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Volume 7, Number 1/2

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Articles

1 ROBERT L. KERR

Desperately Seeking Coherence: The Lower Courts Struggle to Determine the Meaning of *Sorrell* for the Commercial Speech Doctrine

30 CHRISTOPHER TERRY

The Living Legacy of FCC Indecency Enforcement: Trump, “Shithole” and Profanity in the News

41 YONG TANG

Defaming Officials and Celebrities: Evolution of Libel Law and the *Sullivan* Impact in China

68 RASUL ORIYOMI OLUKULU ET AL.

Social Media, Regulation and Challenges of Communication in an Evolving Nigerian Society

DESPERATELY SEEKING COHERENCE: THE LOWER COURTS STRUGGLE TO DETERMINE THE MEANING OF *SORRELL* FOR THE COMMERCIAL SPEECH DOCTRINE

Robert L. Kerr*

In its most recent major commercial-speech case, Sorrell v. IMS Health Inc., the U.S. Supreme Court implied that commercial speech could thenceforth be considered nothing more than a protected viewpoint – rather than a component of contractual offerings between seller and buyer. The opinion has been called “incoherent” and “a Pandora’s Box of First Amendment challenges.” This study finds the efforts of lower courts to address a rapidly growing body of Sorrell-grounded claims have only begun to bring the nature of the ruling’s impact on commercial-speech doctrine into focus.

While it is not yet possible to reconcile the array of approaches and emphases asserted by various lower courts, the stark disagreement between two panels of appellate judges in the Ninth Circuit may represent an opportunity for the Supreme Court to provide clarification. Despite the ongoing debate among lower courts, a number of laws have been struck down that, but for Sorrell, would have remained on the books today. As this article documents, Sorrell’s reach has already extended the doctrine breathtakingly far beyond the more limited understanding of what not so long ago comprised the outer boundaries of commercial speech.

Keywords: commercial speech, first amendment, *Central Hudson*, heightened scrutiny

I. Introduction

In its most recent major commercial-speech case, the U.S. Supreme Court raised many important questions as to where its doctrine was headed – alarming proponents of that doctrine as it had been understood, but sending hopes soaring for would-be plaintiffs. In *Sorrell v. IMS Health Inc.*,¹ the Court reached its holding through a new rationale so jarring it implied that commercial speech could thenceforth be considered nothing more than a protected viewpoint, rather than a component of contractual transactions between seller and buyer. And the holding that government may not burden the expression of such viewpoints when it does not similarly burden non-commercial speakers² seemed at least potentially expansive and quite possibly amorphous.³

The ruling almost immediately set off warnings from scholarly commentators. Tamara Piety, who has written extensively on commercial speech, declared that the ruling in *Sorrell* rendered the Court’s well-established *Central Hudson* doctrine⁴ “incoherent” and

¹ 564 U.S. 552 (2011).

² *Id.* at 579-80.

³ See *infra* text accompanying notes 63-91 for fuller discussion of the *Sorrell* holding and rationale.

⁴ See *infra* text accompanying notes 23-62 for fuller discussion of the doctrine grounded in *Central Hudson Gas and Electric v. Public Service Comm’n*, 447 U.S. 557 (1980).

established in its place a rationale that “cannot be reconciled with the concept of a commercial speech doctrine.”⁵ *Sorrell* was characterized by Isabelle Bibet-Kalinyak in similarly ominous tones as a ruling that “sets the nation on a precarious path long after the Supreme Court established the carefully-crafted legal principles of the commercial speech doctrine.”⁶ These scholars echoed Justice Stephen Breyer’s warning in dissent that, at best, the Court had opened “a Pandora’s Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message,” and, at worst, had reawakened “Lochner’s pre-New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue.”⁷ Even enthusiastic commentators on *Sorrell*’s potential to expand protection for commercial speech, such as Rich Samp of the Washington Legal Foundation, conceded that its effect in practice going forward was “far from clear.”⁸

It seemed possible to read the *Sorrell* majority’s rationale as reducing the well-established distinction between commercial and non-commercial speech to nothing more than differences in “political persuasion.” Such an evolution in the commercial-speech doctrine could effectively open the door to commercial speakers, very easily characterizing their messages as forms of political persuasion under the First Amendment and thereby escaping regulation.

In the years since *Sorrell* was handed down, the range of ways that plaintiffs have seized upon it as justifying challenges to all sorts of regulated activity has been stunning. Parties involved in cases before lower courts have invoked *Sorrell* – successfully in some instances and unsuccessfully in others – to extend First Amendment protection against regulation to many and varied forms of arguably commercial expression or expressive conduct. Among the activities that have been asserted to be unconstitutionally regulated under *Sorrell* are:

- Promoting pharmaceutical medications for “off-label” (unapproved) uses;
- Simulated gambling programs involving cash or cash-equivalent prizes;
- Monopoly companies’ promoting product withdrawals to force consumers to adopt replacements;
- Local tour guides operating outside city licensing requirements;
- Marks considered disparaging by federal trademark regulations;
- Insurance firms’ accessing health records of accident victims despite court orders;

⁵ See Tamara R. Piety, “A Necessary Cost of Freedom”? *The Incoherence of Sorrell v. IMS*, 64 ALA. L. REV. 1, 7 (2012).

⁶ See Isabelle Bibet-Kalinyak, *A Critical Analysis of Sorrell v. IMS Health, Inc.: Pandora’s Box at Best*, 67 FOOD & DRUG L.J. 191, 192 (2012).

⁷ 564 U.S. at 602-603 (Breyer, J., dissenting) (citing *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 589 (Rehnquist, J., dissenting); and invoking *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a regulation limiting the number of hours bakery employees could be required to work weekly and providing broad precedent for invalidating other regulation of business)).

⁸ See Rich Samp, *Supreme Court’s ‘Sorrell v. IMS Health’ Ruling Gains Traction in the Federal Appeals Courts*, FORBES, Jan. 21, 2016, <https://www.forbes.com/sites/wlf/2016/01/21/supreme-courts-sorrell-v-ims-health-ruling-gains-traction-in-the-federal-appeals-courts/#721fbc2f7f59> (last visited Dec. 30, 2018).

- Advertising inside ridesharing vehicles;
- Promoting legal services without state-required licensing;
- In-store, liquid-crystal-display alcohol advertising;
- Converting existing commercial billboards to digital displays;
- Outdoor advertising of tobacco products;
- Advertising alcohol in student newspapers at state universities;
- Transfer, use, sale, and licensing of prescriber-identifiable data;
- Labeling on prescription drugs;
- Soliciting or accepting work from vehicles near public rights-of-way;
- Advertising handguns outside firearms dealerships;
- Maintaining buffer zones around abortion clinics;
- Physicians' discussing health-related issues of firearms with patients;
- Chiropractors' solicitation of accident victims;
- Commercial signs subject to size limitations by zoning restrictions;
- Student-loan information required by federal economic regulations;
- Recruiting and enrolling students at for-profit schools;
- Magazine publishers' selling subscribers' personal information without permission;
- Making robocalls to cell phones without permission;
- Commercial photography in neighborhood city parks without a permit;
- Booking services for unregistered city rental units;
- Using names and likenesses in commercial press releases without permission;
- Promoting psychologist's services by unlicensed individuals.⁹

Sorrell has also been argued as support for considering a number of other activities similarly worthy for protection, even though they lie considerably beyond historical understandings of commercial speech. Among these activities are:

⁹ See *infra* text accompanying notes 101-199 for fuller discussion of cases involved in these assertions.

- Complying with federal equal-employment regulations aimed at preventing retaliation against individuals filing disability-related charges;
- Complying with city prohibitions against employers inquiring into a prospective employee’s wage history;
- Trespassing on private property to gather environmental information;
- Consumer reporting agencies failing to protect confidential information;
- Complying with state medical investigators’ request for medical and billing records;
- Enrolling students in violation of state regulations on for-profit secondary schools;
- Accessing lists of registered voters without meeting state requirements;
- Identifying individuals involved in state lethal-injection executions.¹⁰

The arguments as to why such a diverse range of activities should be understood in the post-*Sorrell* era as worthy of First Amendment protection against regulation helps to illustrate the challenges facing lower courts. As completion of the first decade of adjudicating the commercial-speech doctrine since the historic 2011 ruling nears, the efforts of lower courts to address that rapidly growing body of *Sorrell*-grounded claims have only begun to bring the nature of the ruling’s impact on the doctrine into focus. On balance, their efforts remain far from coalescing into a consistent understanding. Indeed, this analysis finds that lower courts today are drawing upon a dizzying array of approaches and emphases in seeking to articulate and apply *Sorrell*.

As the following sections will elaborate, some courts have declared that *Sorrell* did not replace the *Central Hudson* intermediate-scrutiny analysis, while others distinguish *Sorrell* by emphasizing various essential facts that differ from dispositive elements of *Sorrell*. Some lower courts assert that *Sorrell* “adjusted” or “refined” the commercial-speech doctrine so as to require heightened judicial scrutiny on any content-based regulation of commercial expression. These courts specifically apply the fourth prong of the *Central Hudson* test in a manner that combines the second through fourth prongs in a new configuration that implements the heightened level of scrutiny that the *Sorrell* Court actually left unspecified.

Other lower courts have applied *Sorrell* in a manner that stresses a heightened level of scrutiny, but less clearly focused on a *Sorrell*-adjusted fourth prong of the *Central Hudson* test. Some courts are focusing on the new step of determining whether a challenged regulation on commercial speech is content-based, but then still proceeding with the *Central Hudson* test in a traditional manner – quite possibly *because* *Sorrell* did not actually define the heightened scrutiny that should be applied. Some courts seem to be applying a more aggressive *Central Hudson* test that focuses primarily on targeting “paternalism” in regulating commercial speech, and some courts have applied other particulars from *Sorrell* less systematically to strike down challenged regulations.

¹⁰ *See id.*

That range of activities in the lower courts will be reviewed more fully in section IV. Section II discusses the evolution of the commercial-speech doctrine over the course of the half-century preceding *Sorrell*, while section III more fully discusses that 2011 ruling. Finally, the article focuses particular attention on a pair of almost diametrically opposed analyses and rulings on the same case in the same circuit, which may offer the U.S. Supreme Court – if it should choose to weigh in on the debate any time soon – the most substantial and fully articulated arguments on what *Sorrell* has wrought in the commercial-speech doctrine.

II. EVOLUTION OF THE COMMERCIAL SPEECH DOCTRINE, PRE-*SORRELL*

The *Sorrell* ruling represents one of the most significant steps in the development of a First Amendment doctrine that has already evolved considerably since the Supreme Court declared midway through the 20th Century that the Constitution provided zero protection from government regulation for commercial speech. In 1942's *Valentine v. Chrestensen*, the Court held that commercial speech should not be able to “to achieve immunity from the law’s command,” in this case, an anti-litter ordinance, by appending to it a protected “civic appeal, or a moral platitude.”¹¹ While the Court has never rejected that part of the holding, it has wrestled with many questions on the degree to which commercial speech and political speech should be understood as distinct phenomena concerning the availability of First Amendment protection from regulation. In particular, the arc of rulings in the quarter-century since *Valentine* has been toward ever greater protection for commercial speech deemed to be truthful.¹²

Valentine represents not only the Court’s first statement on commercial speech, but also the beginning of commercial speakers’ efforts to gain First Amendment protection similar to the greater level afforded political expression. When promoter F.J. Chrestensen attempted to distribute a handbill advertising tours of a submarine he had anchored at a New York City dock, he was warned that distribution of commercial and business advertising matter on city streets violated an anti-littering code. Chrestensen then attempted to evade that sanction by printing a message of protest on the back of his handbills, seeking to imbue them with a less commercial and more political character. When police were not sympathetic to that messaging strategy, Valentine argued in court that the First Amendment should protect his handbills in the way it protected political speech.¹³ But the Supreme Court disposed of the question unanimously less than two weeks after hearing oral arguments with a four-page opinion declaring that although government was limited in the degree to which it could regulate freedom of speech on public streets, “We are equally clear that the Constitution imposes no such restraint on government as respects purely

¹¹ 316 U.S. 52, 55 (1942).

¹² Numerous articles discuss the development of the commercial speech doctrine. See, e.g., Soontae An, *From a Business Pursuit to a Means of Expression: The Supreme Court’s Disputes Over Commercial Speech from 1942 to 1976*, 8 COMM. L. & POL’Y 201 (2003); Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 CASE W. RES. L. REV. 681 (1997); Michael Feldman, *Survey of the Literature: Commercial Speech and Commercial Speakers*, 2 CARDOZO L. REV. 659 (1981); Arlen W. Langvardt, *The Incremental Strengthening of First Amendment Protection for Commercial Speech: Lessons from Greater New Orleans Broadcasting*, 37 AM. BUS. L.J. 587 (2000); Mary B. Nutt, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173 (1988); Peter J. Tarsney, *Regulation of Environmental Marketing: Reassessing the Supreme Court’s Protection of Commercial Speech*, 69 NOTRE DAME L. REV. 533 (1994).

¹³ 316 U.S. at 54.

commercial advertising.”¹⁴ The Court did concede that future cases might involve more complicated questions related to distinguishing commercial speech from political speech, but for the time being, “The stipulated facts justify the conclusion that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose of evading the prohibition of the ordinance.”¹⁵

That understanding of commercial speech as meriting no First Amendment restraint from government regulation firmly endured for twenty-two years until the Court held in *New York Times Co. v. Sullivan* – a libel action involving an advertisement that urged the public to support civil-rights activists against Southern repression – that advertising format alone could not bar expression from First Amendment protection.¹⁶ That started the Court off on a long journey through a series of challenges that, over the decades ahead, would significantly expand the scope of First Amendment protection for commercial speech.

In *Pittsburgh Press v. Pittsburgh Commission on Human Relations*¹⁷ in 1973, the Court drew upon the reasoning of the *Sullivan* Court to reject a newspaper’s argument that its help-wanted classified advertisements should not be considered commercial speech subject to a city regulation that banned segregation of help-wanted advertisements according to male or female interest.¹⁸ The Court concluded, however, that those ads did not express a position on “whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize” the regulation, but represented “no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.”¹⁹

Two years later, in declaring unconstitutional a Virginia statute that banned publication in the state of any advertisement for abortion services,²⁰ the Court in *Bigelow v. Virginia* distinguished such ads from the mere commercial proposals in *Pittsburgh Press* by emphasizing that the Virginia ads contained truthful information for a service that was legal in the state (New York) where the services were offered and contained material of public interest in the state where the commercial message was published.²¹ Still, the Court declined to decide “the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit.”²²

But just a year later, the Court for the first time established that even speech that does “no more than propose a commercial transaction” was not without any First Amendment protection.²³ In striking down a state statute prohibiting pharmacists from advertising the price of prescription drugs in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Court again focused on its assertion that the First Amendment restrains government from denying truthful information to citizens: “Virginia

¹⁴ *Id.* at 55.

¹⁵ *Id.*

¹⁶ 376 U.S. 254, 266 (1964).

¹⁷ 413 U.S. 376 (1973).

¹⁸ *Id.* at 388.

¹⁹ *Id.* at 385.

²⁰ 421 U.S. 809, 820-821 (1975).

²¹ *Id.* at 821-823 (1975) (citing 413 U.S. 376).

²² *Id.* at 824-825.

²³ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (quoting 413 U.S. at 385).

is free to require whatever professional standards it wishes of its pharmacists. ... But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering”²⁴ The Court grounded that assertion more broadly by advancing an understanding of commercial speech as contributing to something like a political marketplace of ideas:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.²⁵

Nevertheless, a concurring opinion stressed that the holding did not restrict government’s right to “take broader action to protect the public from injury produced by false or deceptive price or product advertising.”²⁶ Justice Potter Stewart’s concurrence explained that the advertiser’s “access to the truth about his product and its price substantially eliminates any danger that governmental regulation of false or misleading price or product advertising will chill accurate and nondeceptive commercial expression.”²⁷

In *Ohralik v. Ohio State Bar Association* two years after *Virginia Pharmacy*,²⁸ the Court made clear that it still intended to distinguish commercial and political expression for First Amendment purposes. In rejecting a lawyer’s challenge of his suspension from practice for face-to-face solicitation of business that was barred by state rules, the Court declared that to “require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment’s guarantee with respect to the latter kind of speech.”²⁹

And the correctness of Justice Stewart’s assertion that government’s power to regulate false commercial speech remained intact was demonstrated unequivocally two years after that when the Court established a four-part test for assessing the constitutionality of advertising regulations under intermediate scrutiny in *Central Hudson Gas and Electric v. Public Service Commission*.³⁰ Because First Amendment protection for commercial speech is based on the informational function of advertising, “consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity,”³¹ wrote Justice Lewis Powell for the majority, again emphasizing the “extensive knowledge” that commercial speakers have “of both the market and their products.”³²

²⁴ *Id.* at 770.

²⁵ *Id.* at 765.

²⁶ *Id.* at 776-777 (1976) (Stewart, J., concurring).

²⁷ *Id.* at 777 (Stewart, J., concurring).

²⁸ 436 U.S. 447 (1978).

²⁹ *Id.* at 456.

³⁰ 447 U.S. 557 (1980).

³¹ *Id.* at 563.

³² *Id.* at 564.

The threshold question in the four-part *Central Hudson* test is whether the speech at issue concerned lawful activity and was not misleading; failure to survive that prong of the test denies the speech any First Amendment protection.³³

In *Metromedia, Inc. v. City of San Diego*,³⁴ a year later, struck down a city ban on most outdoor signs because it permitted signs advertising goods or services available on sites where the goods or services were sold, but did not permit other, noncommercial messages on those signs.³⁵ The Court emphasized that the regulation had “invert[ed]” the doctrine of “recent commercial speech cases [that] have consistently accorded noncommercial speech a greater degree of protection than commercial speech” by “affording a greater degree of protection to commercial than to noncommercial speech.”³⁶

In 1983’s *Bolger v. Youngs Drug Products Corp.*, the Court provided guidance for distinguishing between commercial and noncommercial speech, in the course of holding that a condom manufacturer’s flyers and pamphlets commercially promoting its products – but also providing messages of social interest on venereal disease and family planning – could not be considered commercial messages subject to federal regulation.³⁷ To that end, the Court developed a three-part test that assessed the advertising format of the messages, reference to a specific product, and the economic motivation for disseminating the messages in combination.³⁸

In 1993, in *Edenfield v. Fane*,³⁹ the Court refocused on an aversion to regulation that limited citizens’ access to commercial information that sought “to communicate no more than truthful, nondeceptive information proposing a lawful commercial transaction,”⁴⁰ striking down a state ban on certified public accountants’ personal solicitation of prospective clients.⁴¹ Two years later, in *Rubin v. Coors*,⁴² the Court similarly emphasized that it could find no basis for failing to protect the dissemination of truthful, factual information from government regulation.⁴³ In that case, the Court held a federal law prohibiting beer labels from advertising alcohol content to be unconstitutional specifically because it failed both the third and fourth prongs of the *Central Hudson* test.⁴⁴

In 1996’s *44 Liquormart v. Rhode Island*⁴⁵ the Court demonstrated how divided it was concerning how and if its commercial-speech doctrine should further diminish the

³³ *Id.* at 566 (“At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”). The Court struck down a state ban on advertising that promoted use of electricity after determining that the ban failed the fourth prong of the test.

³⁴ 453 U.S. 490 (1981).

³⁵ *Id.* at 503-517.

³⁶ *Id.*

³⁷ 463 U.S. 60 (1983).

³⁸ *Id.* at 62-63, 65-68.

³⁹ 507 U.S. 761 (1993).

⁴⁰ *Id.* at 765.

⁴¹ *Id.* at 767-773. The State of Florida had argued the ban was aimed at preventing fraud, protecting the privacy of accountants’ potential clients, and maintaining the fact and appearance of accountants’ independence.

⁴² 514 U.S. 476 (1995).

⁴³ *Id.* at 484.

⁴⁴ *Id.* at 62-63, 65-68.

⁴⁵ 517 U.S. 484 (1996).

distinction between commercial and political expression. In striking down two Rhode Island statutes that prohibited the advertisement of alcohol prices anywhere in Rhode Island except at the point of purchase,⁴⁶ justices were splintered in their reasoning, with no more than four justices agreeing on what test should be applied to the commercial speech regulations involved. A majority agreed only on the judgment and the application of the Twenty-first Amendment to the issue, affirming that the “Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment.”⁴⁷ Otherwise, the nine justices aligned themselves into five groups with varied memberships of three or four justices each to join selected parts of the eight-part principal opinion.

Only two joined Justice John Paul Stevens’s argument that more rigorous scrutiny than *Central Hudson*’s intermediate scrutiny should be applied to regulations that entirely prohibit “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process.”⁴⁸ Justice Sandra Day O’Connor’s concurring opinion, joined by three other justices, specifically rejected any such departure from the *Central Hudson* test for considering First Amendment protection of the commercial speech involved.⁴⁹ In that concurrence, Justice O’Connor argued that the regulation would fail the fourth prong of the *Central Hudson* test because it was more extensive than necessary to serve its stated interest.⁵⁰

No one joined Justice Clarence Thomas in his concurring opinion arguing that government’s denying “legal users of a product” information in order to “manipulate their choices in the marketplace ... can no more justify regulation of ‘commercial’ speech than it can justify regulation of ‘noncommercial’ speech.”⁵¹ Despite arguing for full constitutional protection of truthful commercial speech, Justice Thomas’s concurrence seemed to support continued regulation of commercial speech that is false or misleading or proposes illegal transactions,⁵² and Justice Stevens did so unequivocally: “When a State regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the regulation’s purpose is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”⁵³

Five years later, in *Lorillard Tobacco v. Reilly*,⁵⁴ the Court noted that petitioners challenging state regulations on outdoor tobacco advertising had urged the Court to “reject the *Central Hudson* analysis and apply strict scrutiny”⁵⁵ on the ground that several justices had “expressed doubts about the *Central Hudson* analysis and whether it should apply in certain cases.”⁵⁶ The Court instead rejected any departure from *Central Hudson*, declaring

⁴⁶ *Id.* at 495-514. 517 U.S. 484, 518-528 (1996)

⁴⁷ *Id.* at 516.

⁴⁸ *Id.* at 501.

⁴⁹ *Id.* at 528, 532 (O’Connor, J., concurring).

⁵⁰ *Id.* at 529-532 (O’Connor, J., concurring).

⁵¹ *Id.* at 518. (Thomas, J., concurring). For discussion of Justice Thomas’s arguments for greater protection of commercial speech, see David L. Hudson, Jr., *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485 (2002)

⁵² *Id.* at 520 (Thomas, J., concurring).

⁵³ *Id.* at 501.

⁵⁴ 533 U.S. 525 (2001).

⁵⁵ *Id.* at 554.

⁵⁶ *Id.* For further discussion of the Court’s recent consideration of its *Central Hudson* test, see, e.g., Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism*

that its doctrine centered on the four-part test of intermediate scrutiny, “as applied in our more recent commercial speech cases, provides an adequate basis for decision.”⁵⁷ The Court held that the regulations involving advertising of cigars and smokeless tobacco failed the *Central Hudson* test as more extensive than necessary to advance the government’s substantial interest in preventing underage tobacco use,⁵⁸ while the regulations on advertising of cigarettes were found to be preempted⁵⁹ by the Federal Cigarette Labeling and Advertising Act.⁶⁰ The Court found that while the government’s stated interest in preventing use of tobacco by minors was

substantial, and even compelling ... it is no less true that the sale and use of tobacco products by adults is a legal activity. We must consider that tobacco retailers and manufacturers have an interest in conveying truthful information about their products to adults, and adults have a corresponding interest in receiving truthful information about tobacco products.⁶¹

Justice Thomas joined Chief Justice William H. Rehnquist and justices Antonin Scalia, Anthony Kennedy, and Sandra Day O’Connor (who wrote for that majority), but asserted in a concurring opinion that he would have subjected all of the advertising regulations in question to strict scrutiny rather than *Central Hudson*’s intermediate scrutiny. Nevertheless, Justice Thomas qualified his argument on strict scrutiny to specify that it would apply when “the government seeks to restrict truthful speech in order to suppress the ideas it conveys ... whether or not the speech in question may be characterized as ‘commercial.’”⁶²

III. SORRELL ENTERS THE COMMERCIAL-SPEECH LANDSCAPE

Thus, when *Sorrell v. IMS Health Inc.*⁶³ came before the Court, justices in preceding cases had expressed some disagreement about the appropriate level of constitutional protection for commercial speech, but no majority had come close to departing from the doctrine that had centered on *Central Hudson* for more than thirty years. Over the years, that doctrine has generated substantial scholarly criticism of its lesser protection for commercial expression,⁶⁴ support for maintaining that subordinate status,⁶⁵ and proposals

and Conflict in Commercial Speech Doctrine, 9 COMM. L. & POL’Y 237 (2004); Susan Dente Ross, *Reconstructing First Amendment Doctrine: The 1990s Revolution of the Central Hudson and O’Brien Tests*, 23 HASTINGS COMM. & ENT. L.J. 723 (2001); Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626 (1997).

⁵⁷ 533 U.S. at 554-555 (citing *Greater New Orleans Broadcasting v. United States*, 527 U.S. 173, 184 (1999) (holding unconstitutional federal regulations that prohibited casino gambling advertisements broadcast by stations located in states where such gambling was legal)).

⁵⁸ *Id.* at 566-66.

⁵⁹ *Id.* at 550-551.

⁶⁰ 15 U.S.C. § 1331 et seq.

⁶¹ *Id.* at 564.

⁶² *Id.* at 572 (Thomas, J., concurring).

⁶³ 564 U.S. 552 (2011).

⁶⁴ See, e.g., R. H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUDIES 1 (1977); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630-35 (1982); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627 (1990); Leo Bogart, *Freedom to Know or Freedom to Say?*, 71 TEX. L. REV. 815 (1993); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX.

for degrees of compromise.⁶⁶ Through all the debate at the Court, its holdings never wavered on the government's power to regulate false or deceptive speech. However, it increasingly focused the doctrine ever more intensely on preventing government's restricting truthful information, including aggressive rejection of the use of commercial-speech restrictions to discourage activities that government otherwise makes legal, even in the case of lawful but socially problematic products such as alcohol and tobacco.⁶⁷ While

L. REV. 777 (1993); Michael W. Field, *On Tap, 44 Liquormart, Inc. v. Rhode Island: Last Call For The Commercial Speech Doctrine*, Roger Williams, U. L. REV. 57 (1996); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart*, 1996 SUP. CT. REV. 123; Martin H. Redish, *First Amendment Theory and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy*, 24 N. KY. L. REV. 553 (1997); Brian J. Waters, *A Doctrine in Disarray: Why the First Amendment Demands the Abandonment of the Central Hudson Test for Commercial Speech*, 27 SETON HALL L. REV. 1626 (1997); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Martin H. Redish & Kyle Voils, *False Commercial Speech and the First Amendment: Understanding the Implications of the Equivalency Principle*, 25 WM. & MARY BILL OF RTS. J. 765 (2017).

⁶⁵ See, e.g., C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Thomas H. Jackson & John Calvin Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979); C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's "The Value of Free Speech,"* 130 U. PA. L. REV. 646 (1982); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985); R. Moon, *Lifestyle Advertising and Classical Freedom of Expression Doctrine*, 36 MCGILL. L. J. 76 (1991); Ronald K.L. Collins & David M. Skover, *The Psychology of First Amendment Scholarship: A Reply*, 71 TEX. L. REV. 819 (1993); Ronald K.L. Collins & David M. Skover, *Commerce and Communication*, 71 TEX. L. REV. 697 (1993); Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805 (1993); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Tamara R. Piety, *"Merchants of Discontent": An Exploration of the Psychology of Advertising, Addiction, and the Implications for Commercial Speech*, 25 SEATTLE UNIV. L. REV. 377 (2001); Bruce Ledewitz, *Corporate Advertising's Democracy*, 12 B. U. PUB. INT. L. J. 389 (2003); Robert L. Kerr, *A Justice's Surprise That Has Stood Its Ground: The Enduring Value of the Commercial Speech Doctrine's Powellian Balance*, 13 JOURN. & COMM. MONOGRAPHS 4 (2011); Richard Hamm, *Off the Streets: The Origins of the Doctrine of Commercial Speech*, 57 AM. J. LEGAL HIST. 495 (2017); Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73 (2018); Daniel J. Croxall, *Cheers to Central Hudson: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable*, 113 12 NW. U. L. REV. ONLINE. 1 (2018).

⁶⁶ See, e.g., Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212 (1983); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CIN. L. REV. 1317 (1988); Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205 (1988); Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181 (1988); Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411 (1992); Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 MD. L. REV. 55 (1999); Felix T. Wu, *The Commercial Difference*, 58 WM. & MARY L. REV. 2005 (2017).

⁶⁷ For further discussion of the evolution of the Court's doctrine so as to more greatly limit government's right to restrict non-misleading commercial communication about lawful products and services, see, e.g., Timothy R. Mortimer, *44 Liquormart, Inc. v. Rhode Island: A Toast to the First Amendment*, 32 NEW. ENG. L. REV. 1049 (1998); Michael Hoefges & Milagros Rivera-Sanchez, *"Vice" Advertising under the Supreme Court's Commercial Speech Doctrine: The Shifting Central Hudson Analysis*, 22 HASTINGS. COMM. & ENT. L. J. 345 (2000); Nicholas P. Consula, *The First Amendment, Gaming Advertisements, and Congressional Inconsistency: The Future of the Commercial Speech Doctrine after Greater New Orleans Broadcasting Association v. United States*, 28 PEPP. L. REV. 353 (2001); Michael Hoefges, *Protecting Tobacco Advertising Under the Commercial Speech Doctrine: The Constitutional Impact of Lorillard Tobacco Co.*, 8 COMM. L. & POL'Y. 267 (2003); Robert L. Kerr,

those doctrinal trends can be read to provide at least partial direction for the majority rationale that produced the holding in *Sorrell*, the turn the Court took in deciding that case nevertheless was excessive for some justices and many commentators.

In its resolution of *Sorrell* in the late Spring of 2011, the Court ruled unconstitutional a Vermont statute that restricted the sale, disclosure and use of prescriber histories for marketing purposes without the physician's consent.⁶⁸ The act targeted the practice of collecting data on the prescriptions individual physicians write and selling that data to pharmaceutical companies who, in turn, use the information to more successfully market their drugs to doctors.⁶⁹ According to the majority, Vermont was essentially trying to curb the effective promotion of brand-name prescription drugs in favor of generic alternatives.⁷⁰ Thus, the Court held that the statute restricted speech based on its content and on the identity of the speaker and, therefore, warranted heightened constitutional scrutiny under the First Amendment – although it did not specify that level of higher scrutiny.⁷¹

Vermont argued that the speech involved was simply a commercial regulation involving conduct rather than speech, and thus deserving of less protection.⁷² But the Court declared that the statute's restrictions on speech would not survive regardless of the scrutiny level used.⁷³ The Court reaffirmed the strong interest consumers have in receiving free-flowing commercial information and said that interest is especially important "in the fields of medicine and public health, where information can save lives."⁷⁴ The Court did not formally abandon its *Central Hudson* analysis as the constitutional test for restrictions, but indicated it would henceforth scrutinize regulations more stringently if they disfavored particular speakers and messages. The Court never defined what it meant by heightened scrutiny,⁷⁵ as lower courts would soon note.⁷⁶ For the *Sorrell* Court, the Vermont law's restricting marketing disfavored "speech with a particular content" and "specific speakers, namely pharmaceutical manufacturers" and, thus, imposed "burdens that are based on the content of speech and that are aimed at a particular viewpoint."⁷⁷

Writing for the majority, Justice Kennedy dismissed the government's asserted interest in protecting "medical privacy, including physician confidentiality, avoidance of harassment, and the integrity of the doctor-patient relationship"⁷⁸ as "manipulation to support just those ideas the government prefers."⁷⁹ The ideas that Justice Kennedy characterized as government-preferred were exceptions in the law that allow private or academic researchers access to the prescription records for non-commercial purposes.⁸⁰ Those exceptions, he wrote, were also evidence that the regulation "by design favored

From Sullivan to Nike: Will the Noble Purpose of the Landmark Free Speech Case be Subverted to Immunize False Advertising? 9 COMM. L. & POL'Y. 525 (2004).

⁶⁸ 564 U.S. at 557.

⁶⁹ *Id.* at 557-561.

⁷⁰ *Id.* at 576.

⁷¹ *Id.* at 557, 563, 565-566.

⁷² *Id.* at 566-567, 570.

⁷³ *Id.* at 571.

⁷⁴ *Id.* at 566.

⁷⁵ *Id.* at 571.

⁷⁶ See, e.g., *United States v. Caronia*, 703 F.3d 149, 163-164 (2d Cir. 2012).

⁷⁷ *Id.* at 564, 565.

⁷⁸ *Id.* at 572.

⁷⁹ *Id.* at 580.

⁸⁰ *Id.* at 559-560

speakers of one political persuasion over another.”⁸¹

That stroke alone – the majority’s ruling that the commercial purpose of a speaker represents no more than a viewpoint or political persuasion that the government may not burden with regulation it does not impose on non-commercial speakers – seemed to fracture the very foundation of the Court’s established commercial-speech doctrine. That foundation had long been grounded in subordinate status for commercial expression, which was considered to represent part of a contractual offering between seller and buyer and thus subject to very different considerations, since “[c]ontract law consists almost entirely of rules attaching liability to various uses of language,” and “the use of language to form contracts is not the sort of ‘speech’ to which the First Amendment applies.”⁸² The doctrine has also recognized the informational component of commercial speech, however. Thus, the four-part test established in *Central Hudson* is grounded in that contractual and informational conceptualization, providing an intermediate level of protection in the First Amendment hierarchy and requiring judicial review of challenged regulations of commercial speech to be conducted at a level of scrutiny between the higher level of strict scrutiny applied to regulation of political expression and the lower level of rational-basis scrutiny applied to regulations that do not infringe upon fundamental rights.⁸³

Considering *Sorrell* in that historical context, Justice Kennedy’s opinion paid minimal attention to the cornerstone *Central Hudson* test. He did cursorily acknowledge and purport to apply the test, but declared up front that “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied,” declaring that the government’s interests in the regulation did not withstand either.⁸⁴ And in dismissing a report that indicated some doctors had complained of feeling coerced and harassed by pharmaceutical marketers before the regulation was implemented, Justice Kennedy spoke of commercial speech with the same rhetoric that the Court has used to protect the most controversial political speech. “Many are those who must endure speech they do not like, but that is a necessary cost of freedom,”⁸⁵ he wrote, comparing the Court’s recent holding that the families of slain soldiers must endure harassment by politically motivated picketers in order to preserve First Amendment values to *Sorrell*’s assertion that marketing based on private prescription records must similarly be endured, because “[s]peech remains protected even when it may ‘stir people to action,’ ‘move them to tears,’ or ‘inflict great pain.’”⁸⁶

Thus, the ruling raised questions among other justices concerning its ramifications for a commercial-speech doctrine that long had permitted many regulations on commercial speakers that would not be permissible on noncommercial speakers. Justice Stephen Breyer argued in dissent that if extended in future cases, the reasoning of the *Sorrell* majority “would work at cross-purposes” with the Court’s established commercial-speech doctrine.⁸⁷ He formally applied the *Central Hudson* test in the more overt manner that had long been the Court’s practice in such cases, and concluded it showed the government had “developed

⁸¹ *Id.* at 574.

⁸² See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. L. REV. 372, 386-87 (1979).

⁸³ See KERR, *supra* note 65 for full discussion of the contractual/informational conceptualization of commercial speech in relation to development and endurance of the *Central Hudson* doctrine.

⁸⁴ 564 U.S. at 571.

⁸⁵ *Id.* at 575.

⁸⁶ *Id.* at 576 (quoting *Snyder v. Phelps*, 562 U.S. 443 460-461 (2011)).

⁸⁷ *Id.* at 584-585 (Breyer, J., dissenting).

a record that sufficiently shows that its statute meaningfully furthers substantial state interests.⁸⁸ Neither the majority nor respondents suggests any equally effective ‘more limited’ restriction,” and therefore, “if we apply an ‘intermediate’ test such as that in *Central Hudson*, this statute is constitutional.”⁸⁹ Justice Breyer characterized Justice Kennedy’s purported application of the *Central Hudson* test as an “unforgiving brand of ‘intermediate’ scrutiny”⁹⁰ and also warned that to “apply a strict First Amendment standard virtually as a matter of course when a court reviews ordinary economic regulatory programs (even if that program has a modest impact upon a firm’s ability to shape a commercial message)” would contradict the Court’s established commercial-speech doctrine.⁹¹

The Court has not addressed *Sorrell* substantially since then, but in concurring with the judgment in *Reed v. Town of Gilbert* in 2015, Justice Breyer pressed the argument that *Reed* and *Sorrell* both represent a dangerous trend of relying excessively on strict scrutiny when a lesser standard of review could resolve the issue.⁹² In *Reed*, the Court struck down an Arizona municipal sign code as unconstitutional content regulation because even though it did not discriminate against any viewpoint, it singled out subject matter for differential treatment by imposing shorter time limits on temporary directional signs than on political signs.⁹³ Both Justice Breyer’s separate concurrence⁹⁴ and Justice Elena Kagan’s concurrence joined by Justice Breyer and Justice Ruth Bader Ginsburg, contended the same ruling could have been reached through a lesser level of scrutiny.⁹⁵ Kagan declared there was “no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us.”⁹⁶ She warned that by potentially declaring that “strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption, ... courts will discover that thousands of towns have such ordinances,” and this “Court may soon find itself a veritable Supreme Board of Sign Review.”⁹⁷

Similarly, Piety warned in an analysis shortly after *Sorrell* that rather than “maintaining First Amendment protection for truthful commercial speech in order to protect consumers’ right to receive accurate product information,” as the Court had emphasized in a number of prior cases, it now seemed to “suggest any sales pitch may be protected as a ‘viewpoint.’” Going that direction would place the Court “in a position to pick and choose and selectively invalidate” any parts of any “regulation of commerce brought to it with which its majority disagrees.”⁹⁸ Kalinyak argued that while *Central Hudson* struck a balance between consumer protection and free market forces, *Sorrell* “implicitly destabilizes that balance.”⁹⁹ She warned that the pharmaceutical and tobacco industries in particular would seek to leverage the case to challenge other regulations aimed at protecting consumers and healthcare providers. “While not explicitly overturning” the *Central Hudson* test, the *Sorrell* “reasoning presents a serious implicit challenge to the resilience of the test

⁸⁸ *Id.* at 601 (Breyer, J., dissenting).

⁸⁹ *Id.*

⁹⁰ *Id.* at 592 (Breyer, J., dissenting).

⁹¹ *Id.* at 584.

⁹² 135 S. Ct. 2218, 2234-2236 (2015) (Breyer, J., concurring).

⁹³ *Id.* at 2224, 2230.

⁹⁴ *Id.* at 2234-2236 (Breyer, J., concurring).

⁹⁵ *Id.* at 2237-2239 (Kagan, J., concurring).

⁹⁶ *Id.* at 2239 (Kagan, J., concurring).

⁹⁷ *Id.*

⁹⁸ See PIETY, *supra* note 5 at 54.

⁹⁹ See KALINYAK, *supra* note 6 at 239.

in future commercial speech disputes.”¹⁰⁰ Dire warnings, indeed. Now that enough years have passed for a body of related cases to be adjudicated in the lower courts, the next section of this article proceeds to consider more closely the impact of *Sorrell* as it has played out in such proceedings.

III.A. CASES WITH UNSUCCESSFUL SORRELL-BASED ARGUMENTS

Shepardizing *Sorrell* for this study identified more than 80 instances in which lower courts have considered how that Supreme Court ruling should be applied for the purposes of resolving the cases before them, providing the body of data analyzed for this study. In some, of course, *Sorrell* proved not to play a major factor in the resolution of the cases. This study focuses on those in which its interpretation and application were relatively substantial factors in the outcome of the cases, particularly those in which parties involved in them invoked *Sorrell* as significant support for their arguments and/or the court applied it in reaching its decision.

As will be discussed, *Sorrell*'s invocation by parties before a number of lower courts has proven to be dispositive, including a number of holdings in which regulations and statutes were struck down only because of *Sorrell*. However, this review will begin by discussing the ways that – even though a large number and range of theories have successfully asserted *Sorrell* as justification for challenging all sorts of regulated activity – many courts are not accepting the arguments.

An illustrative example of how strongly *Sorrell*-based arguments have often been rejected can be found in the language employed in response to a challenge to a Massachusetts statute that maintained fixed and floating buffer zones around abortion clinics. “The plaintiffs base their claim on recent decisions of the Supreme Court standing for the wholly unremarkable proposition that content-based and speaker-based speech restrictions are disfavored,” pronounced the the U.S. Court of Appeals for the First Circuit in 2013’s *McCullen v. Coakley*. “In their view, these neoteric decisions have so reconfigured the First Amendment landscape as to justify a departure from the law of the case. This impressionistic argument, though ingenious, elevates hope over reason.”¹⁰¹

The cases referenced so dismissively by that court were *Sorrell*, along with *Citizens United v. FEC*¹⁰² and *Snyder v. Phelps*.¹⁰³ After disposing of plaintiffs’ assertions regarding the other two cases – “propositions ... [that] are no more than conventional First Amendment principles recited by the Supreme Court in the context of factual scenarios far different than the scenario at issue here”¹⁰⁴ – the appellate court proceeded to assess the relevance of *Sorrell* to the plaintiff’s argument as “equally mislaid.” Finding that the case involved a law that was neither content- nor speaker-based (in contrast to what the Court had held in *Sorrell*) and thus “could not be more different,” the appellate court characterized the plaintiff’s invocation of *Sorrell* as “a Rumpelstiltskin-like effort to turn straw into gold.”¹⁰⁵ The plaintiffs in that case fared better on appeal when the judgment was

¹⁰⁰ *Id.* at 240.

¹⁰¹ *McCullen et al. v. Coakley et al.*, 708 F.3d 1, 7 (1st Cir. 2013).

¹⁰² 558 U.S. 310 (2010). (holding that corporations may make unlimited political expenditures directly from their treasuries, and declaring unconstitutional virtually any limits on such spending).

¹⁰³ 562 U.S. 443 (2011) (affirming an appeals court reversal of a jury verdict of intentional infliction of emotional distress against picketers at a military funeral).

¹⁰⁴ 708 F.3d at 8.

¹⁰⁵ *Id.*

later overturned by the Supreme Court, which did so without any reference to *Sorrell* or the lower court's assessment of it.¹⁰⁶

Among lower courts ruling against parties that have asserted *Sorrell*, the basis for rejection can be categorized for the most part along one of three lines: countering assertions that *Sorrell* replaced the *Central Hudson* intermediate-scrutiny analysis with strict-scrutiny analysis in commercial-speech cases; stressing that *Sorrell*'s alteration of the commercial-speech doctrine in no way changed its fundamental grounding in providing zero constitutional protection for false or deceptive expression; or distinguishing *Sorrell* in other ways by emphasizing various contextual specifics that differentiate essential facts of cases before the courts from dispositive elements of *Sorrell*.

A. Central Hudson Standard Endures in 'Post-Sorrell Silence'

Some courts have strongly dismissed arguments that *Sorrell* had broadly replaced the *Central Hudson* intermediate-scrutiny analysis with a higher level of scrutiny in commercial-speech cases. The year after *Sorrell* was handed down, the Sixth Circuit federal court of appeals rejected a constitutional challenge to federal tobacco packaging and advertising regulations in which plaintiffs had argued for strict scrutiny instead of *Central Hudson* intermediate scrutiny. "We see no reason to now upend the longstanding approach that the courts have taken respecting restrictions on commercial speech in favor of Plaintiffs' suggestion," that court responded. "We review the [challenged regulation's] restrictions on commercial speech, subject to the framework initially set forth in *Central Hudson Gas & Elec. Corp.*"¹⁰⁷

In 2016's *Boelter v. Advance Magazine Publishers*, the federal district court for the Southern District of New York rejected an argument by a magazine publisher that *Sorrell* justified striking down the Michigan privacy act it violated by disclosing a subscriber's confidential information.¹⁰⁸ Finding that its reading of *Sorrell* showed the privacy regulations in question to be "comparatively well-crafted,"¹⁰⁹ the district court applied established *Central Hudson* intermediate scrutiny in upholding the regulations, dismissing the publisher's assertion that since *Sorrell*, "all content-based regulations of speech are subject to strict scrutiny." It declared that "absent further guidance from the Supreme Court or the Second Circuit, we join numerous courts in applying *Central Hudson* to commercial speech" since *Sorrell*.¹¹⁰

A year later, the federal district court for the Northern District of Illinois, Eastern Division, upheld the constitutionality of a city ordinance prohibiting advertising inside vehicles of ridesharing services,¹¹¹ holding that the challenge's invoking of *Sorrell* and *Reed v. Town of Gilbert*¹¹² relied "on the misguided belief that restrictions on non-misleading commercial speech that does not concern unlawful activity are per se content-based, and

¹⁰⁶ McCullen, et al. v. Coakley, et al., 134 S. Ct. 2518, (2014) (agreeing that the Massachusetts statute was content-neutral, but holding that it was not narrowly drawn. *Id.* at 2531, 2537). See *infra* text accompanying notes 140-146 for fuller discussion of how a holding of content-neutrality renders *Sorrell* inapplicable.

¹⁰⁷ *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 522 (6th Cir. 2011).

¹⁰⁸ 210 F. Supp. 3d 1, 579, 584 (S.D.N.Y. 2016).

¹⁰⁹ *Id.* at 601.

¹¹⁰ *Id.* at 598 n.15.

¹¹¹ *Vugo, Inc. v. City of Chi.*, 273 F. Supp. 3d 910, 579, 584 (N.D. Ill. 2017).

¹¹² 135 S. Ct. 2218 (2015). See *supra* text accompanying notes 92-97 for discussion of *Reed*.

thus subject to the higher level of scrutiny the Court applies to such restraints.”¹¹³ The court found the ordinance survived the established *Central Hudson* intermediate scrutiny, and to the argument that “any governmental restraint on commercial speech, unless directed to misleading speech or to speech concerning an unlawful activity, is per se content based and thus subject to strict scrutiny,” stated flatly: “No court has interpreted *Reed* or *Sorrell* so broadly, however, and the decisions themselves do not suggest that the Court intended such a sweeping shift in the law.”¹¹⁴

The appellate division of the Superior Court of New Jersey similarly applied the established *Central Hudson* intermediate scrutiny and boldly laid out its basis for doing so in upholding the constitutionality of a state measure that bars employers seeking to fill job vacancies posting advertisements stating applicants must be currently employed.¹¹⁵ It acknowledged it did so “mindful” that the *Sorrell* majority had indicated “a more rigorous test of ‘heightened judicial scrutiny’ should be applied to certain forms of restrictions on commercial speech” but also that despite that, “the Court still applied the traditional *Central Hudson* analysis for restrictions on commercial speech (i.e., intermediate, not heightened, scrutiny), to the facts in *Sorrell*, and did not articulate how the ‘heightened scrutiny’ test should be applied going forward.”¹¹⁶ Further, the New Jersey court observed, “we also find it significant that the United States Supreme Court has yet to issue an opinion applying the ‘heightened scrutiny’ test intimated by *Sorrell* to a restriction on commercial speech” or “clearly elucidated what that ‘heightened scrutiny’ might entail.”¹¹⁷ That, it concluded, explains why, “[i]n the wake of the Supreme Court’s post-*Sorrell* silence and inaction, many federal and state courts are continuing to apply the standard set forth in *Central Hudson*.”¹¹⁸

Most recently, the federal court for the Eastern District of Pennsylvania upheld part and struck down part of a city ordinance prohibiting employers from inquiring into a prospective employee’s wage history and relying on that history to determine an employee’s salary.¹¹⁹ In doing so, it also applied established *Central Hudson* intermediate scrutiny to the ordinance, declining the plaintiff’s *Sorrell*-grounded assertion that strict scrutiny should apply.¹²⁰ “Whether the Supreme Court upended the *Central Hudson* intermediate scrutiny test” in *Sorrell* or *Reed* “for content-based or speaker-based commercial speech regulations is not abundantly clear,” it said in explaining its decision, because “*Reed* does not address commercial speech,” and “*Sorrell* references a ‘heightened scrutiny,’ but it is just as likely that this is the same as intermediate scrutiny, which is stricter than rational basis scrutiny.”¹²¹ It further observed that since *Sorrell* and *Reed*, “circuit courts confronted with content- and speaker-based restrictions on commercial speech have continued to apply *Central Hudson*’s intermediate scrutiny rather than strict scrutiny.”¹²²

B. No Change on Communication More Likely to Deceive Than Inform

¹¹³ 273 F. Supp. 3d at 915.

¹¹⁴ *Id.* at 916.

¹¹⁵ New Jersey Dept. of Labor and Workforce Development v. Crest Ultrasonics, 82 A.3d 258 (N.J. Super. Ct. App. Div. 2014).

¹¹⁶ *Id.* at 267-268.

¹¹⁷ *Id.* at 268.

¹¹⁸ *Id.*

¹¹⁹ Chamber of Commerce for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773, 779 (E.D. Pa. 2018).

¹²⁰ *Id.* at 785.

¹²¹ *Id.* at 784.

¹²² *Id.*

Other courts have also resisted arguments that *Sorrell* sweepingly requires strict scrutiny, as in the federal district court for Massachusetts’s rejection of a challenge to state regulations on recruiting and enrolling students in for-profit schools that relied heavily on *Sorrell*.¹²³ It characterized *Sorrell* as “not as expansive as” the private-school-association plaintiff asserted and as “replete with language indicating that the Supreme Court would not categorically apply strict scrutiny to content-based commercial-speech regulations that are justified on consumer-protection grounds.”¹²⁴ That led the Massachusetts court to ultimately focus on another understanding of *Sorrell*’s significance that has proven to be an important theme for many lower courts – stressing that *Sorrell*’s alteration of the commercial-speech doctrine did not change its fundamental grounding in providing no constitutional protection for false or deceptive expression.

In particular, it stressed that *Sorrell* and *Reed*, which the plaintiff also invoked, “do not appear to overrule, or diminish, the well-established principle” that regulation of commercial messages for the purpose of protecting “consumers from misleading, deceptive, or aggressive sales practices,” or disclosing “beneficial consumer information ... is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.”¹²⁵ Other lower courts, in rejecting *Sorrell*-grounded arguments for heightened scrutiny have declared “the most important question in determining what level of scrutiny the court should apply is whether” the challenged regulation “simply prohibits false, misleading, or unlawful speech,”¹²⁶ because it is a well-settled proposition that government “may ban forms of communication more likely to deceive the public than to inform it.”¹²⁷

C. Distinguishing *Sorrell*

Beyond that emphasis on what *Sorrell* may offer parties seeking First Amendment protection for expression, lower courts are also distinguishing *Sorrell* from cases before them by pointing out material facts in those cases that differ from the facts of *Sorrell*. For example, the federal district court for the Southern District of New York in 2016 upheld a Michigan privacy law that prohibited all businesses that sell, rent, or lend any printed or recorded materials from disclosing identifiable information about individuals. The court cited several statements in *Sorrell* to distinguish the Vermont law it rejected because it restricted only a limited group of health insurers and pharmacies.¹²⁸

In rejecting a First Amendment challenge to a Maryland law that limited access to the state’s lists of registered voters to Maryland residents, the federal district court for Maryland in 2018 emphasized that, in contrast, the law rejected in *Sorrell* restricted access to “information in private hands” by “prohibiting a speaker from conveying information that the speaker already possess[e]” – a significant distinction because “[a]n individual’s

¹²³ *Massachusetts Association of Private Career Schools v. Healey*, 159 F. Supp. 3d 173, 190 (D. Mass. 2016).

¹²⁴ *Id.* at 190-191.

¹²⁵ *Id.* at 193 (quoting *44 Liquormart v. Rhode Island*, 517 U.S. 484, 501 (1996)).

¹²⁶ *Gonzalez-Colon v. Estado Libre Asociado De Puerto Rico*, 2018 U.S. Dist. LEXIS 113594, 18 (D.P.R., May 16, 2018).

¹²⁷ *State ex rel. Wilson v. Ortho-Mcneil-Janssen Pharms.*, 414 S.C. 33, 777 S.E.2d 176 (S.C. 2015) (quoting *Central Hudson Gas and Electric v. Public Service Commission*, 447 U.S. 557, 563 (1980)).

¹²⁸ *Boelter v. Hearst Communs., Inc.*, 192 F. Supp. 3d 427, 584 (S.D.N.Y. 2016) (quoting *Sorrell v. IMS Health*, 564 U.S. 552, 564-579 (2011)).

right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which the information might be used’ or disseminated.’”¹²⁹

Rejecting a *Sorrell*-based challenge to a federal-court-issued protective order that blocked insurance companies’ access to health records of an auto-accident victim, the federal court for the Northern District of Virginia focused on the “key distinction ... in the nature of the records” involved. In contrast to the law challenged in *Sorrell* that “prohibited sales of prescriber-identifying information for marketing purposes to ‘data miners’ without the prescriber’s consent,” but not to others (for research, compliance with insurance formularies, educational communications, and law enforcement), the individual with the protective order was seeking “to protect his own personal health care records from dissemination to everyone not entitled to them for the evaluation and resolution ... of his claims,” records which “are not public records required to be maintained ... by federal and state law.”¹³⁰ More recently, the same court rejected a physician’s *Sorrell*-based argument against complying with state medical investigators’ request for medical and billing records. The court emphasized that while *Sorrell* “is a First Amendment case, which merely observes that states have a legitimate interest in protecting the privacy of medical records on behalf of doctors,” it could not “infer from *Sorrell* a reasonable expectation of privacy in patient records on the part of doctors” against a state medical board.¹³¹

A *Sorrell*-based argument that state regulations forbidding promotion of legal services by individuals without state-required licensing should be subjected to strict scrutiny was dismissed by the federal court for the Southern District of Texas in 2017. It distinguished the Texas Penal Code’s regulation of commercial speech “in which persons who are not lawyers try to profit from holding themselves out as lawyers with the right to practice in this state” from any justification provided by *Sorrell* that individuals who try to do so are engaged in “any type of expressive speech or matters of interest to public discourse” that are unconstitutionally restricted.¹³²

A number of lower courts are also distinguishing cases involving *Sorrell*-grounded arguments by emphasizing that the laws involved are not content-based. For example, the federal appellate court for the Ninth Circuit declined to strike down two state requirements that pharmacy benefit managers bi-annually report the results of studies of retail drug pricing. The court asserted that the managers “remain free, in reporting survey results ... to assert any viewpoint they would like. They may encourage action or inaction on the basis of the statistics, or they may say that the report is worthless, sent only under government mandate” and therefore the challenged regulations do not “alter or burden speech otherwise protected under the First Amendment.”¹³³ Neither of the challenged regulations “directly restricts nor results in the chilling of protected speech,” the court said, “and accordingly places no such burden on any expression. The absence of any such burden is what saves [the regulations] from the Vermont law’s fate” in *Sorrell*, the appellate court declared.¹³⁴

¹²⁹ *Fusaro v. Davitt*, 327 F. Supp. 3d 907, 923 (D. Md. 2018) (quoting 564 U.S. at 568 (quoting *Los Angeles Police Dep’t v. United Reporting Pub. Corp.*, 528 U.S. 32, 40 (1999))).

¹³⁰ *Small v. Ramsey*, 280 F.R.D. 264, 282 (N.D. Va. 2012) (citing 564 U.S. at 557-558).

¹³¹ *Barry v. Freshour*, 905 F.3d 912, 915 (N.D. Va. 2018) (citing 564 U.S. at 571-572).

¹³² *Celis v. Williams*, 2017 U.S. Dist. LEXIS 40901, 15 (S.D. Texas, March 21, 2017).

¹³³ *Jerry Beeman & Pharm. Servs. v. Anthem Prescription Mgmt., LLC*, 652 F.3d 1085, 1101 (9th Cir. 2011).

¹³⁴ *Id.* at 1101 n.17.

Lower courts have also emphasized the absence of content-based restrictions in upholding *Sorrell*-grounded challenges to laws, for example, involving a prohibition on commercial photography in neighborhood city parks without a permit,¹³⁵ an injunction for engaging in real estate with the required state license,¹³⁶ restrictions on conversion of existing commercial billboards to digital displays,¹³⁷ student-loan information required by federal economic regulations,¹³⁸ and restrictions on accessing the identities of individuals involved in state lethal-injection executions.¹³⁹

Beyond distinguishing challenged laws that are not content-based, lower courts also are clarifying some cases that include *Sorrell*-grounded First Amendment arguments by emphasizing that the *Sorrell* Court did not “take issue with Vermont’s law merely because it imposed a content- and speaker-based restriction on commercial speech, but because its restriction could not be justified on neutral grounds.”¹⁴⁰ In that challenge to federal law requiring consumer reporting agencies to protect individuals’ confidential information, the federal court for the Eastern District of Pennsylvania considered the agencies’ assertion that the federal “restriction on the dissemination of truthful commercial information cannot survive the ‘heightened’ constitutional scrutiny” required since *Sorrell*’s alteration of First Amendment law.¹⁴¹ However, while “the *Sorrell* decision reaffirms the core meaning of the First Amendment and attempts to guide lawmakers trying to protect privacy interest without unduly suppressing speech,” the Pennsylvania court declared, it “stopped far short of overhauling nearly three decades of precedent, which is clearly demonstrated by the fact that the opinion characterizes commercial speech [precedents], including *Central Hudson* itself, for support.”¹⁴² Therefore, if “the Court wished to disrupt the long-established commercial speech doctrine as applying intermediate scrutiny, it would have expressly done so. Absent express affirmation, this Court will refrain from taking such a leap.”¹⁴³ In support of that conclusion, the Pennsylvania Court cited *Sorrell*’s emphasis on the Vermont law’s lack of neutral justification, in contrast to the federal consumer-reporting law’s neutral purpose of providing “businesses with the most accurate and relevant information while simultaneously protecting the privacy rights of consumers.”¹⁴⁴ Lower courts have also emphasized the neutral justification of content-based regulations in upholding *Sorrell*-grounded challenges to laws involving chiropractors’ solicitation communications with accident victims¹⁴⁵ and alteration of state public-employee labor laws.¹⁴⁶

IIIB. FOURTH PRONG SUCCESS FOR SORRELL-BASED ARGUMENTS

Although many courts for reasons discussed in the preceding section have rejected parties’ assertion of *Sorrell* as justification for their arguments, *Sorrell*-based theories have also found considerable success elsewhere in the lower courts. Less than nine months after

¹³⁵ *Havlak v. Vill. of Twin Oaks (In re Josephine Havlak Photographer, Inc.)*, 864 F.3d 905, 915 (8th Cir. 2017).

¹³⁶ *Kan. City Premier Apts., Inc. v. Mo. Real Estate Comm’n*, 344 S.W.3d 160, 169 n.3 (Mo. 2011).

¹³⁷ *Lamar Central Outdoor, LLC v. City of Los Angeles*, 245 Cal. App. 4th 610, 623 (Ct. App 2016).

¹³⁸ *Consumer Fin. Prot. Bureau v. ITT Educ. Servs.*, 219 F. Supp. 3d 878, 902 (S.D. Ind. 2015).

¹³⁹ *Zink v. Lombardi*, 783 F.3d 1089, 1113 (8th Cir. 2015).

¹⁴⁰ *King v. General Info. Servs.*, 903 F. Supp. 2d 303, 309 (E.D. Penn. 2017) (citing 564 U.S. at 579).

¹⁴¹ *Id.* at 306.

¹⁴² *Id.* at 308 (citing 564 U.S. at 565-566, 570-571).

¹⁴³ *Id.* at 308.

¹⁴⁴ *Id.* at 309.

¹⁴⁵ *Chiropractors United for Research & Educ., LLC v. Conway*, 2015 U.S. Dist. LEXIS 133559, 11-12 (W.D. Ky, Oct. 1, 2015).

¹⁴⁶ *Wis. Educ. Ass’n Council v. Walker*, 705 F.3d 640, 648 (7th Cir. 2013).

Sorrell was handed down, the federal district court for Massachusetts declared that it was “the Court’s last word to date regarding restrictions on commercial speech.” In striking down as unconstitutional a city ordinance prohibiting outdoor advertising of tobacco products, that court relied heavily on *Sorrell* in reaching its decision: “Under *Sorrell*, [the City of] Worcester may not prohibit tobacco advertisements in order to prevent adults from making the choice to legally purchase tobacco products.”¹⁴⁷ It dismissed the city’s argument that some of the products being advertised were also illegal in the city and that it had a substantial interest in the saving of lives and reducing illness and medical expense through discouraging use of tobacco products. Instead, the court focused on its interpretation of how the fourth prong of the *Central Hudson* test, as altered by *Sorrell*, outweighed the city’s arguments. “The *Sorrell* Court did not address the substantial interest prong of the *Central Hudson* test,” it asserted. “Instead, the *Sorrell* decision skipped ahead to the direct advancement factor” and stated “While Vermont’s stated policy goals may be proper, [the statute] does not advance them in a permissible way.”¹⁴⁸

The Massachusetts’ district court’s focus on the the fourth prong of the *Central Hudson* analysis as dispositive reflects a strong trend among a number of lower courts that have taken that as the key meaning of *Sorrell* in ruling favorably for parties challenging government regulations. The same year, the federal district court for Arizona upheld a challenge to a state act that made it illegal for anyone in a motor vehicle stopped on a roadway to attempt to hire a person for work elsewhere or for a person to enter such a motor vehicle in order to be hired. The court drew upon the way *Sorrell* had “refined” the *Central Hudson* test.¹⁴⁹ It also specified how it understood that refinement as having melded multiple elements of that test so as to alter the function of the fourth prong: “In *Sorrell*, the Supreme Court emphasized the second, third, and fourth elements of the *Central Hudson* test, stating, ‘To sustain the targeted, content-based burden [the statute at issue] imposes on protected expression, the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.’” That revision means thenceforth, “if a ban on commercial speech is content-based, *Sorrell* instructs that it must be ‘drawn to achieve’ ‘a substantial governmental interest,’ whereas the *Central Hudson* test requires that the regulation not be ‘more extensive than is necessary to serve that interest.’”¹⁵⁰

After applying the first three prongs of the *Central Hudson* test in established pre-*Sorrell* terms and finding the challenged law survived all three, the Arizona court then clarified how it applied that “refined” fourth prong: *Sorrell*’s holding that “a content-based restriction on commercial speech must be ‘drawn to achieve’ a substantial governmental interest. ‘There must be a fit between the legislature’s ends and the means chosen to accomplish those ends.’”¹⁵¹ It compared that post-*Sorrell* fourth prong to the previous version by characterizing the latter as substantially similar to the “time, place, and manner restrictions for content-neutral speech” until “*Sorrell* tightened the test for content-based bans on commercial speech.”¹⁵² In applying the “refined” or “tightened” fourth prong, the court concluded the government had not shown the challenged law was “drawn to achieve

¹⁴⁷ Nat’l Ass’n of Tobacco Outlets v. City of Worcester, 851 F. Supp. 2d 311, 319 (D. Mass. 2012).

¹⁴⁸ *Id.* at 318 (quoting 564 U.S. at 577).

¹⁴⁹ Friendly House v. Whiting, 846 F. Supp. 2d 1053, 1057, 1062 (D. Ariz. 2012).

¹⁵⁰ *Id.* at 1057-1058 (quoting 564 U.S. at 572) (citing *Central Hudson Gas and Electric v. Public Service Comm’n*, 447 U.S. 557, 566 (1980)).

¹⁵¹ *Id.* at 1059-1060 (quoting 564 U.S. at 572) (quoting *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469 (1989)).

¹⁵² *Id.* at 1060.

the substantial governmental interest in traffic safety” and “because the regulation is content-based and applies only to solicitation of employment, not other types of solicitation, it appears to be structured to target particular speech rather than a broader traffic problem.”¹⁵³ The federal court for the Eastern District of New York declared unconstitutional on a similar basis in 2015 a city ordinance that made essentially the same activities illegal.¹⁵⁴

The federal appeals court for the Fourth Circuit in 2013 focused on that understanding of a revised *Central Hudson* fourth prong in declaring unconstitutional a state ban on advertising of alcohol in student newspapers at state universities “because the advertising ban is not appropriately tailored to Virginia’s stated aim” of reducing underage and abusive alcohol consumption.¹⁵⁵ The challenge to the ban relied primarily on *Sorrell*, and the appeals court concluded that “the challenged regulation fails under the fourth *Central Hudson* prong because it prohibits large numbers of adults who are 21 years of age or older from receiving truthful information about a product that they are legally allowed to consume.”¹⁵⁶ As in other courts so applying the *Central Hudson* fourth prong, the Fourth Circuit held *Sorrell* dictated that element must outweigh a government interest accepted as substantial, in this case preventing abusive drinking. The court declared that “regardless of the importance of this interest,” the ban order does exactly what *Sorrell* prohibits: it attempts to keep would-be drinkers in the dark based on what the [state] perceives to be their own good.”¹⁵⁷ While focusing somewhat less overtly and centrally on the fourth prong, in finding most of a state law restricting physicians’ discussions with their patients concerning health-related issues of firearms in the home unconstitutional in 2017, the appeals court for the 11th Circuit held that the state had not shown that most of the law was narrowly drawn to advance its interests in protecting Second Amendment rights.¹⁵⁸

A. Other Approaches by Courts Accepting *Sorrell*-Based Theories

Another group of cases in which *Sorrell*-based arguments have found success in the lower courts emphasizes somewhat different terms. Those courts have asserted that what is first required is a focus on determining whether a challenged regulation is content-based, but then often proceeding with the established *Central Hudson* test, on the reasoning that the *Sorrell* Court did not define the heightened scrutiny that should be applied instead.

One of the more influential rulings advancing that approach has been the opinion of the federal appeals court for the Second Circuit in 2012’s *United States v. Caronia*.¹⁵⁹ In that successful First Amendment challenge to a federal conviction for illegally promoting an approved drug for off-label uses, the Second Circuit relied centrally on *Sorrell*’s holding that “speech in aid of pharmaceutical marketing” is a form of expression protected by the First Amendment. The court concluded that the defendant “was prosecuted [for] precisely his speech in aid of pharmaceutical marketing.”¹⁶⁰ In reversing the conviction by the district court, the appellate opinion made clear “we have a benefit not available to the district court:

¹⁵³ *Id.*

¹⁵⁴ *De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 128 F. Supp. 3d 597, 601 (E.D.N.Y. Ariz. 2015).

¹⁵⁵ *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 294, 301 (4th Cir. 2013).

¹⁵⁶ *Id.* at 301.

¹⁵⁷ *Id.* at 302.

¹⁵⁸ *Wollschlaeger v. Governor*, 848 F.3d 1293, 1301, 1312 (11th Cir. 2017).

¹⁵⁹ *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012).

¹⁶⁰ *Id.* at 152, 162 (quoting 564 U.S. at 557).

the Supreme Court's decision in *Sorrell*.¹⁶¹ Despite so squarely focusing on *Sorrell* and concluding that the conviction was reached under provisions of law it deemed “content- and speaker-based, and, therefore, subject to heightened scrutiny,” however, the *Caronia* Court did not apply such scrutiny.¹⁶² Instead, it followed what it characterized as “the *Sorrell* Court’s two-step analysis” for determining whether a challenged regulation is constitutional under the First Amendment:

Considering first, as the *Sorrell* Court did, if the government regulation restricting speech was content- and speaker-based, and then second “whether the government had shown that the restriction on speech was consistent with the First Amendment under the applicable level of heightened scrutiny.”¹⁶³ However, as the *Caronia* Court emphasized, the Supreme Court “did not decide the level of heightened scrutiny to be applied, that is, strict, intermediate, or some other form of heightened scrutiny,” but instead “concluded that the Vermont statute was unconstitutional even under the lesser intermediate standard set forth in *Central Hudson*” and that “the outcome is the same” as if “a stricter form of judicial scrutiny is applied.”¹⁶⁴

Therefore, that was how the Second Circuit reviewed the challenged law in *Caronia*, similarly concluding that “the government cannot justify a criminal prohibition of off-label promotion even under *Central Hudson*’s less rigorous intermediate test.”¹⁶⁵ That review led it to conclude that the challenged law failed to survive both the third and fourth prongs of established *Central Hudson* intermediate scrutiny.¹⁶⁶ In rejecting a challenge to state regulations on advertising involving insurance benefits for accident victims two years after that, the federal district court for Minnesota also highlighted the *Sorrell* Court’s not defining or applying heightened scrutiny and declared, “The upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*.”¹⁶⁷

Other courts have emphasized various additional particulars from *Sorrell* in resolving related cases. That has included, for example, articulating its significance to require a more aggressive *Central Hudson* test in which “paternalism” is asserted as fiercely banned by *Sorrell* – although that term is not actually used in the Supreme Court’s opinion. The very recent opinion of the federal district court for Eastern California provides a substantial example of that in a 2018 ruling that declared unconstitutional a California statute that prohibited advertising handguns outside firearms dealerships.¹⁶⁸ Rather than focusing either on the *Sorrell*-adjusted fourth prong of the *Central Hudson* test¹⁶⁹ or on the

¹⁶¹ *Id.* at 163.

¹⁶² *Id.* at 164-165 (citing 564 U.S. at 571).

¹⁶³ *Id.* at 164-165 (citing 564 U.S. at 563-572).

¹⁶⁴ *Id.* at 163-164 (quoting 564 U.S. at 571).

¹⁶⁵ *Id.* at 164-165.

¹⁶⁶ *Id.* at 166-167.

¹⁶⁷ 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1050, 1055 (8th Cir. 2014). The court concluded that the commercial speech in question was deceptive and thus not deemed ineligible for First Amendment protection under the first prong of the *Central Hudson* test. *Id.* at 1056.

¹⁶⁸ Tracy Rifle & Pistol LLC v. Harris, 2018 U.S. Dist. LEXIS 154926, 26 (E.D. Calif., Sept. 11, 2018).

¹⁶⁹ See *supra* text accompanying notes 147-158 for fuller discussion of cases emphasizing *Sorrell*-adjusted fourth prong of the *Central Hudson* test.

two-step *Sorrell* analysis of *Caronia*,¹⁷⁰ that court applied the *Central Hudson* test for the most part as it had been established pre-*Sorrell*.¹⁷¹

After finding that the challenged law survived the first two prongs of *Central Hudson*, in applying the third and fourth prong it emphasized *Sorrell*'s rejection of what it characterized as a "highly paternalistic approach to limiting speech."¹⁷² It declared that through the California law, the government "aims to stop a group of law-abiding adults with the shared personality trait of 'impulsiveness' from making what it sees the bad decision of purchasing a handgun," believing "if it can inhibit such persons from making the initial decision to purchase a handgun, it will save them from harming themselves or others with the handgun at some later date."¹⁷³ The district court rejected such an aim, asserting that government "may not restrict speech that persuades adults, who are neither criminals nor suffer from mental illness, from purchasing a legal and constitutionally-protected product, merely because it distrusts their personality trait and the decisions that personality trait may lead them to make later down the road."¹⁷⁴ Therefore, it "impermissibly seeks to achieve its goals through the indirect means of restricting certain speech by certain speakers based on the fear that a certain subset of the population with a particular personality trait could potentially make what the Government contends is a bad decision."¹⁷⁵ The court also rejected all of the state's expert testimony on studies in support of the challenged law's effectiveness and concluded that it failed both the third and fourth prongs of the *Central Hudson* test.¹⁷⁶

Still other courts finding elements of *Sorrell* significant have applied such particulars even less systematically than focusing either on the *Sorrell*-adjusted fourth prong of the *Central Hudson* test or on the two-step *Sorrell* analysis of *Caronia*. In one example, the federal appeals court for the 11th Circuit emphasized *Sorrell*'s expansive recognition of the "creation and dissemination of information" as expression qualifying for First Amendment protection to overturn a conviction for trespassing on private property in order to gather environmental information.¹⁷⁷ In another, the federal court for the Middle District of North Carolina drew upon *Sorrell*'s holding that regulation of prescriber information is subject to heightened scrutiny because it "imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint."¹⁷⁸ It declared unconstitutional a state law requiring healthcare providers to provide specified information to patients seeking an abortion in part because the court found it did not "advance any of the proffered state interests" and was not "drawn to achieve a substantial state interest."¹⁷⁹

IV. AN OPPORTUNITY FOR CLARIFICATION

¹⁷⁰ See *supra* text accompanying notes 159-167 for fuller discussion of cases emphasizing the two-step *Sorrell* analysis of *Caronia*.

¹⁷¹ Tracy Rifle & Pistol, 2018 U.S. Dist. LEXIS 154926, 7-26.

¹⁷² *Id.* at 12 (citing 564 U.S. at 577).

¹⁷³ *Id.* at 13.

¹⁷⁴ *Id.* The state had argued that the challenged law directly advanced its "interest in decreasing handgun suicides because the law inhibits handgun purchases by people with impulsive personality traits, who, as a group, are at a higher risk for suicide than the population in general." *Id.* at 10.

¹⁷⁵ *Id.* at 14. The district court also found the challenged law "fatally underinclusive." *Id.* at 14-15.

¹⁷⁶ *Id.* at 22, 26.

¹⁷⁷ *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1191 (10th Cir. 2017) (quoting 564 U.S. at 570).

¹⁷⁸ *Stuart v. Loomis*, 992 F. Supp. 2d 585, 598-599, (M.D.N.C. 2014) (citing 564 U.S. at 557, 563-565).

¹⁷⁹ *Id.* at 594, 600, 607.

As discussed above, the process of articulating the meaning of *Sorrell* is far from coalescing into anything that can yet be considered a consistent understanding of how it should be applied and how or to what extent it has altered the *Central Hudson* grounding of the commercial-speech doctrine. However, while it is almost certainly not yet possible to reconcile the array of approaches and emphases asserted among various lower courts, the stark disagreement between two panels of appellate judges in the Ninth Circuit that directly contradicted each other in interpreting and applying *Sorrell* in 2016 and 2017 may represent a substantial opportunity for the Supreme Court to clarify *Sorrell*'s meaning in the commercial-speech doctrine going forward.

In 2013 the federal court for the Central District of California rejected a *Sorrell*-grounded First Amendment challenge to state regulations on in-store liquid-crystal-display alcohol advertising,¹⁸⁰ in which plaintiff had argued that the Ninth Circuit's 1986 upholding of the regulations in *Actmedia, Inc. v. Stroh*¹⁸¹ was irreconcilable with *Sorrell* and the Supreme Court's earlier *Rubin v. Coors Brewing Co.*¹⁸² and *44 Liquormart, Inc. v. Rhode Island*¹⁸³ holdings.¹⁸⁴ The appeal from that decision was heard by a three-judge panel for the Ninth Circuit in 2016 that reversed the district court, concluding that *Actmedia* was no longer binding because it was "clearly irreconcilable with *Sorrell*."¹⁸⁵ That panel concluded that *Sorrell* required "heightened judicial scrutiny of content-based restrictions on non-misleading commercial speech regarding lawful products, rather than the intermediate scrutiny applied to [the challenged regulations] in *Actmedia*."¹⁸⁶

The court found that even though *Sorrell* did not apply heightened scrutiny, it modified the *Central Hudson* test by holding that heightened scrutiny could be applied through focusing on the adjusted fourth prong as applied in 2012 by the federal district court in Arizona.¹⁸⁷ It declared that other circuits had "agreed that *Sorrell* requires stricter judicial scrutiny of content-based restrictions on non-misleading commercial speech, though they may not have settled on the contours of this more demanding level of scrutiny."¹⁸⁸ In support of that assertion, it quoted decisions in the Eighth, Second, and Third circuits.¹⁸⁹ The panel remanded the case to the district court to develop the factual record and apply heightened judicial scrutiny.¹⁹⁰

¹⁸⁰ *Retail Digital Network, LLC v. Appelsmith*, 945 F. Supp. 2d 1119, 1125-26 (C.D. Cal. 2013). The district court held that the challenged regulations did not impose a complete speech ban as did the challenged law in *Sorrell*, that *Sorrell* applied *Central Hudson* intermediate scrutiny rather than heightened scrutiny, and that *Actmedia* thus remained controlling. *Id.*

¹⁸¹ 830 F.2d 957 (9th Cir. 1986).

¹⁸² 514 U.S. 476 (1995).

¹⁸³ 517 U.S. 484 (1996).

¹⁸⁴ 945 F. Supp. 2d at 1123-1125.

¹⁸⁵ *Retail Digital Network, LLC v. Appelsmith*, 810 F.3d 638, 641 (9th Cir. 2016).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 648 (citing *Friendly House v. Whiting*, 846 F. Supp. 2d 1053, 1060-61 (D. Ariz. 2012)).

¹⁸⁸ *Id.* at 649.

¹⁸⁹ *Id.* at 649-650 (characterizing and quoting *1-800-411-Pain Referral Serv., LLC v. Otto*, 744 F.3d 1045, 1054-1055 (8th Cir. 2014), "If a commercial speech restriction is content- or speaker-based, then it is subject to 'heightened scrutiny,'" because although "*Sorrell* 'did not define what 'heightened scrutiny' means, . . . [t]he upshot is that when a court determines commercial speech restrictions are content- or speaker-based, it should then assess their constitutionality under *Central Hudson*"); (characterizing *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012) as having "interpreted *Sorrell* to require heightened scrutiny of content- or speaker-based restrictions on commercial speech, which may be applied using the framework of the *Central Hudson* test); and (characterizing *King v.*

However, shortly after the three-judge panel's decision, a majority of nonrecused active Ninth Circuit judges voted to rehear the case en banc.¹⁹¹ An eleven-judge panel did so in early 2017 and decided the case mid-year, holding contrary to the three-judge panel that "*Sorrell* did not modify the *Central Hudson* standard."¹⁹² The full panel conceded that over the decades since *Central Hudson* was decided, the Supreme Court had engaged in "considerable debate about the contours of First Amendment protection for commercial speech, and whether *Central Hudson* provides a sufficient standard," but insisted that "[w]hat the Supreme Court repeatedly has declined to do, however, is to fundamentally alter *Central Hudson*'s intermediate scrutiny standard."¹⁹³

As to the challenged regulation, the full panel declared that the plaintiff "reads *Sorrell* too expansively," because "*Sorrell* did not mark a fundamental departure from *Central Hudson*'s four-factor test, and *Central Hudson* continues to apply."¹⁹⁴ It argued, "Notably, the *Sorrell* Court referred to 'heightened scrutiny' within the context of deciding whether [the challenged law] regulated speech whatsoever" in response to the state's argument that the law should only be subject to rational-basis review as a non-speech regulation of commerce – and thus the Court was referencing "heightened scrutiny" only in relation to rational-basis review, not to *Central Hudson* intermediate scrutiny.¹⁹⁵

Regarding the *Sorrell* Court's assertion that the outcome in that case "is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied," the full Ninth Circuit panel argued that the Supreme Court only "entertained the potential application of a 'stricter form of judicial scrutiny,' but ultimately applied *Central Hudson*, deeming it unnecessary to determine whether a stricter form of scrutiny would be appropriate."¹⁹⁶ It contended that *Sorrell* did not alter the fourth prong of *Central Hudson*, and *Sorrell*'s clear acknowledgement that "the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech'" and makes clear "one of the core principles that animates the Court's approach to commercial speech" remains intact after *Sorrell*.¹⁹⁷ For the full panel, requiring "greater-than-intermediate yet lesser-than-strict scrutiny would both diminish that principle and impose an inscrutable standard."¹⁹⁸ In support of its conclusion that the established *Central Hudson* test had not been altered, it quoted decisions in the Second, Fourth, Sixth, and Eighth circuits.¹⁹⁹

Governor of N.J., 767 F.3d 216, 236 (3d Cir. 2014) as having "suggested that *Sorrell* may require strict scrutiny of content-based burdens on commercial speech").

¹⁹⁰ *Id.* at 651-653.

¹⁹¹ *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 842 (9th Cir. 2017).

¹⁹² *Id.* at 841.

¹⁹³ *Id.* at 846.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 847 (citing 564 U.S. at 566-571).

¹⁹⁶ *Id.* at 847 (citing 564 U.S. at 571).

¹⁹⁷ *Id.* at 849 (quoting 564 U.S. at 579 and *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 849-850; (quoting *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012, "[W]e conclude the government cannot justify a criminal prohibition of off-label promotion even under *Central Hudson*'s less rigorous intermediate test); (quoting *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013), "However, like the Court in *Sorrell*, we need not determine whether strict scrutiny is applicable here, given that, as detailed below, we too hold that the challenged regulation fails under intermediate scrutiny set forth in *Central Hudson*"); (quoting *Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 533 (6th Cir. 2011), "Thus, this Court is left with

V. CONCLUSION

This article's review of lower courts' efforts toward articulating a consistent understanding of *Sorrell* provides evidence that its meaning is under significant debate that seems to call for clarification from the Supreme Court. Whether that happens, and how it might contribute to more uniformity of treatment for *Sorrell*-related arguments in the lower courts going forward, will be a crucial development in the First Amendment's commercial-speech doctrine. As the previous discussion has highlighted, the disagreement between two panels of appellate judges in the Ninth Circuit in particular seems to offer significant potential for the High Court to weigh in.

For now, though, it also bears consideration that in what is now approaching a decade after what many commentators considered the perplexing and possibly alarming rationale and holding in *Sorrell*, its impact has been far from merely theoretical. Despite the ongoing debate among lower courts, a number of laws that very likely would have remained on the books today if not for *Sorrell* no longer do so. For example, in striking down as unconstitutional a city ordinance prohibiting outdoor advertising of tobacco products, the federal district court for Massachusetts made clear how single-mindedly dispositive it took *Sorrell* to be. When the City of Worcester asserted in that case that its "interest supporting the Ordinance is not a mere policy difference on the question whether people should smoke cigarettes, it is a question of saving lives, reducing serious illness and reducing expenses, all caused by a product that, when used as intended by its manufacturers, inflicts death and destruction on a massive scale," it was completely irrelevant to the outcome of the case.²⁰⁰ That had to be so, because according to the guidance of *Sorrell*, "it was immaterial to the decision whether [the government's asserted interest in that case] was unimportant or crucial. The Court found it sufficient to note that the speech was prohibited in order to prevent it from persuading its intended audience; that alone indicated that the law failed to meet the direct achievement prong and therefor infringed the First Amendment."²⁰¹

When the federal appeals court for the Second Circuit overturned on *Sorrell*-based First Amendment grounds a federal conviction for illegally promoting an approved drug for off-label uses, Judge Debra Ann Livingston focused in dissent on the potential practical consequences. By vacating such a conviction "on the theory that whatever the elements of the crime for which he was duly tried, he was in fact convicted for promoting a drug for unapproved uses, in supposed violation of the First Amendment," she argued, "the majority calls into question the very foundations of our century-old system of drug regulation. I do not believe that the Supreme Court's precedents compel such a result."²⁰²

When the federal appeals court for the Fourth Circuit in 2013 declared unconstitutional a state ban on advertising of alcohol in student newspapers at state universities, a dissent by Judge Dennis W. Shedd highlighted how singular *Sorrell* had been

Plaintiffs' 'action directed to consumers through the media or otherwise . . . respecting the product'); and (quoting 1-800-411-Pain Referral Serv., LLC v. Otto, 744 F.3d 1045, 1055 (8th Cir. 2014), "The upshot is that when a court determines commercial speech restrictions are content-or speaker-based, it should then assess their constitutionality under *Central Hudson*").

²⁰⁰ Nat'l Ass'n of Tobacco Outlets v. City of Worcester, 851 F. Supp. 2d 311, 319 (D. Mass. 2012).

²⁰¹ *Id.* (citing 564 U.S. at 576).

²⁰² United States v. Caronia, 703 F.3d 149, 152 (2d Cir. 2012) (Livingston, J., dissenting).

in determining the decision.²⁰³ Observing that when the case had come before the same court at an earlier stage of its adjudication – the year before *Sorrell* was handed down – the Fourth Circuit had found the challenged regulation “a reasonable fit to Virginia’s interest in combating underage and abusive drinking on college campuses. The record, and my view of the regulation, have not changed.”²⁰⁴

In Shedd’s assessment, the challenged regulation was an important part of “a comprehensive, multifaceted approach to combat what is acknowledged to be a serious problem – underage and abusive drinking, as well as the associated problems of increased fatal and nonfatal motor vehicle crashes, vandalism, suicide attempts, homicide, non-motor vehicle-related injuries, sexual violence, and unprotected sexual encounters.”²⁰⁵ That plan, he asserted, “only minimally impacts commercial speech by attempting to limit advertising aimed at a targeted market which includes a substantial percentage of readers for whom use of the product is illegal. Virginia’s approach does not prohibit all advertising for alcohol which will reach this audience; it is a minor limitation on such advertising in college newspapers.”²⁰⁶ His characterization of the practical implications of the ruling contrasted sharply with the theoretical rationale from *Sorrell* arbitrarily striking down any government effort that prevents adults from “receiving truthful information about a product that they are legally allowed to consume.”²⁰⁷

As the lower courts continue to work through the array of approaches and emphases discussed in this article in their effort to articulate and apply the relevant meaning of *Sorrell* – and to watch for further clarification from the Supreme Court – such reminders point out the very real impact that the ruling is having across the country. The outcomes that *Sorrell* is dictating may or may not accord with what communities and lawmakers believe are the best ways to deal with the social concerns involved. For example, would communities consider the standard of “receiving truthful information” about a legal product to be legitimately met simply by placing persuasive sales pitches for alcohol in publications targeted at college populations consisting of both adults and minors – when it is also true that the product the ads are designed to sell has the well documented record of associated problems enumerated by Judge Shedd? Would communities consider that standard met by promoting such messages on billboards for tobacco products – when it is also true that the product they promote “when used as intended ... inflicts death and destruction on a massive scale,” as the City of Worcester put it? Would they truly consider the town to be kept “in the dark” – as the *Caronia* Court put it – concerning the availability of alcohol and tobacco products unless they were promoted via billboards and college media?²⁰⁸

Such characterizations vividly evoke the fundamental societal interests often at stake in cases like those discussed in this article – and increasingly decided by a *Sorrell*-skewed commercial-speech doctrine with the power to sweep aside all other concerns beyond its relatively narrow conceptualization of truth. A century ago, Justice Oliver Wendell Holmes launched the Supreme Court on its long quest of providing ever greater protection for a marketplace of ideas that would test the truth of ideas by free trade rather than government

²⁰³ *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 302-303 (4th Cir. 2013) (Shedd, J., dissenting).

²⁰⁴ *Id.* at 302 (citing *Educ. Media Co. at Va. Tech, Inc. v. Swecker*, 602 F.3d 583, 590-91 (4th Cir. 2010)) (Shedd, J., dissenting).

²⁰⁵ *Id.* (Shedd, J., dissenting).

²⁰⁶ *Id.* (Shedd, J., dissenting).

²⁰⁷ *Id.* at 301.

²⁰⁸ 703 F.3d at 302.

punishment²⁰⁹ – and ultimately influenced the dramatic evolution of a commercial-speech doctrine that once provided zero protection for such expression.²¹⁰ Justice Holmes called “the power of the thought to get itself accepted in the competition of the market” the “theory of our Constitution” and “an experiment, as all life is an experiment.”²¹¹ He was dissenting that day from the majority’s upholding the government’s power to punish what he characterized as “seditious libel” – “opinions that we loathe.”²¹²

Are outlawing limits on billboards that promote products linked to “death and destruction” the logical extension of banning seditious libel? Justice Holmes emphasized that he was “speaking only of expressions of opinion and exhortations,” and conceded the precariousness of human efforts to apply theory to practical endeavor: “Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.”²¹³

These are familiar words for First Amendment scholars. But as this article has documented in the struggle of the lower courts to determine from imperfect knowledge the ultimate meaning of *Sorrell*, its reach already has extended the doctrine breathtakingly far beyond the more limited understanding of what not so long ago comprised the outer boundaries of commercial speech. And it has considerably raised the stakes wagered upon its majority’s prophecy that the First Amendment requires protecting commercial speech as just another protected viewpoint.

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²⁰⁹ *Abrams v. United States*, 250 U.S. 616, 624-631 (1919) (Holmes, J., dissenting).

²¹⁰ *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976) (discussing the rationale for its expansion of First Amendment protection for commercial speech with marketplace of ideas rhetoric: “So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.”).

²¹¹ 250 U.S. at 630.

²¹² *Id.*

²¹³ *Id.*

The Living Legacy of FCC Indecency Enforcement: Trump, “Shithole” and Profanity in the News

Christopher Terry*

After news reports surfaced that President Trump had used the term “shithole” to describe some countries as part of a debate over immigration policy, media organizations were faced with a legal and ethical dilemma over use of the term in news coverage. Traditional over-the-air radio and television broadcast stations are still restrained by the legacy of indecency enforcement by the FCC. In response, organizations like National Public Radio developed guidelines for limited use of the term in newscasts, while other organizations censored the profanity outright.

This paper explores the legacy of indecency enforcement by the FCC in context of the use of “shithole” during the five major periods of indecency enforcement by the agency, starting with the Pacifica decision involving George Carlin’s Seven Dirty words, a period of stringent enforcement that began with the appointment of FCC Chair Albert Sikes, through the 2001 guidelines used by the agency during the “wardrobe malfunction” in the 2004 Superbowl Half Time Show, into the 2006 “Fleeting Expletives” standard, and concluding with the 2013 proposal for “egregious situations.” The paper concludes that although much of the FCC’s enforcement process went away in the wake of the Fox Television decision, as recently as 2015 the agency was still collecting substantial fines for indecency violations by local broadcast stations and that caution was probably warranted across all of the eras of enforcement.

Keywords: broadcast, indecency, Federal Communications Commission

I. Introduction

During his first term as president, Donald Trump has caused debates over several of the traditional and accepted legal standards related to the First Amendment. His multiple calls for revision of libel laws for public figures, his derision of the press with charges of “Fake News,” and his rhetoric at political rallies has bordered on the standards for incitement and have each led to a discussion of existing legal precedents. Likewise, when Senator Dick Durbin informed the public that President Trump had used the term, “shithole” to describe other countries in a meeting on immigration,¹ news organizations struggled and debated on whether or not to use the term verbatim in the

¹ Lauren Fox, *Dick Durbin admonishes Trump for 'shithole' comments*, CNN, <https://www.cnn.com/2018/01/12/politics/dick-durbin-trump-shithole-reaction/index.html>.

coverage of the event. Several media organizations, including National Public Radio, developed impromptu guidelines for using the actual term during news coverage.²

At the heart of this dilemma is a legacy of enforcement of the indecency rules by the Federal Communications Commission. While newspapers, news content on the internet, and cable are not bound to the legacy of indecency enforcement, traditional, over-the-air broadcast radio and television stations remain subject to FCC regulation.³ This paper explores indecency regulation in the context of President Trump's use of the term "shithole" and the potential implications for broadcasters during five different eras of FCC enforcement beginning with the *Pacifica* decision through the contemporary, but rarely applied, "egregious situation" standard.

II. Inception: *Pacifica v. FCC* to *Sikes*

A prohibition on the airing of indecent content by broadcasters was first included in the 1927 Radio Act.⁴ "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years or both."⁵ This provision was included in 1934 Communications Act, and then later transferred into Title 18, Section 1464, of the U.S. Code.

Importantly, while closely related to the legal concept of obscenity, indecency has different legal protections. Obscenity, as defined by the test developed by the US Supreme Court in *Miller v. California*,⁶ is unprotected speech. Indecency is protected speech, but regulated content, for broadcasters. In practical terms this means that the FCC enforces a blanket ban against obscene content but the agency can only regulate the time of day when broadcasters are allowed to carry indecent material.⁷

The Commission first considered possible indecency violations during the 1964 license renewal for radio stations owned by the Pacifica Foundation.⁸ At the time, the FCC was more interested in a making a formal decision regarding how the programming affected the overall public interest standard, rather than the material contained within the broadcasts themselves.⁹ The FCC issued the first fine for the broadcast of indecent material in the year 1970. The Commission fined WUHY-FM, an educational station, for airing the tape of profanity-laced interview with Grateful Dead singer Jerry Garcia.¹⁰

² Elizabeth Jenson, *NPR's Approach To A Reported Presidential Profanity Evolves*, NPR, <https://www.npr.org/sections/ombudsman/2018/01/12/577631226/nprs-approach-to-a-reported-presidential-profanity-evolves>.

³ See generally *FCC, Obscenity, Indecency & Profanity FAQ*, <https://www.fcc.gov/reports-research/guides/obscenity-indecency-profanity-faq>.

⁴ 47 USCS §§ 81-119.

⁵ 18 U.S. Code § 1464.

⁶ 413 U.S. 15 (1973).

⁷ Broadcasters are allowed to air indecent, but not obscene, content between 10pm and 6am local time in a period of each day known as "Safe Harbor." William Davenport, Comment, *FCC, Indecent Exposure? The FCC's Recent Enforcement of Obscenity Laws*, 15 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* (2005).

⁸ T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FIFTH ESTATE* 229 (1996).

⁹ *Id.* at 230.

¹⁰ *Id.*

In 1978, the Supreme Court ruled on the constitutionality of indecency regulation of broadcast stations in *Federal Communications Commission v. Pacifica Foundation*.¹¹ The case began after a Pacifica station in New York played a recording of a twelve-minute monologue from comedian George Carlin. The “Filthy Words” recording was a discussion of seven words a person could not say on-air during a broadcast and was aired as part of a larger conversation on contemporary language. The afternoon broadcast was heard by a parent driving with his teenage son. Although the station broadcast a warning prior to airing the monologue, the father and son apparently did not hear the disclaimer and filed the only complaint regarding the broadcast.¹²

The primary issue before the Supreme Court was whether or not the FCC had the power to regulate broadcasts of indecent speech that was not obscene.¹³ The court ruled that the Commission had jurisdiction because it was not trying to suppress indecent speech, but acting to fulfill a societal goal in order to keep graphic content away from children. In the decision, the Court recognized the rights of a listener to receive material, but found the restrictions on time of day valid, due to the concern about the direct accessibility of broadcast content to children.¹⁴

The *Pacifica* decision validated the Commission’s authority to regulate indecency in broadcasting. Ruling that broadcast media are “uniquely pervasive presence,” the Court defended the rights of the listener over the broadcaster by stating, “[indecent material] presented over the airwaves confronts the citizen, not only in public, but also in the privacy of their home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder.”¹⁵

After the *Pacifica* decision, the FCC, for all practical purposes, adopted the seven dirty words proposed by Carlin as the model for indecency enforcement. The FCC would find a broadcast to be indecent only if it contained one or more of the seven dirty words, spoken repeatedly with the intent to shock the audience, and if the program aired at a time outside of the safe harbor period.

III. Indecency: Sikes to 2001

In 1987, under significant pressure from religious groups and other interested parties, the FCC’s metric on indecency enforcement changed.¹⁶ The agency began to expand the definition of indecency beyond derivatives of Carlin’s dirty words. In 1989, Albert Sikes was appointed chairperson of the agency.¹⁷ During his confirmation hearing, as well as those of two other Bush FCC appointees, Sherrie Marshall and Andrew Barrett, indecency was brought up frequently as a regulatory issue.¹⁸ That was a

¹¹ FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

¹² The seven words in the Carlin monologue were shit, piss, fuck, cunt, cocksucker, motherfucker and tits. After proposing these seven words, Carlin launched into a discussion of the ways shit and fuck could be used within sentences. *Id.* at 727.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Milagros Rivera-Sanchez & Michelle Ballard, *A Decade of Indecency Enforcement: A Study of How The Federal Communications Commission Assesses Indecency Fines (1987-1997)*, 75 JOURNALISM & MASS COMM. Q. 143 (1998).

¹⁷ <https://www.fcc.gov/general/commissioners-1934-present>.

¹⁸ Sanchez and Ballard, *supra* note 16, at 145.

marked contrast from commissioners appointed between 1985-1987, when indecency was never raised as a policy or enforcement issue during confirmation hearings.¹⁹

Under Sikes's leadership between 1989-1993, the FCC ramped up indecency enforcement substantially. In addition to raising the potential fine for violations to \$25,000, the FCC issued 20 fines for the airing of indecent content.²⁰ The trend started by Sikes was continued by his successors. James Quello, who was FCC chair for a short time during 1993, oversaw four fines for indecency.²¹ Clinton appointee Reed Hundt's FCC issued 17 fines between 1993-1997, and Hundt's successor, William Kennard, who was FCC Chair from 1997-2001,²² participated in the issuing of 18 fines during his term. Significantly, the FCC under Kennard's leadership created the Enforcement Bureau in 1999 and tasked it with the agency's investigations of indecency complaints.²³

During this period of enforcement, the Commission found three categories of language indecent: expletives, such as those used by Carlin in his monologue; sexual innuendo, where the sexual meaning is inescapable; and patently offensive descriptions of sexual or excretory activities or organs. In terms of medium, radio was the dominant violator of the agency rules on indecency. Of the thirty-eight fines the FCC issued between 1993-2000, only one was for television.²⁴ Fines peaked during calendar 1994 when a total \$674,500 was assessed for seven radio violations. At the end of the Clinton administration, by comparison, there were seven fines in 2000, again all for radio content, but the FCC only assessed \$48,000 in fines.²⁵

IV. Indecency: New Guidelines and The Super Bowl

In 2001, the FCC released a five-part series of guidelines in a policy statement explaining what would make broadcast content indecent in the eyes of the Commission.²⁶ These guidelines required the Commission to first make two determinations regarding material that may be indecent. Specifically, the content in question had to be: "[L]anguage or material that, in context, depicts or describes in terms patently offensive as measured by the contemporary community standards for the broadcast medium, sexual or excretory activities or organs."²⁷

Under the 2001 rules, the full context of material was theoretically important to determining if material is patently offensive, and the decision on contemporary community standards was not geographically tied to the location where the infraction occurred. To determine context, the Enforcement Bureau examined three factors, but any combination of the elements could provide the basis for a finding of indecency.²⁸

¹⁹ *Id.*

²⁰ Jan H. Samoriski, John L. Huffman & Denise M. Trauth, *Indecency, the Federal Communications Commission, and the Post-Sikes Era: A Framework for Regulation*, 39 J. BROADCASTING & ELECTRONIC MEDIA 51 (1995).

²¹ <https://transition.fcc.gov/eb/broadcast/ichart.pdf>.

²² *Id.*

²³ <https://transition.fcc.gov/eb/wm.html>.

²⁴ <https://transition.fcc.gov/eb/broadcast/ichart.pdf>.

²⁵ *Id.*

²⁶ Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency. 16 F.C.C.R. 7999 (2001).

²⁷ *Id.* at 8004.

²⁸ *Id.* at 8004-8005.

- 1) The explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- 2) Whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities;
- 3) Whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.²⁹

Investigations of indecent material were handled by the Commission's Enforcement Bureau following the filing of a complaint.³⁰ As part of the adjudication, the Enforcement Bureau would assess if the material meets the description or depiction requirements for sexual or excretory functions or actions; and whether the material was aired outside of the safe harbor time period. If the Enforcement Bureau determined the programming segment met both sets of criteria, the bureau would launch a formal investigation.³¹

The 2001 rules were minimally enforced by the agency until the broadcast of the 2004 National Football League Super Bowl Halftime Show.³² During the broadcast of the Super Bowl, pop singer Janet Jackson's breast was exposed for a total of 19/32 of a second.³³ The Enforcement Bureau charged that the context of the half-time show was sexually orientated, which allowed the Commission to find the segment patently offensive according to the titillation and pandering prong.³⁴ When the Commission assessed the \$555,000 fine, only Viacom-owned-and-operated CBS affiliates carrying the broadcast were fined.³⁵

Notably, the public outcry for indecency enforcement in the wake of the Superbowl broadcast led to a record number of complaints and 2004 represented the agency's high-water mark for indecency enforcement.³⁶ Congress involved itself in the middle of the FCC's post-Superbowl indecency crackdown raising the limit on fines for single instances of indecency from \$32,500 to \$325,000. In response to public reaction to the Superbowl, and facing new, record fines and with a newfound interest in enforcement by the agency that followed, media organizations with pending indecency cases entered into high-dollar consent decrees with the agency. In fact, a large percentage of the fines collected during 2004 were actually made up of the consent

²⁹ *Id.* at 8004.

³⁰ *Id.* at 8016.

³¹ *Id.* at 8007.

³² Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, *Notice of Apparent Liability (NAL) for Forfeiture*, 19 F.C.C.R. 19230 (2004).

³³ *Id.* at 19237.

³⁴ *Id.* at 19237-19238.

³⁵ *Id.* at 19344.

³⁶ In 2003, the FCC issued three *NALs* for a total of \$440,000 in fines. In 2004, the FCC issued 12 *NALs* and made three *Consent Decrees* for a total of \$7,928,080.

decrees the Commission entered into with Clear Channel,³⁷ Emmis³⁸ and Viacom.³⁹ Each consent decree, while assessing a financial penalty to the companies, settled all of each company's pending indecency complaints with the Commission.⁴⁰

During 2004, radio programming content was again found indecent at a higher rate than television. Nine of the twelve Notices of Apparent Liability (NALs) issued during 2004 were for programming that aired on radio.⁴¹ Aside from Howard Stern, who has been fined multiple times for on-air behavior when his program was on over-the-air broadcast stations, including twice during 2004,⁴² the Enforcement Bureau issued fines for sexual and excretory descriptions or depictions. Rulings of indecency were made for seven radio segments of the Bubba the Love Sponge program,⁴³ and a radio segment that included a birthday interview with pornography actor Ron Jeremy, who described how he was once able to perform oral sex upon himself.⁴⁴ The Enforcement Bureau also issued NALs for radio discussions ranging from the on-air use of a device that suggested it was capable of increasing the size of man's penis,⁴⁵ to a discussion of the way to humiliate a woman after sexual intercourse,⁴⁶ a segment that described an in-progress game of "Naked Twister,"⁴⁷ and a segment where on-air personalities encouraged the public simulation of a sex act as part of a contest to win a video game console.⁴⁸

The FCC adopted three indecency findings in NALs and a fourth in a Memorandum Opinion and Order for television programs during 2004. The first television NAL was issued for a segment on a San Francisco television station's morning

³⁷ Clear Channel Communications et al., *Order*, 19 F.C.C.R. 10880 (2004). This order was the *Consent Decree* with Clear Channel and its subsidiary broadcast companies to settle all pending indecency violations for \$952,500.

³⁸ Emmis Communications Corp., *Order*, 19 F.C.C.R. 16003 (2004). This order was the *Consent Decree* between Emmis and the FCC and was settled for \$258,000.

³⁹ Viacom Inc., *Order* 19 F.C.C.R. 23100 (2004). This order was the *Consent Decree* between the FCC and Viacom, settled for \$3,059,580.

⁴⁰ The Viacom consent decree did not cover the fines in the NAL issued for the Super Bowl Halftime Broadcast. *Id.* at 23106.

⁴¹ Chart of Indecency Enforcement by the FCC 1993-2004, <https://transition.fcc.gov/eb/broadcast/ichart.pdf>.

⁴² Infinity Broadcasting Operations, Inc., *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 5032 (2004). Clear Channel Broadcasting et al, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 6773 (2004).

⁴³ Clear Channel Broadcasting et al, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 1768 (2004).

⁴⁴ AMFM Radio Licenses LLC., *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 5005 (2004).

⁴⁵ AMFM Radio Licenses LLC., *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 10751 (2004).

⁴⁶ Entercom Sacramento Licensee, LLC., *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 20129 (2004).

⁴⁷ Entercom Kansas City License, LLC, and Entercom Wichita License, LLC, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 25011 (2004).

⁴⁸ Capstar TX Limited Partnership, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 4960 (2004).

news program that showed a fleeting image of a penis during an interview with two performers in a stage show entitled, “Puppetry of the Penis.”⁴⁹

In another television case, the Commission issued a fine to every Fox network affiliate that carried a 2003 episode of the program, *Married by America*, regardless of a station’s ownership or operation.⁵⁰ The program was recorded, and the Commission argued that the local affiliates should not have carried the episode based on the nature of the content.⁵¹ In the episode, which featured the contestants attending a bachelor and bachelorette party, both with exotic dancers, visible naked body parts were pixilated by the network to prevent full exposure.⁵² The Enforcement Bureau rejected the Fox Network’s claim that the pixilation prevented the Commission from finding the segment indecent.⁵³ The Commission issued a \$7000 fine to every Fox Network affiliate that carried the program.⁵⁴

In 2004, two of the NALs issued dealt with material broadcast during 2001, five dealt with content from 2002, and four resulted in content broadcast in 2003. Despite the crackdown on indecency and the massive increases in fines, nearly all of the material was more than a year old by the time it was ruled on by the Enforcement Bureau. In one case, the FCC had to issue an order to cancel an NAL, because the statute of limitations had expired before the Commission had made a ruling in the case.⁵⁵

V. Indecency: 2006, Fleeting Expletives, and Fox Television v FCC.

A *Memorandum Opinion and Order* was issued for the reconsideration of a complaint denial regarding the use of the profanity “fuck” during the broadcast of the Golden Globe Awards.⁵⁶ U2’s lead singer Bono was given an award during the program and during his acceptance speech, the singer stated, “This is really, really, fucking brilliant. Really, really great.”⁵⁷ The Enforcement Bureau initially denied the complaints about the broadcast, claiming the use of the profanity was fleeting and not used to describe a sexual or excretory function.⁵⁸ A request for review was then filed by the Parents Television Council.⁵⁹

In the request for review, the PTC argued that any usage of the word “fuck” in any context is patently offensive. The FCC agreed with this view on reconsideration and declared the segment to be indecent despite the earlier dismissal of the complaint.⁶⁰

⁴⁹ Young Broadcasting of San Francisco, Inc., *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 1751 (2004).

⁵⁰ Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program “Married By America” on April 7, 2003, *Notice of Apparent Liability for Forfeiture*, 19 F.C.C.R. 20191 (2004).

⁵¹ *Id.* at 20198.

⁵² *Id.* at 20195-20196.

⁵³ *Id.*

⁵⁴ *Id.* at 20198.

⁵⁵ AMFM Radio Licensees LLC., *Order*, 19 F.C.C.R. 10775 (2004).

⁵⁶ Complaints Against Various Licensees Regarding Their Airing of the Golden Globe Awards Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975 (2004).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 4977.

⁶⁰ *Id.*

However, although the ruling declared the single utterance to be indecent, the Commission did not issue a fine in the case.⁶¹

With respect to the first step of the indecency analysis, we disagree with the [Enforcement] Bureau and conclude that use of the phrase at issue is within the scope of our indecency definition because it does depict or describe sexual activities. We recognize NBC's argument that the "F-Word" here was used "as an intensifier." Nevertheless, we believe that, given the core meaning of the "F-Word," any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition. This conclusion is consistent with the Commission's original *Pacifica* decision, affirmed by the Supreme Court, in which the Commission held that the, "F-Word" does depict or describe sexual activities.⁶²

Ultimately, the agency adopted a "fleeting expletives" standard in a 2006 order and then coupled it with the \$325,000 fine approved by Congress in response to the 2004 Superbowl Half Time show.⁶³

"We now depart from this portion of the Commission's 1987 *Pacifica* decision as well as all of the cases...holding that isolated or fleeting use of the "F-Word" or a variant thereof in situations such as this is not indecent and conclude that such cases are not good law to that extent. We now clarify, as we have made clear with respect to complaints going beyond the use of expletives that the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent."⁶⁴

VI. Indecency: "Egregious" and WDBJ

The FCC's actions in the Golden Globes decision and again in the corresponding 2006 Indecency Order resulted in a lengthy legal battle. Multiple legal challenges from the major broadcast companies resulted in the consolidation of cases in the 2nd Circuit under *Fox Television*.⁶⁵ Initially the appeals court overturned the FCC's 2006 order on procedural grounds. The FCC then appealed to the Supreme Court, which overruled the decision of the lower court,⁶⁶ but also remanded the decision to the 2nd Circuit for a ruling on Constitutional grounds.

On remand, the 2nd Circuit declared the FCC's fleeting expletives standard to be unconstitutional.⁶⁷ Once again, the agency appealed to the Supreme Court. In a mixed decision, the Supreme Court then handed down a decision that stated that the agency retained its authority to regulate indecency under the *Pacifica* precedent, but also ruled

⁶¹ *Id.* at 4975.

⁶² Golden Globes, 19 F.C.C.R. 4975 (2004), ¶ 8.

⁶³ Broadcast Indecency Enforcement Act, Pub. L. 109-235, 120 Stat. 491 (2006).

⁶⁴ Golden Globes, 19 F.C.C.R. 4975 (2004).

⁶⁵ FCC v. Fox Television Stations, 489 F.3d 444 (2d Cir. 2007).

⁶⁶ FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009).

⁶⁷ Fox Television v FCC II, 613 F.3d 317 (2d Cir. 2010).

that the current regulatory implementation was invalid, and remanded the indecency enforcement process to the agency.⁶⁸ The agency responded to the remand in April 2013 with a proposal for a new enforcement approach it labeled as “egregious situations.”⁶⁹ According to the proposal, the agency would only make a ruling for indecency in high profile or very obvious situations.

Only four fines have been issued by the FCC since the initial proposal of the 2013 “egregious” standard. In 2013, in a consent decree, Lieberman Broadcasting agreed to pay \$110,000 for indecency in episodes of the Spanish language Jose Louis program. In April 2014, the FCC settled with KRXA–AM a California radio station for \$15,000. In August 2014, KBDR-FM, a Montana radio station paid \$37,500 to settle an investigation into allegations of indecent language after a listener complained to the FCC that during the morning show on May 18, 2011, host “Danny Boy” used indecent language during a discussion in which he asked his audience what it took to get a “blowjob” from a woman.

The most notable indecency decision after *Fox Television* represents the largest single fine issued to a station by the agency for indecency. WDBJ-TV was carrying a story during a 6 p.m. newscast about a new local firefighter who had previously worked as an actress in pornographic films. In the coverage of the story, WDBJ used a screen capture of images of actress Harmony Rose on a website.⁷⁰ In the corner of the screen there was an advertisement for another pornographic website that included a video GIF of an erect penis being masturbated. The image appeared for approximately 3 seconds. For the infraction, WDBJ was assessed the largest allowable fine of \$325,000.⁷¹ Although WDBJ management initially suggested that the station would challenge the assessed fine, the station eventually paid the full amount without mounting a legal challenge.⁷²

There have been no additional issued fines by the FCC, and no legal challenges have been filed. The “egregious situation” era of enforcement remains unresolved. Although it has been largely quiet, ironically indecency enforcement has often been a higher priority for the Commission during Republican administrations.

VII. Discussion

The news value of, or professional ethics in, a media organization’s choice to use “shithole” in coverage is certainly debatable. Although the FCC’s commitment to indecency enforcement has waxed and waned since Carlin’s monologue first aired, there is no question that the legacy of enforcement remains and plays a role in influencing the design and content of news production involving sexual topics or profanity.

Notably, National Public Radio was on the forefront with a written policy on usage of the “shithole” in news coverage. NPR had previously weighed violation of the indecency rules when airing a series of news stories that included the audio from a

⁶⁸ FCC v Fox Television II, 132 US 2307 (2012).

⁶⁹ FCC Extends Pleading Cycle for Indecency Cases, <https://www.federalregister.gov/documents/2013/06/06/2013-13339/fcc-extends-pleading-cycle-for-indecency-cases-policy> (GN Docket No. 13–86; DA 13–1071).

⁷⁰ WDBJ Television, Inc., *Notice of Apparent Liability for Forfeiture*, 30 FCC Rcd 3024 (2015).

⁷¹ *Id.*

⁷² The station paid the entire fine. Documentation obtained from FCC via FOIA #2018-000190.

profanity laden recording of John Gotti.⁷³ Since the vast majority of indecency fines have been assessed against radio, NPR was doing due diligence to protect affiliate stations by limiting usage of the term in news and discussions.

An examination of the FCC's five major periods of indecency enforcement demonstrates that in the "*Pacifica* Era," the "Sikes Era," and the "Fleeting Expletives" era, use of the term shithole would have been a risky proposition for a broadcast station. Although limited actions have been undertaken since the FCC's "egregious situation" proposal in 2013, there have continued to be periodic fines for broadcaster content.

When one applies the first of the five historical standards to the usage of "shithole," the FCC's enforcement of indecency would have merited some discretion by stations, even in the context of news content. Although the FCC engaged in limited enforcement of indecency, issuing just a total of four fines in the time period following the *Pacifica* decision, the primary focus of indecency enforcement during this time period were the seven dirty words themselves, of which "shithole" is a clear derivative.

After the *Pacifica* period, the FCC expanded the definition of material considered indecent during the Sikes era of enforcement. So even with a greater focus on indecency, the legacy of the particular language of the Carlin monologue still contributed a significant influence to the agency's enforcement agenda in practical terms. The agency's comparatively strong interest in enforcement proceedings during the Sikes era would have made the usage of "shithole" by media organizations a very risky decision, even in the context of a newscast.

Ironically, in the period proceeding and through the 2004 Super Bowl, when public interest and the agency's actions regulating of indecency were at their apex, a station's inclusion or usage of "shithole" is the most questionable in terms of enforcement outcomes. In the wake of the Superbowl half time show, and the multiple consent decrees that followed, it is important to note that the FCC's guidelines issued in early 2001 proposed that context was central to a finding of indecency, and that incidental profanity would not be considered indecent.⁷⁴

More specifically, one example provided in the guidelines involved the accidental usage of "fuck" during a newscast and how in the situation in which it was aired, the profanity was not indecent.⁷⁵ However, as the public reaction to the Superbowl Half Time Show was very prominent, the agency became heavily invested in indecency enforcement during 2004. Had the news story aired later in this time period, it is likely the Commission would have investigated any complaints. While it is likely to have generated enforcement in either the *Pacifica* or Sikes eras, caution would certainly have been warranted on use of "shithole" during most of calendar year 2004. Yet, by calendar of 2005, the agency had already retreated from an aggressive enforcement regime, and the FCC issued no fines for indecent content.

⁷³ Neal Cohen, *How The "Teflon Don" Rubbed Out The "7 Dirty Words,"* <https://www.npr.org/sections/talk/2010/07/14/128514339/how-the-teflon-don-rubbed-out-the-seven-dirty-words>.

⁷⁴ 2001 Guidelines, *supra* note 26, at 8003.

⁷⁵ "The 'news announcer's use of a single expletive' does not 'warrant further Commission consideration in light of the isolated and accidental nature of the broadcast.'" *Id.* at 8010.

While time may have been an important factor under the 2001 guidelines, after the *Golden Globes* decision and the corresponding 2006 “fleeting expletives” standard was released, any usage, even within a newscast, of the term “shithole” would have been found indecent following a complaint and investigation process. Broadcasters who used the term would have risked significant sanctions for usage of the actual term, even within news coverage.

Although the FCC has not abandoned indecency enforcement entirely, after the *Fox* decision, the likelihood of an enforcement action against a broadcaster that included “shithole” as part newscast has been dramatically reduced. Although the largest single station fine for indecency was issued for indecent material carried within a newscast, the WDBJ case involved content was clearly of a graphic sexual nature in the larger context of a salacious news package. The station’s decision not to challenge the fine, or the fleeting nature of the content, leaves the indecency on the FCC’s table as a regulatory option. So, while the legacy of indecency enforcement continues, so do the subjective, flexible, and variable conditions of the enforcement, and frankly that’s the profanity news producers should be concerned about.

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DEFAMING OFFICIALS AND CELEBRITIES: EVOLUTION OF LIBEL LAW AND THE *SULLIVAN* IMPACT IN CHINA¹

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The free speech principles of New York Times v. Sullivan were introduced to China during the tumultuous period of the late 1980s and early 1990s. Chinese media law scholars, attorneys and journalists had proposed that their country adopt Sullivan's "actual malice" test for libel. They have believed that the "actual malice" standard would better enable Chinese citizens to enjoy their constitutional right to freedom of speech and criticism of party and government officials. Over the last 30 years, however, the National People's Congress and the Supreme Court have steadfastly refused to recognize the Sullivan principle to constrain politicians and famous persons from suing for defamation. Likewise, no courts, regardless of their status and jurisdiction, have cited or adopted the concept of public persons in libel suits brought by public officials. Yet an encouraging trend in Chinese libel law is that more and more local courts, though still few in number, have either cited or adopted the public persons v. private citizens concept in libel lawsuits brought by public figures. Consequently, a few celebrities in sports, entertainment, art, and academia have lost their suits against news media organizations. Chinese judges have ruled in the celebrity libel cases that public figures, unlike ordinary citizens, should understand and endure the "possible minor harms" inflicted upon their reputation from negative media reporting. Through case and statutory analysis, this paper investigates the development of libel law in China, focusing on how public officials and public figures have been treated statutorily and judicially. The paper also explores political, societal, cultural and legal factors contributing to such treatment. The paper concludes by suggesting that China adopt the Sullivan standard when its media outlets become more independent, ethical and responsible.

Keywords: China, libel, *New York Times v. Sullivan*, actual malice

I. Introduction

Globally, freedom of expression and the right to reputation are two important human rights.² Different societies' predilections for these two rights vary, depending upon the interplay of political and legal systems, cultures, values and social ethos. The choice

¹ The original version of this article was presented at the 2017 International Communication Association annual convention, San Diego, California, 25-29 May 2017.

² Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT'L L. REV. 183 (2010).

America has made is to let freedom of expression take precedence in the event of a conflict between the two rights whenever a *powerful* individual sues for defamation.

Fifty-five years ago, the U.S. Supreme Court in *New York Times Co. v. Sullivan*³ rejected the centuries-old U.S. common law in which all libel defendants had to carry the burden of proving the truthfulness of their statements. In a unanimous and revolutionary ruling, the court stated that a public official may not recover damages for defamatory statements relating to official conduct “unless he proves by clear and convincing evidence that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴ A half-century later, *The New York Times* still considered the ruling “the clearest and most forceful defense of press freedom in American history.”⁵

Under post-*Sullivan* U.S. libel law, a public official must prove knowledge of falsity or reckless disregard of truth or falsity, unlike a private citizen who needs to prove only negligence.⁶ The official may prove knowledge of falsity by showing that the defendant lied in the story.⁷ The official may prove reckless disregard of truth or falsity on the part of the media defendant by showing that the publication of the questionable story was not urgent, the writer relied upon unreliable sources, and the story was improbable or unbelievable to a reasonable person.⁸

In explaining the rationales for the *Sullivan* ruling in 1964, Justice William Brennan boldly stated: “[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be *uninhibited, robust, and wide-open*, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁹ Brennan also wrote, “Erroneous statement is inevitable in free debate, and...it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”¹⁰

Later the same year, *Garrison v. Louisiana*¹¹ extended the “actual malice” rule to public officials in criminal defamation and, two years after *Garrison, Ashton v. Kentucky*¹² further eroded the legal basis of criminal libel. Some scholars believe that those two cases virtually dismantled the infamous criminal defamation system in the country.¹³ In 1967, the Court extended the “actual malice” burden of proof to public figures,¹⁴ thus dramatically expanding the scope of libel plaintiffs who carry a heavier burden of proof.

³ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴ 376 U.S. at 279-80.

⁵ The Editorial Board, *The Uninhibited Press, 50 Years Later*, N. Y. TIMES, March 8, 2014.

⁶ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

⁷ *Goldwater v. Ginzburg*, 414 F. 2d 324 (2d Cir. 1969).

⁸ *Don R. Pember and Clay Calvert*, MASS MEDIA L. 203 (2015).

⁹ 376 U.S. at 270 (emphasis added).

¹⁰ 376 U.S. at 271-272.

¹¹ *Garrison v. Louisiana*, 379 U.S. 64 (1964).

¹² *Ashton v. Kentucky*, 384 U.S. 195 (1966).

¹³ Roy L. Moore, MASS COMM. L. & ETHICS 300 (1994); Bryan A. Garner, BLACK’S LAW DICTIONARY: ABRIDGED VERSION 762 (2005).

¹⁴ *Associated Press v. Walker*, 389 U.S. 28 (1967). Public figures include all-purpose public figures, limited-purpose public figures/voluntary public figures, and involuntary public figures. The U.S. Supreme Court clarified the concept of a limited-purpose public figure in four cases: *Gertz v. Robert*

Despite various flaws in the *Sullivan* ruling,¹⁵ America, understandably, witnessed a steady decline of libel cases after the establishment of the “actual malice” standard. Since the 1960s, the impact of the free speech concept in *Sullivan* has also been more and more strongly felt across the globe. Many countries and regions, such as the United Kingdom, Philippines, Argentina, Hungary, India, Taiwan, South Korea, the Federation of Bosnia-Herzegovina, the Bosnia Serb Republic, Pakistan, and international organizations such as the Inter-American Court of Human Rights and the European Court of Human Rights, have adopted, to varying degrees, the *Sullivan* rule of “actual malice.”¹⁶ Some countries such as Argentina and Bosnia-Herzegovina are even more expansive than the United States in defining “actual malice.”¹⁷ Of course, for various reasons, countries that rejected, either explicitly or implicitly, the U.S. “actual malice” principle are not few in number. For example, the Supreme Court of Canada¹⁸ and many other Commonwealth courts¹⁹ are unwilling to embrace the U.S. way of handling libel cases involving famous and/or powerful plaintiffs.

The purpose of this paper is to examine the impact of the “actual malice” standard, as set forth in *New York Times Co. v. Sullivan* and extended in *Associated Press v. Walker*, on Chinese libel law. To be more extended in scope, this project aims to investigate the development of libel law in China, focusing on how the concept of public officials and public figures has evolved in China and how famous and/or powerful plaintiffs have been treated statutorily and judicially, with an eye on whether the Chinese judiciary and legislature have considered or even adopted principles embodied in U.S. libel law.

The study is significant for three reasons. First, with the advent of globalization, more and more people in the world are becoming heavy consumers of foreign goods, services, values, ideas and even way of life. Examining the impact of the *Sullivan* case on China would provide an interesting case through which scholars in law and communication could explore why a U.S. legal concept might be rejected in a foreign land. It may also show

Welch, Inc., 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979).

¹⁵ See, e.g., Thomas A. Hughes, *The ‘Actual Malice’ Rule: Why Canada Rejected American Approach to Libel*, 3 COMM. L. & POL’Y 55 (1998) (noting that the Supreme Court of Canada rejected the argument that Canada should adopt the “actual malice” rule in *New York Times v. Sullivan*, and most Canadian judges and scholars believe that the rule fails to strike a proper balance between freedom of expression and right to reputation); John C. Watson, *Times v. Sullivan: Landmark or Land Mine on the Road to Ethical Journalism?* 17 J. MASS MEDIA ETHICS 3(2002) (arguing that the “actual malice” standard has damaged ethical journalism by encouraging publication of fabricated or factually incorrect materials); Richard A. Epstein, *Actual-Malice Rule Should Go*, CHI. TRIB., Feb. 18, 1985 (contending that both defamed parties and the press became losers under the “actual malice” arrangement).

¹⁶ Kyu Ho Youm, *The “Actual Malice” of New York Times Co. v. Sullivan: A Free Speech Touchstone in A Global Century*, 19 COMM. L. & POL’Y 185 (2014) [hereinafter *Touchstone*]; Kyu Ho Youm, *Impact on Freedom of the Press Abroad*, 22 COMM. LAW. 13 (2004) [hereinafter *Impact*]; Kyu Ho Youm, *Globalization of U.S. Law on Press Freedom: “Actual Malice” as a Balancing Test for Libel*, paper presented at the annual meeting of the International Communication Association, New York City, May 25, 2009 [hereinafter *Globalization*]; Edward Carter, *“Actual Malice” in the Inter-American Court of Human Rights*, 18 COMM. L. & POL’Y 395 (2013).

¹⁷ *Touchstone*, supra note 16, at 193-194, 203.

¹⁸ Thomas A. Hughes, *The “Actual Malice” Rule: Why Canada Rejected American Approach to Libel*, 3 COMM. L. & POL’Y 55 (1998).

¹⁹ *Touchstone*, supra note 16, at 207.

how a body of law might be transplanted from a liberal democracy, where freedom of expression is cherished, to an authoritarian regime where such freedom is still a luxury, not a necessity. Second, as the world enters into an era of instant and digital communication, publishers of online content “are finding themselves increasingly subject to foreign laws of defamation.”²⁰ Thus, it is becoming increasingly important for scholars and law practitioners to better understand foreign libel law. This paper would help better understand similarities and differences between Chinese and American libel law. Such help would prove valuable as more and more Chinese plaintiffs are coming to the United States to sue for defamation and vice versa.²¹

Third, few English-language scholarly articles and books have been written about the impact of the *Sullivan* standard on Chinese libel law. A database search found three English-language journal articles that discussed defamation law in China. Benjamin L. Liebman’s work mainly examined more than 200 defamation cases and identified general patterns and trends behind those cases.²² Xiaoming Hao and Kewen Zhang chiefly explored reasons why there was an explosion of libel cases in the 1990s.²³ Meining Yan’s paper conducted a comprehensive survey of Chinese criminal defamation statutes and cases.²⁴ To varying degrees, these articles touched upon the subject of whether Chinese libel law has differentiated between public and private persons. All three articles concluded that Chinese court decisions and statutes, with a few exceptions, rejected such a distinction.²⁵ None of the articles, however, examined relevant judicial opinions in great detail and does not answer fully how, why and to what extent Chinese judiciary and legislature refuse to Americanize in

²⁰ *Impact*, *supra* note 16, at 12.

²¹ An appropriate example of Chinese plaintiffs coming to America to sue is *Zhiyi Zhang v. Boxun*. In this case, a famous Chinese actress sued a US-based Chinese website for publishing materials alleging that the plaintiff slept with top Chinese officials for money and gifts. The plaintiff and the defendant reached an undisclosed out-of-court settlement in 2013. BBC, *China's Zhang Ziyi Wins Sex Claims Case against Boxun*, Dec. 18, 2013, <http://www.bbc.com/news/world-asia-china-25426869> (last visited Oct. 15, 2018). A good example of American writers coming to China to sue for defamation is Zhouzi Fang, a popular scientific writer and a green card holder living in San Diego, California. Fang sued in Chinese courts many Chinese individuals for defamation, and he has also been frequently sued in China. Chris Luo, *China's Raging GM Food Debate Leads to Libel Suit Between Fraud-Buster, TV Anchorman*, S. CHINA MORNING POST, Jan. 14, 2014, <http://www.scmp.com/news/china-insider/article/1405435/anti-fraud-campaigner-fang-zhouzi-sues-former-cctv-veteran-gm> (last visited Oct. 15, 2018). Family members of China’s former premier Wen Jiabao threatened to sue *New York Times* for libel after the paper published articles alleging that the premier’s family amassed a fortune of \$2.7 billion. *Statement from Lawyers of Premier Wen Jiabao's Family Obtained by the Sunday Morning Post*, S. CHINA MORNING POST, Oct. 28, 2012, <http://www.scmp.com/news/china/article/1071455/statement-lawyers-premier-wen-jiabaos-family-obtained-sunday-morning-post> (last visited Oct. 15, 2018); David Barboza, *Billions in Hidden Riches for Family of Chinese Leader*, N.Y. TIMES, Oct. 25, 2012, <http://www.nytimes.com/2012/10/26/business/global/family-of-wen-jiabao-holds-a-hidden-fortune-in-china.html?pagewanted=all> (last visited Oct. 15, 2018).

²² Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT’L L. J. 33 (2006) [hereinafter *Innovation*].

²³ Xiaoming Hao & Kewen Zhang, *The Chinese Press and Libel: Political and Legal Implications*, 55 INT’L COMM. GAZETTE 77 (1995) [hereinafter *Implications*].

²⁴ Meining Yan, *Criminal Defamation in the New Media Environment—The Case of the People’s Republic of China*, 14 INT’L J. COMM. L. & POL’Y 1 (2011) [hereinafter *Criminal Defamation*].

²⁵ *Implications*, *supra* note 23, at 85-86; *Innovation*, *supra* note 22, at 104-106; *Criminal Defamation*, *supra* note 24, at 20.

libel law. The consequences of such refusal are also left unexplored. Legal and policy recommendations are not provided. This paper aims to fill that gap.

The next section of this paper examines framework of Chinese libel law to see if any constitutional and statutory law pertains to the concept of public persons. The third section studies court decisions and investigates if and how Chinese courts have discussed or applied the concept of “public officials” and “public figures” standards in libel cases. The fourth section evaluates how *New York Times Co. v. Sullivan* and its “actual malice” rule have been introduced to China by journalists, lawyers, and legal scholars. It also explores the impact of scholarly discussion on law-making activities. The fifth section examines reasons why China has decided to reject the public-person principle and what consequences occur as a result of the country’s unwillingness to write the concept of public persons into libel law. In the concluding part, the paper summarizes key findings, briefly discusses the future of *Sullivan* in China, and provides recommendations as to why, when, and how Chinese libel law should adopt the spirit of *Sullivan*.

II. Framework of Chinese Libel Law

This section examines Chinese libel law from constitutional and statutory perspectives. Before delving into Chinese libel law, it is worthwhile to have a brief introduction to the Chinese political and legal system. China is a one-party state in which the Communist Party of China has ruled the country since 1949 without any meaningful “oppositional parties” in the Western sense of the words. The party bureaucracy runs from the top at the central level to the bottom at the township/village level, with each level having a corresponding party committee responsible for making major decisions affecting every aspect of Chinese society. In parallel with the party bureaucracy, the people’s government apparatus runs vertically from the central level to the township/village level. Like the U.S. government, the people’s government in China has three branches, namely, the legislative branch, the executive branch and the judicial branch. The National People’s Congress and its Standing Committee is the highest organ of state legislative power. The State Council, the country’s national cabinet, is the highest organ of state executive power. The Supreme People’s Court is the highest state judicial organ in China while the Supreme People’s Procuratorate is the highest prosecutorial agency in the country. In theory, the National People’s Congress is the highest organ of state power in China, with authority to make constitutional and statutory laws, supervise all other state organs, and elect major officers of the state. In practice, however, the party remains the most powerful political entity in China, exercising control over all the other state organs via various means.²⁶ As the Chinese judiciary is not as independent as its Western counterparts, it is thus unsurprising for courts to yield, at times, to pressure from party and government leaders, especially when judges face sensitive and controversial cases.

The United States is a common law country and has five sources of law: constitutional law, common law, equity law, administrative law, and statutory law, at both the state and federal level. China is a civil law country and has the following sources of the law: the Constitution and statutes promulgated by the National People’s Congress (NPC) or its Standing Committee; administrative laws enacted by the State Council; ministerial regulations adopted by various ministries under the State Council; local laws and regulations passed by provincial and local legislative and executive organs; legislative,

²⁶ A *Brief Introduction to China*, CHINA L. INFO. (BEIDA FABAO), <http://www.lawinfochina.com/Legal/index.shtml> (last visited Oct. 15, 2018) [hereinafter *Introduction*].

judicial and administrative interpretations issued by the NPC, the Supreme Court and the State Council.²⁷ The Constitution is the most important law of the country, courts, however, are not allowed to interpret and apply it²⁸ although this is gradually changing.²⁹ Unlike the United States, where court decisions serve as legal precedents, decisions made by Chinese judges have no strict precedential value, indicating that “each case stands as its own decision and will not bind another court.”³⁰ Unlike American courts’ having the power to examine the constitutionality of laws, Chinese courts have no authority to declare any laws unconstitutional. In theory, such power belongs to the National People’s Congress Standing Committee which rarely exercises that power.

The Criminal Law (1979),³¹ the Constitution (1982),³² the General Principles of the Civil Law (1987),³³ three judicial interpretations issued by the Supreme Court (1993, 1998, 2013),³⁴ and the Law on Administrative Punishments for Public Order and Security (2006)³⁵ provide the main framework for China’s current libel law. The Criminal Law 1979 criminalizes defamation against individuals, providing that persons who insult or slander others, through violence or other means, shall be imprisoned for less than three years, be placed in criminal detention, or be deprived of political rights, if the consequences are serious.³⁶ The criminal code also criminalizes seditious libel by stating that persons

²⁷All the major legislations (both Chinese text and English translation) in China are available from a Chinese legal database, CHINA L. INFO. (*BEIDA FABAO*), <http://vip.chinalawinfo.com/>.

²⁸ Sanzhuan Guo, *Implementation of Human Rights Treaties by Chinese Courts: Problems and Prospects*, 8 CHINESE J. INT’L L. 161, 178 (2009) (noting that “China’s Constitution cannot be cited as a legal basis in China’s courts”).

²⁹ In recent years, more and more Chinese courts are beginning to cite the Constitution as the legal basis of their decisions. Stanley Lubman, *Citizens’ Rights, the Constitution and the Courts*, WALL ST. J., Sept. 26, 2011, <http://blogs.wsj.com/chinarealtime/2011/09/26/citizens-rights-the-constitution-and-the-courts/> (last visited Oct. 15, 2018); Shen Kui (trans. Yuping Liu), *Is It the Beginning of the Era of the Rule of the Constitution? Reinterpreting China’s “First Constitutional Case,”* 12 PAC. RIM L. & POL’Y J. 199 (2003); Thomas E. Kellogg, *Constitutionalism with Chinese Characteristics? Constitutional Development and Civil Litigation in China* (Ind. U. Research Ctr. for Chinese Pol. & Bus. Working Paper No. 1, February 2008, http://www.indiana.edu/~rccpb/WorkingPaper/RCCPB_WP1_Kellogg_Feb_08.pdf (last visited Oct. 15, 2018).

³⁰ *Introduction*, *supra* note 26.

³¹ The Criminal Law 1979 (amended in 1997).

³² The Chinese Constitution 1982 (amended in 1988, 1993, 1999 and 2004).

³³ The General Principles of the Civil Law 1987 (GPCL). China passed the General Rules of Civil Law (GRCL) in 2017 to update the GPCL and move toward codification of Civil Law. The GRCL, however, does not replace GPCL and does not change the libel law provisions in GPCL. Instead, the GRCL adds a new article that bans the slander of “historical heroes and martyrs” approved by the ruling Communist Party. Simon Denyer, *China Criminalizes the Slander of Its ‘Heroes and Martyrs,’ As It Seeks to Control History*, WASH. POST, Apr 27, 2018, https://www.washingtonpost.com/world/asia_pacific/china-criminalizes-the-slander-of-its-heroes-and-martyrs-as-it-seeks-to-control-history/2018/04/27/c4b48f16-49e9-11e8-ad53-d5751c8f243f_story.html?utm_term=.ca43bd067b2c (last visited Oct.15, 2018).

³⁴ Explanation of the Supreme People’s Court Regarding Some Questions in the Trial of Cases Concerning the Right to Reputation, 1993[hereinafter 1993 Supreme Court Explanation]; Interpretation of the Supreme People’s Court Regarding Some Questions in the Adjudication of Cases Involving the Right to Reputation, 1998[hereinafter 1998 Supreme Court Interpretation].”Interpretation of the Supreme People’s Court and Supreme People’s Procuratorate on Several Issues Regarding the Applicable Law in Cases of Using Information Networks to Commit Defamation and Other Such Crimes, 2013 [hereinafter 2013 Supreme Court Interpretation].

³⁵ The Law on Administrative Punishments for Public Order and Security 2006.

³⁶ The Criminal Law 1979, Amended in 1997, Art.246.

spreading rumors and slander that “incite to subvert the power of the state” or “overthrow the socialist system” may be sentenced to life imprisonment.³⁷ The code was revised in 2015 to penalize lawyers and others for “disrupting court order” or “defaming judicial officers.” The penalty is up to three years imprisonment, short-term detention, controlled release, or a fine.³⁸

According to the Constitution, freedom from being slandered or defamed is a fundamental right. Chinese citizens’ personal dignity is inviolable, “insult, libel, false charge or frame-up directed against citizens by any means is prohibited.”³⁹ The General Principles of Civil Law explicitly grants Chinese citizens and legal persons the right to reputation,⁴⁰ and states that, “If a citizen’s right of personal name, portrait, reputation or honor is infringed upon, he shall have the right to demand that the infringement be stopped, his reputation restored, the ill effects eliminated and an apology made; he may also demand compensation for losses.”⁴¹

The three interpretations issued by the Supreme Court in 1993, 1998 and 2013 provide binding guidelines for courts in handling defamation cases. According to the interpretations, any citizens, legal persons such as government or non-government entities, and close relatives of dead persons can sue for defamation. Both writers and media outlets that publish or broadcast the materials at issue can be listed as defendants.⁴² Media outlets that republish defamatory statements from other media can be listed as defendants as well if plaintiffs wish so. Plaintiffs can sue either in their own domiciles or in locations where defendants legally reside. Unlike American libel law in which plaintiffs carry the burden of proof, Chinese libel law requires defendants to carry the burden of proving that the questionable materials about plaintiffs are substantially true. Plaintiffs prevail as long as courts find materials at issue were published, were of or concerning plaintiffs, seriously mistaken and such mistakes or inaccuracies result in harm to reputation. Truth is not a defense where the alleged defamation results from insulting words or from revelation of personal details. Unlike American libel law, fault, whether intentional or unintentional, is not a valid defense for defendants in Chinese libel law. However, the level of damages awarded depends upon the severity of the defendants’ fault. Damages increase if mistakes were found to be intentionally made and decrease if mistakes were made unwittingly. The Supreme Court acknowledges the concept of a qualified communication privilege that is widely adopted in libel law in many Western countries, meaning that media cannot be held liable for reporting on information included in public official documents or proceedings as long as such information is covered in an objective and accurate manner.⁴³ The Supreme Court also privileges confidential internal reports by stating that media outlets enjoy immunity from libel liability for all information published in media reports sent exclusively to party and government leaders.⁴⁴ The Supreme Court criminalizes online defamation by

³⁷ The Criminal Law 1979, Amended in 1997, Art.105.

³⁸ The Criminal Law 1979, Amended in 2015, Art. 309.

³⁹ The Constitution 1982, Art.38.

⁴⁰ The General Principles of the Civil Law 1987, Art.101.

⁴¹ The General Principles of the Civil Law 1987, Art.120.

⁴² Media organizations, not writers, are listed as defendants if allegedly defamatory statements were published as a part of the writers’ job or professional duty. 1993 Supreme Court Explanation; 1998 Supreme Court Interpretation.

⁴³ News media outlets may be held liable for defamation if government authorities have corrected inaccuracies in public official documents and proceedings but the media organizations decline to report such corrections. 1993 Supreme Court Explanation; 1998 Supreme Court Interpretation.

⁴⁴ 1993 Supreme Court Explanation; 1998 Supreme Court Interpretation.

stating that anyone posting defamatory comments online may face probation, deprivation of political rights, or even up to three years in prison, if such statements are clicked and viewed more than 5,000 times, or reposted/retweeted more than 500 times.⁴⁵

The Law on Administrative Punishments for Public Order and Security is another noteworthy statute that could be used by police to punish, without trial, persons for violations of right to reputation. Under the law, a person fabricating stories to defame another person may be subject to punishment ranging from a fine of up to 500 Chinese Yuan (approximately US\$72.23) to administrative detention of less than 10 days, depending upon the severity of the offense.⁴⁶

An examination of the legislation regarding defamation in China and a search of all the Chinese laws archived in *Beida Fabao*, a major legal database hosted by the prestigious Peking University, show that the phrases “public persons,” “public officials,” and “public figures” cannot be found in Chinese libel law. In other words, neither the Constitution, nor various statutes, administrative regulations, or judicial interpretations contain any clauses drawing a distinction between officials, celebrities and private citizens in the libel context.

Thus, unlike American libel law in which the negligence or malice of media defendants is crucial in cases alleging defamation against public persons, the motivations of defendants in Chinese libel law are irrelevant, regardless of the status of plaintiffs. Defendant motivations matter only when determining the amount of damages owed to a prevailing plaintiff. The fact that defendants have to carry the burden of proving truthfulness has further made the Chinese libel law more advantageous to plaintiffs.

III. Use of the Phrase “Public Persons” in Chinese Judicial Decisions

This section investigates how Chinese court decisions have discussed or applied the concept of “public persons” standard in libel cases. It will first examine the level of use of the phrase “public officials” in judicial opinions. Then this section will focus on if and how Chinese judges relied upon the concept of “public figures” to make verdicts.

As examined in the previous section, the Chinese legislature and the Supreme Court have not provided any statutory or judicial basis for differentiating between public figures and private citizens in libel litigation. A *Beida Fabao* database search and an examination of media reports⁴⁷ found that no Chinese courts have mentioned phrases such as “*New York Times v Sullivan*,” “actual malice,” and “public officials” in their judicial opinions. It was also found that no Chinese courts have adopted the concept of heightened legal protections for media defendants in libel cases involving plaintiffs who are people holding powerful positions in various levels of party organizations and government agencies.

These findings are consistent with prior research. After examining more than 200 defamation cases brought in China’s courts between 1995 and 2004, a Columbia University media law scholar found that Chinese courts have never ruled against plaintiffs on the

⁴⁵ 2013 Supreme Court Interpretation.

⁴⁶ The Law on Administrative Punishments for Public Order and Security 2006, Art. 42.

⁴⁷ *Beida Fabao* is a major legal database in China. It does not archive all judicial verdicts made by various levels of courts in China, but many court decisions that are not in the database were reported by media outlets. Thus, it is advisable to combine database search with an examination of media stories available on the Internet.

ground that plaintiffs were officials and thus should receive less protection in libel litigation.⁴⁸ After research into 26 cases that were all brought to court between 1991 to 2004 by powerful public officials against media outlets for allegedly defamatory statements criticizing their job performance, a Chinese media law scholar found that none of the judicial opinions endorsed support for weakened protection for public officials' right to reputation.⁴⁹ It was also found that, in most cases, courts did not mention the motivations of media defendants, but rather presumed that the media outlets being sued were negligent.⁵⁰

It seems that the Chinese judiciary is still not bold enough to entertain the idea of applying greater scrutiny to officials, an elite group long regarded as a privileged class in Chinese society. A search of *Beida Fabao* database and an examination of media reports by using the key term "public figures," however, yielded much more encouraging results. The search shows that, unlike the term "public officials," the term "public figures" was cited in 66 civil cases, 3 criminal cases and 12 administrative cases.⁵¹ This shows that the use of the phrase "public figures" by Chinese judiciary is not uncommon. The following will examine, in chronological order,⁵² all libel cases that referred specifically in judicial opinions to the phrase "public figure," meaning celebrities or famous persons without party and/or government affiliations.

In *Hongqin Chen v. Fashion News*, a local TV anchorwoman and actress in Nanjing City sued a newspaper for violating her right to privacy⁵³ by publishing an allegedly defamatory story about the plaintiff's public wedding ceremony. Both the trial court and the appellate court ruled in favor of the defendant, reasoning that a public wedding ceremony was not private at all, the story was factually correct, and it had no insulting words, thus reporting the event did not violate the bride's right to reputation. It seems the courts accepted the general idea of "public figures" because their verdicts stated that the threshold of winning a libel case for a "public figure" should be higher than for a private citizen.⁵⁴ The judges, however, rejected the defendant's argument that the plaintiff was a "public figure." They reasoned that the plaintiff was not widely known because the TV programs she hosted attracted only local viewers and none of TV dramas and films she starred in were famous. The courts thus concluded that the plaintiff was not a "public figure."⁵⁵

In *Tianshuo Zang v. Beijing Net Frog Digital Music Co. and Guangzhou NetEase Computer System Co.*, a famous singer of pop songs sued two Internet corporations for harming his reputation by posting online allegedly derogatory materials about the plaintiff such as ranking him among the Top Ten Ugly Chinese Celebrities. The defendants insisted that, as a public figure, the plaintiff should "endure possible minor reputational harms" upon him. Both trial and appellate courts ruled in favor of the plaintiff, reasoning that,

⁴⁸ *Innovation*, *supra* note 22, at 50.

⁴⁹ Li Zhu, *Status Quo, Problems and Recommendations for Public Officials Defamation Cases: Study of 26 Defamation Cases Involving Public Officials* [hereinafter *Status Quo*], in AN INQUIRY INTO NEWS MEDIA TORTS 128 (Xun Xu ed., 2009) [hereinafter *INQUIRY*].

⁵⁰ *Status Quo*, *supra* note 49, at 128.

⁵¹ It is unknown whether or not those cases are related to defamation.

⁵² If judicial opinions for both appellate and trial courts are available, the case is examined in the order of the year when the trial court decision was made.

⁵³ In China, the right to reputation encompasses the right to privacy.

⁵⁴ *Hongqin Chen v. Fashion News*, Baimin chuzi No. 31, BEIDA FABAO (Nanjing City Baixia Dist. Ct. 1999); Ningmin zhongzi No.31, BEIDA FABAO (Jiangsu Province Nanjing City Interm. Court 2000).

⁵⁵ *Id.*

despite the status of the plaintiff as a “public figure,” he still should prevail and recover damages for defamation because the two defendants were “at fault.” In other words, the defendants published materials that caused the plaintiff a lot of emotional distress and pain. Both courts supported drastically reducing damages because of the status of the plaintiff as a “public figure.” The courts stated, “Just because we are aware of the status of Tiansuo Zang as a public figure who should be more prepared than average citizens to endure harm of this nature, the courts applied weakened protection for the plaintiff’s reputation by reducing amount of damages he requested.”⁵⁶

In *Zhiyi Fan v. Wenhui and Xinmin United Newspaper Group*, a famous Chinese soccer player sued a Shanghai-based newspaper affiliated with the defendant for portraying him, in a series of published articles, as an alleged suspect of soccer gambling. Although it later turned out that the plaintiff was not involved in such gambling, the court ruled in favor of the defendant, reasoning that the stories, if viewed in its entirety, were substantially true because they covered the whole process of how a rumor initially broke out and was finally confirmed as untrue. Another reason cited by the court for its judgment was “public figures rationales.” The court accepted the defendant’s argument that the plaintiff, as a public figure, should tolerate media criticism and the publication should be protected because its coverage was in the public interest and satisfied the public’s “right to know.” The court stated in its ruling: “Even if the plaintiff argued that the articles in question harmed his reputation, the plaintiff [as a public figure] shall understand and endure possible minor [reputational] harms arising from the course of media fulfilling their justified role as social watchdogs.”⁵⁷ The plaintiff did not appeal.

The court in *Xiaosong Gao v. Yahoo Hong Kong* ruled in favor of the plaintiff despite judges’ willingness to adopt the public figure rationale.⁵⁸ In this suit, the plaintiff, a famed music composer, accused an Internet company of defaming his reputation by publishing on its website 10 articles portraying him in an extremely negative light. The court designated the plaintiff as a public figure and reasoned that “when the plaintiff is a public figure, protection for his right to reputation should be restricted, as many legal scholars suggest.... Only by so doing, can our society strike a proper balance between right to reputation and freedom of speech and the press, which are often at odds with each other.”

The court proposed that, in handling defamation cases involving plaintiffs who are public figures, a court should first determine if the defendant was at fault.⁵⁹ If the media defendant was found having no fault, a court should rule in favor of the defendant because society would benefit from giving greater protection for a “public right” like freedom of the press versus weaker protection for a “private right” like reputation. However, if the media defendant was found to be at fault in preparing the story, judges should rule in favor of the plaintiff while at the same time reducing damages requested. The court said it ruled against Yahoo because the website company was at fault. It published substantially erroneous materials without proper prior editing. However, because the plaintiff was a public figure,

⁵⁶ Tianshuo Zang v. Beijing Net Frog Digital Music Co. & Guangzhou NetEase Computer System Co., Mindi No.1935, BEIDA FABAO (Beijing City Chaoyang Dist. Ct. 2001); Mindi No.397, BEIDA FABAO (Beijing City Second Interm. Ct. 2002).

⁵⁷ Zhiyi Fan v. Wenhui and Xinmin United Newspaper Group, Jingminyminchuzi No.1776, Media Reports (Shanghai Jing’an Dist. Ct. 2002).

⁵⁸ Xiaosong Gao v. Yahoo Hong Kong, Chaomin chuzi No. 04336, BEIDA FABAO (Beijing City Chaoyang Dist. Ct. 2002).

⁵⁹ The court did not elaborate on the meaning of “at fault.” “At fault,” in the Chinese context, encompasses both negligence and ill-will. Ill-will is almost an equivalent of “actual malice.”

the court drastically reduced the damages requested by the plaintiff from 52,818 Chinese Yuan (about US\$7630.23) to 14,818 Chinese Yuan (about US\$2140.65).⁶⁰

In *Qiuyu Yu v. Xialin Xiao*, a famous writer sued a Beijing-based literary magazine editor for publishing unconfirmed reports that the plaintiff got a fancy villa from the Shenzhen City government in return for positive comments about the city's culture.⁶¹ Both the trial and appellate courts ruled in favor of the defendant despite their reluctance to accept the "public figure" argument made by the defendant attorney. Citing the defamation law of the United States, in particular, *New York Times Co. v. Sullivan* and its related "actual malice" standard, and the case of *Zhiyi Fan* in which judges based their verdict on the public figure concept, the defendant attorney in *Qiuyu Yu* argued that judges should accept the public-figure standard and rule in favor of his client. Refuting the argument and basing the ruling on other legal grounds,⁶² the court stated in its verdict that (1) the "public figure-private citizen distinction is still in the phase of scholarly discussion and not yet becomes a part of Chinese libel law;" (2) the verdict in *Zhiyi Fan* is not law and cannot be applied to other cases, as China is a civil law, not a common law country.⁶³

The court in *Jili Tang v. Youth Times et. al.* acknowledged the plaintiff's celebrity status although it still ruled in his favor. In this case, a famous Hong Kong-based movie director sued six media outlets in mainland China for publishing a story alleging that his ex-girlfriend tried to commit suicide after she became pregnant with his child and was abandoned by him. The court stated in its verdict, "...Public figures are more newsworthy than ordinary citizens. Coverage of public figures will draw [more] social attention and benefit media outlets both in terms of fame and revenue...Media organizations can report news about the lives of public figures with 'due professional care' in order to fulfill their duty as social watchdogs.... If such reports are substantially true and pertain to matters of public interest, the plaintiff shall tolerate such reports even if such reports could possibly bring various kinds of inconveniences and harm the plaintiff's reputation."⁶⁴ The court finally ruled in favor of the plaintiff for the following reasons: 1) The defendants could not prove substantial truthfulness of the story. 2) The defendants were at fault and failed to exercise reasonable care. 3) The story did not pertain to matters of legitimate public interest. Although the defendants lost the case, the court reduced the requested damages from one million Chinese Yuan (about US\$144,462.70) to 160,000 Chinese Yuan (appropriately US\$23,114.03).⁶⁵

The court in *Yu Zhang v. China National Radio et. al.* adopted the concept of voluntary/limited-purpose public figure. The trial court held against the plaintiff on the ground that "the plaintiff turned herself into a public figure by voluntarily distributing [sexually graphic] audio and video clips and photos to various media outlets and published, via various media platforms, huge amounts of her personal opinions." So she should be able

⁶⁰ *Xiaosong Gao*, Chaomin chuzi No. 04336.

⁶¹ *Qiuyu Yu v. Xialin Xiao*, Dongmin chuzi No.1807, Media Reports (Beijing City Dongcheng Dist. Ct. 2003); Erzongmin zhongzi No. 9452, Media Reports (Beijing City Second Interm. Ct. 2003).

⁶² The courts found no falsity and defamation, insisting that the gossip about the fancy villa was widely known among scholars and the publication of the gossip does not contribute to the plaintiff's reputation being harmed.

⁶³ *Qiuyu Yu*, Erzongmin zhongzi No. 9452.

⁶⁴ *Jili Tang v. Youth Times et. al.*, Huyizhong minyi minchuzi No.13, Media Reports (Shanghai First Interm. Ct. 2004).

⁶⁵ *Id.*

to anticipate the implications of her actions. In other words, at the time when the plaintiff turned herself into a public figure, she should endure and even accept all kinds of commentaries made by...the general public, regardless of whether or not those comments are negative.⁶⁶ The appellate court upheld the verdict by emphasizing that the plaintiff should anticipate and bear consequences of voluntarily “thrusting herself into a public spotlight.”⁶⁷

In *Liangying Zhang v. Wenhui and Xinmin United Newspaper Group*, a prominent young pop singer sued a Shanghai-based newspaper for defamation arising from publication of allegedly fabricated stories that portrayed her as a ruthless and arrogant celebrity. The defendant argued that the author of questionable stories was not intentionally ill-willed and prior reports about the plaintiff were mostly positive or neutral. “As a public figure, the plaintiff should be tolerant of media criticism.” The court accepted the argument and dismissed the case because the story had no insulting words and there was no evidence to support the claim that the defendant harbored ill will toward the plaintiff. The judicial opinion declared, “As an entertainer, the plaintiff should understand and tolerate minor [reputational] harms [inflicted upon her] arising from fans’ enthusiasm and media attention.”⁶⁸

In *Chuanguo Xiao v. Tom Online*, a famous professor of medicine and a candidate for a fellowship in the China Academy of Sciences, brought an Internet company to court, accusing the defendant of harming his reputation by publishing statements questioning his academic credentials and professional capabilities. The defendants argued that the plaintiff was a “public figure” and thus should subject himself to media criticism and should “endure minor reputational damage arising from negative media reports.” Both the trial and appellate courts ruled in favor of the defendant. The reasons cited by the courts for the judgment included the plaintiff’s status as a public figure. The courts stated that critical opinions about public figures should be tolerated, even when those opinions are not well grounded in facts. “Public figures such as Xiao should endure caustic remarks in order to help maintain a healthy and uninhibited debate [on matters of public concern].”⁶⁹

In two related cases *Guosong Guo v. Zhouzi Fang* and *Zhouzi Fang v. Guosong Guo*, a former newspaper editor in Beijing and a San Diego-based science writer sued each other for publishing defamatory statements alleging fabrication. The trial court dismissed the two cases, describing both the plaintiff and the defendant as public figures.⁷⁰ During an interview after the dismissal of the cases, the presiding judge said that both the plaintiff and the defendant are “famous people” and they should treat each other with “more generosity and tolerance.”⁷¹ According to the judge, it is impossible to expect commentaries about public figures to be all positive. At times, doubts and negative remarks [about public figures] can better signify the true meaning of freedom of speech. In this case, neither the

⁶⁶ Yu Zhang v. China National Radio et. al., Media Reports (Beijing City Haidian Dist. Ct. 2006).

⁶⁷ Yu Zhang v. China National Radio et. al. Media Reports (Beijing City First Intern. Ct. 2006).

⁶⁸ Liangying Zhang v. Wenhui and Xinmin United Newspaper Group, Jingminyi minchuzi No. 2845, BEIDA FABAO (Shanghai City Jing’an Dist. Ct. 2006).

⁶⁹ Chuanguo Xiao v. Tom Online, (2007), Yizhongmin chuzi No.631, BEIDA FABAO (Beijing City First Intern. Ct. 2007); Gaomin zhongzi No.1146, BEIDA FABAO (Beijing Higher Court 2007).

⁷⁰ The cases were widely reported, but the judicial decisions to dismiss both cases cannot be found on the Internet and they are also unavailable from Beida Fabao.

⁷¹ Siming Huang, *Judge: Public Figures Shall Understand Tolerance*, SOHU, May 13, 2014, <http://news.sohu.com/20140513/n399509937.shtml> (last visited Oct. 15, 2018).

plaintiff nor the defendant harbored ill will toward each other, despite sharply unpleasant remarks from both sides. The judge said, “Public figures shall better endure critical and questioning remarks than ordinary citizens, and public figures deserve a lower level of legal protection [for reputation than that accorded ordinary citizens].”⁷²

In two related cases *Kaiyuan Guan v. QingdongKong* and *Qingdong Kong v. Xiaoping Wu*, a famous professor from Peking University, Qingdong Kong, and his opponents fought legal battles for using expletives to defame each other. In both cases, the courts ruled against Professor Kong on the ground that he is a “public figure” and thus enjoys reasonably less protection over his reputational right than private citizens.⁷³

An examination of these libel cases indicates that use of the phrase “public figures” in Chinese court rulings does exist, but is a new phenomenon. No Chinese judges used the term in their judicial opinions for defamation cases in the 1980s and 1990s. When Xiaoqing Liu, a famous film actress and businesswoman, won a libel suit in 1990 against a reporter for publishing a misquoted story about her failure to pay tax, she was treated like an ordinary citizen. The judgment did not mention Liu’s celebrity status or how that high-profile status might have influenced the outcome of the case.⁷⁴ Since 2000, things have begun to gradually change, as more and more judges were inclined to use the term “public figure” in their opinions. All judicial opinions examined above, with the single exception of *Hongqin Chen v. Fashion News*, were issued after the new millennium. All judicial opinions with the phrase “public figure” were issued for libel cases involving media defendants.

This is not pure coincidence. The free speech concept of *Sullivan* was introduced to China by journalists and legal scholars in the late 1980s and early 1990s,⁷⁵ which will be examined in the next section of this paper. Although no Chinese judges who relied on the public figure rationale in court rulings indicated whether they were influenced by *Sullivan*, it is safe to assume that judges were inspired by Chinese journalists and legal scholars who introduced the *Sullivan* case to China and proposed amending the current Chinese libel law with the ethos of the *Sullivan* case.⁷⁶

An analysis of these libel cases also indicates that Chinese judges, given the lack of explicit guidance from either the National People’s Congress or the Supreme Court, are still contemplating various aspects of the “actual malice” rule and are far from reaching a consensus on whether and how public figures should be exposed to a higher degree of public scrutiny. Such lack of consensus is reflected by the wide range of diversity in judicial decisions that can be grouped into three categories: In the first category are verdicts that explicitly embrace the concept of public figures and rule in favor of media defendants. Just a

⁷² *Id.*

⁷³ *Kaiyuan Guan v. QingdongKong*, Media Reports; *Qingdong Kong v. Xiaoping Wu*, Yizhongmin zhongzi No. 02203, CHINA JUDGMENTS ONLINE, <http://goo.gl/PjPgmW> (Beijing City First Intern. Ct. 2015). For media reports, see Patrick Boehler, *Beijing Courts Address the Right to Criticize Public Figures*, N.Y. TIMES BLOGS, Feb. 27, 2015, http://sinosphere.blogs.nytimes.com/2015/02/27/beijing-courts-address-the-right-to-criticize-public-figures/?_r=1 (last visited Oct. 15, 2018).

⁷⁴ Chengdu Intermediate Court, *The Trial and Analysis of Xiaoqing Liu’s Libel Suit*, 11 LAWS 13-14 (1990).

⁷⁵ INQUIRY, *supra* note 49, at 227.

⁷⁶ Yongzheng Wei and Hongxia Zhang, *An Examination of the Concept of Public Persons in the Use of Chinese Mass Media Defamation Cases* [hereinafter *Public Persons*], in INQUIRY, *supra* note 49, at 223; Yongzheng Wei, *Some Thoughts on Recommendations on Judicial Interpretation* [hereinafter *Some Thoughts*], in INQUIRY, *supra* note 49, at 234.

few verdicts fall into this category. In the second category are verdicts that explicitly reject the public figure theory, arguing that the theory is scholarly and not legally binding. In the third category are verdicts that accept the public-figure principle but insist that the principle does not necessitate a finding for defendants, as even public figures have reputational rights. Most verdicts fall into the second and third categories.

No Chinese courts, even the most conservative or liberal ones, have set a clear standard for the protection of public figures' reputational right. This is different from American judges, who explicitly require plaintiffs to carry burden of proving five elements of libel (publication, identification, defamation, falsity and fault). It seems that, under the current Chinese libel law, Chinese libel plaintiffs carry the burden of proving publication, identification and defamation, while Chinese media defendants carry the burden of proving truthfulness. The level of fault is irrelevant to deciding winners. Some Chinese courts are proposing that plaintiffs be required to prove negligence on the part of media defendants, allowing media defendants to prevail if they can prove reasonable care, even though their stories were substantially untrue and defamed public-figure-plaintiffs. No courts, however, have adopted the increased level of fault ("actual malice" or intentional ill will) as a required element to be proved by celebrity plaintiffs. Although Chinese courts, in general, are reluctant to give more leeway to media defendants when judges have to decide which party wins, judges are much more generous to media defendants in terms of awarding damages. They prefer reducing damages drastically if media defendants showed no ill will or negligence.

The cases examined in this section demonstrate the Chinese courts' willingness to experiment with expanded protection for the media in libel cases brought by public figures, and the courts' unwillingness to do so when plaintiffs are powerful public officials. Such a double-standard attitude is understandable in the Chinese context. Party and government officials, in general, are much more powerful than public figures in Chinese society. Angering officials would have much greater consequences for judges, since those officials control the appointment and promotion of judges and the funding needed for courts. Officials may penalize courts for unfavorable verdicts by obstructing judges' careers and/or withholding appropriation. Public figures, on the other hand, would have much less direct influences on China's judicial system despite their widespread fame and substantial wealth.

Another noteworthy pattern is that no Chinese courts have entertained the idea of adopting the *Sullivan* standard in criminal defamation suits, even if plaintiffs were officials. This is especially discouraging, considering that a large portion of criminal defamation cases were brought by officials to silence critics and hide misconduct.

It is not appropriate to overstate the significance of Chinese judges' efforts to enhance protections for the media in defamation litigation. First of all, courts willing to embrace the concept of public figure-private citizen differentiation are still extremely few in number. In addition, as China is not a common law country, decisions made by progressive judges have limited precedential value and cannot bind other courts for handling similar cases. Underestimating the importance of such "judicial innovation,"⁷⁷ however, is equally

⁷⁷ Normally, Chinese courts are not authorized to issue judgments based on something that is still not yet law; the standard approach is to apply existing laws. Media law scholar Benjamin Liebman considered a few Chinese local courts' adoption of the public figures-private citizens standard in libel cases without explicit guidance from the Supreme Court and the National People's Congress as "judicial innovation." *Innovation, supra* note 22, 105-106.

unwarranted. First, the efforts of a few liberal Chinese courts may encourage other courts to adopt similar standards. Second, local experimentation by Chinese judiciary may eventually push the Supreme Court and the National People's Congress to move closer toward across-the-board adoption of the public-person standard in Chinese libel law.

IV. “Public Persons” Debate Among Chinese Journalists, Legal Scholars, and Practicing Attorneys

This section examines how journalists, lawyers, and legal scholars introduced *New York Times Co. v. Sullivan* and its “actual malice” rule to China. This part pays particular attention to scholarly debate among journalists, legal scholars and professionals over the feasibility of transplanting the *Sullivan* standard to China, a country with a sharply different culture and ethos from America's. The section also explores the recommendations made by journalists, legal scholars and legal professionals to government authorities, and the ultimate outcomes of those recommendations.

In China, average citizens and legal professionals in particular, are playing an increasingly important role in law-making activities as the country is seeking to make its legislative process more transparent and democratic. Many laws and regulations are a result of compromise between progressive legal scholars and conservative party and government elites. For example, Chinese legal academia has advocated greater governmental transparency since the new millennium. Scholars worked together to produce a scholarly version of China's first freedom of information (FOI) law and sent it to government authorities for reference. Their efforts finally contributed to the passage of Open Government Information Regulations,⁷⁸ an administrative regulation that grants Chinese citizens and legal persons unprecedented legal right of access to government-held records and files. Although the State Council, China's national cabinet, rejected many progressive ideas and practices recommended by scholars, the adoption and enforcement of the FOI law has made China a member of the global community in which more than 90 countries pride themselves on having access-to-information laws.⁷⁹ It would be enlightening to see if scholars, lawyers and journalists played similar roles in the evolution of Chinese libel law.

Various studies of Chinese libel law show that Chinese journalists, attorneys and legal scholars introduced the free speech principle of *Sullivan* to China in the late 1980s and early 1990s.⁸⁰ The introduction came against the backdrop of Deng Xiaoping's policy of reform and opening up to the outside world in the late 1970s, which included systematically learning from Western countries and reflecting on drawbacks of China's own cultural heritage.

In the 1980s, China attempted to draft the Press Act that, once enacted, would virtually eliminate party and government censorship and better ensure journalistic

⁷⁸ Regulations of the People's Republic of China on Open Government Information, adopted in 2007, went into effect in 2008.

⁷⁹ For more discussion on the role of legal academia in the enactment of China's freedom of law, see Yong Tang, Chinese Freedom of Information: An Evolution of the Legislative History, Rationales, Significance and Efficacy of Regulations of the People's Republic of China on Open Government Information (2012) (unpublished Ph.D. dissertation, The Pennsylvania State University) (on file with author).

⁸⁰ INQUIRY, *supra* note 49, at 227; Songnian Yu, *What Kind of Press Law Should We Have?* in CHINESE JOURNALISM Y.B. 1989 106 [hereinafter *Press Law*]; *Public Persons*, *supra* note 76.

autonomy. In 1988, when discussing the clauses of the law, journalists, legal scholars and many other drafters believed that they should learn from their American counterparts. They agreed that the news media, when performing their supervision function, should differentiate their targets. “Their criticism should be focused on *public affairs* and *public servants*. Only then will the news media have greater room for expressing their opinions without fear of overstepping the boundaries.”⁸¹ The scholarly discussion on the law did not explicitly refer to *New York Times v. Sullivan*, but the concept behind the ideas of Chinese journalists and legal scholars was strikingly similar to the citizen-critic rationale undergirding the “actual malice” rule.

Although the proposed press freedom law was killed in its infancy as a result of the Tiananmen Square incident in 1989, the *Sullivan* standard became known by more and more journalists, attorneys and legal scholars in China. Taizhi Chen, a veteran journalist from Shanxi Province, discussed *New York Times v. Sullivan* in 1991 in a media law seminar and proposed that China adopt the “actual malice” standard for libel suits brought by officials.⁸² Since then, the *Sullivan* case and its underlying rationales have been vigorously debated among Chinese scholars, attorneys, and journalists.

An evaluation of online media reports, examination of scholarly books, and careful reading of Chinese-language journal articles retrieved from China Academic Journal Databases find that most journalists, legal scholars and attorneys in China had supported introducing the concept of public persons⁸³ to Chinese libel law and recommended strengthened legal protections for media defendants in libel suits brought by the powerful, rich and influential.⁸⁴ Such prominent academicians, journalism and legal professionals include (but are not limited to): Han Xiao, Liming Wang, Weifang He, Lixin Yang, Xinbao Zhang, Zhiwu Chen, Liufang Fang, Xun Xu, Zhiqiang Pu and Songmiao Wang. The rationales used by them for domesticating the free speech principle of *Sullivan* included 1) limiting the power of public persons, 2) ensuring the people’s right to know, 3) upholding freedom of speech, 4) constraining the potential for abuse of power, 5) protecting the public interest, and most importantly, 6) striking a proper balance between the constitutional right to reputation and the constitutional right to unfettered criticism of officials and state organs.⁸⁵

Perhaps no one in China has advocated the *Sullivan* standard and freedom of the press more eloquently, vigorously, and persistently than Zhiqiang Pu, a lawyer with a master’s degree in law from China University of Political Science and Law. Dubbed by the *Washington Post* as “China’s version of a First Amendment lawyer,”⁸⁶ Pu often cited,

⁸¹ *Press Law*, *supra* note 80, at 106 (emphasis added).

⁸² INQUIRY, *supra* note 49, at 227.

⁸³ Most Chinese scholars like using the more expansive term “public persons” to refer to public officials, all-purpose public figures, limited purpose/voluntary public figures, and involuntary public figures, terms widely used in the context of American libel law. *Public Persons*, *supra* note 76, at 229.

⁸⁴ *Recommendations on New Judicial Interpretation on Cases Involving Media Defendants Allegedly Violating Right to Reputation and Privacy: Proposed Clauses and Their Rationales* [hereinafter *Recommendations*], in INQUIRY, *supra* note 49, at 358-367.

⁸⁵ *Id.* Article 35 of the Chinese Constitution 1982 provides that Chinese Citizens enjoy freedom of speech and the press. Article 41 of the constitution provides that Chinese Citizens have the right to criticize state organs and officials. The Chinese Constitution 1982, Art. 35, Art. 41.

⁸⁶ Philip P. Pan, *In China, Turning the Law into the People’s Protector* [hereinafter *Protector*], WASH. POST, Dec. 28, 2004, A01, <http://www.washingtonpost.com/wp-dyn/articles/A30146-2004Dec27.html> (last visited Oct. 15, 2018).

emotionally, in court arguments, the *New York Times v. Sullivan* opinion and the First Amendment to the U.S. Constitution in cases brought by public officials and public figures against news media and writers. According to Pu, public officials and public figures in China, like their counterparts in the United States, must prove “actual malice” to prevail in defamation suits.⁸⁷

Although courts often did not accept his arguments, Pu has not given up. As his influence has expanded, Pu has become increasingly vocal in fighting against the suppression of speech. He worked together with other legal experts in the draft of a report to help the Supreme Court revise its judicial interpretations regarding defamation. A copy of the proposed interpretation, with the “actual malice” rule as a provision, was sent to the Supreme Court in 2007.⁸⁸

Pu is also a frequent commentator on court rulings. After the court in *Zhiyi Fan v. Wenhui and Xinmin United Newspaper Group* released its judgment, Pu stated enthusiastically, “Rulings in prior libel cases sporadically mentioned the public figure-private figure differentiation; however, the status of the plaintiff [either as a public or private figure] seems having no substantial impact on trial investigations, cross examinations and rulings.”⁸⁹ Pu said that *Zhiyi Fan* was the first libel case in which a Chinese court relied upon the concept of public figure for its legal reasoning and the court ruled against the plaintiff in accordance with that concept. “The efforts made by this court should be cherished given that the public figure and ‘actual malice’ principal has not yet been officially endorsed by [Chinese] government authorities.”⁹⁰

Like Zhiqiang Pu, many attorneys, journalists and judges are fighting, via various means, to help enhance public awareness of the importance of expanding protections for media defendants in libel cases. In 2012, Han Han, a mainland China best-selling author, sued Zhouzi Fang, a San Diego-based Chinese scientific writer, for defamation. The plaintiff accused the defendant of harming his reputation by publishing statements alleging that the plaintiff secretly hired ghostwriters to work for him. Before the plaintiff withdrew lawsuit for unknown reasons,⁹¹ a prominent commentator with the Guangzhou-based *Southern Weekend* published an editorial with frequent references to the *Sullivan* concept and judicial opinion of the landmark case. The writer said, from a legal perspective, it is hard for Han Han to win this lawsuit. As a public figure, he must surrender part of his [reputational] right to public censure. He must carry a higher burden of proof in this libel suit. According to the writer, this is necessary for ensuring “*wide-open and vigorous* debate on matters of public concern.”⁹² Anyone, including Zhouzi Fang, has the legal right to question and criticize Han Han, even inaccuracies in minor details could harm Han Han’s reputation.

⁸⁷ Zhiqiang Pu, *Criticizing Public Officials for Misconduct Does Not Defame Them, No Matter How Caustic Remarks Are: Gan Wu v. Chenglan Yuan*, in NEWS MEDIA TORTS IN CHINA: ANALYSIS OF 50 SIGNIFICANT CASES 251-259 (Research Group on Selection and Evaluations of Chinese Defamation Tort Cases, ed. 2009)[hereinafter NEWS MEDIA TORTS]; *Protector*, *supra* note 86.

⁸⁸ *Recommendations*, *supra* note 84.

⁸⁹ Zhiqiang Pu, *Special Obligations of Public Figures: Tolerate Media Criticism and Endure Minor Harms*, in NEWS MEDIA TORTS, *supra* note 87, at 227.

⁹⁰ *Id.* at 225.

⁹¹ Han Han v. Zhouzi Fang (2012).

⁹² Tie Li, *Han Han v. Zhouzi Fang Comes at the Right Time*, SOUTHERN WEEKEND, Feb. 2, 2012, <http://www.infzm.com/content/68339> (last visited Oct. 15, 2018) (emphasis added).

Only in this way can we guarantee that “freedom of expression has *its breathing space to survive*.”⁹³

A judge went even further than the newspaper commentator in popularizing the *Sullivan* concept in China. Fan He is a well-educated and liberal-minded judge sitting on the bench of China’s Supreme Court. In 2011, He translated Anthony Lewis’s seminal work *Make No Law: The Sullivan Case and the First Amendment* into Chinese and published the translation with the prestigious Peking University Press. The book has a new title: *Marking the Boundaries of Criticizing Officials: New York Times v. Sullivan*. A full-page interview with the translator was published in *China Youth Daily*, a popular newspaper known in China for aggressive journalism.⁹⁴ The judge said in the interview, “When we reflect on our social reality, we will find that inspirational significance of *New York Times v. Sullivan* can still never be overemphasized in today’s China.”⁹⁵ The interview was widely republished online, indicating enormous reader interest in the *Sullivan* case.

Journalists, legal scholars, and attorneys were not satisfied with purely scholarly discussion on the *Sullivan* standard. They wanted to see its principles become part of Chinese libel law. A group of leading journalists, media law scholars, and attorneys worked together to produce a recommendation report that aims to advise the Supreme Court in rewriting judicial interpretations on defamation-related cases. The report was first submitted in 2007 to the All-China Journalists’ Association which later sent the report to the Supreme Court.⁹⁶ The report, among many other things, urged the highest judicial organ in the country to adopt the *Sullivan* principle. The document recommended that Chinese courts avoid supporting defamation claims made by “public persons” when media defendants did not harbor any “intentional ill will” towards plaintiffs, and issues in question pertain to public interest.⁹⁷

The report also suggested that, in suits brought by public persons, libel defendants’ intentional ill will in preparing the story at issue be evidenced by two actions: (1) receiving or seeking material gain, acting at someone’s instigation, or seeking revenge; and (2) recklessly publishing questionable materials despite knowledge of falsity or reasonable doubt about the truthfulness of materials in question. As plaintiffs, public persons must carry the burden of proof for the first action while the burden of proof for the second action would be borne by defendants. The defendants should be deemed to have no “actual malice” if they could disprove the second action by sound evidence and if the plaintiffs could not prove the first action.⁹⁸

Apart from requiring defendants to carry part of the burden of proof, the recommendation is nearly a Chinese equivalent of the American “actual malice” standard. It is even more progressive than judicial opinions written by local judges in China who explicitly referred to the term “public figure.” Drafters of this report hoped that China’s

⁹³ *Id.*

⁹⁴ Yunnan Fu, *Freedom to Criticize Officials*, CHINA YOUTH DAILY, sec. 12, Aug. 17, 2011, http://zqb.cyol.com/html/2011-08/17/nw.D110000zqgnb_20110817_1-12.htm (last visited Oct. 15, 2018).

⁹⁵ *Id.*

⁹⁶ Xun Xu, *Report for Recommendations on New Judicial Interpretation on Cases Involving Media Defendants Allegedly Violating Right to Reputation and Privacy*, in INQUIRY, *supra* note 49, at 336.

⁹⁷ *Recommendations*, *supra* note 84, at 358.

⁹⁸ *Id.* at 365.

highest court could include the *Sullivan* principle in its revised judicial interpretations, thereby making heavier burden of proof for public persons binding on similar cases in the future. Unfortunately, pleas from scholars, attorneys, and journalists fell on deaf ears. As of January 2019, the Supreme Court has not publicly responded to the report, nor provided any explanations for its silence.⁹⁹

Of course, not all scholars agree with unreserved adoption of the *Sullivan* standard in Chinese libel law. Legal scholar, Jinxi Zhang, warns against drawing a distinction between public figures and private citizens in libel cases, although he believes a similar distinction between public officials and average people is warranted. Zhang argues that, unlike public officials who are major decision-makers of public affairs, public figures generally have no say in public affairs; it is thus unnecessary to require them to have a higher burden of proof.¹⁰⁰

Yongzheng Wei, a leading media law scholar in China, embraces the *Sullivan* concept with caution despite the fact that he was advisor to the research group that produced the recommendation report mentioned above. According to Wei, enforcement of the public person defense in *New York Times Co. v. Sullivan* is a desirable check against possible abuse of power in American society. Enforcement of the “actual malice” principle in China, however, may bring about unintended consequences for society due to sharply different political and media systems in these two countries.¹⁰¹ Professor Wei explains that American media organizations are independent from the government, whereas, in China the party and the government strictly control media institutions. Chinese laws and party policies heavily favor protecting officials’ reputation. Any articles about top-ranking officials and their families need clearance from the Central Propaganda Department before they can be published or broadcast.¹⁰²

Wei thus warned that the adoption of the *Sullivan* principle in China would not enhance average citizens’ right to criticize public persons. Instead, media outlets with strong party and governmental backgrounds and connections would have much greater say in the information market, and they could possibly become weapons of officials for retaliation against political enemies. Media institutions would worsen professionally and ethically because they enjoy immunity for spreading fake news, rumors and slander. Wei said that public figures, because of their lack of ties to party and government entities, would likely see their right to reputation greatly weakened. Overall, the adoption of the “actual malice” rule would create huge unfairness in Chinese society.¹⁰³

Many of Wei’s arguments do hold water, and his concerns about the consequences of giving Chinese media too much power at a time when power abuse is highly likely is not without valid reasons. However, he tends to overemphasize his points of view. Any society has to face many difficult choices and it has to choose between the lesser of two evils. Clearly, the lesser of two evils in libel law is giving too much power to media, not giving too much power to people who are already powerful, wealthy, and influential.

⁹⁹ Email interview, May 18, 2014, with Xun Xu, one of the principal writers of the report.

¹⁰⁰ Jinxi Zhang, *On the “Actual Malice” Standard in American Libel Law*, Yongzheng Wei’s blog, <http://weiyongzheng.com/archives/32539.html> (last visited Oct. 15, 2018).

¹⁰¹ *Public Persons*, *supra* note 76, at 223; *Some Thoughts*, *supra* note 76, at 384-386.

¹⁰² *Id.*

¹⁰³ *Id.*

V. Reasons and Consequences: China's Reluctance to Embrace "Public Persons" in Libel Law

The first libel case in the People's Republic of China was concluded in 1988 when two reporters from the Shanghai-based monthly magazine *Democracy and Law* were convicted of criminal libel for injuring personal dignity and reputation of the plaintiff by publishing materials falsely charging the plaintiff of torturing his wife for 20 years.¹⁰⁴ Since then, suing the press for libel has become more and more popular in China. This section examines why Chinese libel law, as a whole, has decided to reject the "public person" principle and what kind of consequences occurred as a result of the country's unwillingness to write "public persons" into libel law and thus grant greater protections for media.

As can be seen from prior analysis, the citizen-critic rationale undergirding the "actual malice" rule is widely accepted among many Chinese legal scholars, journalists, and attorneys. This rationale, however, has not been adopted into Chinese libel law, despite persistent lobbying from lawyers, academics and journalists. No laws, regulations, or judicial interpretations have provided explicit and expanded protections for media criticism of public officials and public figures. Like the Chinese legislature, the Chinese judiciary is also unwilling to accept the citizen-critic rationale, although a few local courts embraced the public-person concept.

The reasons for China's reluctance to adopt the public-person standard in libel suits are at least fivefold. First, history and cultural traditions play a role. As a country worshipping Confucianism and Legalism, China has a long history of suppressing expression, speech, and the flow of information. Although some governors in ancient China allowed open-wide and vigorous debates on public affairs,¹⁰⁵ for Chinese rulers, cherishing the value of unfettered speech is always the exception, not the norm.¹⁰⁶ This kind of cultural predilection and social ethos has an unfathomable but significant impact on today's law-makers. The designation of communism as the country's dominating ideology after 1949 has further eroded public space where people can freely express and exchange their thoughts on matters of public concern.

Second, Chinese law-makers designed a legal system that is purposefully tilted toward protection of the right to reputation due to the country's tragic experiences during the Cultural Revolution (1966-1976). During the 10-year-long period of social chaos and turmoil, it became common practice for people to vilify others via media, and millions of Chinese people saw their reputations and integrity ruthlessly trampled upon without remedies. In a 1989 speech about the role of the press, Jiwei Hu, a veteran journalist and former publisher of *People's Daily*, expressed his criticism of the way media outlets were

¹⁰⁴ Shen & Mu v. Du (1988); Yafu Shen and Chunlin Mu, *The 20-Year-Old Mystery of A Lunatic Woman*, 1 DEMOCRACY & LAW 1-7 (1983); Shanghai Intermediate Court, *The Truth about the Libel Case Involving the 20-Year-Old Mystery of A Lunatic Woman*, SHANGHAI LEGAL NEWS, sec. 2, Jan. 16, 1986; *Journalists Lose Libel Case Appeal*, XINHUA NEWS AGENCY, Jan. 25, 1989.

¹⁰⁵ For example, Chan Zhi, prime minister of Zhen during the Spring and Autumn Period, was known for his tolerance of public discussion on public affairs. He refused to destroy village schools where people gathered to gossip and criticize officials. Qiuming Zuo, *The Commentaries of Zuo* (Bojun Yang, trans. 1981).

¹⁰⁶ For example, according to the Qin Dynasty law, anyone who criticized the emperor or the government will see his or her entire family exterminated and anyone who participated in conversations with others will face execution in public [《史记·高祖本纪》：“诽谤者族，偶语者弃市。”]

used during the Cultural Revolution: “Newspapers and broadcast stations could easily expose a person to be shunned and bring him down.”¹⁰⁷ When the Cultural Revolution was over and the country started to repair the broken legal system, the legislature decided to give the reputational right a preferred position in order to prevent the Cultural Revolution tragedy from happening again.

At first glance, it looks like the right to reputation and freedom of expression are treated equally in China as both rights were written into the 1982 Constitution.¹⁰⁸ In reality, however, the country has much stronger legal protections for the right to reputation. This imbalance is evident from the fact that there is no single statute in China that turns the constitutional ideals of freedom of expression into an enforceable right,¹⁰⁹ whereas many existing laws favor the reputational right and marginalize the role of freedom of expression. For example, the Criminal Law 1979 explicitly prohibits defamation and seditious libel,¹¹⁰ but none of its clauses upholds freedom of speech. Likewise, right to reputation was given preferential treatment in the 1987 General Principles of the Civil Law, China’s first civil law. Two articles of the law explicitly¹¹¹ uphold citizens’ right to integrity and reputation. The civil law, however, nowhere mentions protection of freedom of expression and the press. This kind of legal arrangement results in excessive protection of reputation and insufficient protection of individual and institutional expression. Adopting the public-person standard in libel suits would require an overhaul of China’s legal system, which would be extremely hard, if not impossible.

Third, in America, drawing a distinction between public persons and average citizens in libel cases would encourage media to report more aggressively on public affairs and thus ensure greater oversight of public servants and celebrities. This is because American media institutions have evolved from partisan, to yellow, to professional journalism, and the general public can count on journalists to act in the public interest. The Chinese media system, in contrast, is still far from being an impartial and independent watchdog institution despite its march toward commercialization and professionalization that began in the 1990s. In the media circle, sensationalism is a common practice and corruption is widespread.¹¹² Chinese law crafters may feel that, with the newly gained power of defaming officials and celebrities without legal consequences, Chinese media would very likely use the power to pursue private gains instead of using the power to report for the public good.

¹⁰⁷ Jiwei Hu, Speeding up Press Law Legislation and Protecting the Freedom of the Press, Address delivered at a meeting of deputies of Sichuan Province to the Sixth National People’s Congress (March 3, 1989), in *ECONOMIC WEEKLY*, April 2, 1989.

¹⁰⁸ Article 35 of the Constitution protects Chinese citizens’ freedom of speech and freedom of the press. Article 41 gives citizens the right to criticize state organs and officials. Article 37 upholds the reputational right.

¹⁰⁹ China once tried in the 1980s to enact a Press Law that would have redefined libel and given the media stronger protections. The law was killed in its infancy after the Tiananmen Square incident. See *Implications, supra* note 23, at 84.

¹¹⁰ The Criminal Law 1979 (amended in 1997), Art. 246 and Art. 105.

¹¹¹ General Principles of the Civil Law 1987, Art. 101 and Art. 120.

¹¹² For discussions of journalism corruption in China, see Yuezhi Zhao, *MEDIA, MARKET AND DEMOCRACY IN CHINA: BETWEEN THE PARTY LINE AND THE BOTTOM LINE* (1998). The head of China Central Television finance channel was investigated under suspicion of bribery in June 2014. *Senior CCTV Producer Investigated for Bribe-Taking*, *GLOBAL TIMES*, June 3, 2014, <http://www.globaltimes.cn/content/863510.shtml> (last visited Oct. 15, 2018).

In addition, China has strict policies on reporting about high-ranking officials and their families.¹¹³ Chinese lawmakers may feel that drawing a distinction between public persons and average citizens is unnecessary to Chinese libel law because reporting on top party and governmental officials is strictly controlled in the first place; the public-person standard in libel law would not enhance citizens' right to know and their right to criticize public officials. More importantly, lawmakers may fear, with the adoption of the *Sullivan* standard, Chinese media outlets would become too powerful, not in terms of aggressiveness of reporting, but in terms of its relationship with courts.

This kind of concern is not unwarranted, as Chinese media usually enjoys a better position in the Chinese legal system than courts because of the media's closer ties to party and government connections and resources, and also because of the media's administrative ranking.¹¹⁴ As a Columbia University media law scholar stated, "[T]he media often have far more real authority and power in the Chinese legal system than the courts."¹¹⁵ If China adopts the *Sullivan* standards, "such provisions would serve to protect one arm of the state (the media) from other state institutions,"¹¹⁶ thus further eroding courts' marginalized power base.

Last but not least, Chinese law makers may also be concerned that party and government leaders may turn media outlets into ruthless vehicles for political revenge, a scenario envisioned by some Chinese scholars.¹¹⁷

China's reluctance to adopt the public-person standard in civil and criminal libel suits is just a part of the country's efforts to give a preferred position to the reputational right to avoid the tragic history of ruthless trampling upon the integrity and reputation of millions that happened during the Cultural Revolution. The preferential legal treatment given to reputation is a contributing factor of the explosion of defamation suits in the 1990s¹¹⁸ and continues to prompt libel litigation in the 21st century. In the 1980s, libel litigation was still uncommon. Since the 1990s, Chinese courts have been accepting more and more libel cases. There were a total number of 3,138 defamation (both criminal and

¹¹³ *Public Persons*, *supra* note 76, at 223; *Some Thoughts*, *supra* note 76, at 384-386.

¹¹⁴ Leading media organizations such as *People's Daily*, Xinhua News Agency, and China Central Television are considered ministerial-level party or governmental agencies. Their top leaders are usually ministerial-level officials appointed by the party. People usually do not dare sue those media outlets. Even if those media outlets are sued, they often choose not to appear in court, knowing that courts would not have the courage to rule against them. Even if those media outlets lose, the verdicts are usually hard to enforce.

¹¹⁵ *Innovation*, *supra* note 22, at 35.

¹¹⁶ *Id.* at 106.

¹¹⁷ *Public Persons*, *supra* note 76, at 223; *Some Thoughts*, *supra* note 76, at 384-386.

¹¹⁸ Two scholars cited a number of additional reasons for the explosion of libel litigation in the 1990s: Various laws protecting civil rights of citizens were enacted during the late 1970s and 1980s, providing the legal means for citizens to settle disputes with the media; as China changes from a planned economy to market economy, media outlets become separate economic entities and are no longer a part of the government and party apparatus, thus seeming less intimidating; sensationalism and muckraking journalism spurred by market competition and loss of governmental funding are more likely to generate complaints from citizens; libel cases brought by famous entertainers, writers and athletes draw more media attention and thus prompt more litigation followers; the very act of suing gives plaintiffs a sense of pride and satisfaction and resolving a dispute via litigation is less expensive and more convenient than negotiating with media's supervisors. *Implications*, *supra* note 23, at 80-83.

civil) cases in 1993. The number of libel cases jumped to 7,000 in 2001 and went down slightly to 5596 in 2003.¹¹⁹

Preferential treatment given to reputation also encourages courts to apply the defamation law more expansively, prompting people to sue even if they have no minimal evidence. In many circumstances, plaintiffs sue for minor factual errors, with the assumption that courts will support a finding of falsity.¹²⁰ This has caused the majority of Chinese media defendants to lose. An examination of 223 defamation cases brought in China's courts between 1995 and 2004 found that the media defendants lost 68 percent of all cases. Specifically, media defendants lost 69 percent of all public official plaintiffs and state entities, and 65 percent of all cases involving public figure plaintiffs.¹²¹ Another evaluation of 26 libel cases brought by public officials between 1991 and 2004 found that media defendants lost 65 percent of all cases.¹²² It was also found that all court decisions for the above 26 cases neither mentioned the theory of public officials nor endorsed support for intensified protection for freedom of the press.¹²³ For all the 22 cases in which public officials prevailed, the court rulings just presumed that media defendants were negligent in handling questionable materials.¹²⁴

Media defendants in criminal defamation cases have an even higher rate of losing than in civil cases. While defendants in civil cases may make an apology and pay some money when they lose, defendants in criminal defamation face far more severe consequences: long periods of detention, public humiliation, and social ostracization. "All these things are very threatening and intimidating and can certainly induce a chilling effect on would-be critics."¹²⁵ A disturbing trend in the first 10 years of the new century is that more and more Chinese citizens were sued and convicted of criminal defamation just because they criticized powerful local officials. Such controversial cases prompt an avalanche of nationwide arrests and convictions for criminal libel. The central government had to step in and issue directives to curb the rapid rise of criminal defamation.¹²⁶

VI. Summary and Conclusions

Through case and statutory analysis, this paper investigated the development of libel law in China, focusing on how public officials and public figures have been treated statutorily and judicially. The paper also explored political, societal, cultural, and legal

¹¹⁹ Bing Guo [vice president of Higher People's Court of Jiangxi Province], speech delivered at Seminar on Media Violating Individuals' Right to Reputation and Privacy, Sept. 23, 2005, Nanchang, Jiangxi Province; *Innovation*, *supra* note 22, at 45.

¹²⁰ In a typical case, a restaurant owner sued a newspaper for defamation because the news story miscounted the number of flies flying around in the restaurant. Zhanqi Shi, *If You Are Writing A Critical Story*, 76 CHINESE JOURNALIST 31(1993).

¹²¹ *Innovation*, *supra* note 22, at 50.

¹²² *Status Quo*, *supra* note 49, at 121-131.

¹²³ *Id.* at 126.

¹²⁴ *Id.* at 128.

¹²⁵ *Criminal Defamation*, *supra* note 24, at 40.

¹²⁶ Ministry of Public Security Notice on the Handling of Criminal Defamation and Insult Cases Strictly in Accordance with the Law No. 16 (Gongtongzi, March 3, 2009). The Supreme People's Procuratorates did not publish the full text of the 2010 Guidelines. It provided a press release to media. *Criticizing Leaders Does Not Equal to Committing Criminal Defamation*, CHINA YOUTH DAILY, Aug. 8, 2010, <http://news.163.com/10/0808/06/6DHVMMUO00014AED.html> (last visited Oct. 15, 2018).

factors contributing to such treatment.

The free speech principle of *Sullivan* was introduced to China in the tumultuous periods of the late 1980s and early 1990s by Chinese media law scholars, attorneys, and journalists. The *Sullivan* case and its underlying rationales have aroused heated debate among legal professionals and journalists as to whether the America-born concept should be added to Chinese libel law. Most scholars, attorneys and reporters believe that the “actual malice” standards would better enable Chinese citizens to enjoy their constitutional right to freedom of speech and freedom of the press. More importantly, the standards would better enable citizens to exercise their constitutional right to criticize state organs, party, and government officials. Chinese legal scholars and journalists thus proposed that their country adopt the “actual malice” test of U.S. libel law.

Over the last 30 years, however, Chinese legislators from the National People’s Congress and the Supreme Court judges have steadfastly refused to recognize the *Sullivan* principle to constrain politicians and celebrities from suing for defamation, criminal and civil. No statutes, either criminal or civil, have been written to enhance protections for media in libel suits. No courts have cited or adopted the concept of public persons in libel suits brought by powerful party and government officials. Strong legal and policy protections granted to party and government officeholders make it extremely hard for media defendants to defend against powerful officials’ abuse of libel law.

Yet an encouraging trend in Chinese libel law is that more and more local courts, though still few in number, have either discussed or adopted the public persons versus private citizens concept in civil libel lawsuits brought by public figures/famous persons. Consequently, a few celebrities in sports, entertainment, art, and academia lost their suits against news media organizations. Chinese judges ruled in several high-profile celebrity libel cases that public figures, unlike ordinary citizens, should understand and endure the “possible minor harms” inflicted upon their reputation from negative media reporting. Chinese courts’ rulings are striking if we consider the fact that the defamation law of China has not drawn any distinction between ordinary persons and public persons. It demonstrates some Chinese courts’ willingness to experiment with American approach of expanded protections for the media in libel cases brought by public figures. Nonetheless, such experiments should not be lauded as a revolution because (1) they are still tentative in nature, (2) their overall effect on the libel law of China remains to be seen, and (3) those pro-*Sullivan* judicial decisions cannot bind other courts which normally rely on statutory law in writing their own decisions.

This paper finds that China’s long history of suppressing speech and criticism, the country’s legal system characterized by excessive protections for the legal right to reputation, strict government control on flow of information, concerns for the possibility of media abusing their newly gained power, and lack of media professionalism may contribute to the country’s disenchantment with adoption of the public-person standard in libel suits. This paper also finds that preferential legal treatment given to reputational right is prompting an explosion of libel suits since the 1990s, and the majority of media defendants lost in cases brought by public officials, public figures or even private citizens.

The paper finds that, in the last 10 years, public officials are increasingly using criminal defamation to suppress criticism and to punish critics and whistleblowers, a

disturbing trend also identified by prior research.¹²⁷ Officials win criminal defamation cases easily because there is no requirement for them to prove “actual malice” or even negligence. Consequently, Chinese civil and criminal defamation laws are having a chilling effect on the media. “With libel suit as a sword of Damocles over a journalist’s head, China’s media will find it harder to play a vital role in promoting wide-open, robust, and uninhibited discussion.”¹²⁸

In the coming years, it is believed that local courts in China will continue to experiment with expanding legal protections for media defendants in libel suits. It won’t be surprising if a few more courts rule in favor of media defendants in accordance with the public person standard. It is highly unlikely, however, that China will adopt such a standard in its statutory law in the near future. In the long run, it is equally unlikely that the Chinese legal system “may achieve a free speech balancing comparable to what the United States did in *Sullivan* – without using the phrase ‘actual malice’”¹²⁹ if China continues to be an authoritarian regime in the far distant future. The pessimism is due in part to China’s thousands of years of history of suppressing speech, communist ideology’s orientation against the value of an open society, emphasis of several generations of post-Mao party leadership on economic liberalism and political conservatism.¹³⁰

Chenyang Xie, a Beijing attorney with a law degree from China University of Political Science and Law and a graduate from the Pennsylvania State University law school doctoral program, shares this pessimistic view. Xie said that he did not know *New York Times Co. v Sullivan* until he came to the United States as a student a couple of years ago. According to Xie, the adoption of the “actual malice” rule in China is “very unlikely” because party and government officials in China are not sufficiently tolerant of criticism from citizens and the media.¹³¹

Although it is unlikely for *Sullivan* to become a part of Chinese libel law in the near future, it remains a goal worth fighting for. Many important values are often in conflict. Deciding which one to take precedence in the event of such a conflict defines a person, a people and a nation. Fifty years ago, the United States made the choice: let freedom of speech and expression take precedence over right to reputation when the powerful, the wealthy, the famous, and the influential sue for libel. The choice America made reaffirms the country’s commitment to a truly vibrant, open, and transparent society. Such a society eventually benefits all, including public officials and public figures. Despite all its flaws, American journalism has evolved to be a more ethical, responsible, and impartial watchdog since the 1960s. The potential for media abuse of the power to defame someone for private gains is limited.

¹²⁷ *Criminal Defamation*, *supra* note 24, at 4, 60.

¹²⁸ *Implications*, *supra* note 23, at 90.

¹²⁹ *Touchstone*, *supra* note 16, at 210.

¹³⁰ Zhiqiang Pu, the attorney who has been vigorously pushing government authorities to accept the *Sullivan* standards in Chinese libel law, was arrested and placed under criminal detention for participating in a small seminar on the 25th anniversary of the Tiananmen Square incident. Pu was arrested together with some other seminar participants. This arrest might not bode well for the future of *Sullivan* in China. Malcolm Moore, *Chinese Journalist Charged with Leaking State Secrets and Paraded on TV*, TELEGRAPH, May 8, 2014, <http://www.telegraph.co.uk/news/worldnews/asia/china/10816725/Chinese-journalist-charged-with-leaking-state-secrets-and-paraded-on-TV.html> (last visited Oct. 15, 2018).

¹³¹ Email interview with Chenyang Xie, May 18, 2014.

China should make a similar choice. China should allow the spirit of *Sullivan* to flourish if it wants to evolve into a more democratic, innovative, diverse, vibrant, and open society. The citizen-critic rationale is a concept that Chinese libel law reformers must embrace if the country really wants to establish a more transparent, vibrant, and democratic society. When they sue for libel, Chinese public servants and famous persons, like their American counterparts, should endure a higher degree of scrutiny than ordinary persons. Such degree of scrutiny may be achieved by either adopting American brand of “actual malice” or using whatever mechanisms China feels comfortable with.

The introduction of the *Sullivan* standard to China is desirable and feasible. The reason is at least threefold. First, Chinese history repeatedly proves that freer flow of information benefits not only the governed but also the governors. The Qin Dynasty and Yuan Dynasty are among the most short-lived dynasties partly because the emperors were too ruthless in restricting what people could say and write.¹³² On the contrary, the Tang and Song dynasties are among the most politically stable, economically prosperous, and culturally rich dynasties partly because the rulers were more tolerant toward criticism, and commoners enjoyed greater freedom of expression.¹³³

Second, the Article 19 of the Universal Declaration of Human Rights said, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”¹³⁴ The current draconian Chinese libel law severely harms people’s ability to receive and disseminate information. It is creating a chilling effect. Writing *Sullivan* into Chinese law would demonstrate China’s commitment to promote and protect freedom of expression and the press, two fundamental human rights acknowledged and upheld by the United Nations.

Third, the Communist Party is trying to create a cleaner, more transparent and accountable government, and more credible media organizations. Adopting the *Sullivan* standard in the libel law would in some way help the party achieve these goals. The *Sullivan* standard would allow news organizations to be more aggressive in exposing government misdeeds and corruption, and the state-run media would, thus, instantly become more popular in the eyes of readers and viewers. This would earn the Chinese media credibility, something the party always wants its media apparatus to have in face of severe competition from Western media conglomerates. At the same time, the party’s anti-corruption campaign would become more effective because of the participation of the media and public.

Last but not least, China is no longer a stranger to *Sullivan*. Since its introduction to the Chinese public discourse in the late 1980s and early 1990s, the landmark First Amendment case from the United States is getting more and more attention among college

¹³² According to the Qin Dynasty law, anyone who criticized the emperor or the government will see his or her entire family exterminated and anyone who participated in conversations with others will face execution in public. [史记·高祖本纪：“诽谤者族，偶语者弃市”].

¹³³ For example, the Song Dynasty is known for being especially tolerant toward criticism of emperors and government. Very few official-scholars and commoners were executed for their criticism of government conduct. Xiaofeng Huang and Xiaomin Lv, *Why Were Intellectuals in Song Dynasty Not Afraid to Speak Up* [宋代士大夫为何风骨最盛?], PEOPLE’S DAILY ONLINE, Aug. 2, 2011, <http://history.people.com.cn/GB/205396/15310270.html> (last visited Oct. 15, 2018).

¹³⁴ The Universal Declaration of Human Rights, Article 19, <http://www.un.org/en/universal-declaration-human-rights/index.html> (last visited Oct. 15, 2018).

students, lawyers, scholars, journalists, and general citizens. Courts across the country are experimenting with the concept of “public figures.” Although it is still uncertain how the Supreme Court would respond if local courts start discussing the concept of public officials in their verdicts, it is encouraging that the Supreme Court sat on the sidelines when some local courts wrote “public figures” into judicial opinions. All these encouraging trends have paved way for reshaping the Chinese libel law according to the spirit of *Sullivan*.

The real question for China, therefore, is not whether it should adopt the *Sullivan* standard, but when. As discussed in the article, it might be premature for China to do this right now when its media is still so corrupt and partisan. It would be an opportune time to write the public-person standard into libel law when China’s media becomes more ethical, responsible, impartial, and independent, and thus, have the confidence and ability to use the new gained power for more aggressive and responsible journalism. When nearly 20 percent of the world’s population finally decides to embrace *Sullivan*, it would certainly be “an occasion for dancing in the streets.”¹³⁵

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¹³⁵Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 200 (1991).

SOCIAL MEDIA, REGULATION AND CHALLENGES OF COMMUNICATION IN AN EVOLVING NIGERIAN SOCIETY

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The rise of new media via the newly invented communication technologies in our society today has increased communication among people globally. These new communication technologies include but are not limited to the computer, mobile devices, internet and social media. Unlike other traditional forms of media, the unique characteristic of social media has enhanced the freedom of speech giving rise to citizen journalism, online activism, opinion forums and questioning of anti-public policies of the government. This has led to attempts by governments in some countries like Nigeria to censor the social media. Recently, there was a failed attempt by the legislature to pass into law a controversial social media bill which sought to imprison Nigerians for criticizing politicians and public officials on social media. The bill also proposed to jail for two years anyone who circulates alleged false messages to others on social media. This was a gross violation of not just the freedom of the press but of expression as well. This paper will focus on how social media as a platform of communication is being threatened under the guise of regulation in Nigeria. It will also bring out the reportorial perspective of social media usage in Nigeria.

Keywords: Nigeria, social media, technology, regulation, internet

I. Introduction

Today, we live in a world globally connected by social media. Its impact is felt in every sphere of life, politically, economically, culturally and socially. It has transformed communication. When you think the world, you think Facebook, Twitter, Instagram, YouTube, LinkedIn, and other social media. As observed by Flew (2002), through social media, virtual communities are being established online, transcending geographical boundaries, and eliminating social restrictions. According to Cairncross (2000), people in virtual communities use words on screens to exchange pleasantries and argue, engage in intellectual discourse, conduct commerce, make plans, brainstorm, gossip, feud, fall in love, create a little high art and a lot of idle talk. Social dialogues facilitate interaction based on certain interests and characteristics.

The social media is a form of virtual community which facilitates interaction based on certain interests and characteristics. It uses web-based technologies to transform and broadcast media monologues into social dialogues. According to Kaplan and Haenlein (2010), social media is a group of internet-based applications that build on the ideological and technological foundations of Web 2.0 and that allow the creation and exchange of user-generated content. Parr (2010) defines social media as the use of electronic and internet tools for the purpose of sharing and discussing information and experiences with other

human beings in more efficient ways. Social media can take many different forms including social networking websites, wikis, video sharing sites, photo sharing websites, news aggregation, social bookmarking sites, online gaming and presence apps (Amobi 2010, p.28). According to Mayfield (2008), there are basically seven kinds of social media, including social networks, blogs, wikis, podcasts, forums, content communities and micro-blogging. In Nigeria, there are at least 9 million social media users in Nigeria (Terragon Insights, 2013).

Accordingly, Shea (2010, p.103) stated that social media are elements of the new media and have become the highest activity on the internet. The rapid growth of social media activities in recent years is indicative of its entry into the mainstream culture and its integration into the daily lives of many people. Amobi (2011, p.26) corroborated Shea's (2010) submission when she opined that social media have been embraced by sectors of the Nigerian public for their power to explicitly structure and make visible online relationships as well as create new connections. In the words of Ihebuzor (2010), social media has become a veritable tool with vast potential for awareness creation, sensitisation and social mobilisation. As a result of the widespread popularity and influence of the social media, it has gained considerable attention in politics.

Today, the government has turned its searchlight on social media. This is because of the increasing importance and influence of social media in the country. As noted by Ibraheem, Ogwezzy-Ndisika and Amobi (2014), the rate at which social media is fast becoming a major part of shaping public policies makes compelling the need for a concerted effort to enable the relevant stakeholders to properly understand and use these media within the context of existing institutions. There is, therefore, a conflict between the increasing influence of social media on the socio-political and economic situation of the countries and the individual citizen's rights to free speech as enshrined by law.

Some commentators have, however, rebuffed the increasing influence of social media. Hendrickson (2007, p.188), for instance, said that, in the late 20th century, many initially resisted the importance of the internet as a viable news outlet because of the ease and economy with which individuals could make use of the new medium. Online journalists were resisted and criticized by their mainstream counterparts as they emerged, with some denying association with them. Some traditional journalists condemned the rapid way, with which information was posted without proper editing, perceiving the practice as unprofessional. In the words of Berger (2003, pp. 1373–1374),

“The organization of news outlets as complex organizations is a means to an end and, for a long time, was probably the only means to that end if publishers wanted to reach large audiences. But this is no longer so. The Internet, a worldwide network, gives individuals the capacity to reach audiences around the globe, free of the natural limits of the airwaves, the constraints of paper delivery or the related need to be affiliated with a recognized media organization.”

With the robust use of and activities on social media and social networks, the governments in some countries like Nigeria and India see it as a threat. In this regard, there have been attempts to censor the social media and suppress its users. The questions now arise: is there a need for a separate social media law? What effect will it have on free speech in Nigeria? What implication will this new development have for Nigeria and Africa? All the foregoing questions will be considered in this paper.

II. Social Media: A Force for Good?

Social media are internet activities which can be said to be an offshoot of a constitutional right to free speech. In Nigeria, free speech is guaranteed under Chapter 4 of the 1999 Constitution as amended (section 39). This is in tandem with the United States' First Amendment on the rights to free speech as declared by the Supreme Court in *Packingham v. North Carolina* (137 S.Ct. 1730 (2017)) where it was unanimously ruled that using social media is a constitutional right. This judgment will, no doubt, corroborate Collin et al.'s (2011) position on the benefits of social media which they identified to include media literacy, education, creativity, individual identity and self-expression, strengthening of interpersonal relationships, sense of belongingness, and collective identity, strengthening and building of communities, civic engagement and political participation and well-being.

Social media allows for creative activities online, as Papacharissi (2007, p.22) puts it, through focusing on self-expression, use of rhetorical strategies, socialization and display of alternative content. According to Smith (1998) online media allowed individuals to project their identity and establish connections with their audiences. For Dominick (1999), individuals on online media engage in social association because they indirectly defined themselves and their social status by listing their interests on their pages thus seeking positive reinforcement and social contact by inviting other users to be their friends, view their pages or follow them. These strategies, according to Dominick, are used for self-representation online and are very similar to those used in face-to-face settings.

In a study by Papacharisi and Mendelson (2010), people engage in social media to stay connected to those they already know and to meet new people. People valued Facebook for helping them keep up with people at a distance, inform others about themselves and find people with similar interests, and enjoyed being able to keep up with their friends' achievements, news, relationship status and life developments. All the foregoing thoughts accord with the reasoning of the United States Supreme Court in *Packingham* when it held that a North Carolina law banning sex offenders from social media violated the First Amendment on the rights to free speech and further ruled that the government cannot restrict access to social media.

Furthermore, social media provide the opportunity for media audiences to function not only as content consumers but as content producers. Microblogs and blogs provide the opportunity for amateur journalism and personalized publishing (Herring, Kouper, Scheidtand Wright, 2004). In the words of Manovich (2001), "bloggers blur the line between producer/consumer and reality/ mediation—a typical new-media perspective." Hewitt (2006) posits that citizens no longer need to wait for the traditional media but are now bypassing them to independently seek information on social media.

In Nigeria, however, despite the availability of a robust legal framework on free speech and free press, there has been agitation particularly from the government to suppress these constitutional rights, particularly from the angle of social media with the insertion of a derogatory clause, such as section 45, in the Constitution of Nigeria, 1999 as amended. The purport of the derogatory clause in section 45 was examined by the Nigerian Supreme Court in *Ukeagbu v. Attorney General of Imo State* ([1981] 2 N.C.L.R 568). The court unfortunately held that section 45 did not derogate from the fundamental rights of free speech and expression as enshrined in the constitution. In fact, all the American judicial authorities which the appellant relied on in the case were rejected by the apex court

on the principle of constitutional incongruous. In addition, there are also some laws in Nigeria, such as the Nigerian Press Council Act (NPCA) (CAP N128, Laws of Federation of Nigeria, 2004), which derogate from the rights to free speech and of expression. A High Court in 2010 has held in *Newspapers Proprietors Association of Nigeria v. President of the Federal Republic of Nigeria & Others* (FHC/L/CS/1324/99) that NPCA violates the rights to free speech.

III. Internet Access in Nigeria: Examining the Ruse of Digital Divide among Nigerians

In this twenty-first century, interaction between humans and computers has greatly increased in our society owing to the fast and running rate of development in technology globally. The ability to access computers and the internet has become increasingly important to completely immerse oneself in the economic, political, and social aspects of not just the community one belongs, but of the world. However, not everyone has access to this technology. Notably, a common concept among communication scholars and practitioners when it comes to the internet, social interaction and social media is the concept of digital divide. This concept is usually played up in cases that warrant a clear picture on the usage of internet among people. Digital divide refers to the difference between people who have easy access to the Internet and those who do not have access. Amobi (2009, p.25) expanded this view when she made a statistical description of what constitutes digital divide, stating in the findings of her research how 47% of Nigerian youths were found to be active participants on the social media compared to 81% of youths in United States of America. Access in this instance, is not restricted to particular devices such as computer. It could also include mobile devices and all other devices that can be used for communication with the aid of the internet.

The necessity of digital divide on the regulation of social media in view of the challenges it poses in a developing Nigerian society is borne out of the increasing rate of participation of Nigerians on the platform. In recent times, there has been a rise in internet usage in Nigeria which necessitates social media activity. Citing World Internet Statistics (2011) in Amobi, (2011, p26), studies from 2008 to 2011 indicate an unprecedented increase in internet usage population in Nigeria from 1,129,345 to 44,000,000 in 2011. In the face of harsh economic conditions that exist in the Nigeria, it may be safe to project that between 2011 and 2016, the statistical population of internet users could have increased to 70,000,000 taking account of a slash in prices of devices and internet connection in Nigeria. However, a media report by Premium Times (2015) revealed that the number of internet users on Nigeria's telecoms networks has hit 97.21 million, up from the 95.37 million recorded in August 2015, according to figures released by the Nigerian Communications Commission (NCC). Judging by this figure, there may be a need to ask if truly there exist a wide digital divide in Nigeria, comparing the statistics of internet users to the general population of Nigeria unofficially put at 197,000,000.

With this situation, more than half of the population is one way or the other connected to the internet; hence, a condition for a mass participation on the social media for various reasons ranging from political participation to social and economic participation. Specifically, an infographic report provided by TechTalkAfrica (2013) shows that out of 21 million people that constitute the population of Lagos State, over 87% access Facebook from their mobile phones making it the second largest mobile Facebook access in the world. Over 1.5 million tweets emanate from the country, placing it at number three in terms of the

number of tweets emanating from the continent. Again, a recent study conducted by one of Nigeria's largest mobile social network, Eskimi, revealed that more Nigerians use social media as tool of communication than other medium such as email. While we recognise that the Lagos population may not reflect what the general population of Nigeria looks like, it may be safe to call Lagos a "Model State" for other states in Nigeria. We are of the opinion that there is a strong need for a second look on what constitutes a digital divide between Nigerians in Nigeria which may not necessarily mean a wide digital divide as people are generally meant to believe when issues on internet usage or social media usage arise. The need in Nigeria, therefore, for actual free speech and freedom of expression which is devoid of government interference in line with what obtains in civilized nations such as the United States of America cannot be over emphasized.

IV. Social Media and its Negatives

Although social media has provided opportunities and prospects for global communication and change, it is not without its negative consequences. Researchers have exposed the negative behavioural consequences of internet use and by extension social media (Katz and Aspden, 1997; Kraut et al, 1998; Nie and Erbring, 2000). Many social media users, in order to compete for attention or just to say something online, often veer off into gossip, innuendo, ridicule and hollow sarcasm—much in a childish manner. Hills and Huges (1998) in Azeez (2013, p.34) suggested that the new media promotes cyberbalkanization, which occurs when individuals purposefully limit their discussion with those that share their belief and ideas, thereby hindering robust deliberative discussions.

Cyber fraud is on the increase, along with child pornography, criminal harassment, copyright violations, identity theft and other illegalities perpetrated through the internet and social media. A popular type of cyber fraud is Phishing. This is a scam which makes internet users believe they are receiving emails from a trusted source when the actual source is a criminal. Other forms of cyberfraud include Data Mining, Online Trickery and Advance Fee Fraud (Snow, 2010). In Kehinde's (2013, p.185) opinion, while the internet is a medium of globalization, the term "globalization" is value neutral and could be positive or negative. Thus, there is globalization of peace seekers, liberators, solidarity seekers as well as fraudsters, evil people, war mongers (ibid). This is evidenced in the brutal murder of Cynthia Osokogu, at Northern Nigeria, by two young men whom she met on Facebook, who lured her and killed her in bizarre circumstances.

These negatives are the major weapons by the government for the consistent agitations to regulate social media and, therefore, interfere with the unfettered rights of citizens to free speech and expression in Nigeria. We submit that, despite these ills, these rights as enshrined in the constitution are inalienable and ought to be sacrosanct in line best international standard and practice.

V. The Digital Public Sphere called the "Social Media"

The concept of the "public sphere" was popularized by the German philosopher, Jurgen Habermas, as a space where the opinion of the public arises from private reflection upon public affairs and from public discussion (Habermas, 1989, p.94). It is assumed that all citizens can interact freely through public communication with one another on public issues and come up with ideas that can affect state policies positively. The advent of the internet and social media have redefined the public sphere. Browning (2002) in Daramola et al (2011, p.178) sees the internet as a booster of the public sphere and deliberative

democracy since it supports an equal and unrestricted means of access to information which is fundamental to the practice of discourse.

According to Azeez (2013, p.30), the success of the Arab Spring shows the impact and power of the new media to effectively mobilize people for agitations and civic engagement. He opined that the new media provide the ideal public sphere envisioned by Habermas for deliberation of decisions and issues. Thus, the unlimited space, unrestricted platform and un-coerced conversation make the new media a veritable platform for discussion. Coleman (2001, p.121) went as far as describing the new media as the fifth estate that helps scrutinize and engage national parliaments.

Social media is deployed as a medium to engage in public democratic debates and influence public policies and laws. These debates are constantly fueled by opinion leaders or influencers who share their opinions vigorously and whose views are respected by the public. Vibrant twitter discussions, chat rooms and group discussions between policy makers and citizens have helped the latter air their views on issues and insist on reforms and reviews of policies, as well as help the former to understand the minds of the masses in public issues. For example, the Occupy Nigeria protest of 2012 (which began first on Twitter Nigeria), in which a multitude of protesters gathered at Gani Fawehinmi's Park, Lagos, to protest the removal of the oil subsidy, forced the government to reduce the pump price of fuel. The Bring Back Our Girls campaign on Twitter in 2014 is also another example of social media activism and its enduring impact on social and foreign policy support for change. The campaign which started on Twitter with the *hashtag* #BringBackOurGirls soon became a global phenomenon. Days after trending in the Nigerian social media space, the hashtag gained support from global media as well. The campaign forced world leaders in USA, UK and other countries to put pressure on the Nigerian government to start a rescue mission. A Twitter analytic tool, Topsy, estimates so far that more than 3.1 million tweets have been sent using the #BringBackOurGirls hashtag, with 188 tweets per hour. In addition, Twitter has been said by certain analysts (Sesan and Olukotun, 2016) to be partly responsible for the success of the winning political party, All Progressive Congress (APC), in the 2015 Nigeria presidential elections.

VI. Theoretical Framework

The guiding theory for this study will be the Social Responsibility Theory which is an important theory that shows the relevance of this study in relation to free and responsible media in any society. Historically, Social Responsibility Theory owes its origin to the Hutchins Commission on Freedom of the Press, set up in the United States of America in 1947 to re-examine the concept of Press Freedom. This theory, according to Christian (2004), reflected a dissatisfaction with media, owners and operators and the way they distributed media. Accordingly, the theory accepted certain principles such as the press servicing the political system, enlightening the public, safeguarding the liberties of the individual, servicing the economic system, entertaining the public (provided that the entertainment is "good"), and maintaining its own financial self-sufficiency as the case may be. According to Marzolf (1991), Robert Hutchins (the head of Hutchins Commission on Freedom of the Press) once said that "freedom requires responsibility." If the Press would be free to publish anything, it behooves them to accept responsibility for whatever is published. And in this case, the struggle against the proposed social media regulation bill and the "freedom" which the press and media practitioners enjoy under the Freedom of Information Act (FOI), presupposes that the media will have freedom on one hand, and lose its freedom on the other hand.

Social Responsibility Theory seems to be appropriate for the framework of this study. This theory, which is an off-shoot of Libertarian Theory and propounded by F.S. Siebert, T.B. Peterson and W. Schramm in 1963 describe the need for the media to be socially responsible. In summary, this theory is meant to “safeguard against totalitarianism.” The relevance of this theory to this study is the fact that it focuses on the media to be careful while exercising their freedom. And this freedom by implication is not absolute. According to McQuail (1987) cited in Anaeto, Onabanjo, Osifeso (2008), this theory assumes that the media should accept and fulfill certain obligations to society amongst others. These obligations are already spelled out in various media regulations in Nigeria warranting no need for social media regulation. What should be of importance to policy makers is the re-echoing of the assumptions of this theory that demands for professional standards of information dissemination, truth, accuracy, objectivity and balance, that the practice of journalism already entails.

VII. The Frivolous Petition Bill, Freedom of Information (FOI) Act, Press Freedom, and Free Speech in Nigeria

The recent proposed social media regulation bill sponsored by Senator Bala Ibn Na'Allah representing Kebbi South Senatorial District of Kebbi State under the All Progressives Congress (APC) has generated heated debate particularly on the intention and timing of the bill in Nigeria. The proposed bill "Frivolous Petition Bill 2015 (SB. 143)" also known as anti-social media bill was generally believed as a bill intended to gag online media practice and social media activism in Nigeria. The bill, proposes to jail for two years anyone who circulates alleged false messages or "abusive statement" to others on social media. These false statements could be from “a group of persons” to an “institution of government” and warrants a fine of N2,000,000 (\$10,000) or two years in jail (section 4).

It is a popular suspicion that the bill is targeted at journalists and other users of the internet who are actively involved in exposing the purported dastardly acts of the politicians and leaders in authority. Various groups or organised associations in Nigeria such as Nigerian Union of Journalists, Organised Labour, Nigerian Bar Association, Civil Society Organisations (CSOs), and Online Platforms publishers have been kicking against the bill since it was first proposed. At the moment, the bill has been discarded by the Senate of the Federal Republic of Nigeria due to huge pressure placed on the lawmakers (Vanguard, June 6, 2016), but with growing agitation to re-introduce same at a future date (Daily Trust, June 26, 2018). The bill, "an Act to prohibit frivolous petitions; and other matters connected therewith," prescribed stiff penalties for purportedly social media offenders and false petitioners. The bill, amongst other things, seeks to prohibit frivolous petitions and abusive statement through text messages, tweets, WhatsApp and other social media platforms. The bill mandates a petitioner to depose to an affidavit at a Federal or State High Court. In other words, an individual may not be able to post whatever he/she likes on social media on any public figure or private individual without first swearing an affidavit and any agency of government to whom the post or petition is directed cannot rely on same (sections 1-3 of the Bill).

By implication, there is an impending infringement on an individual's liberty to post any information online, hence an individual's freedom of expression. Notable in this regard is the fact that there are laws in Nigeria protecting the fundamental human rights of citizens as they relate to breach of privacy, protection against slander, defamation, sedition, and regulation of social media generally, together with their intricacies etc. The Nigerian Criminal Code Act (chapter 17), Nigerian Communications Act, No. 62 of 2003 (sections 1 -

4), Cybercrimes (Prohibitions, Preventions, etc) Act, 2015 (sections 6, 11, 22 and 24), and the common law tort of defamation (*Ajakaiye v. Okandeji* [1972] 1SC 92), all speak to the forgoing issues. With all these laws in place, is there a need for other laws regulating an individual's right to communicate or openly express oneself as the bill seeks to prohibit? Since it is implicitly assumed that the bill is targeted at the army of online content producers who are journalists and other citizens alike, there may not be a wide difference in the act of re-introducing a breach of press freedom under the guise of social media regulation as airborne by this bill. Interestingly, the debate on press freedom which has raged on for decades is believed to be silently fading away with the strong entrenchment of democracy in Africa and Nigeria.

According to Alabi (2003, p.53), press freedom simply means that the press should be allowed to publish without prior restraint. Also, citing Aiyar (1979) in Alabi (ibid), press freedom involves the right to "report facts honestly and faithfully, even if they prove inconvenient or embarrassing to someone. Accordingly, it means liberty to interpret the evidence before them according to their (reporters') independent judgement and journalistic conscience." Again, freedom of the press according to Bollinger (1991) means the right to publish newspapers, magazines, and other printed materials without governmental restriction and subject only to the laws of libel, obscenity, sedition, etc. It could also mean the right to broadcast through electronic media, without prior restraints (Campbell, 1994). In summary, it is the right to confidentiality of sources, and a right to access information. Not only is it important to see the press as an integral part of the freedom of expression, but also as part of a system of social control whereby relationships between individuals and social institutions are mediated. The proposed media regulation bill, we strongly believe as targeted at traditional/professional journalist, citizen journalist and online content producers is another way to fight the media, people and political/social observers from performing roles such as watching and reporting activities of governance to the people.

Ordinarily, the average expectation of Nigerians, journalists, media scholars would have been for lawmakers to make laws that will encourage reportage of political activities and access to information in government that will be reported by the media and in turn increase the confidence-level of the people on the government. Instead, it is the other side of the coin that is being played up. However, there may be a divergent view on media freedom in Nigeria as it relates to the Freedom of Information (FOI) Act and the proposed bill. Robert (2000), describing freedom of information, posited that it is specifically access to information held by public authorities which is a fundamental element of the right to freedom of expression and vital to the proper functioning of a democracy. While it is an act that makes provision for the disclosure of information held by public authorities or by persons providing services for them, Robert (ibid) submitted that the FOI Act enables one sees a wide range of public information because it gives the right to ask any public body for all the information they have on any subject.

Summarily, the media has been empowered by this act. Again, Media Rights Agenda (2011) stated that FOI makes public records and information more freely available, provides for public access to public records and information, protects public records and information to the extent consistent with the public interest and the protection of personal privacy, protects serving public officers from adverse consequences for disclosing certain kinds of official information without authorization, and establishes procedures for the achievement of those purposes and; for related matters. Even though there are debates and issues surrounding the reality and practicability of this Act so far in Nigeria, our concern in this

paper is trying to understand why there is need for social media regulation as proposed by the Nigerian legislature when there is already in existence the FOI Act and indeed other legal framework which protects injuries to the person or personality of Nigerian citizens. The lawmakers concern should be focused on aiding free and vibrant media practice to encourage wide media coverage and representation of Nigerians as the case maybe.

No doubt, regulations are important aspect of governance which is required to prevent anarchy and disarray in the polity. Therefore, there is need for the regulation of media institutions. As the social responsibility theory explains, the media must be kept to certain standards and social structures must be put in place to ensure the media behaves in compliance with recognized social standards (Folarin, 1998, p.31). However, there is a thin line between regulating the media and gagging the media. Many governments have crossed that line. They block internet access giving national security as a reason or government interest. For example, China regulates internet and social media access and blocked about 10% of websites in the world, even blocking Google for a month in 2002 (Mooney, 2004).

Countries like Saudi Arabia, Singapore, Malaysia and Brazil have also regulated the social media at different times. Burundi in Africa is another example of government blocking Whatsapp and Viber access during its 2015 presidential elections because it felt activists use these social media apps to challenge its policies (Ikeji, 2015). Also, Bangladesh abducted and killed many journalists and activists, committed human rights crimes sparking global outrage. Currently, the Information and Communication Act (ICT Act 57) is used to clamp down on bloggers, activists and TV channels in the country (Islam, 2014). The law is used to legalise the arrest of atheists, freethinkers, bloggers and any who criticise Islam or advocate anti-religious views. In Vietnam, the government uses Article 258 to shut down the websites of bloggers and arrest any who spreads dissenting views on the country's political leaders (Bao, 2013).

In Nigeria, however, media and government relations have been tumultuous, with the latter trying to censor the former. The relationship has been characterized by mutual distrust, too much government secrecy, and corruption of government officials. According to Adamu (2010, p.5), freedom of the media is adversely affected by a legal environment designed to cripple and hamper it. It is on record that, since independence, repressive laws have been passed to hinder the press from carrying out its duty to the public. These included Official Secrets Act of 1962; Newspaper Prohibition of Circulation Decree of 1967; State Security, Detention of Persons, Decree 2 of 1984; Public Officers' Protection Against False Accusation, Decree 4 of 1984 (Daramola, 2006, p.152-157). During the reign of these laws, the rights of individual journalists and media houses were violated. According to Nwachukwu (2008), for Nigerian leaders in the seventies to protect their authority from "internal threat," media writers were denounced as anarchists and saboteurs, paid agents of foreign powers bent on destabilizing their countries. Many writers were imprisoned or forcefully sent on exile, while some had their lives threatened. Through the years, successive governments continue to cast a suspicious look at the media and treat it as threat; as such, journalists have been working on a tight rope (Duyile, 2007, p.262).

Freedom of online speech is being threatened by the controversial social media bill which seeks to imprison Nigerians for criticizing politicians and public officials on social media. This is yet another booby trap for journalists if it is allowed to be passed into law. As Sesan and Olukotun (2016) put it, the bill makes it a criminal offence to express dissenting opinions against the government and illegitimately places inappropriate restrictions on the power of the masses to criticize the government. It also protects individuals in high places and

institutions. It is also disappointing that the bill, which has a very vague definition of the groups of persons and institutions of the government, ironically targets Whatsapp, the private messaging application and Twitter, the micro blogging tool, used mostly by journalists to report public issues and views. This bill threatens the right to freedom of speech of the over 97 million mobile internet users in Nigeria.

In Adigun's (2015) opinion, the bill was written in a hurry as a result of the exposé on corrupt practices leveled against former and present government officials by online journalists, bloggers and users of social media. Thus, there was no thoroughness in crafting the bill. Furthermore, this attempt at suppressing the media has been recurrent over the years. In 2015, the Cybercrime Act was passed into law. Sections 24(a) and 24(b), which imposed harsh penalties for speech in the name of security led to arbitrary arrests of bloggers on trivial claims. In November last year, the Governor of Ogun State, Ibikunle Amosun ordered the arrest of a blogger, Emmanuel Ojo, who was subsequently remanded in prison over a story published on social media. In 2014 alone, over five newspapers had their operations disturbed by the military leading to confiscation and seizure of prints materials. There were cases of beatings, threatening phone calls, seizure of news equipment, killings and arrests of journalists in 2012. These are just few examples of the numerous assaults and other ills done against journalists. It is no wonder then that out of 160 countries, in 2015, Nigeria ranked 111th in the Press Freedom Index published by Reporters without Borders. This is a far cry from its 49th position in 2002.

VIII. Social Media Regulation: Is There a Need for it?

There is no doubt that governments, as well as private-sector, civil-society and other international organisations have an important role and responsibility in the development of the Information Society. According to the World Summit on the Information Society (2003), the government role includes all the means of communication within a defined society, territory, nation or country. It plays a central and crucial role in supplying open access to the internet, guaranteeing internet freedom, and securing the rule of law online. In this sense, the rule of law must not be restricted to general issues that don't involve technological related issues which concern the internet. The internet as a platform of communication can be said to be part of provisions of the Nigerian Constitution as it relates to freedom of expression, freedom of opinion and freedom to receive and impart ideas and information without prior interference (Section 39, Nigeria 1999 Constitution as amended).

According to Gutterman (2011, p.168), open and affordable internet access that is also secure and reliable is a prerequisite for online freedom. As of April 2011, about two billion people worldwide have access to the Internet. Gutterman (ibid.) says internet penetration is highest in North America, followed by Oceania and Europe. Explaining further, internet penetration is much lower in Asia, Africa, the Middle East and Latin America, but these regions are experiencing spectacular growth, ranging from 700 to 2,500 per cent per year. This growth, as stated by Gutterman, corroborates the submission of Premium Times (2015) and TechTalkAfrica (2013). An open and free internet also means an open and free social media, which in no small way is a key means by which individuals can exercise their right to freedom of opinion, expression, association and assembly as supported in the Nigeria Constitution, section 39. Worthy of note is the fact that these freedoms are not totally absolute as would have been preferred by the general populace.

As a matter of fact, the freedom enjoyed on the internet has led to the question of whether or not to regulate social media activities of persons. By law, it may be argued that it is no longer debatable, and for obvious reasons. What is debatable, however, is the extent of regulation and the manner of penalties to be imposed, if any. The debatable issues must therefore be considered within the contexts of fundamental rights of persons to privacy and freedom of opinion amongst others. Social media has come both with its huge benefits and risks almost in equal measures. If the social media activities of persons are not regulated by law, therefore, how do we preserve the benefits, while curtailing the risks and preventing them from overriding the benefits? How do we stop, for example, the typical risk of deliberate dissemination of falsehood by some of the so-called “soft” and “sensational” blogs and “commenters” whose only motive is commercial enrichment through the generation of traffic to their sites? How do we stop other possibly lethal risks: cyber bullying, hate comments, revenge porn, trolling, and many more? For us, the social media is now like our typical community. On one hand, you have very many decent, intelligent and inspiring members of the community, and, on the other hand, very few people who are poised to spoil the community for all.

IX. Conclusion

Repressive regulations and laws, as exemplified by section 45 of the 1999 Constitution, the Nigerian Press Council Act, and the proposed Frivolous Petition Bill, are a gross violation of not just the freedom of the press but of expression. According to Akinfeleye, (1990, p.112), freedom of the press is freedom or right to publish or not publish information without hindrance from the government. It guarantees against prior restraint, censorship, gagging of the press, arbitrary arrest and detention of journalists. Of course, freedom of the press is not an excuse for hate speech, rumour mongering, and falsehood. Since freedom is never absolute, the media should not publish harmful propaganda or anything that would threaten the stability and security of the society they operate. Still, arbitrary restrictions and hurried controls against the media would be damaging and destructive to the people and the government. Passing the social media bill into law will violate the provisions of Section 39 of the 1999 Nigerian constitution which states: “Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.”

Laws restricting freedom of speech encourage corruption because citizens will be discouraged from whistle blowing and exposing corrupt officials. They create shackles in the subconscious minds of the people, making them hesitate to challenge unfavourable government policies that could hinder the development of the country. Instead of trying to gag people’s opinions on social media, the government needs to focus on more critical development-related issues affecting the country: the *bokoharam* insurgency, corruption, infrastructural decay, other criminality, insecurity, unemployment, and communal violence amongst others.

While there is need for media regulations, repressive laws to silence the media, prevent it from performing its watchdog role in the society, and derogate from the citizens’ rights to free speech, are not appropriate at the moment. The government needs a free press and freedom of expression to foster horizontal development in the society. In the words of the former president of America, Thomas Jefferson, “freedom of the press is the essence of democracy.” Therefore, a country whose government denies the media its required freedom, and willfully impugns the citizens’ rights of free expression will have its democratic growth

stunted and its development hindered. It is hoped that the Nigerian government would create an environment conducive for a free press and freedom of expression.

X. Recommendations

- For a developing country like Nigeria, regulating the social media should be the least of the government's agenda. Government should pay more attention to basic developmental problems that are still bottlenecks in the lives of Nigerians, such as providing good roads, better health care, free education, better standard of living, a more conducive environment for businesses, stable electricity, and other basic needs. Perhaps when these issues are addressed, Nigerians would be less inclined to lash out on social media and vent their frustration on the government at any given opportunity.
- Knowing that the social media is a vehicle for free speech and free speech is an essential element for a thriving democracy, the government should adopt a more tolerant attitude towards differing views and be more open minded when handling the social media. This will prevent them from using legislation to try to gag the media. Rather than attack the social media, it is imperative for governments to use the social media productively to engage their citizens, discuss policies, and get feedback and criticisms that will help them to govern the country better. Government should also endeavour to provide access to information communication technology, such as internet facilities, to the rural population in Nigeria.
- The Nigerian judiciary, particularly the Supreme Court, should also see the need at this period of our democratic development to always err on the part of the citizens whenever it is called upon give interpretation on the desirability or otherwise of the government to derogate from the citizens' constitutional rights to free speech and expression. In doing this, enough persuasion should be provided by the judicial authorities in the United States, such as the decision in *Packingham v. North Carolina*, which accord with international best practices.
- Even though social media has become a proven tool for self-expression – a voice for the voiceless, minority groups and the disadvantaged – journalists, social media activists, and analysts should also be careful to use the social media for sensitization, social mobilization, and other activities that will contribute to the public. They should resist the temptation to propagate propaganda, rumours or unsubstantiated “facts” that would irk public authorities.

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