is high-value speech, courts provide nearly absolute protection by using the "strict scrutiny test." When speech is low-value speech, courts usually provide little or no protection by using the "categorical balancing test."[62] Since defamatory speech is traditionally recognized as low-value speech, courts did not consider the issue of freedom of speech under common law defamation. However, the Supreme Court first considered the protection of defamatory speech in New York Times, because defamatory speech could involve "matters of public

First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.' " *Id.* at 279-280.

[59] Harry Kalvan, *The New York Times Case: A Note on "The Central Meaning of the First Amendment*", 1964 SUP CT. REV. 191, 221 (1964).

[60] 376 U.S. 254, 270 (1964). The Court states that "Thus we 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 …." *Id*. at 221.

[61] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942).

[62] The Harvard Law Review Association, *The Content Distinction in Free Speech Analysis after Renton*, 102 HARV. L. REV. 1904, 1906 n. 12 (1989). See also MELVILLE B. MINNER, MINNER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 2.04 (1984 & Supp., 1991).

concern." Courts consider speech involving matters of public concern to have high value and thus provide the higher protection of free speech. Therefore, speech involving a matter of public concern is the most critical factor that triggers protection of free speech in defamation law.

b. Public Figure as the Standard that Determines the Level of Protection of Free Speech

The U.S. Supreme Court seems to consider the plaintiff's status as another key factor that triggers the protection of freedom of speech. However, public plaintiff in American constitutional defamation law should not be the key factor that triggers the protection of free speech, but rather, the standard used to determine how much free speech protection the speaker should receive.

In its decisions to date, the Supreme Court has not considered the status of the plaintiff when speech has involved matters of private concern. Instead, the Court returned to the common law approach by adopting presumed and punitive damages without requiring a showing of actual malice.[63] The Court did not distinguish between a public plaintiff and a private plaintiff in this context, probably because there has been no such distinction regarding the status of plaintiffs in the common law era. In contrast, when speech involves matters of public concern in defamation cases, the Court distinguishes the status of the plaintiff to provide different levels of protection. If the plaintiff is a public plaintiff, the Court will apply

[63] Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

the actual malice standard to offer the greatest protection of free speech. If the plaintiff is a private plaintiff, the Court will apply the negligence standard to offer lesser protection of free speech.[64] As a result, the status of the plaintiff should be the factor upon which the Court relies in determining the applicable level of protection of free speech.

2. Equal Evaluation of Public Factors in My Proposal

Under the two role theory, the Supreme Court may continue to consider public plaintiff and public concern in determining the protection of free speech in defamation law by assigning them different functions. The Court should regard public concern as the key factor to activate the protection of freedom of speech in defamation law. The public/private plaintiff distinction provides different levels of protection for speakers only after the courts have taken freedom of speech into account by recognizing that the speech involves matters of public concern. By doing so, the logical gap (public figure/private concern) becomes acceptable, because, when the defamatory speech involves matters of private concern, it does not trigger any protection of free speech. Therefore, we do not need to distinguish the status of the plaintiff in this context. In this regard, when the plaintiff is a public figure and the defamatory speech involves matters of private concern, courts might impose common law strict liability on speakers. However, this raises three controversial questions: (1) If courts apply the strict liability standard as described above, do they

[64] New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964); Gertz v. Robert, 418 U.S. 323, 347 (1974).

ignore the fact that the plaintiff is a public plaintiff?[65] (2) If, in contrast, courts apply the actual malice standard, do they ignore the fact that the content of speech involves no matters of public concern?[66] (3) Should courts apply the middle negligence standard when the content of speech and the status of the plaintiff are of equal weight?[67]

Since the Supreme Court has not clarified the role of these two factors, the logical gap still remains a defect. More importantly, even using the two roles theory to justify the logical gap, one still cannot avoid the three controversial questions regarding the fault requirement for the public figure/private concern. Therefore, my proposed law will take another approach to avoid these problems. In my proposal, both the content of speech and the plaintiff's status are factors that equally trigger constitutional protection of the freedom of speech.

Accordingly, I will borrow the public/private distinction both in the content of speech and in the status of the plaintiff from American constitutional defamation law. However, I will use a different approach -"the equal evaluation approach"- to meet the current needs of Taiwanese

[65] Public plaintiffs deserve less protection of their reputation interests, since they are in the best position to solicit help from the media and should take more public criticism for their public roles.

[66] As a result, as long as the plaintiff is a public plaintiff, courts will apply the actual malice standard even when the speech involves matters of private concern. This result is contrary to the self-government theory that serves as the core of the First Amendment.

[67] Courts should adopt the middle negligence standard when the plaintiff is a public figure and the defamatory speech involves matters of private concern.

defamation law and to avoid the problems that the American constitutional defamation law has created. The status of the plaintiffs and the content of speech will serve the following crucial functions: Public plaintiffs have the burden of proving falsity, and speakers have a special defense when defamatory speech involving matters of public concern. Next in B and C, I will discuss them in more detail.

B. Public Plaintiffs Have the Burden to Prove Falsity

Falsity is an important element in defamation law. Who has the burden of proving falsity can change the balance of protection between free speech and individual reputation interests. In my proposed defamation law, public figures have the burden of proving falsity.

1. Falsity is an Element of Defamation

The previous analysis of defamation from the side of individual reputation interests under the two-sided theory indicates that speakers liable for making true, defamatory statements misunderstand the meaning of defamation.[68] The term "defamation" means the devaluing of someone's reputation. A person's reputation cannot be devalued by a true statement, because knowing the truth allows society to judge a person's reputation accurately. Even though a reasonable person may regard a true statement as defamatory under the general standards of politeness in society, this injured person actually suffers no essential harm to his reputation from this defamatory statement.

[68] Yang, *supra* note 36, at 142; and the accompaning text.

Moreover, no speaker should be liable for true defamatory speech in terms of the protection of free speech.[69] If we agree to accept more false defamatory speech by lowering the duty of care of speakers in constitutional defamation law, it should be much easier to extend the protection of free speech to true defamatory speech. Therefore, speakers should not be liable for true defamatory statements. Falsity is an element of defamation and serves a crucial role in defamation law.

However, falsity as an element of defamation raises a more important question here about the burden of proof: Should plaintiffs be required to prove falsity, or should all defamatory statements be presumed false unless the speaker can prove otherwise? The approach to answering this question impacts the degree to which freedom of speech is protected.

2. Assigning the Burden of Proving Falsity on Public Figures

In the general view of common-law countries, most statements that are defamatory are also false. The common law of defamation in the United States is an example. Falsity is not an element of proof in American defamation common law; thus plaintiffs do not have the burden to prove falsity. Therefore, the common law usually does not require

[69] For a discussion of the arguments on this point, please see the previous context in III. The Analysis of the Two-Sided Theory to Balance Free Speech and Reputation Interest/ B. From the Side of Individuals' Reputation Interests/ 1. Analyzing the Essence of Defamation.

plaintiffs to prove falsity; instead, truth is an affirmative defense.[70] However, requiring plaintiffs to prove falsity makes plaintiffs less likely to win defamation lawsuits, because they have one more element to prove. Therefore, the shift by the Supreme Court in constitutional defamation law of the burden of proving falsity to plaintiffs, thereby relieving defendants from having to prove their common law affirmative defense of truth, represents an effort to increase protection of free speech.

Shifting the burden of proving falsity onto plaintiffs indeed brings great benefits for freedom of speech. However, as a matter of practice, it is often too difficult for plaintiffs to prove that something does not exist. In addition, plaintiffs, at least from their own perspective, are the victims of the defendants' conduct. Thus, it might seem unfair to place all of the burdens in the case on the injured party.[71] On the other hand, it could be easier for speakers to prove "something does exist", establishing that the speech is true. Moreover, speakers are the ones who initiate or disseminate the defamatory statements, and they surely are in the better position to prove those materials are true due to the easy access to the original information or sources upon which they relied in making those statements.

Indeed, shifting the burden of proving falsity onto plaintiffs is a significant contribution by constitutional defamation law. However, for

[70] RALPH L. HOLSINGER & JON DILTS, MEDIA LAW 150 (1994).

[71] In both Taiwanese current civil defamation law and U.S. constitutional defamation law, plaintiffs must prove falsity. If plaintiffs still need to prove falsity, then they bear the burden of proof with regard to all elements in defamation cases.

practical reasons as described above, putting the burden of proving truth on defendants has value in defamation cases. Therefore, I propose requiring public plaintiffs to prove falsity and, when plaintiffs are private persons, creating a rebuttable presumption of falsity for speakers to use truth as a defense. The underpinning of this approach initiates from categorizing the status of the plaintiff from the side of individual reputation interests under the two-sided theory. Since public plaintiffs have less protection of their reputation interests than do private plaintiffs, it is appropriate to assign the burden of proving falsity to public plaintiffs to promote free speech. Distinctively, private plaintiffs, who deserve more protection of their reputation interests, need not prove falsity in defamation cases. This approach strikes the best balance to protect between freedom of speech and individual reputation interests.

C. Speakers Have the Benefit of a Special Defense When Defamatory Speech Involving Public Matters Are Concerned

Ensuring that true defamatory statements do not trigger liability in defamation law and that public figures have the burden of proving falsity is the first step in protecting freedom of speech under constitutional defamation law. The more important issue for freedom of speech, however, is deciding which speakers should be liable for making false defamatory statements. The concept of fault is the most decisive factor to answer the above question. Speakers should not liable for making false

defamatory statements without fault as to falsity.

1. Fault with Regard to Falsity Is Crucial in Defamation Law

Adding a fault requirement to defamation - that is, imposing a duty on the speaker to determine the truthfulness of the statement - provides an excellent means of balancing the conflicting values of freedom of speech and individual reputation interests. Speakers should not be liable for making false defamatory statements if they make those statements without fault. Speakers should only be liable when they know or reasonably should know that the defamatory statements are false.[72] In other words, the inner mind of speakers with respect to their knowledge of falsity should be an element in constitutional defamation law.

Another reason to adopt a fault requirement as a line-drawing criterion is found in the theory of self-expression justification for freedom of speech mentioned in the previous section.[73] Under the self-expression theory, since freedom of speech exists to protect speakers, speakers cannot abuse its protection. Speakers deserve more protection when they exercise reasonable care in determining the truthfulness of their

[72] Justin H. Wertman, *The Newsworthiness Requirement of the Privilege of Neutral Reportage Is a Matter of Public Concern*, 65 FORDHAM L. REV. 789, 792-793 (1996).

[73] Please refer to previous context in III. The Analysis of the Two-Sided Theory to Balance Free Speech and Reputation Interest/ A. From the Side of Freedom of Speech/ 2. Connecting these three theories with defamation law under "all-considerations approach".

statements than when they do not, especially when their statements harm the reputation of others. Similarly, when speakers either intentionally or negligently make false defamatory statements that harm others, they do not deserve protection; they have not shown that they deserve protection. Therefore, speakers with fault should be liable, thereby providing the balance between these two conflicting values.

Moreover, a fault requirement helps speakers to predict whether they will be liable for their speech to prevent any chilling effect on speech. This predictability is also one of the important ways to protect the freedom of speech. For example, defamation law ensures that speakers will not be held liable for their statements when they use due diligence in investigating the statements' truth. Then speakers will be more likely to speak without worrying about liability in defamation lawsuits, because they will know how much they should do to prevent liability. As a result, society will not be threatened by the chilling effect.

In American defamation common law, speakers are liable for defamatory statements without regard to fault (strict liability). With the advent of constitutional defamation law in the United States, the fault requirement became actual malice or negligence.[74] The change from strict liability to actual malice or negligence is the critical step in providing more protection to freedom of speech.

Unlike American common law defamation, which holds speakers

[74] Nat Stern, *Private Concerns Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597, 599-602 (2000).

liable without regard to fault, Article 184 in the Taiwanese Civil Code has provided a fault requirement for Taiwanese civil defamation law. When the United States Supreme Court imposed a fault requirement upon plaintiffs in defamation cases, it made important progress toward the protection of freedom of speech. In Taiwan, however, we are not going to impose, but rather will increase, the fault requirement to achieve greater protection of free speech in defamation law.

2. The Higher the Fault Requirement Imposed upon Defendants, the Greater the Protection of Freedom of Speech

The level of protection of freedom of speech under defamation law depends upon the level of fault required in a claim for defamation. To provide maximum protection, speakers should be liable only when they have actual knowledge of the falsity of their defamatory statements.[75] This is the highest level of fault. Speakers who are merely reckless with regard to the falsity of their statements exhibit a lesser amount of fault. Both of these situations represent "actual malice" in American constitutional defamation.[76]

[75] This category would include speakers who made up statements or knew the statements were false and still disseminated them.

[76] New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964). Actually, the recklessness standard can be recognized as gross negligence. However, I put the recklessness standard as the highest level of fault, instead of putting it in the next level with negligence, to comply with the American actual malice standard, which includes the recklessness standard as a category for American jurisdiction in defamation cases.

The next lower level of fault is negligence. Speakers are not liable under this category, unless they are negligent in their investigation about the sources for the statements. “The reasonably believed truth” is an important notion of this standard.[77] Under the reasonably believed truth standard, speakers must satisfy a certain standard of investigation of the sources of their statements. If speakers have a reasonable belief in the truthfulness of their statements after their investigation, they are not liable if those statements are actually false. In contrast, if they decide to disseminate those defamatory statements while having reasonable doubts as to the falsity of the statements, then they will be liable for the harm caused by the statements.

Strict liability represents the lowest level of fault, because liability does not require any fault at all. In other words, speakers may absolutely believe that their speech is true when they utter it and have no way, reasonable or otherwise, to find out that the speech is false, and yet still be liable. Their knowledge of falsity does not matter in determining their liability. In this context, there is no constitutional privilege in the context of freedom of speech, because speakers are liable if the defamatory statements are false.

3. Reasonably Believed Truth Standard as a Special Defense

As described above, the actual malice standard under American

[77] I will adopt “the reasonably believed truth” standard to develop Taiwanese civil defamation law. For more details, please see the next section “3. Reasonably believed truth standard as a special defense.”

constitutional defamation law affords the most protection of freedom of speech and of the well-developed achievement of democracy. The United States Supreme Court changed the common law's strict liability approach and adopted the actual malice standard to offer broad protection of the freedom of speech. This innovation not only significantly influenced American defamation law, but it also inspired many other democratic countries to discuss whether to adopt the actual malice standard in their own defamation law.[78] Many countries, however, have not accepted the actual malice standard, opting instead to adopt the negligence standard.[79]

Taiwan should adopt the reasonably believed truth standard (negligence standard) for the following reasons. First, the actual malice standard is too rigid for Taiwanese society. Taiwanese culture has strong Confucian roots. Confucianism places a high value on personal reputation. An old Chinese saying states that "a decent man can be killed, but he cannot be insulted." Even though Taiwan has experienced a rapid growth of democracy, the protection of individual reputation interests is still strongly needed in Taiwan.[80] In addition, courts usually avoid

[78] Holsinger & Dilts, *supra* note 70, at 141.

[79] Wu, *supra* note 8, at 53, 58, 60, 63, 73, 77, 82. (Different countries have differing reasons not to adopt the actual malice standard in their defamation law. Korea pays more attention to the protection of individual reputation interests, and, therefore, the actual malice standard is not applicable. Britain believes that the actual malice standard encourages irresponsible journalism and that fair common defense is enough to protect freedom of speech. *Id*. at 141.)

[80] In the ancient book "*Xin Wudai Shi*" (New History of Five Dynasties), there is an old Chinese saying "*bao si liu pi, ren si liu ming*" (The thing that a person can leave in the world after his death is reputation, like a panther leaving his skin

interpreting laws in a way that contravenes legislative intent. The judicial branch in Taiwan has the power to apply and interpret current law (the negligence standard), but it has no power to make law (the actual malice standard).[81] On the other hand, legislators, who have the exclusive power to make law, may be reluctant to change the current negligence standard to the actual malice standard, because such a change would diminish the protection of their own reputation interests to an extent.[82] As public officials, legislators are among the most attractive targets for public criticism. Moreover, adopting the highly permissive actual malice standard may lead to media abuses, because self-regulation of the media in Taiwan is not well-developed.[83] Instead of adopting the highest fault

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after death). From this standpoint, it is not difficult to understand that Taiwanese people, who are greatly influenced by traditional Chinese culture, should still strongly advocate the protection of a person's reputation. Even though Taiwan is a democratic society that takes freedom of speech seriously, in the context of defamation law, the Taiwanese people still cannot largely accept sacrificing protection of personal reputation for the sake of free speech.

[81] Under Taiwanese Constitution Article 78, courts have the power to interpret law when applying it. No court cases can be decided without applying one or more statutory provisions.

[82] In adopting American constitutional defamation law, courts apply the actual malice standard to those speakers who make defamatory statements about public officials.

[83] Taiwan has a unique political status. It has been only twenty-five years since the government lifted martial law in 1987. The most important symbol of the limited freedom of speech was the government's control of the media. After the government lifted martial law, the media suddenly emerged into full bloom. However, the "instant" development of democracy and a free media also caused many problems, such as abuse of the media. See Yung-Sung Lin & Ya-Shin Wan,

requirement - the actual malice standard - which could potentially spoil the media, adopting the negligence standard represents the best way to encourage the growth of the media in Taiwan. After all, the growth of the media is the ultimate solution to preventing the growth of unnecessary defamation lawsuits in the future.

Second, the reasonably believed truth standard imposes the best fault requirement with regard to establishing falsity without imposing a chilling effect on the free exchange of ideas. One may argue that the actual malice standard is more likely to prevent the chilling effect, because speakers will be not liable for defamation for more kinds of speech than under other approaches. However, the chilling effect is mainly from the speakers' inner fear of liability about their speech, because they do not know whether their defamatory speech is true or false. In this regard, there is no chilling effect on those who know that the defamatory speech they made was false under the actual malice standard and are determined to publish it anyway.

Third, the reasonably believed truth standard is the best choice to meet the current civil legal system in Taiwan. Article 184 of the Taiwanese Civil

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Mei ti tsung yen jen yuan yu fei pang-tzu lu hai shih ta lu [The Media Workers and Defamation - Self-Censorship or Censorship by Others], 1(5) LUSHI ZAZHI [Taiwan Bar Journal] 57, 59 (1997). See also Chin-E Hung, *Yi ying tai lo chi chieh hsi ming yu kai nien* [The Analysis on the Concept of Reputation under the Approach of Deontic Logic], 6(6) LUSHI ZAZHI [Taiwan Bar Journal] 41, 41-42 (2002). Therefore, it would not be appropriate to adopt the American actual malice rule in Taiwan, because the current Taiwanese media is not as mature as the American media in terms of self-regulation or professionalism.

Code governs every tort, including the tort of defamation. That article imposes liability on defendants who are at least negligent in their conduct, and negligence is the base standard for liability. The reasonably believed truth standard corresponds to this negligence standard. Indeed, one may argue that the recent standard regarding fault in Taiwanese courts is the considerably believed truth standard.[84] However, the current considerably believed truth standard stands for the traditional view of fault in Taiwanese civil defamation law and thus does not provide more space for free speech. Compared to the reasonably believed truth standard that I propose, the considerably believed truth standard requires speakers to hold a higher level of belief in truthfulness of their defamatory statements. The reasonable believed truth standard, on the other hand, reduces the degree of culpability on the part of speakers and thus provides more room to promote free speech in defamation law.

Moreover, I will take the reasonably believed truth standard as a special defense for speakers, which will define the purpose of the defamation law to be the protection of free speech, because this defense applies only to those cases with speech involving matters of public concern. The message of this rule will be clear: Speakers deserve greater protection for free speech only when the speech is about matters of public concern in the context of the theory of self-government for free speech.

[84] Interpretation No. 509 of the Grand Justice Council and Zuigao Fayuan [Sup. Ct.], Civil Division, 93 Tai-Shang No. 851 (2004) (Taiwan) both embrace “the considerably believed truth” standard.

Accordingly, using the reasonably believed truth standard as a special defense will reinforce the importance of protecting free speech in defamation law.

V. Conclusion

Under the two-sided theory and the further connections from my previous analysis, I conclude my proposed new Taiwanese civil defamation law as follows: “A defamatory statement shall be presumed to be false, unless the injured person is a public figure, in which event the public figure must prove the falsity of the statement. When this statement involves matters of public concern, the speaker shall not be liable if he reasonably believed the statement to be true.” In analyzing this proposed law under the equal evaluation approach, two rules arise from the public/private distinction: (1) When speech involves matters of public concern, speakers enjoy reasonably believed truth as a defense, regardless of the status of the plaintiff; and (2) When the plaintiff is a public figure, the plaintiff has the burden of proving falsity without regard to the content of speech. Accordingly, when the plaintiff is a public figure and the defamatory statement involves matters of public concern, the plaintiff has the burden of proving falsity, and the speaker enjoys reasonably believed truth as a defense. When the plaintiff is a public figure and the defamatory statement involves matters of private concern, the plaintiff has the burden of proving falsity. When the plaintiff is a private figure and the defamatory statement involves matters of public concern, the

speaker enjoys reasonably believed truth as a defense. Finally, when the plaintiff is a private figure and the defamatory statement involves matters of private concern, courts should apply the original tort law without considering any protection of free speech.

My proposed law will attain three major achievements. First, my proposed law creates two precise and useful rules to solve the problem created by the application of Interpretation No. 509 in Taiwanese civil defamation law. As I mentioned in Section II, whether Interpretation No. 509 or its essence is applied to civil defamation law is the most important challenge for the current Taiwanese civil defamation law. By implementing my proposed general rules, we would not only build a new Taiwanese civil defamation law, but also provide a workable approach for courts when they encounter Interpretation No. 509 issues in civil defamation cases.

Second, my proposed law considers the content of speech and the status of the plaintiff separately and thereby successfully avoids the logical gap created by the United States Supreme Court. In my analysis, the Supreme Court failed to state clearly that both the content of the speech and the status of the plaintiff are factors that play different roles in constitutional defamation law. This result makes the logical gap and unpredictability in Supreme Court defamation cases. My proposed law, therefore, asserts that the status of the plaintiff and the content of the speech should weigh equally as two separate factors that activate constitutional protection. As long as the plaintiffs are public figures in defamation cases, my proposed law requires that they prove falsity

regardless of the content of speech. Whenever speech involves matters of public concern, my proposed law provides the reasonably believed truth defense for the protection of free speech without regard to the status of the plaintiff. In this way, courts will not disregard the context when defamatory speech involves matters of public concern about public figures. Therefore, my proposed law can avoid a logical gap as American law does.

Third, my proposed law does not change the existing defamation statutes in the current Taiwanese Civil Code. Rather than change the negligent standard in tort law, I add two constitutional protections: public figures have the burden to prove falsity; and speech involving matters of public concern has the special defense of reasonably believed truth for defendants. As a result, my proposed law keeps the original Taiwanese defamation law functioning. When courts apply the constitutional protections that my proposal advocates in defamation cases, the law they apply will in many respects resemble current defamation law.

In sum, based on the two-sided theory, this new Taiwanese defamation law helps to develop the most appropriate balance between freedom of speech and individual reputation interests. This proposed law not only extracts the precious public/private distinction experience of American constitutional defamation law, but also fills the logical gap that currently confronts that law. More importantly, this proposal considerably examined Taiwanese defamation law, providing a more advanced theoretical analysis of the balance between individual reputation interests

and free speech, and a clear, workable rules for courts when they hear civil defamation cases. This new perspective of Taiwanese civil defamation law will, therefore, enable Taiwan to be a more modern and mature democratic country in the world.

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Abstract

Having the highest esteem for free speech, the United States appears to have achieved a balance between free speech with each individual's reputation interests. Taiwan currently holds freedom of speech as a significant value and is struggling to achieve the same balance. This paper describes the many civil defamation cases dealing with unresolved free speech issues arising in Taiwan due to the absence of a more defined theoretical basis following the issuance of the Grand Justices Council's Interpretation No. 509 in 2000. The goal of this paper is to propose a new Taiwanese civil defamation law that will resolve these problems. To achieve this goal, this article examines constitutional defamation law in the United States and proposes a "two-sided theory" to combine all possible factors for balancing free speech and the reputation interests of individuals in simple principles. In doing so, this paper provides a more advanced and precise theoretical analysis to solve the confused free speech issues in current Taiwanese civil defamation law. This paper also provides a clearer and more feasible rule for courts to follow when hearing civil defamation cases.

以「雙面理論」之論證分析開啟我國民事侵害名譽權法之新思維

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摘要

歷經約半世紀的發展，美國侵害名譽權法已將名譽權與言論自由的衡平，作出進步與細膩的規制；台灣近年來也基於對民主價值之重視，對言論自由與名譽權之間的衝突與保障，經歷相同的衡平議題。台灣在二〇〇〇年司法院大法官作出釋字第五〇九號後，使大量的民事侵害名譽權案件面臨言論自由的問題，由於欠缺更深入的學理分析，實務上在處理民事侵害名譽權的案件時，仍未能作出精確統一的適用原則，本文針對上述情況，藉由研析美國侵害名譽權法的經驗與啓發，提出「雙面理論」之論證分析，綜合所有衡平名譽權與言論自由可能考量的因素，透過更深入與精確的學理研究，整合出適合我國民事侵害名譽權法之簡明原則，以解決上述懸而未決的言論自由與名譽權之衡平問題，進而開啓我國民事侵害名譽權法之新思維，並期以此研究成果，提供未來

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關鍵字：民事侵害名譽權法、名譽權、言論自由、雙面理論、公共因素。