

Opinio Juris in Comparatione

Studies in Comparative and National Law

Op. J. Vol. I, n. I/2013

**What Would Happen to the Actual Malice Doctrine
in a Severely Polarized Democracy?
The Case of Taiwan**

by
Jimmy Chia-Shin Hsu

WHAT WOULD HAPPEN TO THE ACTUAL MALICE DOCTRINE IN A SEVERELY POLARIZED DEMOCRACY? THE CASE OF TAIWAN

by

Jimmy Chia-Shin Hsu*

Abstract:

The American legal doctrine of actual malice in tort of defamation, developed by the U.S. Supreme Court in *New York Times v. Sullivan* and its progeny, is one of the hallmarks of the exceptionally speech-protective First Amendment jurisprudence. Despite the doctrine's uniqueness among western advanced democracies, an Asian new democracy, Taiwan, has undertaken an extraordinary experiment in the past decade to transplant the doctrine of actual malice in its laws of defamation. I analyze how the actual malice doctrine underwent extraordinary twists and turns in Taiwan's criminal and tort defamation laws in the past decade. I argue that Taiwan's severe political polarization since 2000 first led to its rise in tort of defamation, and also to its eventual downfall. It was followed then by the divergence of criminal and tort of defamation in terms of fault degree, with criminal defamation leaning consistently toward actual malice and tort of defamation back to negligence. The divergence was a sensible response to the wildly irresponsible culture of exposé in Taiwan's public sphere that developed after 2005. In light of Taiwan's experience, I also argue that actual malice presumes a thick layer of social consensus on what counts as irresponsible speech. When political polarization and political distrust destroys the social consensus, the "reckless disregard of truth and falsity" prong of actual malice collapses along with it, as is the case with Taiwan's criminal libel during the height of political conflict.

Keywords: New York Times v. Sullivan, defamation, libel, actual malice, negligence, gross negligence, fault standards, freedom of speech, reputation, political polarization, comparative law, rumor, the marketplace of ideas, truth, Chen Shui-bian, Kuomintang, Democratic Progressive Party

* Assistant Research Professor, Institutum Iurisprudentiae, Academia Sinica, Taipei, Taiwan. J.S.D., 2009, The University of Chicago Law School; LL.M., 2003, The University of Chicago Law School; LL.M., 1999, National Chengchi University; LL.B., 1996, National Taiwan University. My heartfelt thanks go to Geoffrey R. Stone and Cass R. Sunstein for their support of my J.S.D. work at the University of Chicago Law School, which laid the foundation for this article. I also thank Tom Ginsburg and two anonymous reviewers for their very helpful comments.

INTRODUCTION

The American legal doctrine of actual malice in tort of defamation, developed by the United States Supreme Court in the 1964 case *New York Times v. Sullivan*¹ and its progeny, is one of the hallmarks of the exceptionally speech-protective First Amendment jurisprudence. The doctrine prescribes that in tort of defamation as well as in criminal defamation,² when the plaintiff or victim is a government official, the defendant can be found liable only if the defamatory statement is made with “knowledge that it was false or with reckless disregard of whether it was false or not”.³ In a series of cases that followed, the doctrine has been expanded to apply in cases in which the plaintiff is a public figure.⁴ The doctrine deviates from counterparts of almost all other advanced democracies, such as Australia,⁵ Canada,⁶ the United Kingdom,⁷ Japan,⁸ and Germany.⁹ In terms of the extraordinary weight given to free speech, the United States is an outlier not only among advanced western democracies, but perhaps around the globe. Such American exceptionalism attracts scholarly attention and is usually explained by cultural factors such as the American liberal tradition and distrust of government regulation.¹⁰

That much is well-known. What is little known in comparative law literature is that an Asian new democracy, Taiwan, has undertaken an extraordinary experiment in the past decade to transplant the doctrine of actual malice in its laws of defamation. The Taiwanese experiment is significant, because Taiwan inherits a strong Confucian cultural heritage, in which the liberal political tradition and distrust of government is weak. It means that the cultural explanation employed to make sense of the American divergence with other Western democracies may be of little help to explain the convergence of two

¹ 376 U.S. 254 (1964).

² See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

³ 376 U.S. 254, 280 (1964).

⁴ See *Curtis Publishing Co. v. Butts*; *Associated Press v. Walker*, 388 U.S. 130 (1967).

⁵ Leonard Leigh, *Of Free Speech and Individual Reputation: New York Times v. Sullivan in Canada and Australia*, in *IMPORTING THE FIRST AMENDMENT* 64-5 (Ian Loveland ed., 1998).

⁶ *Id.* at 57-62.

⁷ See IAN LOVELAND, *POLITICAL LIBELS: A COMPARATIVE STUDY* (1999).

⁸ RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* 155-164 (2006).

⁹ *Id.* at 104-118.

¹⁰ Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29, 45-49 (Michael Ignatieff ed., 2005); RONALD J. KROTOSZYNSKI, JR., *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* (2006).

countries as culturally diverse as Taiwan and the United States. Even as Taiwanese civil courts eventually drifted away from the doctrine, as this article shows, the receptiveness once shown by some Taiwanese courts cannot be satisfactorily explained with cultural factors. My argument is that the venture of the actual malice doctrine in Taiwan is best explained, not by cultural factors, but by dynamic socio-political factors, which used to be hidden in comparative defamation law literature due to the limited number of jurisdictions being compared.

Taiwan's experiment is significant in another respect. Taiwan has a continental civil law system, in which codified legal rules dominate the source of law. However, the reception of the actual malice doctrine has been a purely judicial undertaking. It began with two influential separate opinions of Interpretation No.509 (hereinafter as I.509), a decision delivered in 2000 by Taiwan's Constitutional Court. It was then developed and experimented by Taiwan's lower courts. The timing of the development coincided with the most turbulent era of Taiwan's democratic politics, i.e. the political polarization triggered by Taiwan's historic presidential power turnover in 2000. The decentralized judicial experiment allows a rare degree of flexibility for the courts to interact dynamically with the political environment. Observing how political polarization exerted pressure on the development of Taiwan's laws of defamation provides fresh insights into the deep structure of the actual malice doctrine and its social foundation.

In the wake of I.509, Taiwan's courts have been struggling to stabilize I.509's doctrinal impact. For criminal defamation, which is a misdemeanor not appealable to the Supreme Court, the several branches of Taiwan High Court,¹¹ after the first few years of trial and error, have been consistently relaxing culpability standards toward actual malice and even beyond it since 2006. In contrast, the civil

¹¹ Taiwan's governmental system is unitary, rather than federal. The judiciary is no exception. The Constitutional Court is a distinct entity, which has the ultimate authority over constitutional issues. Alongside it, the ordinary court system is organized into three hierarchical levels, namely the Supreme Court, the Taiwan High Court, and the District Court. There is only one Supreme Court, composed of two divisions, the civil and the criminal. The civil division is composed of seven panels, while the criminal contains thirteen. The High Court has five branches located in five metropolitan or regional centers of Taiwan, including Taipei, Taichung, Tainan, Kaohsiung, and Hualien. The District Courts are located at each county or major city. For a brief introduction to the organization of Taiwan's judiciary, please refer to the Judicial Yuan's English Website: <http://www.judicial.gov.tw/en/> (last visited 06/11/2012).

division of Taiwanese courts has shown ambivalence toward the issue. Tort of defamation cases can be appealed to the Supreme Court. At first the Civil Panels of the Supreme Court seemed determined to stick to negligence, while allowing some fine-tuning for higher protection of speech in political libel cases. However, after 2004, some panels departed from the previous consensus of negligence and embraced actual malice in certain high-profile political libel cases. The deviation continued until early 2007. Afterwards, actual malice quietly faded into obscurity as almost no Civil Panels have used it again. The general trend among the civil panels of the Supreme Court after 2007 has been to return to negligence in private libel cases, while negligence could be adjusted to something akin to gross negligence in cases involving public interest. Such twists and turns in the Supreme Court Civil Panels can also be witnessed in the general trends of the appellate courts.¹²

The key to understanding the divergence of Taiwan's criminal and tort of defamation is the wavering of the Civil Panels of the Supreme Court. It provides a focal point where in-depth analysis of a manageable number of cases can shed light on the decentralized development at both criminal and civil divisions of lower courts. Analyzing the rise and fall of the actual malice doctrine in the Supreme Court Civil Panels provides insight into the forces that drove both criminal and tort defamation toward radical protection of free speech before late 2006.

Here I argue that the severe political polarization between Taiwan's two major political camps, at both elite and popular levels, tore down the basic political trust between warring partisan camps and social consensus on the code of civility. It became more and more futile to hold liable someone deeply believing in the truth of the defamatory speech, even when such belief would otherwise be judged groundless and the behavior reckless in a normal state of politics. The futility of liability was furthered by the fact that such apparently groundless belief may have been shared by millions of voters.

¹² Jimmy Chia-Shin Hsu, *Minxingfeibang Eryuantixi zi Xingcheng yu Fenxi* (民刑誹謗二元體系之形成與分析)[Analyzing the Formation of the Dual System of Taiwan's Criminal and Tort of Defamation] 18-20(paper presented at the Second International Conference on Empirical Studies of Judicial Systems, June 6/24-25, 2011, Academia Sinica, Taipei, Taiwan).

It is true that severe political polarization has gradually made it pointless to hold liable someone who believed firmly in groundless rumors and spread it out of deeply-rooted political bias. However, by late 2006, a free-wheeling culture of exposé was taken advantage of by more and more irresponsible and malicious politicians seeking to defame political nemesis.¹³ Taiwan's courts were then caught in a dilemma. On the one hand, political polarization had eroded social consensus on what constituted responsible speech and so it grew pointless to discipline someone deeply believing in otherwise unfounded rumors; on the other hand, opportunists began to take advantage of the free-wheeling rumor mongering culture, and these opportunists should be disciplined. The difficulty is that a principled distinction between bias-motivated true believers and opportunists is almost impossible to draw.

The divergence of Taiwan's criminal and tort of defamation after 2006 is a sensible response to the difficult challenge. On the one hand, criminal defamation continued on the course of actual malice, because criminal punishment is symbolically more severe in moral condemnation than tort; the punishment is more consequential; and the silencing effect more severe with the possibility of incarceration. Further, it is more likely to be abused by government prosecutorial function. All these characteristics of criminal defamation demand its restraint in polarized politics. On the other hand, the free-wheeling politics of rumors should be curtailed with moderate but still meaningful tactics. The tort of defamation is more suitable for this function, because Taiwan's tort of defamation is not equipped with punitive damages, which helps avoid complete silencing by excessive damages. Negligence became a sensible effort to restore the collapsing social consensus on responsible political speech.

Interestingly, a closer look at the doctrine's use in some of Taiwan's criminal defamation law cases since 2006 reveal that in some high-profile political cases the doctrine was radicalized to an extent that it surpassed the American actual malice doctrine in its protection of speech. Under the radicalized form

¹³ For a full account of the historical process, see Jimmy Chia-Shin Hsu, *Free Speech and Democratic Consolidation in a Divided Polity: Taiwan's Politics of Rumors and Laws of Defamation, 2000-2008*, 95-116 (August 2009)(unpublished J.S.D. dissertation, The University of Chicago Law School)(On file with Regenstein Library, The University of Chicago).

of the doctrine, only knowing falsification of facts would be criminally punishable. The second prong of the American actual malice doctrine, namely “reckless disregard of truth or falsity”, was neutralized by serious erosion of social consensus on what constitutes reasonable speech. Such radicalization of speech protection can be explained by two reasons. First, spreading rumors, however improper in a normal state of democratic politics, may be seen as a way of rebellion against the official authority, the trust of which has been withered away among a substantial portion of the population because of political conflict. Second, the courts may have distanced itself from the political conflict too severe to handle properly by the judicial branch. Over-protection of free speech may serve as a fortress against fear of governmental over-restriction of political speech. This point is especially pertinent in criminal defamation law, because government prosecutors may be politically motivated to suppress opposition speech, the suspicion of which is not unwarranted in a new democracy.

Such an extraordinary development exposes the deep structure of the American version of the doctrine. At least in libel involving national politics, the distinction between “honest yet inaccurate utterance” and “calculated falsehood”, which the U.S. Supreme Court held to be the central ideas about what speech is worth protecting and what is not,¹⁴ presumes a deep layer of political consensus and public trust toward the social establishments which defines the boundary of true and false speech. The breakdown of consensus and trust leads to serious blurring of the distinction.¹⁵

In Part I, I introduce how I.509 was born, followed by an analysis of what it means to Taiwan’s laws of defamation. Then I offer a brief account of the political polarization since 2000 that constituted the general political settings, against which the courts developed the laws of defamation in the wake of I.509. In Part II, I report and analyze the rise of actual malice in the Supreme Court Civil Panels. I argue that the rise of the actual malice doctrine in Taiwan’s tort of defamation in late 2004 cannot be

¹⁴ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

¹⁵ For a similar view regarding social consensus needed for how to verify a fact in defamation cases, see Martin Hansen, *Fact, Opinion, and Consensus: The Verifiability of Allegedly Defamatory Speech*, 62 GEO. WASH. L. REV. 43 (1993).

fully understood without taking into account the rising political conflict between Taiwan's major political parties. Next, I give a brief account of the emergence of a radical culture of exposé in 2005, which is important to help understand the downfall of actual malice in late 2006. In Part III, I observe that the radical culture of exposé resulted in divergence of fault standards in criminal and tort of defamation. Then I analyze how actual malice was radicalized in Taiwan's criminal defamation law during the days when the radical culture of exposé was at its height. I argue that severe political polarization and political conflict eroded the social foundation of actual malice. This article reveals that a successful working of the actual malice doctrine presumes a thick layer of social consensus on what constitutes responsible speech and trust in the official authority to pursue official misdeeds.

I. LIBERALIZATION OF PUBLIC DISCOURSE—I.509 AND ITS MIXED LEGACY

A. The struggle against authoritarian remnants and the birth of I.509

Up until the end of World War II, Taiwan had been colonized by Japan for fifty years since 1895, when the Ching Dynasty of China ceded Taiwan after its defeat in the Sino-Japanese War. After the WWII, Taiwan was taken over by the Chinese government under the rule of Chiang Kai-shek and his party Kuomintang (The Nationalist Party/KMT). In 1949, Chiang Kai-shek lost the civil war to the Chinese Communist Party. Generalissimo Chiang and his government fled to Taiwan and ruled the island with iron fist. The post-1949 KMT authoritarianism was constructed on a quadripartite foundation - an elaborate and centralized party apparatus, a system of extra-constitutional legal arrangements and emergency decrees, a controlled electoral pluralism implemented at the local level, and structural symbiosis between the party and the state.¹⁶ As a quasi-Leninist regime, the KMT party cells reached into all organized social sectors, such as labor unions, youth groups, religious groups,

¹⁶ Yun-Han Chu and Jih-Wen Lin, *Political Development in 20th-Century Taiwan: State-Building, Regime Transformation and the Construction of National Identity*, 165 THE CHINA QUARTERLY 102, 113(2001).

professional associations, business associations, farmers' associations, women's associations, schools and mass media. Detecting and suppressing seditious speech is carried out by this intricate web of party cells and state apparatuses, with draconian censorship and punishment.

Democratization, which was set in motion officially in 1987, unleashed long-suppressed social forces clamoring for political and civil liberties, among which freedom of thought and expression was hailed and advocated with the most passion. President Chen Shui-bian (陳水扁), who held office from 2000 through 2008, was previously incarcerated for eight months for libeling a KMT official in 1986, before the democratization officially began. In 1989, a prominent opposition publisher, Nylon Cheng (鄭南榕), set himself on fire in his office as he awaited an incoming police ransack for his pro-Taiwan-independence magazines. His message was loud and clear---freedom of thought and speech for Taiwan independence.¹⁷ His martyrdom contributed to the acceleration of political liberalization and democratization, and galvanized opposition to KMT's authoritarian rule led mainly by the major opposition party, Democratic Progressive Party (DPP)¹⁸. In 1992, the Article 100 of the Criminal Code, the source of law for punishing seditious speech as treason, was amended to rid of wordings that incriminated seditious speech. This major reform opened the gateway for exiled prominent Taiwan-independence advocates to return to Taiwan, which reinforced the DPP's political might. Under increasing pressure for political liberalization, the Executive Yuan exercised increasing self-restraint in executing the Publication Act, the legal source of censorship, which eventually was abolished in 1998.

Although the KMT remained in power after the initiation of democratic transition, capabilities of the state and party to control speech had substantially weakened under the waves of democratization.

¹⁷ For Nylon Cheng's biographical note and his influence, please refer to website of Deng Liberty Foundation, which was founded to memorialize Nylon Cheng's contribution to Taiwan's democratization and freedom of speech. http://www.nylon.org.tw/index.php?option=com_content&view=category&id=13&Itemid=46 (last visited, 2012/9/05).

¹⁸ DPP was founded as late as in 1986 in defiance of KMT's ban on political parties. For a succinct historical account of the rise of democratic opposition and the birth of Democratic Progressive Party, See DENNY ROY, TAIWAN: A POLITICAL HISTORY 152-82 (2003).

The swift transition to democracy caused a sudden expansion of room for political speech in the 90s. Not surprisingly the flowering of public discourse led to a surge of high-profile political criminal defamation cases.¹⁹ Many of these cases involved defamation of the KMT government officials or KMT affiliated individuals or institutions. In these cases, the courts were asked to carry out speech-disciplining functions, which were executed by the executive power in the form of censorship before democratization. In the eyes of reformists, most of these cases were continuation of the KMT's authoritarian attempt to suppress political speeches. And the criminal defamation articles in the Criminal Code were seen as outdated authoritarian remnants, in that strict liability was the rule and the defendant had to prove the truth of the statement in order for the criminal act to be justified.²⁰ Public calls for de-criminalization of libel gradually gathered steam, as more and more high-profile criminal defamation cases threatened the breathing space for criticizing the government and the ruling party. The burgeoning mass media, particularly those unaffiliated with the KMT, were most vocal in the advocacy.

It was amid the increasingly vocal public calls for de-criminalization of defamation that I.509 was born. Two petitions for constitutional review jointly led to the issuance of this Interpretation. The first petition came from a reporter, Lin Yingqiu(林瑩秋), and the chief editor, Huang Hongren(黃鴻仁), of Business Weekly magazine. Both of them were indicted and convicted for libeling the Minister of

¹⁹ For example, Taipei District Court Criminal Decision 82-Zi(自)-699 (1997) involves a former Minister of Transportation as the victim and opposition Legislators as defendants; Taipei District Court Criminal Decision 85-Zi(自)-1098 (1997) involves a high-ranking KMT party official as the private prosecutor and a weekly news magazine as the defendant; Taiwan High Court Criminal Decision 84-Shanyi (上易) -3196(1995) involves a KMT Legislator as the victim and a local newspaper president as the defendant; Taipei District Court Criminal Decision 83-Chunsu(重訴)-1107(1995) involves the Chief of Staff of the President's Office as the victim and an opposition legislator as the defendant.

²⁰ Article 310 of the Criminal Code of the Republic of China (Taiwan): "Section 1: A person who states or reiterates a fact injuring the reputation of another with an intent to address the public, commits the offense of slander and shall be sentenced to imprisonment for not more than one year, short-term imprisonment, or a fine of not more than five hundred yuan. Sec. 2: A person who by circulating a writing or drawing commits an offense specified in the preceding section shall be sentenced to imprisonment for not more than two years, short-term imprisonment, or a fine of not more than one thousand yuan. Sec.3: A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation unless the fact concerns private life and is of no public concern."

Transportation, Cai Zhaoyang(蔡兆陽). Lin was sentenced to four months and Huang five months in prison.²¹ Since libel is a misdemeanor and the sentences were below six months, both convicts could pay monetary fines in exchange for absence from prison.

The report that resulted in their conviction was published in the Business Weekly magazine on October 28, 1996. In the article, Lin Yingqiu reported that one certain deluxe residential tower in Taipei accommodated several ministers. The new Minister of Transportation Cai Zhaoyang, who lived in that tower, expended 2,780,000 TW dollars (about 90,000 US dollars) from a governmental fund to renovate the interiors of his new residence. The amount was deemed excessively large, and the report created a negative image of Cai as leading a luxurious life-style and being unscrupulous with public funds. The report was proved to be wrong in court, based on convincing evidence of official documents provided by Cai with respect to his renovation of residence. The actual expenditure was only one-tenth of the amount reported.

Lin's article was initially based on a legislative report²² containing Legislator Zhu Huiliang's (朱惠良) questioning of possible misuse of government fund. Legislator Zhu questioned that one unnamed minister expended 2,780,000 TW dollars to renovate his residence. Lin followed the lead and asked Legislator Zhu which minister she referred to. But Zhu refused to identify who it was. Lin continued to interview Zhu's aide. Zhu's aide refused to give any name, either. But Lin was relentless. She offered to call all ministers' names and requested Zhu's aide to passively identify the one in question. When she called the name of Cai Zhaoyang, Zhu's aide laughed loudly and said nothing further. Lin interpreted the laugh as a reference to Cai. To pursue the clue, Lin interviewed a neighboring resident, one Mr. Shaw, in the particular residential tower where Cai lived. Lin asked Mr.

²¹ Taiwan High Court Criminal Decision, No.90-Shangengyi (上更易) -533. The following account of the case is extracted from this court decision.

²² The legislative report is official documentation of the legislative proceedings, published by the Legislature's administrative department.

Shaw whether any minister that he knew of was renovating the residence. Mr. Shaw answered that the minister whom he knew better was not doing any renovation, and that if there was anyone doing renovation, it may have been Mr. Cai. Based on these investigations, Lin concluded that it was Mr. Cai that expended the amount of money first mentioned by Legislator Zhu to renovate his residence.²³

It is true that Lin's investigative work was unimpressive. She believed the legislative record from the very beginning. All her subsequent works were aimed to prove what she already believed to be true. We do not know very well why she was so credulous of Legislator Zhu's statement that she did not seriously entertain the possibility that perhaps nobody expended the amount of money she suspected at all. One possible reason was Legislator Zhu's unblemished reputation of professionalism and statesmanship. Zhu was esteemed highly enough as a legislator to have later been chosen by the DPP breakaway Xu Xinliang(許信良) as his running mate for president and vice president in 2000.²⁴ Nonetheless, even though she would have been found negligent in a tortious libel case, if she was tried under the American doctrine of actual malice, she would probably have been found not guilty.

The other petition considered by the Grand Justices came from a case, in which the prominent NGO, Judicial Reform Foundation, was brought to the court upon private prosecution of the defamed.²⁵ The libel concerned a public report published by the Foundation, in which all judges of the Taipei District Court were ranked based upon a comprehensive survey of more than two thousand practicing attorneys. The ranking was lauded as a path-breaking attempt initiated by the civil society to push for reform of the judicial system, which in the past was unable to filter out incompetent and

²³ Judicial Reform Foundation, *Dafaguan Geige Shuofa ! (大法官，給個說法！)*[The Grand Justices, You Owe Me an Account!] 260-2(Taipei: Business Weekly Publications, 2003).

²⁴ However, Xu and Zhu were never considered a significant pair of contenders in the race. They ended up with only 0.63 percent of the vote in the presidential election in 2000.

²⁵ The petitions that led up to I.509 is available on the website of Taiwan's Judicial Yuan. http://www.judicial.gov.tw/constitutionalcourt/p03_01.asp?expno=509 (Last visited on Sep.12, 2012).

corrupt judges under the authoritarian clientele system.²⁶ The private prosecutors are six judges, who ranked the bottom by receiving points under 60. Simply put, the flunked sued the evaluator. This case was actually not difficult to dispose of, even under Taiwan's draconian criminal defamation provision. There was a provision in Article 311 of the Criminal Code that allows privilege for "reasonable comment on matters open to public scrutiny". But Judge Chen Zhixiang(陳志祥), a young reform-minded judge, decided to suspend the case and petition to the Grand Justices. Judge Chen's intention was clear. He held serious doubts about the constitutionality of the criminal defamation provisions, and he wanted to use the seemingly easy case to highlight the necessity of de-criminalizing libel.

Both petitions made constitutionality of criminal defamation the main issue. And their petitions were welcomed and supported by prominent NGOs, such as the Taiwan Association for Human Rights, Judicial Reform Foundation, and Association for Taiwan Journalists.²⁷ Moreover, support was voiced by the legal profession. Taipei Bar Association made de-criminalization the main theme in their Taipei Bar Journal in February 1998. The Taipei Bar expressed their strong support by publishing as the editorial statement an article written by the eminent law professor, Fa Zhibin, who was a constitutional scholar and a hot candidate for Grand Justice nomination. The article was entitled, "De-criminalization of Libel Is an Imperative".²⁸ Meanwhile, a handful of reform-minded judges were already defying statutory constraints by citing the American doctrine of "actual malice" to give more room to public discourse.²⁹

²⁶ Wang Chin-shou (王金壽). Taiwan de Sifaduligaige yu Kuomintang Shicongzhuyi de Bengkui (臺灣的司法獨立改革與國民黨侍從主義的崩潰)[Judicial Independence Reform and the Breakdown of the Kuomintang Clientelism in Taiwan], 10(1) TAIWAN POLITICAL SCIENCE REVIEW 103-162 (2006).

²⁷ Judicial Reform Foundation, *supra* note 23, at 262.

²⁸ Fa Zhibin(法治斌), Feibangzui chuzuihua shizaibixing (誹謗罪除罪化勢在必行)[Decriminalization of Defamation Is an Imperative], 1998 TAIPEI BAR JOURNAL 2-3 (1998).

²⁹ For example, Taipei District Court Criminal Decision, No.87-Zi(自)-528(1998), 87-Yi(易)-2411(1999), 86-Zi(自)-826(1999); Kaohsiung District Court Criminal Decision, No.86-Zi(自)-436(1998) ; Taitung District Court Criminal Decision, No.88-Yi(易)-242 (2000). Regarding English citation format of Taiwan's court decisions, particularly the lower courts, there is no particular format that commands consensus. I avoid the Bluebook style, because it is inconvenient and out of touch with current common practice of Taiwanese lawyers. The basic idea of the Bluebook is to ask authors to refer to bound editions of the court decisions in the jurisdiction of Taiwan. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 404-6 (19th ed., 2010). However, not all lower court decisions are bound

Nearly two years after accepting the petitions, the Constitutional Court issued I.509 on July 7, 2000.³⁰ The Court indicated that freedom of expression is a basic right of fundamental importance. Then The Court articulated that based on Article 11 of the Constitution, which prescribes “The people shall have freedom of speech, teaching, writing and publication,” the state shall accord freedom of speech “the maximum degree of protection”, so that it furthers individual self-realization, communication of ideas, truth-seeking and checking of political and social activities. The clarity and strong language of this opening would later prove to be influential on some of the lower courts’ rationale, which gave more weight to free speech when balancing it against the right to reputation.

This grandiloquent opening is then followed by a cautious qualification. The Court rejected the claim that decriminalization is mandated by the Constitution. The Court explained that despite the fundamental importance of freedom of speech, it is subject to necessary restrictions in accordance with Article 23 of the Constitution, which allows restriction of basic rights by law only for the purposes of “preventing infringement upon the freedom of other persons, averting imminent crisis, maintaining social order or advancing public welfare.”³¹ Under heavy influence of German constitutional jurisprudence, the Court conventionally uses the principle of proportionality in balancing the basic rights and the restrictive clauses. However, in this case, the Court recognized that the issue was not

into volumes. Moreover, as the Judicial Yuan has developed a public internet database covering all court decisions after 1998, which is easily accessible through its website, now it is common practice for Taiwanese lawyers to directly search court decisions through the database. It is now rare for Taiwanese lawyers to make reference through bound volumes. The problem with making reference through the web edition of court decisions, however, is that the decisions are not paginated by the Judicial Yuan. Problems therefore would arise when reference has to be made to a particular sentence out of a long decision. There is no clear solution to this problem. Nevertheless, it does not create serious difficulty in practice, because the web edition makes it quite easy to search the referenced sentence through the search function of the web browser. My format of citation of Taiwan’s court decisions is aimed to make it easy for interested readers to search the Judicial Yuan’s database. My format contains all the information needed to retrieve the decision through the database. The website (in Chinese) of the database is: <http://jirs.judicial.gov.tw/Index.htm> (Last visited April 11, 2013)

³⁰ English versions of all Taiwan Constitutional Court Interpretations can be obtained at the website: <http://www.judicial.gov.tw/constitutionalcourt/EN/p03.asp> (last visited, May 23, 2012) In this article, where the official English translation is unsatisfactory, I use my own translation.

³¹ The full text of the Constitution of the Republic of China (Taiwan) is available in English from the Judicial Yuan’s website. http://www.judicial.gov.tw/constitutionalcourt/EN/p07_2.asp?lawno=36 (Last visited on Sep.12, 2012).

really about restricting basic right in the name of public interests. The issue involves a conflict between two basic rights, namely the right to speak freely and the right to reputation. To balance the two rights, the Court engaged in *ad hoc* balancing. The Court stated that criminal defamation is a necessary measure to protect individual right to reputation, privacy or other public interests. However, the reasons for this judgment are not entirely clear. The Court reasoned that to determine whether decriminalization is constitutionally mandated, it is necessary to consider factors such as civic culture of law-abidingness, respect for other people's rights, functions of tort damages, the degree of professionalism of media practitioners and the efficacy of journalistic professional sanctions. After enumeration of the factors, The Court came directly to the conclusion that, "given the current situations regarding the above factors, it is not necessarily the case that criminal defamation is unconstitutional."³² Interestingly, the Court continued to reason that if infringement of reputation can only be remedied by monetary compensation, it follows that those who are wealthy can buy their right to libel, and it cannot be the intention of the Constitution to let this happen. This reason makes sense, because under Taiwan's tort system there is no punitive damages with respect to tort of defamation.

The Court declined the petitions' invitation to find criminal defamation as in itself unconstitutional, but the Court balanced its decision by giving the criminal defamation provisions a new interpretation. There are two significant holdings. The first concerns who bears the burden of proof to prove that the defamatory statement is true. The first sentence of Paragraph 3, Article 310 of the Criminal Code provides that "A person who can prove the truth of the defamatory fact shall not be punished for the offense of defamation unless the fact concerns private life and is of no public concern."³³ Before the Interpretation, this provision was interpreted as imposing the burden of proof solely on the defendant. The Court reallocated the burden and articulated that "the provision does not exempt the court from

³² The official English translation of I.509 is available on the following webpage. http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=509 (Last visited on Sep.12, 2012).

³³ The English translation of the Criminal Code of Republic of China (Taiwan) is available through the Laws & Regulations Database of the Republic of China created by the Ministry of Justice of Taiwan. <http://law.moj.gov.tw/Eng/LawClass/LawAll.aspx?PCode=C0000001> (Last visited on Sep.12, 2012).

its duty of discovering the truth.” Second, the Court held that, “the defendant shall be found not guilty, when he/she produces sufficient evidence to show that he/she has substantial reasons to believe that the statement was true at the time of dissemination.”³⁴

The phrase “substantial reasons to believe that the statement was true” has become the definitive holding of the Interpretation.³⁵ It relieved the defendant from the oftentimes unbearable burden of proving the statement in question to be true. However, this phrase is vague with respect to the degree of fault required of the defendant. Without further specification, it is not clear whether it is tantamount to gross negligence, negligence, or the American doctrine of “actual malice”, defined as “knowledge of falsity or reckless disregard of truth or falsity”.³⁶ The vagueness was very likely deliberate. In two significant and much-cited concurring opinions of this Interpretation, Justice Su Jyun-Hsiung (蘇俊雄) and Justice Wu Geng (吳庚) both advocated, apart from the majority opinion, doctrines highly similar to the “actual malice” doctrine, even though they did not use the phrase “actual malice” to label their opinions.³⁷ In his concurring opinion, Justice Su wrote, “as long as the defendant did not fabricate the false statement, or the defendant uttered the false statement without gross negligence or recklessness, the defendant is relieved from criminal punishment.”³⁸ Justice Wu’s key phrase was, “knowledge of falsity or significant recklessness with respect to the truth or falsity”.³⁹ One may then

³⁴ I.509, *supra* note 32.

³⁵ Whether this holding was inspired by any foreign law is unknown, since the Court did not provide citations or make any reference. However, it does roughly echo its Japanese counterpart. In 1986, the Japanese Supreme Court ruled in *Hoppo Journal Co. v. Japan* that in criminal defamation cases, “even if the truth is not proved, when there is good reason for the perpetrator of the act to have mistakenly believed that the article was true, the foregoing act should be construed to be not malicious or negligent.” See KROTOSZYNSKI, *supra* note 8, at 156-8 (for discussion), 264 n.154 (for translation of the holding).

³⁶ *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

³⁷ One of Taiwan’s leading free speech scholars, late Professor Fa Zhibin, published an article immediately after I.509 was issued. In it, he pointed out the similarity between the two Justices’ opinions and the American actual malice doctrine. See Fa Zhibin (法治斌), *Baozhang Yanlunziyou di Chilaizhengyi: Ping Sifayuan Dafaguan Shizi di 509 Hao Jieshi* (保障言論自由的遲來正義：評司法院大法官釋字第509號解釋) [Delayed Justice for Free Speech: Reviewing Interpretation No.509], 65 THE TAIWAN LAW REVIEW 152 (2000).

³⁸ Justice Su’s concurring opinion is available in Chinese (no official English translation available) in the attachment contained at the same webpage of the English translation of I.509. I.509, *supra* note 32.

³⁹ Justice Wu’s concurring opinion is also available in Chinese (no official English translation available) in the attachment contained at the same webpage of the English translation of I.509. I.509, *supra* note 32.

legitimately wonder: why did not the two concurring opinions prevail? From the whole reasoning of the Interpretation, it is probable that the Court were suspicious of the social effects of such highly speech-protective approach to defamation. From the grounds upon which the Court refused to decriminalize libel, it is detectable that the Court held serious doubts about the maturity of the journalistic profession and other truth-seeking social institutions. It is then not unreasonable to infer that the same doubts were in play, when the Court were considering whether to adopt a doctrine as speech-protective as the “actual malice”. Yet the Court did not want to rule out the potentiality of adopting such a doctrine. Therefore, it is very likely that the Court deliberately left the question for the lower courts to solve in a case-by-case manner.

In the wake of the significant Interpretation, two difficulties arose. The first is the meaning of the doctrine “substantial reasons to believe that the statement was true”. The second is whether and to what extent the Interpretation can be applied to tort of defamation, given that I.509 was addressing constitutionality of criminal defamation alone. Leaving aside all doctrinal technicalities of Taiwanese tort and criminal defamation law, these two questions can be rephrased into one simple question: what is the degree of fault required of the defendant with respect to false or unverifiable defamatory statement, in tort and in criminal defamation? ⁴⁰

B. A Brief Account of Taiwan’s Political Polarization After 2000

To understand how Taiwan’s courts responded to I.509 in the following decade, it is necessary to come to grips with Taiwan’s major political development after 2000. In 2000, the same year I.509 was

⁴⁰ Taiwan’s legal academia in the aftermath of I.509 was preoccupied with sorting out whether I.509 applies to tort cases and how. The discussion became increasingly unfruitful and was mired in doctrinal technicalities. I published an article for domestic audience in 2006 to clarify the conceptual mess, which turned out to be widely cited. See Jimmy Chia-Shin Hsu (許家馨), *Shizi 509 Hao Jieshi Yingfoa Shiyung yu Minshi Anjian (釋字第509號解釋應否適用於民事案件?)* [Should Interpretation No.509 Be Applied in Tort Cases?] 132 THE TAIWAN LAW REVIEW 102 (2006).

delivered, the then opposition Democratic Progressive Party (DPP) candidate Chen Shui-bian (陳水扁) won the presidential election. This electoral victory is a historic watershed of Taiwan's political development.⁴¹ After half a century in power on Taiwan, and after eight decades of continuous rule at the peak of political control, the Kuomintang (KMT) lost power in a free and fair presidential election. It closed the epoch of one-party dominance and set forward a period of party realignment and political-economic power rearrangement.⁴²

Yet all great promises come with great dangers. Awaiting the historic executive power turnover was a Legislative Yuan still dominated by a KMT majority. On the eve of the presidential inauguration in May 2000, the KMT retained 115 seats, making up 52% of a Legislative Yuan of 221 seats. Chen Shui-bian's DPP had only 65 seats (29.9 %). The rest was claimed by James Soong's (宋楚瑜) People First Party (PFP) (17 seats/ 7.7%), New Party (10 seats/4.5%), and independents (13 seats/5.9 %).⁴³ For many, Chen's victory was not a power alternation like that in any other normal functioning democracy. Since the DPP has inscribed Taiwan's *de jure* independence in its platform,⁴⁴ its takeover of executive power was a devastating blow to a Chinese statehood long embraced by the KMT, which sought ultimate re-unification with China. The upsetting of what the country stood for caused grave unrest and cognitive dissonance among firm KMT supporters.⁴⁵

⁴¹ Larry Diamond, *Anatomy of an Electoral Earthquake: How the KMT Lost and the DPP Won the 2000 Presidential Election*, In TAIWAN'S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE TWENTY-FIRST CENTURY 48-87 (Muthiah Alagappa ed., 2001).

⁴² Yun-han Chu, *Democratic Consolidation in the Post-KMT Era: The Challenge*, In TAIWAN'S PRESIDENTIAL POLITICS: DEMOCRATIZATION AND CROSS-STRAIT RELATIONS IN THE TWENTY-FIRST CENTURY 88 (Muthiah Alagappa ed., 2001).

⁴³ *Id.*, at 106.

⁴⁴ For the DPP platform regarding Taiwan sovereignty, see the DPP English website: <http://dpptaiwan.blogspot.tw/2011/03/establishment-of-sovereign-and.html> (Last visited on Sep.12, 2012).

⁴⁵ The deep frustration of KMT supporters was most vividly seen at their fierce demonstration in front of the KMT headquarter from the night the election result was announced on March 18, 2000 until the President Lee Teng-Hui resigned his KMT chairmanship a week later on March 24, 2000. As Denny Roy aptly observed, the KMT rank-and-file supports, who were mainly Mainlanders, "were expressing their frustration over the Taiwanization of politics and the loss of the KMT's old agenda, a reversal of countless previous occasions when Taiwanese gathered in the streets to protest Mainlander control of the island's destiny." Denny Roy, *supra* note 18, at 230-1.

Not surprisingly, the DPP government met with antagonistic opposition. To make matters worse, in September 2000 President Chen called for a sudden halt of the ongoing construction of the fourth nuclear power plant. This decision infuriated the opposition and further caused the KMT and its splinter party People First Party (PFP) to mend their past rivalry and form an even more formidable opposition alliance. In March 2003, one year away from the 2004 presidential election, the leaders of the two major opposition parties, Lien Chan of the KMT and James Soong of the PFP, announced their joint ticket to run for the president and the vice president. Having mended past rivalry through forming the opposition alliance, Lien and Soong made the best possible bid, since their votes together in 2000 would have defeated Chen Shui-bian by 21 percent of the total votes. Indeed, when Lien and Soong announced their joint bid, they enjoyed a comfortable lead in opinions polls of at least 10 percent over the incumbent Chen and Lu. It is explicable not only by the last election result, but by Taiwan's economic recession. For the first three years of the DPP government, the Taiwanese economy suffered from the worst recession since the 1974 energy crisis. Unemployment rose rapidly from 2.92 percent to over 5 percent, foreign direct investment fell, and average economic growth was a paltry 2 percent.⁴⁶ Naturally, Lien and Soong were not hesitant to capitalize on the economic downturn for campaign purpose. Their comfortable lead lasted for six months, however, before it declined gradually.

As a counter campaign strategy, the DPP chose Taiwanese national identity and Taiwan's claim to sovereignty against China as the major campaign themes. This strategy concretized in the DPP's bids for a national referendum bill and the first-ever national advisory referendum to be held on the same day of the election. The referendum would be on questions regarding how Taiwan should respond to China's military threats. This strategy worked. The DPP successfully avoided its weak performance in the economy and set an alternative tone of the remaining campaign. On October 30, 2003, the DPP

⁴⁶ Tun-jen Cheng and Da-chi Liao, *Testing the Immune System of a Newly Born Democracy: the 2004 Presidential Election in Taiwan*, 2(1) TAIWAN JOURNAL OF DEMOCRACY 81, 83-4 (2006).

held a huge rally in Kaohsiung, a major city in southern Taiwan and the DPP's stronghold, to support the referendum. Chen's popularity surged, gradually closing his lag behind Lien and Soong. On February 28, 2004, the DPP held a successful island-wide mass rally. Millions of supporters made a human chain around Taiwan, symbolizing their determination to guard Taiwan against China. Ten days before the election, some polls showed that Chen already gained a minor lead, while others showed Lien kept a slight upper hand. Overall, the polls showed that in the last stage of campaign, the race was extremely tight.

On March 19, 2004, one day before the election, while standing in a jeep cruising a southern Taiwan city as a final campaign effort, President Chen and Vice President Lu were shot. Both were injured but not fatally wounded. The election went undeterred, but a "National Security Protocol" was activated to raise the level of military alertness. The next evening, the election result came out. Chen and Lu won by a razor-thin margin of 0.22 percent of the vote.⁴⁷ To the surprise of many, at the KMT headquarter facing thousands of frustrated supporters, Lien Chan refused to acknowledge defeat and charged that the election was "unfair". The frustrated crowds were aroused by his provocative speech. The pan blue camp questioned whether the shooting incident was staged by Chen himself in order to gain sympathy votes. To them, the shooting occurred at a timing too opportune; the crime scene of the shooting seemed to have been compromised; the activation of the "National Security Protocol" unfairly grounded too many military personnel—presumably more pan-Blue than pan-Green in their partisan preference—from the ballot booths; the unusually high number of invalid ballots signals possible fraudulent votes.

Closely fought elections intensify partisan polarization.⁴⁸ The polarization syndrome in Taiwan's

⁴⁷ President Chen and Vice President Lu won 50.11%, and opposition contenders Lien Chan and James Soong won 49.89% out of the total of almost thirteen million votes (12,914,422 votes). The election result details are shown at the website of Taiwan's Central Election Committee. <http://db.cec.gov.tw/vote3.asp?pass1=A2004A000000000aaa> (Last visited, 2012/9/05).

⁴⁸ Laurence Whitehead, *The Challenge of Closely Fought Elections*, 18(2) JOURNAL OF DEMOCRACY 18-22 (2007).

2004 presidential election reached unprecedented intensity, not only because of dubious incidents such as the shooting on March 19, but because it took place against a backdrop already under great stress. In the 90s Taiwan's political and social cleavage structure was cut across by both socioeconomic issues and national identity conflicts. As Tse-min Lin and Yun-han Chu forcefully demonstrated, by 2003 the national identity or "blue v. green" conflict, which features blue(KMT and PFP) as pro-Unification with China and green (DPP and TSU/Taiwan Solidarity Union) as pro-Taiwan independence, has belittled all other issues and acquired dominant salience.⁴⁹ Before the election, radically negative campaigning conducted by the contending camps and media critics fueled the already serious mutual distrust to such a degree that on the part of the blue camp there was already a "foundation of deeply negative emotion, discontent, and the conviction that Chen was willing to go to any lengths to get what he wanted."⁵⁰ Lien and Soong's rejection of the election results and their charge of unfairness in the election touched off an outbreak of protests and riots that shook Taiwan's fragile democracy.

Immediately after Lien and Soong announced their refusal to admit defeat and their determination to pursue legal course to invalidate the election, crowds began to gather in front of the prosecutorial offices in several major cities calling for immediate recount of votes. Despite Lien and Soong's professed intention to take the legal course, street demonstrations, which may have been spontaneous at first but were later encouraged by pan-blue leadership, became part of their strategy in the following negotiation. In Kaohsiung, with hundreds of pan-blue supporters around, a campaign truck with the PFP legislator Qiu Yi shrieking into a megaphone atop it rammed the iron gate of the prosecutorial office. In Taipei, a crowd of several thousands gathered first outside the KMT headquarters, and then the Presidential Palace.

⁴⁹ Tse-min Lin and Yun-han Chu, *The Structure of Taiwan's Political Cleavages Toward the 2004 Presidential Election: A Spatial Analysis*, 4(2) TAIWAN JOURNAL OF DEMOCRACY 133-154 (2008).

⁵⁰ OLWEN BEDFORD AND HWANG KWANG-KUO, TAIWANESE IDENTITY AND DEMOCRACY: THE SOCIAL PSYCHOLOGY OF TAIWAN'S 2004 ELECTIONS 125 (2006).

Crisis situations often give rise to rampant rumors, since official news sources are often unable to catch up with the exploding public demands for information.⁵¹ In such a divided society as Taiwan, at a time approaching the end of an overwhelmingly negative campaign, the information flow and dialogue between the two highly mobilized segments of society came to a near-complete halt.⁵² As a result, rumors about the shooting burst out along the “blue vs. green” division immediately after the shooting happened in the afternoon on March 19. Pan-blue radio station hosts intimated or outright stated that Chen had staged the shooting to win sympathy votes. The most noted remark in this vein was made by Sisy Chen, a famous pro-pan-blue publicist and popular talk show host. Through electronic news media, she publicly accused Chen of faking his wounds. She also accused that the national security system was involved in the staging, based on a call she claimed to have received from an anonymous nurse working in the hospital where President Chen and Vice President Lu were rushed to. In contrast, underground pro pan-green radio stations, which were concentrated in southern Taiwan, speculated that the pan blues had cooperated with the Chinese to shoot Chen and Lu.

The election result only aggravated the already-rampant rumor mongering. Evidence offered by administration officials and investigators did nothing to assuage pan-blue suspicions, which were publicly expressed in partisan talk shows, op-ed, print and electronic news analysis. For example, the Criminal Investigation Bureau proved through DNA evidence that the blood on the bullets belonged to Chen and Lu. Physicians gave detailed descriptions to the media of Chen’s 11cm wound and 14 stitches and the vice president’s knee wound. Though both logically would have disproved the rumors that Chen faked his wounds, the rumors did not subside. The opposition’s distrust ran so deep and rumors were so rampant, that President Chen decided to invite the heads of the five Yuans (branches of government) to his office and have them personally witness the wound on his abdomen, a humiliating

⁵¹ TAMOTSU SHIBUTANI, *IMPROVISED NEWS: A SOCIOLOGICAL STUDY OF RUMOR* 37(1965).

⁵² Tun-jen Cheng and Da-chi Liao, *Testing the Immune System of a Newly Born Democracy: the 2004 Presidential Election in Taiwan*, 2(1) TAIWAN JOURNAL OF DEMOCRACY 81, 87(2006).

act for a head of state.⁵³

The blue camp's rejection of the presidential election result eventually would have to be resolved by the courts. And by the spring of 2005, all election litigations came to an end in the DPP government's favor, as the Supreme Court overruled the blue camp's final appeals. Though the blue camp was intensely disaffected by the ruling, the ruling stood to test, because it was based on a fair and swift comprehensive recount of the ballots.⁵⁴

In the summer of 2005, even though the DPP administration appeared gradually off the hook from the election controversies, it soon got mired in a snowballing of corruption scandals. What touched off the chain reaction was the dramatic revelation by opposition legislators and the news media, of the Deputy Secretary-General of the President's Office Chen Zhenan's (陳哲男) possible involvement in bribes. Chen Zhenan's scandals sent a shock wave throughout the society. Although rumors of high level corruption in the Chen administration were occasionally discussed in pro-pan-blue talk shows and already rampant among pan-blue supporters, to the rest of the society the DPP maintained a relatively clean image, earned throughout the years as an active opposition party combating the corruption of the authoritarian KMT. Chen Zhenan's scandals decisively shattered the image, because his close relations with the president suggested likelihood that the DPP government's corruption could be more prevalent and even systematic than expected.

Not before long more striking scandals were revealed. In early May 2006, President Chen's son-in-law, Zhao Jien-ming (趙建銘) and Zhao's father were exposed by opposition legislators to have

⁵³ Li Haochung(李濠仲), Wuyuanyuanchang Chashu Bianliangdupi Lochiangshang(五院院長茶敘扁亮肚皮露槍傷)[Teatime with Heads of Five Yuans Chen Shui-bian exposed abdomen revealed wound], United Evening News, March 24, 2004, at 3.

⁵⁴ See Weitseng Chen and Jimmy Chia-Shin Hsu, *Horizontal Accountability and the Rule of Law: The Judicial Yuan and the Control Yuan*, In DEMOCRATIC CONSOLIDATION IN TAIWAN (Larry Diamond, Yunhan Chu and Eric C.H. Yu ed., forthcoming).

involved in insider-trading of securities. The prosecutorial office swiftly began investigation. Within weeks the prosecutors judged that evidence for Zhao's insider trading was sufficiently robust that they requested detention of Zhao, and the court granted the detention.⁵⁵ The detention of Zhao was a blow to President Chen serious enough to motivate the opposition parties to begin mobilization for an initiative of recalling the president.

Along with Zhao's insider trading, another scandal even more devastating to President Chen was gathering steam. The First Lady Wu Shu-chen (吳淑珍) was first exposed by an anonymous informant to have used millions-of-dollars worth of vouchers issued by a famous department store to purchase luxury jewels. Opposition legislators implicated that the vouchers were obtained in exchange for her interference in the department store's ownership change.⁵⁶ In June, it was exposed that the First Lady used receipts collected from multiple sources to embezzle the "state affairs fund", which was a special fund for the president's discretionary use. Prosecutors began a comprehensive investigation of President Chen's appropriation of the state affairs fund.⁵⁷ Meanwhile, more and more rumors circulated about how the First Lady allegedly interfered in merger and acquisition deals of major financial institutions through which controlling shares of state-owned banks or enterprises fell one by one into the hands of business tycoons, by whom the first family was offered extremely expensive jewelry and watches as gifts for their son's wedding. All these exposures of scandals led to mobilization of blue camp supporters and resulted in huge demonstration in front of the Presidential Palace, known as the Red Shirt Army movement. The demonstration demanded President Chen to step down. The demand eventually remained unanswered, mainly because President Chen was still able to gather

⁵⁵ Su Weirong(蘇位榮), Zaojienming Sutejian Shouya(趙建銘蘇德建收押) [Zao Jien-ming and Su Te-jian Detained], Economic Daily News, May 26, 2006, at A4.

⁵⁶ Dong Jiebai(董介白), Sogoliquanan Guenshueqiu Beijian Jinqi Qing Wushuzhen Shuomin (Sogo禮券案滾雪球北檢近期請吳淑珍說明) [SOGO Vouchers Case Snowballing Taipei Prosecutors Soon to Request Explanation from the First Lady], United Evening News, April 14, 2006, at 4.

⁵⁷ Wang Shengli and Wang Fuqi(王聖藜、黃福其), Guowujiaofei Gaojianshu Fenanzhencha(國務機要費高檢署分案偵查) [State Affairs Fund, High Prosecutorial Office Begins Investigation], United Daily, July 21, 2006, at A1.

support from firm pan-green supporters, who did not really buy into the corruption accusation.⁵⁸

All the political strife in President Chen's final days in office was concluded with the 2008 presidential and legislative elections. The KMT won landslide victories in both the presidential and legislative elections in 2008, putting an end to the sharp clashes between the executive and the legislative branches of government. Even though the politics remains highly polarized, the political struggle between the KMT and DPP would be much less consequential.

To the shock and dismay of his supporters, after President Chen Shui-bian stepped down, it was gradually revealed that he and particularly his wife Wu Shu-chen were involved in taking illegitimate political donations and bribes. On December 12 of 2008, former President Chen Shui-bian was indicted on multiple corruption charges.⁵⁹ These charges include embezzlement of special presidential funds, money laundering, and bribes in major governmental construction and land development projects. According to the indictment, the amount of money engrossed by Chen and his wife totaled more than US\$ 30 million. In addition to Chen, the dozen indicted included his wife, former close aides, family friends, and retired government officials.

II. THE RISE AND FALL OF THE ACTUAL MALICE DOCTRINE IN THE SUPREME COURT CIVIL PANELS

A. Political Polarization and the Adoption of Actual Malice

In the immediate aftermath of I.509, during the first three years, the Supreme Court Civil Panels were given chances only to decide on cases involving private citizens. In Decision No.90-TaiShan-646, which

⁵⁸ For a succinct account of Taiwan's political development, see Yunhan Chu, *Taiwan in 2006: A Year of Political Turmoil*, 48 ASIAN SURVEY 44-51 (2007).

⁵⁹ Wang Shengli and Dong Jiebai(王聖黎、董介白), Biansidaanzhenjie Bianqisu Zuiyanzixing (扁四大案偵結 扁起訴 最嚴之刑) [Investigation of Chen's Four Cases Concluded, Chen Indicted, The Prosecutor Pleads for the Most Severe Punishment], United Evening News, Dec.12, 2008, at A1.

involves disputes between private citizens arising out of breach of contract, the Second Civil Panel of the Supreme Court set the basic tone of the fault standards in tort of defamation cases. It stated that, in accord with the general structure of tort in Taiwan's Civil Code, negligence shall be the fault standard in defamation cases. The implication is clear. No matter how I.509 shall be interpreted, this decision decided to fend tort of defamation from I.509's influence. The seven Civil Panels of the Supreme Court gathered in June 2003 and passed a resolution to make Decision No.90-TaiShan-646 an official "precedent".⁶⁰ By turning a decision into a precedent, the several Supreme Court Civil Panels achieved coordination on issues that may cause division, and its binding force upon the lower courts is significant.

However, the problem with the precedent is that it grew out of a period in which no significant political cases entered into the Supreme Court. The standard adopted in the precedent was not tested by cases of significantly high public concern. Not long after adoption of the precedent, the Third Civil Panel had to decide on the most politically significant tort of defamation case to enter the Supreme Court since I.509. The plaintiff was the then Vice President Annette Lu (呂秀蓮) and the defendant was a prominent news magazine *the Journalist*. The Journalist published an article accusing Lu of being the source of a scandalous gossip about President Chen Shui-bian's extra-marital affairs. The Journalist

⁶⁰ Standing in the civil law tradition, Taiwan's legal system does not recognize the existence of the doctrine of *stare decisis*. It means that judicial decisions are not officially binding on the lower courts. MARY ANN GLENDON, PAOLO G. CAROZZA AND COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS* 245 (2007). The sources of law contain only the constitution, statutes, regulations, and customs. JOHN HENRY MERRYMAN AND ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 20-6 (2007). However, in practice, in order to resolve contradictions among their multiple panels or among lower courts, Taiwan's Supreme Court and Supreme Administrative Court developed a practice to reach consensus upon controversial legal issues. The two Supreme Courts would first select representative case decisions from their own archives by five judges and then have these decisions discussed by the conferences of the several panels. When the conferences resolve that certain decisions shall be deemed as "precedents", the President of the Supreme Court or the Supreme Administrative Court would report the "precedents" to the Judicial Yuan and publicize them. The "precedents" have tremendous *de facto* binding force on the lower courts. Contradiction with the "precedents" by the lower court decisions could constitute reasons for appeal to the Supreme Court, and could result in remand. It should be noted that the "precedent" as passed by the conferences does not encompass the whole text of the original decision. Rather, it is the key holding that is made into the "precedent". As the key holding appears almost always in abstract sentences stripped of case facts, the "precedent" functions much more like legal rules than like distinguishable precedents in the common-law sense.

based the report upon testimony from a prominent news columnist, Yang Zhao(楊照), who then served as one of the editors of *the Journalist*. The editorial board in several meetings questioned Yang but Yang insists on the truth of the fact that Vice President Lu did personally tell him over the cell phone about the scandal. Based upon their trust of Yang's integrity, the other editors eventually decided to print the report, even though the reporters' investigation in other directions produced little evidence to corroborate Yang's assertion. This case received enormous attention both from the press and the legal profession. Most of the press hoped, in professional alliance with the *Journalist*, to see direct influence of I.509 on the tort of defamation, to the effect that fault standard would be further relaxed from negligence.

On April 29, 2004, the Third Civil Panel delivered a meticulously written decision. It decided to stay on the course set up by the precedent, namely that the fault standard shall be negligence. It explicitly distinguished tort of defamation from I.509, which was only implicated in the Precedent No.90-Taishan(台上)-646. However, the decision was innovative in that it recognized the constitutional concern of press freedom involved in the case. To meet constitutional concern, the Third Panel reasoned that the duty of care involved in negligence should be "more or less lessened".⁶¹ But what does "more or less lessened" mean? The Third Panel reasoned that "as long as the press report was preceded by reasonable investigation, and the investigation produced so much evidence that gives the reporter enough reason to believe in the truth of the statement", then tort liability shall not be imposed. Under this test, the Third Panel judged the defamatory statement was untrue and that the *Journalist* did not fulfill its duty to conduct reasonable investigation, hence ruling for the plaintiff. The significance of Decision 93-Taishan(台上)-851 (*Annette Lu v. the Journalist*)⁶² rests with its meticulous attempt to square

⁶¹ Taiwan High Court Civil Decision 93-Shanyi(上易)-851 (2004).

⁶² It is the convention of Taiwan's legal profession to refer to a case by its case number. However, to foreign readers, reference by case number could cause serious confusion. Instead, in this article, where necessary, I refer to a certain decision by the names of the plaintiff and the defendant.

the Precedent's determination of negligence as the proper fault standard with constitutional concern for speech or press freedom.

However, whether *Annette Lu v. the Journalist* has succeeded in reconciling constitutional values and reputation interests in politically charged cases remained to be seen. Five months after the Third Civil Panel delivered the decision, the Fourth Panel delivered Decision 93-Taishan-1979 that flatly contradicted with the Precedent 90-Taishan-646 and *Lu v. the Journalist*. The plaintiff Chang Chunhong was a prominent DPP politician, and the defendant Li Ao was a famous author strongly affiliated with the Blue Camp. In a solo TV talk show Li Ao accused Chang for conspiring with President Chen Shui-bian to shut down the TV channel on which he hosted the talk show and for heartlessly abandoning his wife. Chang sued for tort of libel. Surprisingly, in this case the Fourth Civil Panel deviated from the course determined by the Precedent. Nor did the Panel consider the fine-tuning attempted by the Third Panel in *Lu v. the Journalist* workable. It not only embraced I.509 but went beyond it. While I.509 did not adopt the actual malice doctrine, the Third Panel explicitly took the doctrine in and abandoned negligence. As a result, the Third Panel ruled in the defendant's favor. Decision 93-Taishan(台上)-1797, *Chang Chunhong (張俊宏) v. Li Ao(李敖)*, was significant, because it was not just one anomaly. In the ensuing two years, the Fourth Panel delivered a series of decisions that stayed on the deviant course initiated by Decision 93-Taishan(台上)-1797. Until early 2007, no other Civil Panels delivered significant decisions dealing with the fault standard regarding falsity. In other words, the actual malice doctrine was the dominant fault standards from late 2004 until early 2007.

Why did the Fourth Panel consider the meticulously written *Annette Lu v. the Journalist*,⁶³ which used fine-tuned, relaxed negligence, inappropriate in dealing with the publication involved in *Chang Chunhong*

⁶³ Taiwan High Court Civil Decision 93-Shanyi(上易)-851 (2004).

v. Li Ao,⁶⁴ to the extent that actual malice had to be adopted? The departure of the Fourth Panel craved for explanation because it was a breakaway from previous consensus among the several Panels embodied in the Precedent. And such departure was rare. Even though the parallel Civil Panels were equal in their status, normally they honor the Precedent because it was resolved by the joint Panels meeting. In order to understand the Fourth Panel's extraordinary departure, a comparison between the defamatory speeches in the two cases is necessary.

Does the speech in *Chang Chunhong v. Li Ao*, though negligent, deserve more protection than that in *Lu v. the Journalist*? First, in terms of the plaintiff status, the public concern cannot be higher in *Annette Lu v. the Journalist*, in that it involved the Vice President using immoral gossip to defame the President. Of course the public concern in *Chang Chunhong v. Li Ao* is high as well. But as prominent as Chang Chunhong was, being one of the founding members of DPP, when the defamatory speech was made, Chang Chunhong did not hold any government or party post. He was the president of a private telecommunications company. At most, he was a public figure in the political realm. Second, the defendant in the Lu case was the Journalist, one of the most prominent news weekly magazines in Taiwan. In contrast, the defendant in the Chang case was a writer-turned TV talk show host. Li Ao was not a member of the press. The show was never meant to live up to any journalistic professionalism. It was Li Ao's personal stage to express his political viewpoints. Third, the defamatory speech in Lu case underwent serious discussion in the editorial meetings. The ethics of relying overwhelmingly on Yang Zhao's testimony was taken seriously in the discussion. In contrast, Li Ao's speech was his own suspicion based on fragmented, impressionistic evidence, without anyone else checking the verity of the fact and questioning his reasoning and ethics.

By every criterion, it was the speech in *Lu v. the Journalist* that deserves more protection, not the speech in *Chang Chunhong v. Li Ao*. It hence sharpens the question—despite all its unworthiness, why did the

⁶⁴ Taiwan High Court Civil Decision 93-Shanyi(上易)-1979(2004).

Fourth Panel nevertheless consider the speech in *Chang v. Li* as needing more protection, to the extent that it made the extraordinary decision to depart from the course laid down by the Precedent 90-Taishan-646 and *Lu v. the Journalist*? The Fourth Panel's decision will remain a mystery, so long as we keep a blind eye toward the partisan nature of the cases. By partisan nature, I mean the only distinction between the two cases that has any promise to lead to any meaningful explanation, is that *Chang Chunhong v. Li Ao* is a case in which the match between the plaintiff and defendant can be contextualized in the broader political environment as a struggle between members of the Green Camp and the Blue Camp, since Chang Chunhong was a prominent DPP politician and the defendant Li Ao was a famous blue-camp protagonist. More importantly, Li Ao's speech directed not only at Chang Chunhong, but at President Chen Shui-bian as well. He accused Chang in collaboration with President Chen of attempting to shut down the TV channel that carried his show. It makes it even more likely that under some context, the case would be cast in strong light of the blue-green partisan struggle. In contrast, *Lu v. the Journalist* cannot be so contextualized. Vice President Lu belongs to the Green camp for sure. *The Journalist* by that time had a reputation for journalistic professionalism. Even in a world of media which reflects the political spectrum, *the Journalist* could hardly be characterized as in the camp of "blue" media. During the 90s, it had built a reputation of daring to challenge the long-ruling KMT government. Therefore, *Lu v. the Journalist* could easily be characterized as being a case involving simply the tension between the autonomous press and a high-ranking government official.

There has been no evidence showing systematic partisan bias in the Supreme Court of Taiwan.⁶⁵ As investigation of the series of decisions that followed will show, the Civil Panels did not consistently rule for one particular political camp. Lack of evidence for systematic bias does not rule out attitudinal

⁶⁵ So far there has not been any empirical analysis of partisan or ideological inclinations on Taiwan's regular courts. What has been studied is Taiwan's Constitutional Court. In a series of empirical research Nuno Garupa and his colleagues has found no strong indication of any relationship between judicial ideal points and presidential appointments, which means no strong indication could be found by the Justices' political allegiance and their decision patterns. See Nuno Garoupa, Veronica Grembi & Shirley Ching-ing Lin, *Explaining Constitutional Review in New Democracies: The Case of Taiwan*, 20 PAC. RIM L. & POL'Y J. 1 (2011); Lucia Dalla Pellegrina, Nuno Garupa & Shirley Ching-ping Lin, *Judicial Ideal Points in New Democracies: The Case of Taiwan*, 7 NAT'L TAIWAN U. L. REV.123 (2012).

explanation, as attitudinal approach to judicial behavior could address judges' ideological background, instead of narrow partisan loyalty. But the relevance of the attitudinal approach is undercut by the fact that the major ideological divide in Taiwan's society, namely pro-Taiwan-independence or pro-China-unification involves no necessary inclination toward more protection of reputation or speech. Moreover, attitudinal approach is methodologically difficult to develop in Taiwan's context, as no data is available regarding ideological dispositions of Taiwan's judges. Taiwan's judicial system is a bureaucratic system not unlike that of civil service. And judgeship as a civil service career is admitted by state examination blind to ideology. Moreover, after democratization, the judges were strictly forbidden from partisan affiliation.

To understand how the wider context of partisan-struggle could have influenced the Fourth Panel, it was necessary to pinpoint the exact date of the decision. The Fourth Panel delivered *Chang Chumbong v. Li Ao* on September 29, 2004. Anyone who is sensitive to Taiwan's political development could not have missed the significance of the date. The decision took place in the ongoing turbulence of Taiwan's 2004 Post-Presidential election controversies. The whole country was split into two warring factions. The KMT and PFP candidates refused to acknowledge of the election result. Electoral litigations were on their way into Taiwan High Court Electoral tribunals. Rumors were still rampant that DPP rigged the election by staging the assassination on March 19 2004, the night before the election.

Did the political turmoil create political pressure on the Supreme Court? Did the Supreme Court fear reprisals from either the blue-dominated Legislature or the DPP government? Or did the Supreme Court worry about the potential lambast from the vociferous partisan press? If this was the case, and if the Fourth Panel wished to find a safer haven for adjudication, a better strategy would be to stick to the course already laid down by the several Civil Panels together, namely the Precedent. This way the Fourth Panel could have claimed that the legal standard was predetermined, and that it was only impartially applying the rule. Nonetheless, the Fourth Panel did not take this route. Perhaps by the time

the Fourth Panel was preparing for the decision, the political environment had changed to such an extent that it was not safe even for the Supreme Court as a whole to shoulder the political pressure. The approach developed by the Precedent and *Lu v. the Journalist* might not have been able to provide a legal standard robust enough to justify the result and to shield the Supreme Court from the political pressure. So perhaps the Fourth Panel decided to take a sharp turn in order to create a shield robust enough to shelter the Supreme Court as a whole. And the shield was the “actual malice” doctrine.

This line of strategic explanation was built on the premise that the main strategic goal of the Fourth Panel was to avoid political pressure. However, it is not obvious that political pressure in these political libel cases, however prominent the litigants were, was great enough to have fundamentally defined the incentive structures of the Supreme Court Civil Panels. For one thing, by the time the Fourth Panel was preparing for the decision, the single definitive battleground of both political camps was the electoral litigations which could change the election result. And the litigation was still ongoing in the Taiwan High Court.⁶⁶ It was very unlikely that either camp would risk its legitimacy before the eyes of the court on a case not directly relevant with the election. For another, both the plaintiff and defendant in the case were not central figures of the political stage at that time.

There is no good reason to surmise that it was out of “purely strategic” concern, in the sense of avoiding political pressure, that the Fourth Panel took such pains to alter the predetermined course. A more viable direction of explanation is that the critical political environment did not so much create critical political pressure as cast the nature of political libel cases in a new light, hence changing the way the Court balance the constitutional speech protection and reputational interest. The central idea of “negligence” as a fault standard rests with the concept of “reasonable man”—what would a reasonable man do in like circumstances? This idea is premised on a relatively stable social or professional

⁶⁶ For a succinct account of the election disputes, see Chen and Hsu, *supra* note 54, at 14-16.

consensus on the proper bounds of social conduct. However, the severe political polarization had greatly undermined the social consensus, to the extent that the Court might have deemed the foundation eroded for any standard more demanding on the publisher than actual malice. Implicit in holding the libel defendant liable for negligence is the premise that anyone's good reputation should be presumed unblemished in the public sphere. However, the serious distrust between the two warring political camps has rendered the social consensus regarding reasonable prior investigation in ruin. When almost half of the electorate was already seriously questioning the integrity of the President and the political camp to which the plaintiff belonged, the necessity of reputational protection was substantially weakened. The defendant, however negligent in normal state of affairs, appeared to have stood in line with millions of other opposition supporters in their firm belief in corruption and depravity of the DPP government. There was little point assessing liability on such firm believers of particular political truth. Under such dire political circumstances, "actual malice" seemed the only proper base for tort liability.

Dominant as actual malice was from late 2004 through 2006, quite unexpectedly, actual malice's dominance came to an abrupt end in January 2007, when the Fourth Panel unexpectedly changed course in Decision No.96-Taishan(台上)-35, *Yiu Ching (尤清) v. Wang Chienhsuan (王建煊)*. The plaintiff was Yiu Ching, a founding member of DPP and former DPP Taipei County magistrate. The defendant was Wang Chienhsuan, a New Party (blue camp) candidate for the Taipei County magistracy. The speech was a campaign leaflet made during the 2001 county magistracy election campaign, in which Wang attacked Yiu for corruption. What was problematic about Wang's campaign speech was that it was based upon an outdated corruption allegation, which was a case already dropped by the Taipei District Prosecutor's office as unfounded. The fact that the case was dropped by the Taipei District Prosecutor's office was reported by one of the major newspapers. In view of the recklessness of Wang, it was not a very hard case for the plaintiff even if the fault standard was actual malice.

However, the appellate court ruled for the defendant for reasons quite unjustifiably in favor of the defendant, such as that “the speech was based on a previous report not directly made by the defendant, and the speech was already out there”, and that “there was a question mark, leaving the speech uncertain about the allegation”.⁶⁷

The Fourth Panel quite correctly reversed the appellate court’s decision. Surprisingly, while it could have maintained actual malice and still reversed the decision, it chose to back away from “actual malice” and returned to negligence. There was no reason given for its surprising decision. And the Fourth Panel reasoned in the decision as if it had been the Precedent that had been ruling all along.

Why did the Fourth Panel back away from the course it started? In retrospect, there might be doctrinal reasons given for the eventual fall of actual malice doctrine. The leading authority on Taiwan’s Civil Code, former Grand Justice Wang Tze-chien (王澤鑑) published an important article in December 2006 questioning the transplantation of actual malice into Taiwan’s tort of defamation. He saw no good reason for undermining the “negligence” framework that was stipulated in Taiwan’s Civil Code.⁶⁸ Indeed the debate could have been framed as a purely doctrinal argument. However, the doctrinal debate could not hide what was actually an important matter of constitutional policy. If doctrine was all that mattered, the Fourth Panel should have stayed on the safe course determined by the Precedent. The real question remained as to what changed the Fourth Panel’s constitutional policy judgment? At first sight, it seemed baffling. Political polarization continued. The society continued to split along the blue v. green cleavage. If Li Ao stood for one of those millions of blue supporters firmly believing in the radical untrustworthiness of the DPP politicians, and the Court at one point considered imposing liability on such firm believers as unnecessary, such situations did not change at all in early

⁶⁷ Taiwan High Court Civil Decision 93-Shan(上)-865.

⁶⁸ Wang Tze-chien(王澤鑑), Rengequanbaohu de keti yu zhangwang (3) renequan de jutihua yu baohufanwei (4) mingyuquan (人格權保護的課題與展望(3)：人格權的主體與保護範圍：名譽權)[Issues and Prospect of Rights to Personality(3)-Concretization and Scope of Protection(4)-Right to Reputation], 90 TAIWAN LAW JOURNAL 23, 31-5 (2007).

2007. In order to understand how the political environment had further changed, we need to go back and trace the rise of the so-called “culture of radical exposé”.

B. The Culture of Radical Exposé and the Downfall of Actual Malice in Tort

On October 26 2005, over one year and a half after President Chen’s extremely close reelection and less than two months before the nation-wide mayoral and county magistrate election, Legislator Qiu Yi(邱毅), who was a former opposition PFP member and was not partisan at that time, demonstrated in a political talk show a picture of Deputy Secretary General to the President Chen Zhenan(陳哲男)gambling along with former Vice President of *Kaohsiung Rapid Transit Corporation* Chen Minxian(陳敏賢)at a hotel casino in Seoul, South Korea, in 2002.⁶⁹ Though the verity of the picture was not beyond doubt at the time of exposure, the fact was corroborated the next day by the confession of Chen Minxian that he did go gambling with Chen Zhenan in Korea when they were both still in office. The revelation of the picture was explosive. The gambling itself is not the real problem, even though Chen Zhenan violated presidential decrees by going abroad without prior notice to the President. It was the highly suspicious company of the two Chens, implicating illegitimate deals, that set off the dynamite. Qiu Yi’s exposure of the picture was seen by some observers as giving rise to the rampant *Baoliaowenhua*, a culture of wild exposé.⁷⁰

The picture is a critical addition to a series of explosive scandals of corruption related to the *Kaohsiung Rapid Transit System*, which was still in construction under DPP Kaohsiung City mayor Frank Hsieh(謝長廷). What triggered the domino-like scandal exposés was a riot in the construction site

⁶⁹ The casino was later identified to be in Je-ju Do, instead of Seoul. Qui Yi later claimed that the misidentification of the casino location was deliberate, with intent to tempt self-disclosure by the accused.

⁷⁰ See Media Watch Editorial, Henche! Jizhekanbaoliaozuixingwen [Ridiculous! Reporters watch TVBS talk show 2100 People Speak up for source of news], 53 MEDIA WATCH [目擊者雜誌]15-19 (2006).

dormitory of Thai foreign laborers. In August 2005, the Thai laborers rioted against the Hua Qin (華馨) Management Company's harshly exploitive management practices. The Council of Labor Affairs of the central government interfered to investigate the riot. Based on the investigation, the Chairperson of the Council, a prominent DPP politician, Chen Ju (陳菊) intimated in a TV interview that the incompetent Hua Qin company must have "a strong backing" to become the sole contractor in charge of managing all of the 1700 foreign laborers, whom could well have been managed by more than one company.⁷¹ Rumors swiftly abounded in news media and political talk shows guessing who the "strong backing" was. The guesses went wild, and those mentioned ranged from the major shareholders of the *Kaohsiung Rapid Transition Corporations*, high level Kaohsiung City officials, Mayor Frank Hsieh, First Lady Wu Shu-jen and even to President Chen Shui-bian. Yet most of the rumors converge on the Deputy Secretary General Chen Zhenan. Some rumors had it that Chen Zhenan went to Thailand with foreign labor brokers to straighten things out for importing the workers; some had it that he went to South Korea to launder bribery money; others even had it that he went to South Korea to frequent brothels. Chen Zhenan's immediate response was denial of all those foreign trips.

Before October 26, Qiu Yi was not distinguished from many other rumor mongers who made wild guesses about who the "strong backing" was. Even more, only a short while before, he made two obviously false accusations, which only furthered his public image as an irresponsible rumor monger. The first mistake was made on September 29 in the Legislative Yuan's Judicial Committee, when he was questioning the Prosecutor General. He charged that the prosecutor who initiated investigation into the Kaohsiung Rapid Transit System three years ago dropped the case because he was given free sex service in Kaohsiung's famous underground brothels. The Prosecutor General rebutted that the prosecutor in charge of the case was a female, and given the nature of the places Qiu indicated, it was

⁷¹ Chen Suling(陳素玲), Yinbaozhenhandan Yulizhenshishei Chenjubu Igniting (引爆政憾彈 有力人士是誰 陳菊不知)[Political bomb, Chen Ju does not know who the strong backing was], UNITED EVENING NEWS, August 24, 2005, at A3.

not possible for female attendance. The second mistake was made on October 20, when he charged in a press conference that some constructions of Kaohsiung Rapid Transit System made illegal use of sea sand, which was unsafe for lacking sufficient cohesiveness. He also charged that the sea sand was supplied by the brother of Su Jiaquan(蘇嘉全), a prominent DPP politician and the then Minister of Interior. One month later an independent investigatory report produced by National Chengkung University disproved Qiu's charge.

The picture exposure was a turning point for Qiu Yi as well as for the whole rumor mongering activities in the wake of the Thai laborers' riot. The picture shown by Qiu Yi proved that Chen Zhenan lied about not having those trips, even though whether he was bribed and how deep he was involved in brokering the foreign labors were in need of further investigation.⁷² The picture became the tipping point of the DPP government's downgrading credibility. Before the exposure, the public opinion remained divisive with respect to the credibility of opposition leaders' and their allied news media's wild rumor mongering. DPP supporters and sympathizers, who roughly constituted almost half of the electorate according to President Chen's reelection votes, generally viewed those rumors as unfounded and as deplorable conspiracy to upset the DPP government. The picture decisively broke the stalemate in the mainstream public opinion which then swayed unfavorably away from the DPP government. Qiu Yi successfully stood out from others and dominated the remainder of related muckraking. This resulted in a resounding defeat of the DPP in the county and city level elections in December 2005.

With a decisive boost of credibility, Qiu Yi's aggressive muckraking enterprise forcefully expanded by attracting more insider leaks of potential corruption, as well as malignant accusers eager to find an outlet. Either way, his sources abounded. His methodical muckraking became so powerful that it

⁷² Ironically, Chen Zhenan was found not guilty of bribery by the Kaohsiung District Court on August 24, 2007, because the court found the evidence was insufficient for conviction. This ruling was later sustained by the Taiwan High Court Kaohsiung Branch on January 15 2009. The prosecutors did not appeal to the Supreme Court.

actually changed the press-source relationship. The active role of the press in seeking and filtering information from the source was reduced to the minimum. Qiu Yi domineered all the news media, by gradually developing a pattern of muckraking.⁷³ In the morning, he held a press conference in the Legislative Yuan. What he was going to say was already provided the night before to the newspapers he favored, usually the United Daily News or China Times. The electronic news media reporters read the newspapers in the morning. And they were given press notice from Qiu Yi. In the press conference, Qiu Yi would reiterate and complement what was in the newspapers, so that the TV and Cable news channels got further reportage. Before noontime, Qiu Yi would leak a little more information to the evening newspapers. In the evening, he showed up on the TVBS 2100 People Speak Up talk show, not only to repeat what he said to the press during the day, but to add something more. By doing so, the press reporters were forced to watch the show to avoid missing any new pieces of information. By such highly developed methodology, Qiu Yi captivated almost all types of mainstream news media. And he became powerful enough to discipline those reporters who refused to write or report the way he wanted, by withholding information. During the height of his power, no journalists or news institutions, except perhaps the clearly pro-pan-green *Liberty Times*, dared risking being on Qiu Yi's blacklist.

Despite his success, Qiu Yi's wild exposé wreaked havoc on Taiwan's already shabby journalistic professionalism. A former reporter and a National Taiwan University master student Tsai Huiju reported her interview with journalists working during the height of Qiu Yi's muckraking business,

One reporter (documented as A4 in her study) was documented saying, "Qiu Yi's exposés were often problematic. For example, he might have presented a genuine document. But he made inferences from the document, like something about the timing or events. He put together the

⁷³ See Tsai Huiju, Preliminary Study of Disclosure Journalism in Taiwan: Controversies over Qui Yi's Disclosure Craze, 93-6 (July 2009)(unpublished Master Dissertation, Graduate Institute of Journalism, National Taiwan University)(on file with National Taiwan University Library).

puzzles. Apart from the document, everything else was his conjectures.” “Sometimes, when things get told again and again for a long time, people no longer know what is true or false. All he said involved complex political-commercial relationships, which ordinary folks were unable to tell. Over time, it gives an impression like, “Yes, that’s it!” I think it is unfair to those he accused, and it hurts the authority of the judicial system.”⁷⁴

As a hero in contributing to the KMT’s success in the 2005 county and city level elections, Qiu Yi was welcomed by the KMT after the electoral victory in a high profiled party-entry. The entry was made on January 24, 2006, the eve of the deadline for anyone who wanted to compete for the party’s nomination for Kaohsiung Mayoral election, upcoming at the year-end. Qiu Yi’s entry into the KMT was deemed as revealing his intent on running for Kaohsiung Mayor. His intent forced his potential competitors within the KMT, such as the KMT legislator Li Quanjiao (李全教) to join in the muckraking movement, which further inflamed the already rampant wild muckraking and rumor mongering. In addition to Qiu Yi’s competitors in intra-party power struggle, his success attracted imitators of both political camps, and triggered a storm of wild exposés. Most of them were slipshod in terms of evidence and sources, including Qiu Yi himself. Political talk shows became the centers of political rumors. Shows on different channels took partisan stances and spread negative rumors about political figures on the opposite camp. Skillful rumor mongers became a powerful news source by daily feeding the news media with piecemeal information that guarantees ongoing newsworthiness. Associated political talk shows on cable TV channels scored high in audience rating. Apologies for wrongful accusations had become outlandish on the high tide of exposés. By April 2006, even the pro-pan-blue press began to lament the excess of culture of exposé. China Times, arguably among Qiu Yi’s favorite press to feed his exposés, published a short editorial essay on April 19, 2006 of the title “Heaven of Exposé”, which stated the following:

⁷⁴ *Id.* at 96.

“The culture of exposé has deeply hurt both the ruling and the opposition parties. Everyday the Presidential Office and the First Family are busy defending against corruption accusations, with their public image seriously jeopardized. The opposition has been preoccupied with exploding alleged scandals but was incompetent of showing the beef, which incurred detests from the public. The negative effects of the culture of exposé have been so obvious, that if the irresponsible muckrakers do not restrain themselves, one day the “heaven” of exposé could turn into the ‘hell.’”⁷⁵

Indeed in early 2007, political polarization continued and the political distrust continued to deepen. And so the regulatory foundation for false speech remained weak. However, what became clear by early 2007 was that the actual malice doctrine not only protected deeply biased and yet sincere believers of politically defamatory speech, but also numerous opportunists who took advantage of the political turmoil and rode high on the free-wheeling rumor mongering culture.

III. Radicalization of Actual Malice in Criminal Defamation

A. The divergence of tort and criminal defamation

As the culture of exposé and public rumor mongering went wild, Taiwan’s courts were caught in a dilemma. On the one hand, political polarization had eroded social consensus on what constituted responsible speech and so it grew pointless to discipline someone deeply believing in otherwise unfounded rumors; on the other hand, opportunists began to take advantage of the free-wheeling rumor mongering culture, and these opportunists should be disciplined. The difficulty is that a

⁷⁵ Editorial, Baoliaotientang (爆料天堂)[Heaven of Exposé], CHINA TIMES, April 19, 2006, at A2.

principled distinction between bias-motivated true believers and opportunists is almost impossible to draw.

As aforementioned, the Fourth Civil Panel of the Supreme Court abruptly changed course and abandoned actual malice in early 2007 in *Yiu ching v. Wang Chienhsuan*. The Fourth Panel undid its own making and marked an end to the prevalence of actual malice in tort in the Supreme Court since late 2004. In retrospect, it is difficult to tell precisely why the Fourth Panel decided to change course. The panel did not give any reason for its choice of legal norms. Yet, what matters is not so much what was going on in the judges' minds, but how the decision was received. After *Yiu ching v. Wang Chienhsuan*, multiple Supreme Court Civil Panels had the chance to deliver important decisions, and all of them avoided actual malice and opted for relaxed negligence (close to gross negligence) in cases involving public figures plaintiffs.⁷⁶

Meanwhile, actual malice grew increasingly entrenched in criminal defamation. According to my comprehensive survey and analysis of Taiwan High Court decisions from 2000 to 2010, the fault standards from 2000 through 2005 were generally in a stage of uncertainty. After 2006 there was a marked shift toward more lenience on speech, which means a more consistent shift toward actual malice among the multiple branches of Taiwan High Courts.⁷⁷ It means somehow the coordination problem among the multiple branches and panels of Taiwan High Courts was gradually solved. The Supreme Court's role in solving the problem cannot be ignored. It is true that according to Taiwan's Code of Criminal Procedures a misdemeanor such as criminal defamation was not appealable to the Supreme Court, and so the Supreme Court Criminal Panels had very few chances to directly speak on the issue. However, the Supreme Court exerted influence through an alternative type of cases. In the Civil Servants Election and Recall Act, Article 104 is a provision stipulating a special felony of electoral

⁷⁶ For an intricate analysis of the evolution of tort of libel cases in Taiwan's Supreme Court, see Jimmy Chia-shin Hsu, *Yenlunziyo yu Mingyuquan de Tange: Wuoguo Mingyuqingquanfa Shiwuyulilun zi Huiguyuqianjan* (言論自由與名譽權的探戈：我國名譽侵權法實務與理論之回顧與前瞻)[How to Balance Free Speech and Reputation? Reflections on I.509 after a Decade of Confusion], 128 NAT'L CHENGCHI U. L. REV. 206 (2012).

⁷⁷ Hsu, *supra* note 12, at 14-6.

defamation. It punishes intentional spreading of falsehood and rumors with motive to distort the election results. It is a felony punishable to five years in prison, which is appealable to the Supreme Court. When dealing with cases of the electoral criminal defamation cases, the Supreme Court gradually came to accept the influence of I.509. In a series of important decisions, the Supreme Court Criminal Panels interpreted I.509's influence on both the general criminal defamation and electoral defamation, and clearly pushed both toward actual malice.⁷⁸ The influence of Supreme Court decisions on electoral defamation hence overflowed to general criminal defamation on the lower courts by offering a focal point among multiple possible options.

Overall, the divergence of Taiwan's criminal and tort of defamation after 2007 is a sensible response to the difficult challenge. By "sensible response", I do not mean that it is a purposeful design of any particular courts, perhaps not even the Supreme Court, given that it never explicitly explicated its doctrinal twists and turns. The divergent development could well have been an equilibrium that gradually emerged in reaction to multiple influences on the courts, such as doctrinal debate in the legal academia, responses from the legal profession, media reportage, political repercussion, and so on. Nonetheless, in retrospect, such a development makes good sense. On the one hand, criminal defamation continued on the course of actual malice, because criminal punishment is symbolically more severe in moral condemnation than tort,⁷⁹ and the punishment is more consequential and the silencing effect more severe given the possibility of incarceration.⁸⁰ Further, it is more likely to be abused by

⁷⁸ Supreme Court Criminal Decisions 94-Taishan(台上)-5247 (2005), 97-Taishan(台上)-998 (2008), 97-Taishan(台上)-6156 (2008).

⁷⁹ It should be noted that there is no punitive damages for Taiwan's tort of defamation. Even when some of Taiwan's courts have used damages award of emotional distress for punitive purpose, the amount is far from comparable with the American punitive damages. In my survey of Taiwan High Court from 2000-2008, the average amount of damages awarded in defamation cases is about 256,000 TW dollars (about 8,000 US dollars). 75 percent of damages was under 400,000 TW dollars (about 13,000 US dollars). The highest damages awarded during the time span was 6,000,000 NT dollars (about 200,000 US dollars) See Hsu, *supra* note 13, at 203. Despite the comparatively insubstantial amount, the disciplining effect toward middle-class-income defendants, such as Taiwan's ordinary journalists, should not be underrated.

⁸⁰ However, in practice, the threat of incarceration should not be overestimated. In a survey I conducted of all Taiwan High Court criminal defamation decisions from 2000 to 2008, only 1 percent delivered a sentence of over six months in prison, which according to the Criminal Code means the prison term cannot be replaced with monetary fine

government prosecutorial function. All these characteristics of criminal defamation demand its restraint in polarized politics. On the other hand, the free-wheeling politics of rumors should be curtailed with moderate but still meaningful measure. The tort of defamation is more suitable for this function, because Taiwan's tort of defamation is not equipped with punitive damages, which helps avoid complete silencing by excessive damages. Negligence became a sensible effort to restore the collapsing social consensus on responsible speech.

B. The radicalization of actual malice in criminal defamation

Upon closer examination, the actual malice doctrine that gained ever wider acceptance in criminal defamation cases does not necessarily resemble its counterpart developed by the United States Supreme Court. In certain cases involving public figure victims, the courts adopted a version of actual malice that actually surpassed its American counterpart in its protection of speech.

I will illustrate my observation through one particularly exemplary decision. It is *The People v. Hu Zhongxin* (Taiwan High Court Decision No.96-Shanyi-2306), a criminal defamation ruling delivered by the Taiwan High Court on December 4, 2007.⁸¹ The victim was Chen Xingyu, President Chen Shui-bian's daughter. The defendant was Hu Zhongxin, a famous political commentator and a frequent guest of pan-blue affiliated talk shows. On October 11, 2005, in the wake of Qiu Yi's successful exposé of Chen Zhenan's suspicious gambling in Korea, Hu made remarks on the political talk show that the President's daughter's recent trip to New York was actually not for learning dentistry techniques as publicly known, but for opening bank accounts to facilitate family money laundering. He said, "She went to New York to study tooth-planting, to study how to plant gold and diamond into the mouths of

and the convict has to be incarcerated. It constitutes only 3 percent of all guilty verdicts. Put simply, Taiwan's judges have been greatly reluctant to put people in jail for defamation, except the worst defamers. See Hsu, *supra* note 13, at 198.

⁸¹ Taiwan High Court Criminal Decision No.96-Shanyi (上易) -2306. The following account is extracted from the court decision.

her father and mother. Yes, I am talking about her going to the bank to set up the account for money laundering.”

Hu claimed that his source of information was some kind of “deep throat”, whom he refused to identify in the show. During the trial, it was revealed that Hu’s source was hearsay all along. Hu heard about Xingyu Chen’s opening of bank account in New York from a friend, some Mr. Ji, who was well-known for having broad connections with prominent pan-green politicians. Mr. Ji heard it from two strangers he met at the train station, who approached him claiming that they were Taiwanese Americans who live in New York and they happened to witness Xingyu Chen opening bank accounts. No part whatsoever of Hu’s source of information could corroborate that the opening of bank account, even if it happened at all, was related to money laundering.

Surprisingly, the court acquitted Hu. The court embraced “actual malice” as interpreted by Justice Su’s concurring opinion, that is, “as long as the defendant did not fabricate the false statement, or the defendant uttered the false statement without gross negligence or recklessness, criminal liability shall be absolved.”⁸² Curiously, the defendant in this case could have easily been found reckless, given that his accusation was entirely founded upon uncorroborated second-hand hearsay. How did the court circumvent the “reckless” prong of actual malice and reach the verdict of not guilty?

The court reached the conclusion via two routes. First, the court devised a pair of new concepts to interpret I.509’s key holding, namely as long as the defendant has “substantial reason to believe in the truth”, criminal liability is absolved. The court reasoned that I.509’s holding means that when “objective truth” was either falsified or not verifiable, it was sufficient for the defendant to entertain “subjective truth” in the defamatory statement. And the “subjective truth” was established insofar as the defendant could demonstrate he/she did have some reasons to suspect that the malfeasance

⁸² *Ibid.*

occurred, if the defendant based his suspicion on certain verified facts, even though the factual basis offered only scant evidence of what the defendant inferred from it.

Second, upon the standard definition of actual malice rendered by Justice Su, the court placed another layer of meaning on it. That layer is “malicious motive”. The court interpreted “actual malice” to require not only knowledge of falsehood or recklessness disregard of truth, but malicious motive toward the defamed victim, a misunderstanding not uncommon even by the lower courts in the United States.⁸³ However, distinct from common law malice which means the defendant’s ill will or animosity toward the plaintiff, the court said that it means the defamatory statement was uttered with the sole motive to inflict harm on the defamed victim. This standard actually disarmed the actual malice doctrine, because it is always possible to find other motives on the part of the defendant. Particularly, in cases involving public figure victims, the defendant can always say that the statement was made to further some public interest, and ill will, even present, was not the only motive. Most remarkably, in this case, the court particularly mentioned that it believed the defendant made the statement out of more or less legitimate motive. That is, according to the defendant, by the time the statement was made, the former Deputy Secretary General of the President’s Office Chen Zhenan and a host of other DPP officials were already mired in scandals. The defendant Hu claimed that he wanted to extend what was already wide-spread in the rumor circulation, in order to mount pressure on President Chen to explain himself to the people, and that he did not utter the statement out of ill will.

It is not difficult to see how the two concepts of “subjective truth” and “sole motive of malice” plucked out whatever remaining teeth actual malice might have, leaving it with only direct fabrication of facts to punish. The main question is how do we explain such radical protection of speech?

⁸³ See Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 279 (1990).

I believe that the explanation begins with analysis of these extraordinary legal concepts. But first of all, it is notable that *The People v. Hu* is not exceptional in terms of its radical protection of speech. The concept of “subjective truth” may not have been employed in many other decisions. But it has its equivalent. In quite a number of cases⁸⁴ involving prominent political figures, particularly from the era in which “culture of radical exposé” was at its zenith, it was the concept of “reasonable suspicion” associated with “fair comment” that served to further relax actual malice. “Fair comment” here is not the same as understood in common law, which typically requires that the comments be concerning matters of public concern; based on true statements or on facts known to be true; comment be opinions reasonably based on the true statement; no malicious motives involved.⁸⁵ It only means that the defendant holds “reasonable suspicion” on what he knows. The effect is the same as “subjective truth.” A defendant is relieved from criminal liability as long as he did not fabricate the whole scandalous matter, even though he made known his suspicion only on scant evidence. For example, in *Frank Hsieh v. Su Yingquei*,⁸⁶ former legislator Su Yingquei accused in a political talk show that the then Kaohsiung City Mayor Frank Hsieh was corrupt and was laundering money through a particular foundation. The accusation was inferred from prosecutorial investigations directed at certain Kaohsiung City officials, who were not necessarily close to Mayor Hsieh. The court found the defendant not guilty, because his accusation could be seen as “fair comment” on the investigation, and the defendant “reasonably suspected” the mayor’s corruption, even though the inference was quite tenuous and the accusation never meaningfully corroborated.

No matter how the courts made the ideas of “subjective truth” appear complementary to actual malice, the concepts of “subjective truth” and “reasonable suspicion” actually subverted the foundation of actual malice. The doctrine of actual malice, as developed by the United States Supreme Court, is

⁸⁴ For example, Taipei District Court Criminal Decisions No.96-Zi(自)-204, No.94-Zi(自)-201, No.96-Zi(自)-169, No.96-Yi(易)-1220.

⁸⁵ DON R. PEMBER, *MASS MEDIA LAW* 174-5(5th ed., 1990); Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1227 (1976).

⁸⁶ Taipei District Court Criminal Decision No.94-Zi(自)-201(2009).

meant to punish “calculated falsehood”, and exonerate “honest, yet inaccurate utterance”.⁸⁷ “Calculated falsehood” means that “there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubt shows reckless disregard for truth or falsity and demonstrates actual malice.”⁸⁸ The gist of this was quite aptly conveyed by the U.S. Supreme Court in *Harte-Hanks Communications, Inc. v. Connaughton*.⁸⁹ Even in a case in which the defendant conducted extensive investigation of the story, actual malice would still be found if he/she purposefully avoided truth by shunning critical evidence.⁹⁰ It means that the speaker worthy of protection is one who cares enough about truth and would refrain from speaking if serious doubts were harbored. The Taiwanese doctrines of “subjective truth” and “reasonable suspicion” subverted the “reckless disregard” prong of actual malice, because they protected publishers who publish the speech notwithstanding lack of sufficient evidence, to the extent that it shows disregard of truth or falsity.

Why did Taiwanese courts choose to protect reckless publishers? It is unlikely that the courts were tacitly pushing forward de facto de-criminalization of defamation, since the Constitutional Court has already declared it constitutional and re-interpreted it for higher protection of free speech. If de-criminalization should ever become a policy, it is the legislature that has the power to do it, not the judiciary, especially for a judiciary unaccustomed to policy-making such as Taiwan’s.

We have to probe into this question by a further contrast between the American and Taiwanese jurisprudence. The “reckless disregard” prong refers to the state of mind of the publisher, that is, he/she publishes with serious doubts. But such state of mind can be established by the publisher’s outward deeds. The U.S. Supreme Court gave a few examples in *St. Amant v. Thompson*: the “story is

⁸⁷ *Garrison v. Louisiana*, 379 U.S. 64, 75(1964).

⁸⁸ *St. Amant v. Thompson*, 390 U.S. 727, 731(1968).

⁸⁹ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657(1989).

⁹⁰ *Id.*, at 693.

fabricated by the defendant”; the story is “the product of his imagination or is based wholly on an unverified anonymous telephone call”; the story is “so inherently improbable that only a reckless man would have put them in circulation”; “there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”⁹¹

These examples show that the actual malice doctrine is underpinned by a thick layer of social norms. These social norms constitute the code of civility and regulate publishing activities. When the social norms are generally effective and widely respected, they serve as more or less a stable indicator of the state of mind of publishers. When the act of publication violates the social norms to such an egregious and radical extent, such violation could be interpreted to signal publication with serious doubt of truth.

The doctrines of “subjective truth” and “reasonable suspicion” in some of Taiwan’s court decisions signify that such social norms, at least in the public sphere of national politics, are seriously eroded by the political polarization. The mutual distrust of Taiwan’s blue and green camps ran so deep, and the bias was so entrenched among the divided mass, that what in ordinary cases would be found unreasonable inference from known facts and unfair comment, no longer look so clear in the politically-charged cases. I.509’s key holding “substantial reason to believe in the truth of the statement” was radicalized in such cases, because a great segment of the population shared the deep distrust and suspicion. The “substantial reason” part of the holding was inevitably diluted. And eventually it was the “subjective truth” on the part of the defamer and his/her audience that gained the upper hand in these types of cases. It does not matter whether the defendants as political elites truly believed in the truth of the statement, or were only manipulating the public opinion. What mattered was that the statement was believed by a significant segment of society to be true, despite lack of substantial evidence. In such circumstances, with regard to criminal sanctions, the courts had trouble

⁹¹ *St. Amant v. Thompson*, 390 U.S. 727, 732(1968).

enforcing a more reputation-protective culpability standard, in order not to get entangled in the nasty political struggle.

Moreover, social norms were eroded by the fear of hidden corruption and government abuse of power at the highest level, at least in the eyes of opposition supporters. As revealed in the decisions, the courts were well aware of the political happenings which constituted the background of the case. The rising culture of exposé in late 2005 lent credibility to the serious doubt on the integrity of high-level DPP government officials. If truth-seeking is an important constitutional value, and knowledge about governmental corruption is a social good of the highest degree, it is justifiable under extraordinary circumstances to be radically lenient on speech critical of government officials. This may be seen as the checking value pushed to the extreme, just as Vincent Blasi suggested in his classic article that a theory based on the checking value might provide absolute protection for communications critical of public officials.⁹² Such tolerant approach to defamatory speech allows the public sphere more freedom to expose political scandal at the highest level of government. But such radicalism can only be justified if it is absolutely necessary to rely on such traumatic cure. The checking value is only one value among many, and democracy is not just about people checking the government. When the people and government are divided and polarized, irresponsible criticism of public officials could be seen as part of partisan conflict and hence aggravate the conflict. Despite the potential public good, Taiwan's heated political polarization in the later days of Chen Shui-bian's second term could be attributed in part to the wild culture of exposé. The wild rumor mongering was seen by supporters of the defamed camps as a gross injustice and intensified the political polarization. Whatever the good that could be purchased through such radical protection of speech, it was obtained at a high price.

⁹² Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 582 (1977).

IV. CONCLUSION

In this article, I analyzed how the actual malice doctrine was transplanted in Taiwan and how it underwent extraordinary twists and turns in Taiwan's criminal and tort of defamation laws. I argued that Taiwan's severe political polarization first led to its rise in tort of defamation, and also to its eventual downfall. The eventual divergence of criminal and tort of defamation in terms of fault degree, with criminal defamation leaning consistently toward actual malice and tort of defamation back to negligence, was a sensible response to the wild culture of exposé that developed since 2005. This article does not aim only to report Taiwan's legal development. By investigating Taiwan's extraordinary experiment with the actual malice doctrine, I intend to use Taiwan's experience to shed light on the social foundations of a self-sustaining political speech market. In this article, I came to the revelation that actual malice actually presumed a thick layer of social consensus on what counts as irresponsible speech. When political polarization and distrust destroys the social consensus, the "reckless disregard of truth and falsity" prong of actual malice collapses along with it.