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Reforming the Expert Evidence System in Taiwan Criminal Justice: Lessons from the United States

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ABSTRACT

As Professor Thomas Weigend once mentioned, “Theoretically, the German system of court-appointed expert witnesses should make for a neutral, detached role of experts, in contrast to the “hired gun” syndrome in adversarial system.” However, expert witnesses in Taiwan are not presumed to play an advocate role in favor of one party as those in an accusatorial system. Since communication between expert witnesses and the trier of fact is basically different between these two criminal procedural approaches, this paper reviews the proposed Draft aiming to reform the expert evidence system in Taiwan from the perspective of the United States. Instead of adopting the proposed draft, this study suggests that the lawmakers should adopt the so-called “Blue Ribbon Expert Jury” to resolve all highly complex scientific or technical issues.

Keywords: *Expert Witness, Expert Jury, Expert Evidence, Professional Judges, Lay Jury*

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I. INTRODUCTION

Similar to the Code of Criminal Procedure of German,¹ Article 198 of the Code of Criminal Procedure of the ROC provides the court as well as a public prosecutor with the power to select an expert witness in order to assist the court in finding the truth. Nonetheless, different from the role as a supporter of one party in the United States, an expert witness in either the German or ROC criminal justice system is presumed to be a neutral assistant or advisor on scientific matters to the court² since the accused may object to an expert witness for the same reason he may recuse a judge,³ and experts are selected and paid by the court.⁴ Under this premise, the court or a public prosecutor is entitled to select an expert witness *ex officio* with discretionary powers even without request by each party if it is considered proper and necessary. In practice, a public prosecutor often appoints experts during the investigation stage of the process, and the court retains the same expert for reasons of expediency.⁵ The defense can try to introduce additional experts in the same way as they can nominate witnesses,⁶ but its chance of success is often limited because of financial considerations.⁷

It is noteworthy that an expert witness is allowed to make a report of his findings and results in writing.⁸ An accused usually retains no opportunity to confront and cross-examine this reporting expert witness unless the court or the public prosecutor considers it necessary.⁹ In practice, for instance, the court's judgment in a medical malpractice lawsuit heavily depends on the report of an expert. The court usually makes a decision based merely upon reviewing the expert report submitted by a hospital, medical school, National Investigation Bureau, Medical Malpractice Reviewing Committee, etc.¹⁰

1. Strafprozeßordnung [StPO] [The Code of Criminal Procedure of Germany], Apr. 7, 1987, as amended by Apr. 2014, § 73, para 1 (Germany) (the judge shall select the experts to be consulted, and shall determine their number. He shall agree with them on a time limit within which their opinions may be rendered), more information of German The Code of Criminal Procedure, <http://germanlawarchive.iuscomp.org/?p=754> (last visited Sept. 24, 2015).

2. JOHN D. JACKSON & SARAH J. SUMMERS, *THE INTERNATIONALIZATION OF CRIMINAL EVIDENCE* 74-75 (2012).

3. Xingshi Susong Fa (刑事訴訟法) [The Code of Criminal Procedure] § 200, para. 1 (promulgated Jul. 28, 1928, effective Sept. 1, 1928, as amended Feb. 4, 2015) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 5846 (99台上字第5846號刑事判決) (2010) (Taiwan).

4. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 75 (1977).

5. *Id.* at 76.

6. JACKSON & SUMMERS, *supra* note 2, at 74.

7. Thomas Weigend, *Germany*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 243, 267 (Craig M. Bradley ed., 1999).

8. The Code of Criminal Procedure § 206, para. 1 (Taiwan).

9. The Code of Criminal Procedure § 206-1, para. 1 (Taiwan).

10. Ya-Ling Wu, *The Applicability of the Consumer Protection Law in Medical Malpractice Disputes in Taiwan*, 16 PAC. RIM L. & POL'Y J. 805, 826-34 (2007).

Yet, it is unclear how the court should apply the expert's report as no relevant law exists. Furthermore, even if a reporting expert stands trial, the court would hardly understand what the report actually means without its final suggestion¹¹ since rarely do professional judges have relevant and sufficient medical knowledge. When conflicting expert reports or opinions come out, this defect becomes more evident.

There is also an interesting phenomenon that each party at trial, no matter in a civil or a criminal case, does not seriously try to cross-examine the expert who offers decisive opinions in Taiwan. Although the accused and the defense counsel might be allowed to cross-examine a court-appointed expert witness or examiner,¹² neither an accused nor a defense attorney is capable of doing it in most circumstances. Each party merely insists that the opinion of which he is in favor is correct. In a word, expert evidence is an undeveloped area in the ROC criminal justice system. Thus, it was considered unnecessary and improper for the court to summon the reporting expert witness in the past.

In summary, as Professor Thomas Weigend mentioned, "Theoretically, the German system of court-appointed expert witnesses should make for a neutral, detached role of experts, in contrast to the 'hired gun' syndrome in adversarial system."¹³ Under this tradition, expert witnesses in Taiwan are not presumed to play an advocate role in favor of one party as those in an accusatorial system. Of course, communication between expert witnesses and the trier of fact is basically different between these two criminal procedural approaches. However, whether this inquisitorial scheme of expert evidence reasonably resolves legal disputes deserves further consideration.

II. THE INQUISITORIAL PRACTICE OF EXPERT EVIDENCE IN THE ROC CRIMINAL JUSTICE SYSTEM

A. *Different Practices of Expert Evidence*

The most inquisitorial aspect in the relevant ROC proceedings of expert witness is the active role of the court in examining expert witness. Since the court is designed to be the trier of fact, when professional judges feel unconfident or dissatisfied with the expert witness's explanation, the court will find out what it means verbally or in written by re-asking the inspecting

11. For example, the issue would be whether the defendant is with or without negligence, with or without intent.

12. Zhonghua Minguo 56 Nian Xingshi Susong Fa (中華民國56年刑事訴訟法) [The Code of Criminal Procedure of 1967], §§ 166, 167, 248 (promulgated Dec. 26, 1930, effective May 1, 1931, as amended Jan. 28, 1967, repeal Dec. 5, 1968) (Taiwan).

13. Weigend, *supra* note 7, at 211.

expert witness or requesting another expert witness to inspect it again.¹⁴ Usually the court will not make a decision unless it is satisfied with the expert witness's explanation. It is interesting how the court will be satisfied with expert's opinions especially when professional judges are without proper scientific or technical knowledge.

In an adversarial jurisdiction, on the contrary, each trial lawyer who seeks to furnish scientific evidence or to adduce expert testimony is working with substantive information involving "scientific, technical and other specialized knowledge." The use of expert knowledge in the resolution of legal disputes, as well as other kinds of disputes, is ubiquitous. While the development in the United States focuses on how to qualify an expert as "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify,"¹⁵ the Code of Criminal Procedure of the ROC seems not to care about whether the scientific opinion comes from a "qualified expert." As a result, the parties can present anything possible in evidence whatever the court permits although there is no promise that the court will afford the same weight to the accused-offered evidence as to that produced by the court-appointed experts.¹⁶ The following case illustrates how this happened in the ROC criminal justice system.

B. *The ROC Inquisitorial Practice in an Extraordinary Power Case*

In an interesting and famous fraud offense case, for example, the accused, Ms. Ying Zhang, who claimed to be endowed with an extraordinary power to produce medicinal powder or pill in her palm out of air, requested to show the court her ability of "getting the medicine out of nothing" in front of a panel of judges of the Gaodeng Fayuan (High Court). The court finally allowed her to "perform her show" during the trial, but she did not get anything.¹⁷ Even though allowing the accused to perform her magic power did not fall within the scope of Rule 702 of the Federal Rules of Evidence of the United States, it has "never" been criticized, even from the United States point of view, in Taiwan.

It is worth mentioning that nobody in Taiwan doubts if the court should examine whether the accused is capable of "making something out of nothing." It is also "surprising" that the public prosecutor in charge of the case, in order to make sure if Ms. Zhang really had the power to get

14. LANGBEIN, *supra* note 4, at 76.

15. FED. R. EVID. 702.

16. JACKSON & SUMMERS, *supra* note 2, at 74.

17. The Code of Criminal Procedure § 212 (Taiwan); *see also* Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 90 Shang Yi Zi No. 2963 (90上易字第2963號刑事判決) (2001) (Taiwan).

something out of nothing, did inquire into a well-known scholar who has been doing researches in the field of “extraordinary power,” Professor Dr. Si-Chen Li.¹⁸ Before the public prosecutor, Professor Dr. Li testified that he did witness the accused obtaining kinds of powder and pills out of air once yet he was not sure if it was false. According to his own study and research, however, he said it might be true in a sense. The Taipei High Court therefore discharged the fraud offense, reasoning there existed reasonable doubt if the accused was capable of getting medicine out of air, mainly based on Professor Dr. Li’s testimony, but convicted the accused of practicing medicine without license. The accused, Ms. Ying Zhang, as a result, was sentenced to 13 months in prison and five years of probation in violation of the former Article 28 of Medical Doctor Act by Taiwan High Court on 25 April 2002 in its Judgment of 90 Shang Yi Zi No. 2963.¹⁹

C. *Problems in Expert Evidence*

It is very interesting while the Anglo-American system only allows the court to decide whether evidence is admissible under FRE 702 but the ROC legal tradition does not prohibit the court from addressing substantial ‘scientific’ issues. It is also impressive and worthy of studying that people in Taiwan seem to accept this practice. Furthermore, while “Hypnosis” is provided as an element of offenses in the ROC Criminal Law,²⁰ it is unavoidable for the court to evaluate whether the state of hypnosis exists in any relevant case. In addition to Ms. Zhang’s fraud case, similar issues in medical malpractice, accountant’s liability in auditing, traffic accidents . . . etc. also arise within the scope of expert evidence. Although the Code of Criminal Procedure of the ROC adopted some articles addressing this in 2003, it is still unclear for the ROC criminal justice system to see how expert evidence system should be, particularly when judges in Taiwan are all vocational with rare scientific background and experience.

As illustrated in Ms. Zhang’s fraud case, even the testimony from an expert of parapsychology was admissible after the public prosecutor inquired

18. Professor Dr. Si-Chen Li, the former President of National Taiwan University, earned his Ph. D. in Electronic Engineering from Stanford University (C.A., U.S.A.). He is a well-known scholar with authority in parapsychology in Taiwan and mainland China. More detailed information about Professor Dr. Li, <http://sclee.ee.ntu.edu.tw> (last visited Mar. 29, 2015).

19. It is worth noting that the district court judge convicted the defendant on the fraud offense, which means the judge did not believe the defendant had ability to get something out of nothing, so she did commit the fraud offense, after considering Professor Li’s testimony in the dossier.

20. *E.g.*, *Zhonghua Minguo Xing Fa* (中華民國刑法) [The Criminal Code] § 221, para. 1 (promulgated Jan. 1, 1935, effective Jul. 1, 1935, as amended Jun. 18, 2014) (Taiwan) (a male who renders resistance of a female impossible by threats or violence, by administering drugs, by inducing “hypnosis” or other means and who has sexual intercourse with her is considered to have committed rape).

into the possibility of the accused's extraordinary power. In this Taipei High Court case, the defense attorney did not challenge the witness's testimony. The court discharged the fraud offense merely because it was possible for the accused to 'get the drug out of nothing,' which would not result in guilt beyond a reasonable doubt. Nonetheless, neither the public prosecutor nor the court set out the standard or address why parapsychology was accepted as scientific at trial. Incredibly, no one in Taiwan has challenged this inquisitorial practice as to expert evidence. People seem to accept the expert's testimony not only because he is an authoritative scholar of this field but also because he is a well-known scientist and professor at the best University in Taiwan.²¹

Unlike this inquisitorial practice of expert evidence, the Federal Rules of Evidence deal with this expert evidence issue in more detail. FRE 702 provides for the requirement of admissible expert testimony. In general, the acceptable subject areas of FRE 702 are broad.²² It allows the skilled witnesses qualified by "knowledge, skill, experience, training, or education," including physicians, physicists, bankers, landowners, and architects, to give expert testimony.²³ In a sense FRE 702 is "generous in its definition of an expert" which "opens the door quite wide to the receipt of expert testimony."²⁴ It is not difficult to be qualified as an expert; for instance, a trial judge once said, "My rule of thumb test for whether or not a witness is qualified as an expert is simple. I hear the witness explain his experience, and if there is an objection to the qualifications I would explain to the jury that under the Federal Rules of Evidence an expert is any person who knows more about what he is talking about than I do."²⁵ Although FRE 702 only requires the expert testimony to be helpful to the trier of fact,²⁶ Daubert held "Rule 702's 'helpfulness' standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."²⁷ It is unclear if Professor Li will be treated as an expert of the so-called 'fringe' or 'junk' science according to Daubert. Even an expert of parapsychology seems to be

21. However, it is unclear whether the court would accept Professor Li's testimony if he were neither a Stanford graduate nor an engineer professor at NTU.

22. L. Timothy Perrin, *Expert Witness Testimony: Back to the Future*, 29 U. RICH. L. REV. 1389, 1395 (1995).

23. Eric Ilhyung Lee, *Expert Evidence in the Republic of Korea and under the U.S. Federal Rules of Evidence: A Comparative Study*, 19 LOY. L.A. INT'L & COMP. L. REV. 585, 613 (1997).

24. Irving Younger, *A Practical Approach to the Use of Expert Testimony*, 31 CLEV. ST. L. REV. 1, 3 (1982).

25. Symposium, Barry C. Scheck, *Expert Testimony, in Comparison of the Federal and New York State Rape Shield Statutes, A Symposium: Comparing New York and Federal Evidence Law*, 11 TOURO L. REV. 73, 107, 143 (1994).

26. See Michael C. McCarthy, Note, "Helpful" or "Reasonably Reliable"? *Analyzing the Expert Witness's Methodology under Federal Rules of Evidence 702 and 703*, 77 CORNELL L. REV. 350, 355 (1992).

27. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 592 (1993).

allowed to testify at trial under FRE 702²⁸ and Kumho which held that Daubert is applicable in assessing the reliability of both scientific and “non-scientific” expert testimony,²⁹ however, opponents of expert testimony, which they characterize as based on the so-called fringe or junk science can argue against its admissibility in terms of its topic, the training of the proposed expert, and the reliability of the expert’s methods and application of those methods.³⁰ In other words, while a federal trial judge’s gatekeeping obligation, under the Federal Rules of Evidence, applies to testimony based on skill or experience as it does to testimony based on scientific knowledge, an exclusionary ruling might result from the fact that this kind of expert testimony based on fringe or junk science is not based on sufficient facts or data, that it is not the product of reliable principles and methods, and that it is not based on a reliable application of reliable principles to the facts of the case.³¹

Through the Ms. Zhang’s fraud case, it is not hard to find how an admissible expert testimony under an inquisitorial approach might become inadmissible under an accusatorial and adversarial process. It is difficult to say, however, whether admitting Professor Dr. Li’s expert testimony at trial is right. It is also difficult to determine if the Taipei High Court’s decision absolving Ms. Zhang of the fraud offense is well-grounded. While lay persons are not capable of resolving complicated scientific issues in general, neither professional judges nor lay jurors should be responsible for finding a “fact” based on evidence beyond their abilities. As a result, with this understanding, the ROC lawmakers proposed a legal draft resolving scientific issues by empaneling the court with scientific experts in 2006. It is necessary for them to consider if this proposed legal institution could work more efficiently than either the civil-law-based inquisitorial approach or the common-law-based accusatorial and adversarial procedure. If the proposed legal institution cannot preclude the occurrence of the most significant defects in either the inquisitorial or the accusatorial and adversarial process, then it is unwise and unnecessary to adopt a fruitless and inefficient method

28. STEVEN I. FRIEDLAND, PAUL BERGMAN & ANDREW E. TASLITZ, EVIDENCE LAW AND PRACTICE APPENDICES: FEDERAL RULES OF EVIDENCE 71 (2001) (in fact, Federal Rule of Evidence (FRE) 702 has been amended in response to Daubert and Kumho in 2000, so the current FRE 702 reflects the latest development of the federal practice in expert testimony as noted in the Advisory Committee’s Note to 2000 Amendment).

29. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (we conclude that Daubert’s general principles apply to the expert matters described in Rule 702. The Rule, in respect to all such matters, “establishes a standard of evidentiary reliability.” It “requires a valid . . . connection to the pertinent inquiry as a precondition to admissibility.” And where such testimony’s factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has “a reliable basis in the knowledge and experience of [the relevant] discipline.”).

30. ARTHUR BEST, EVIDENCE 173-74 (2001).

31. *Id.*

to resolve scientific issues. In addition, if a more efficient and practicable approach could be found, the lawmakers should also consider if it is more applicable in the ROC criminal justice system. Without intending to conduct a thorough analysis between these legal institutions that resolve scientific issues, this study just tries to provide an unconsidered legal institution for the ROC lawmakers.³² Before examining the proposed draft of empaneling the court with scientific experts, this study will explore the major defects of expert evidence in both inquisitorial and accusatorial systems. Understanding the defects of expert evidence in each jurisdiction provides important information for better understanding the need for any meaningful improvement in the ROC criminal justice system.

III. DEFECTS OF EXPERT EVIDENCE IN THE ROC AND THE UNITED STATES SYSTEMS

A. *In ROC*

While the expert evidence system is assumed to help the fact-finder reach “a fair determination of the facts and fair adjudication of the disputed claims,”³³ there is not a real American styled expert evidence system in Taiwan. Articles 197 to 211 of the Code of Criminal Procedure of the ROC govern expert evidence in the ROC courts. Unlike the Federal Rules of Evidence addressing issues including qualification of the expert witness and the scope, form, and basis of expert testimony in the United States,³⁴ the ROC provisions of expert evidence focus on more procedural matters such as the method of appointment of an expert witness, the procedure for challenging the appointment of an expert witness,³⁵ and when a warrant is necessary during the process.³⁶ While Articles 206 and 208 of the Code of Criminal Procedure of the ROC allow the court to admit the expert’s written report into evidence at trial, they exist as hearsay exceptions because of their nature as out-of-court statements.³⁷ In a sense admitting out-of-court

32. It should be noted that this study does not suggest that the common-law-based accusatorial process is better than the civil-law-based proceeding in deciding the scientific disputes.

33. Lee, *supra* note 23, at 620.

34. FED. R. EVID. 702-04.

35. Lee, *supra* note 23, at 604.

36. The Code of Criminal Procedure §§ 203-205-2 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 98 Tai Shang Zi No. 7588 (98台上字第7588號刑事判決) (2009) (Taiwan).

37. The Code of Criminal Procedure § 159, para. 2 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 90 Tai Shang Zi No. 3747 (90台上字第3747號刑事判決) (2001) (Taiwan) (however, the private selected expert opinion is treated as hearsay in practice); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 93 Tai Shang Zi No. 1774 (93台上字第1774號刑事判決) (2004) (Taiwan); Zuigao Fayuan (最高法

scientific evidence in written form is a characteristic of the civil law inquisitorial tradition.³⁸ This non-accusatorial and non-adversarial tradition of the fact-finding process was initially designed to provide the court a discretionary power of whether summoning an expert or not in order to locate the material truth,³⁹ especially when the accused is not capable of doing so.⁴⁰ Nonetheless, when the court is not able to discover the truth *ex officio* because of its lack of necessary scientific knowledge, this non-accusatorial arrangement unavoidably becomes fruitless.⁴¹ There is a serious problem of mistrial when the court knows almost nothing about the scientific dispute but is empowered to resolve it.⁴²

Usually in the pre-trial investigation stage, either the public prosecutor or the police have already resolved the scientific issues⁴³ by relying on the expert's opinion before filing an indictment.⁴⁴ While there are very few forensic experts available in the ROC market, it is not easy for the accused, especially for the rich ones, to recruit an expert who is willing and capable of challenging the reliability and the validity of the respective scientific evidence presented by government-hired experts.⁴⁵ According to Article 198 of the Code of Criminal Procedure of the ROC, only the court and the public prosecutor are allowed to appoint experts who have the specialized knowledge relating to the disputed issue or who are delegated by the government to be responsible for resolving the claimed disputes.⁴⁶ And the private-retained expert opinion is categorized as inadmissible hearsay if the selected expert does not testify under oath in front of the court.⁴⁷ In a sense

院) [Supreme Court], Xingshi (刑事) [Criminal Division], 94 Tai Shang Zi No. 3415 (94台上字第3415號刑事判決) (2005) (Taiwan).

38. LANGBEIN, *supra* note 4, at 76.

39. The Code of Criminal Procedure § 208, para. 1 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 29 Hu Shang Zi No. 196 (29滬上字第196號刑事判決) (1940) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], Pan Li (判例) [Precedent], 30 Shang Zi No. 2341 (30上字第2341號刑事判例) (1941) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 88 Tai Shang Zi No. 845 (88台上字第845號刑事判決) (1999) (Taiwan).

40. LANGBEIN, *supra* note 4, at 75.

41. JACKSON & SUMMERS, *supra* note 2, at 74.

42. JACQUELINE HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE* 128 (2005).

43. JACKSON & SUMMERS, *supra* note 2, at 74.

44. HODGSON, *supra* note 42, at 222.

45. JACKSON & SUMMERS, *supra* note 2, at 74.

46. The Code of Criminal Procedure § 198 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 5846 (99台上字第5846號刑事判決) (2010) (Taiwan).

47. The Code of Criminal Procedure § 159, para. 1 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 95 Tai Shang Zi No. 2423 (95台上字第2423號刑事判決) (2006) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 96 Tai Shang Zi No. 430 (96台上字第430號刑事判決) (2007) (Taiwan).

the court-appointed expert witness in Taiwan is regarded either as “an individual with advanced scholarship in a particular field or discipline or as one holding an occupation requiring a certifiable or licensed skill.”⁴⁸ He is viewed as either a man of letters or a specialized professional assumed to lend special or critical analysis helpful to the disputed issue.⁴⁹ Usually, in practice, the ROC Judicial Yuan suggests that the courts locate or summon experts from the Academic or Research Institutes.⁵⁰ Those ROC Judicial Yuan suggested experts of which the systematic bias is in favor are regarded more reliable.⁵¹ When the court considers the disputed issue warrants an expert’s analysis, but the Judicial Yuan does not suggest any reliable expert in the field, the court may ask the parties to nominate suitable expert witnesses or find reliable ones *ex officio*.⁵² The court-appointed expert has to take an oath before resolving the claimed dispute under Article 202 of the Code of Criminal Procedure of the ROC. If the accused is not satisfied with the expert’s opinion, he may “petition the court to summon further court-appointed experts.”⁵³ However, similar to FRE 706 (a), it is up to the court’s discretionary power to determine whether to ask another expert witness to re-examine the disputed issue.⁵⁴ The court has the exclusive power to “call another expert if it deems an opinion insufficient”⁵⁵ and decide which is more reliable if there is a conflict of expert opinion. Both parties are entitled to cross-examine the expert witness if the court deems it helpful in finding the truth based on Paragraph 1 of Article 206 of the Code of Criminal Procedure of the ROC. While the court usually gives less weight to the views of party-selected experts than those come up with by court-appointed ones, an accused would rarely take advantage of summoning

48. Lee, *supra* note 23, at 605.

49. *Id.*

50. ZHONGHUA MINGUO SIFA YUAN (中華民國司法院) [THE JUDICIAL YUAN OF R.O.C.], JIANDING JIGUAN CANKAO MINGCE (鑑定機關參考名冊) [THE SUGGESTED EXPERTS LIST], <http://www.judicial.gov.tw/work/work01/鑑定機關參考名冊.doc> (last visited Mar. 29, 2015) (Taiwan).

51. JACKSON & SUMMERS, *supra* note 2, at 74.

52. The Code of Criminal Procedure §§ 176-2, 197, 208, para. 1 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], 77 Niandu Di 2 Ci Xingshi Ting Huiyi Jueyi (77年度第2次刑事庭會議決議) [The Resolution of the 2nd Criminal Division Conference of Supreme Court of 1988] (1988) (Taiwan).

53. LANGBEIN, *supra* note 4, at 76.

54. The Code of Criminal Procedure § 207 (Taiwan); *see also* Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 88 Tai Shang Zi No. 5039 (88台上字第5039號刑事判決) (1999) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 92 Tai Fei Zi No. 338 (92台非字第338號刑事判決) (2002) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 93 Tai Shang Zi No. 4106 (93台上字第4106號刑事判決) (2004) (Taiwan).

55. LANGBEIN, *supra* note 4, at 76.

party-selected experts.⁵⁶

In practice, however, neither the prosecutor nor the defense lawyer in Taiwan has enough scientific knowledge necessary to cross-examine expert when disputed issues are complicated. While the fact-finder also has very little scientific training as well as knowledge necessary to decide a scientific issue,⁵⁷ adoption of any accusatorial process concerning that issue is merely nominal adversarial and meaningless.⁵⁸ Scientific experts always criticize the trial process for wasting their time at trial since no meaningful and core questions will be presented by the parties and even the court often knows nothing about the expert testimony, which is analogous to “Daubert-inspired debates and skepticism about whether judges are in fact effective gatekeepers of scientific evidence if they are not equipped to apply Daubert-type criteria.”⁵⁹ Under these circumstances, even though the court usually allows either the prosecution or the defense “to have experts of its own choice to contest the views of the court-obtained expert,”⁶⁰ it is still difficult for both parties to cross-examine the court-appointed expert witness especially when the claimed dispute is too complicated. Similar to the German system, the expert witness in Taiwan plays his role as a consultant to the court⁶¹ since his “conclusions and testimony do not carry an aura of infallibility.”⁶²

In general, there are two major defects in the ROC practice of expert evidence: the fact-finder is not capable of resolving the disputed scientific or technical issue; the parties are not able to cross-examine the expert witness when complicated issue is presented. It seems impossible for the fact-finders to make a fair and non-arbitrary decision if they are insufficiently knowledgeable and intelligent to understand the disputed issues.⁶³ In other words, “if discovering the truth is dependent upon understanding the issues, and the person charged with the task of discovery cannot achieve this understanding, then the person’s conclusions cannot bear any relationship to the truth, beyond that which is stumbled upon by sheer luck.”⁶⁴ As a consequence, the court usually makes a decision largely on the expert’s

56. LANGBEIN, *supra* note 4, at 76.

57. JACKSON & SUMMERS, *supra* note 2, at 75.

58. HODGSON, *supra* note 42, at 225 (especially when the fact-finder was easily misled by the testifying expert, it is meaningless to adopt any adversarial process for scientific disputes in a continental-based justice system).

59. JACKSON & SUMMERS, *supra* note 2, 75.

60. LANGBEIN, *supra* note 4, 76.

61. This practice derives from Germany; see Samuel R. Gross, *Expert Witness*, 1991 WIS. L. REV. 1113, 1209 (1991).

62. Lee, *supra* note 23, at 610.

63. Michael A. Fisher, *Going for the Blue Ribbon: The Legality of Expert Juries in Patent Litigation*, 2 COLUM. SCI. & TECH. L. REV. 1, 46 (2001).

64. *Id.* at 47.

professional opinions with little understanding of their real meaning.

B. *In USA*

The current accusatorial expert evidence system in the United States is also under criticism in terms of selecting and using expert witnesses.⁶⁵ Many scholars and researchers wonder if the federal evidentiary system of the United States is conducive to realizing the objective of FRE 702, which is assisting the trier of fact in reaching a fair and objective decision.⁶⁶ Some observers even pointedly doubt whether the Federal Rules of Evidence would undermine “the truth-finding, equal access, and efficiency goals of adjudication.”⁶⁷ In a way, expert testimony is considered to be a disgraceful and weak link in the adversarial fact-finding process.⁶⁸ While the common law tradition encourages the parties to present expert testimony for guiding the fact-finder,⁶⁹ the parties try their best to shop for experts who are capable of providing favorable testimony.⁷⁰ This practice indeed favors the rich since only they can afford to pay for the best experts.⁷¹ Expert witnesses usually give partisan rather than objective testimony⁷² that they believe will not pass peer review.⁷³ They are unrelentingly criticized as “mercenaries, prostitutes or hired guns, witnesses devoid of principle who sell their opinions to the highest bidder.”⁷⁴ While experts are prone to “shade and overstate the certainty of their opinions, use unreliable methodologies or rely on unproven theories, serve as conduits of inadmissible evidence, and occasionally lie to serve their clients,”⁷⁵ their testimony is very likely to be misleading and truth-hiding.⁷⁶ In addition to these shortcomings of expert

65. Tahirin V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL'Y REV. 480, 481 (1988).

66. Lee, *supra* note 23, at 620.

67. Lee, *supra* note 65, at 484.

68. Gross, *supra* note 61, at 1116.

69. Perrin, *supra* note 22, at 1393.

70. Lee, *supra* note 65, at 483.

71. Richard A. Epstein, *A New Regime for Expert Witnesses*, 26 VAL. U. L. REV. 757, 759 (1992).

72. Perrin, *supra* note 22, at 1415 (in practice, “they may either overtly conform their testimony to the need of the side that hired them in order to earn a higher fee, or they may unconscionably develop a bias favoring their employers’ position as a result of a natural team-spirit mentality.”).

73. McCarthy, *supra* note 26, at 352.

74. Perrin, *supra* note 22, at 1393.

75. Lee, *supra* note 23, at 622-23 (despite such harsh criticism, “expert witnesses are merely creatures of the lawyers who vilify them and of the judges who only passively maintain control over their work and influence.”).

76. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985) (as noted by Professor John H. Langbein, “At the American trial bar, those of us who serve as expert witnesses are known as saxophones [T]he idea is that the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes [I] have experienced the subtle pressure to join the team – to shade one’s views, to conceal doubt, to overstate nuances, to downplay weak aspects of the case that one has been hired to

shopping and its high cost,⁷⁷ the current evidentiary system in the United States does not provide any meaningful resolution especially when “expert testimony fails to cover issues for which the trier of fact expects to rely on expert witnesses.”⁷⁸ Frankly, “the risk of non-production of expert evidence becomes serious in matters in which courts are dependent on expert guidance for deciding material facts.”⁷⁹

Under the current federal evidential rules, expert witnesses are often led, or coaxed by lawyers, to give directly opposing testimony on key issues.⁸⁰ Sometimes a blizzard of expert testimony addresses all issues but for those the fact-finder may deem necessary and relevant to the resolution of the case.⁸¹ This practice results in the trial process looking like a battle of the experts and indeed provides the fact-finder little guidance in resolving the issues⁸² since neither lay jurors nor professional judges are intimately familiar with the disputed scientific or technical issues. As a result, the accusatorial and adversarial approach in resolving scientific or technical disputes unavoidably becomes merely nominal adversary and accusatory. It is less meaningful than that in resolving the non-scientific and non-technical disputes.

Reforms toward the use of neutral court-appointed expert witnesses have long been discussed.⁸³ Interestingly, these proposed reforms look more inquisitorial in nature. This curious feature might “require major changes in

bolster. Nobody likes to disappoint a patron; and beyond this psychological pressure is the financial inducement. Money changes hands upon the rendering of expertise, but the expert can run his meter only so long as his patron litigator likes the tune.”)

77. Perrin, *supra* note 22, at 1418 (The high cost of witness preparation would eventually result in judicial inefficiency).

78. Lee, *supra* note 23, at 621.

79. Lee, *supra* note 65, at 485.

80. Lee, *supra* note 23, at 621.

81. Lee, *supra* note 65, at 486 (for an example of such an ‘evidentiary void’ in the presentation of expert testimony, Professor Tahirin V. Lee highlights the murder trial of Robert E. Chambers in 1988: “To help the jury determine the existence of intent to murder the victim, one of the parties’ medical experts testified that the blood vessels in the eyes of the victim had burst, indicating extreme force applied to her neck during strangulation. After this testimony, the jury asked the judge if an expert could testify as to the length of the stranglehold that was necessary to burst the blood vessels. The jury considered that fact relevant to its determination of intent. The prosecution and defense then informed the judge that neither counsel had asked its experts this question during deposition, nor had either counsel asked experts to look into the matter . . . [T]he judge simply informed the jury that no expert opinion would be produced on the matter.”).

82. Lee, *supra* note 23, at 621.

83. *Id.* at 623-24 (in fact, “The most frequently proposed reform is the use of neutral, court-appointed expert witnesses. In addition, there have been proposals to amend the substantive rules of evidence concerning the presentation of expert testimony. Some commentators emphasize the need for the accountability of expert witnesses through, inter alia, peer review. In one state, court rules limit the number of expert witnesses and the length of their depositions. One commentator’s proposed reform includes ‘a call to lawyers to take the higher ground by ending the misuse and abuse of experts.’”).

adversarial procedures.”⁸⁴ Nonetheless, similar to the continental practice where the fact-finder has very limited knowledge about the scientific or technical issue, this does not necessarily resolve the problem of the fact-finder knowing little about the disputed issue.⁸⁵ Even if the expert witnesses are not shopped from the market, it is not easy for the lay fact-finder to assess whether the respective expert testimony is correct. Moreover, while the parties govern the accusatorial and adversarial fact-finding process, it is also difficult for the lawyers to predict and present what the fact-finder deems relevant and necessary to the disputed issues. Although there has been some experimentation with expert witness panels and proposals for rule changes, reforms have been slow.⁸⁶ Since some observers even doubt whether the proposed reforms would “do more harm than good,” the evidentiary system in the United States seems reluctant to change.⁸⁷ To be true, the adversarial system “continues on with all its flaws and remains a much criticized part of the litigation process in the United States.”⁸⁸

IV. NEW DEVELOPMENTS OF SOLVING SCIENTIFIC ISSUES IN CRIMINAL CASES IN TAIWAN

A. *Providing Professional Assistance to Judges and Public Prosecutors*

In order to solve problems that judges and public prosecutors have little scientific knowledge to deal with scientific and forensic evidence, the ROC Legislative Yuan made two major changes to the traditional inquisitorial legal scheme in its criminal justice system. First, professional assistance has been introduced into the criminal justice system since 1999 with the amended Articles 12, 34, 51 and 66-2 of the Court Organization Act which allow the court as well as the public prosecutor office to recruit officials with scientific background as law clerks or prosecution investigators. However, although providing judges and public prosecutors with professional

84. *Id.* at 625; *see also* Gross, *supra* note 61, at 1208-20 (*E.g.*, “Professor Samuel Gross is the author of perhaps the single most comprehensive and concise work on the subject of expert evidence in U.S. courts. He discusses the need for fundamental reforms in the expert evidence process and the relative merits of different proposals. Professor Gross acknowledges that some of the proposed measures require major changes in adversarial procedures. If implemented, these proposals would ‘challenge the basic premises of our adversarial method.’ Nevertheless, serious attempts to reform the current system require consideration of all options. Specifically, Professor Gross’ proposals include: (1) using neutral court-appointed experts, either exclusively or in addition to those retained by the parties; (2) eliminating juries; and (3) presenting expert testimony primarily by written reports.”).

85. JACKSON & SUMMERS, *supra* note 2, at 74.

86. Lee, *supra* note 23, at 624.

87. *Id.*

88. *Id.*

assistance to deal with scientific evidence in a sense would better the traditional continental criminal justice system, how the defense party would efficiently have an opportunity to formulate questions to these expert officials, “to challenge them and to examine them directly at trial if the court decides that an expert examination is needed,” which was held by the ECtHR in *Mirilashvili v. Russia*,⁸⁹ remains to be an open question. In other words, while the defense has the rights to challenge expert evidence, calling an expert official to examine scientific issues still results in a traditional problem “about the type of assistance which the defense might need from experts in order for it to be able to exercise its rights properly to challenge witness evidence.”⁹⁰ In addition, under a systematic bias in favor of expert officials, how the defense could effectively challenge the dependence of the judge on official experts is still unsolved.⁹¹

The second change is the establishment of Intellectual Property Court on July 1, 2008, according to the Intellectual Property Court Organization Act passed by the Legislative Yuan on March 5, 2007. This new institution is in fact in response to criticism of foreign companies operating in Taiwan which “had criticized the lack of a specialized IP Court staffed by specially trained judges and aided by assistants with technical backgrounds.”⁹² Based on Article 1 of the Court Organization Act, there are three levels of criminal courts, consisting of district court, high court, and Supreme Court, in the ROC general judicial system. Although the district courts hear all criminal cases regarding intellectual property matters, however, Article 25 of the Intellectual Property Court Cases Adjudication Act creates an exclusive appellate jurisdiction, which provides that all criminal appeals listed in Article 23 shall be heard by the Intellectual Property Court. This appellate decision may be appealed to the Supreme Court in accordance with Article 26 of the Intellectual Property Court Cases Adjudication Act.

With the establishment of Intellectual Property Court, a new official position, the technical examination officer, has been introduced into the ROC IP judicial system. In general, the technical examination officer is supposed to follow the panel of judges’ order to question the expert witness and to explain to the judge according to Article 4 of the Intellectual Property Court Cases Adjudication Act. Nevertheless, the ROC Supreme Court Judgment of 98 Tai Shang Zi No. 2373(2009) held that “the technical examination officer merely serves to assist the judge, and may not offer an

89. *Mirilashvili v. Russia*, Eur. Ct. H.R., para. 190 (2008).

90. JACKSON & SUMMERS, *supra* note 2, at 361.

91. *Id.*

92. Yu-Tzu Chiu, *Reform IP Legal System Deals Blows to Applied Materials and Lam Research*, IEEE SPECTRUM (2011), <http://spectrum.ieee.org/consumer-electronics/audiovideo/taiwan-patent-court-a-concern-for-us-tech-firms> (last visited Sept. 24, 2015).

independent assessment or act as a witness.”⁹³ Since the accused may object to the technical examination officer for the same reason he may recuse a judge, the technical examination officer's role limited to assisting the judge⁹⁴ is presumed to be neutral and impartial. As a result, traditional problems as how to properly challenge the technical examination officer and how to effectively challenge the dependence of the judge on technical examination officer under a systematic bias in favor of the neutral and impartial technical examination officer remain. In addition, while the Intellectual Property Court Cases Adjudication Act only applies to IP-related issues, how do general courts deal with scientific and technical disputes in non-IP cases is still unsolved.

B. *The Scheme of the Proposed Draft of the Act of Empaneling the Court with the Participating Non-Professional Expert Judges*

While the expert evidence system in the United States is also troubled with the problem that the lay fact-finder finds difficulty in deciding the scientific or technical disputes, it is not a good idea for Taiwan to adopt a troublesome American expert evidence system. In responding for a decision of the 1999 National Judicial Reform Conference which claimed to avoid problems resulting from lay participation in resolving scientific or technical issues,⁹⁵ the ROC lawmakers in 2006 drafted a new Act, the Draft of the Act of Empaneling the Court with the Participating Non-Professional Expert Judges (hereinafter “the Draft”), to empanel the trial court with both professional judges and the participating non-professional expert judges who have necessary knowledge for determining the disputed issues. According to Article 1 of the Draft, it is proposed to improve the efficiency and accuracy of the fact-finding process. The Court composed of both professional judges and the participating non-professional expert judges is assumed to be the

93. Hsiu-Ru Chien, *IP Court's Obligation to Disclose Opinions in Cases Involving Patent Validity*, INTERNATIONAL LAW OFFICE, <http://www.internationallawoffice.com/newsletters/detail.aspx?g=ce126d87-b264-496a-8de3-8f93cf7edb62> (last visited Mar. 29, 2015).

94. Zhihui Caichan Anjian Shenli Fa (智慧財產案件審理法) [Intellectual Property Court Cases Adjudication Act] § 5 (promulgated Mar. 28, 2007, effective Jul. 1, 2008, as amended Jun. 6, 2014) (Taiwan); Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 112 (99台上字第112號刑事判決) (2010) (Taiwan).

95. Zhonghua Minguo Sifa Yuan (中華民國司法院) [Judicial Yuan of R.O.C.], Zhuanjia Canshen Shishin Tiaoli Caoan Zong Shuoming (專家參審試行條例草案總說明) [Advisory Committee's General Note to the Draft of the Act of Empaneling the Court with the Participating Non-Professional Expert Judges] (2006) (Taiwan); Jan Wei-Yau (詹惟堯), Zhuanjia Canshen Zhidu Zhi Tantaos (專家參審制度之探討) [Study on the Expert Acting as Lay Judge in Trial Proceedings] (unpublished master thesis, Shih-Hsin University) (2005) (on file with the Shih-Hsin University Library), <http://handle.ncl.edu.tw/11296/ndltd/25152005468432113684>.

fact-finder.⁹⁶ In general, the participating expert judges are not professional judges. They serve this position on a case by case basis for no remuneration.⁹⁷ The Court is not applicable to all civil, criminal, and administrative disputes—except what the law allows.⁹⁸ Under Paragraph 1 of Article 6 of the Draft, in order to reasonably limit the applicable scope to some high-profile cases with real non-legal disputes at the experimental stage of this expert judge system, only public prosecution of some provided offenses, including disputes on medical malpractice, traffic accident, copyrights, trademark, and exchange securities, is subject to this fact-finding proceeding.⁹⁹ Although the public prosecutor may object to the accused's motion for this expert judge procedure, the Court is the only authority to decide the argument.¹⁰⁰ The ROC Judicial Yuan has to appoint the participating non-professional expert judges who must have more than three years of working experience with the respective “scientific, technical, or other specialized knowledge.”¹⁰¹

The Court is composed of either three professional judges and two non-professional experts, or two professional judges and three non-professional experts.¹⁰² Like professional judges, the participating non-professional expert judges are also allowed to ask questions *ex officio* at trial.¹⁰³ The participating non-professional expert judges have to express their professional scientific or technical opinions before professional judges during deliberation.¹⁰⁴ The professional judges are still responsible for making the written judgment for the majority while the dissenting opinion can be submitted in three days.¹⁰⁵ If the Court is empanelled upon the accused's application, the accused is not allowed to appeal unless provided by law.¹⁰⁶ In sum, under the Draft, the participating non-professional expert judges are deemed expert consultants assisting professional judges in deciding complicated scientific or technical disputes. Nonetheless, while the Draft might result in violations of Article 81 of the ROC Constitution,¹⁰⁷ the

96. Zhuanjia Canshen Shishin Tiaoli Caoan (專家參審試行條例) [The Draft of the Act of Empaneling the Court with the Participating Non-Professional Expert Judges] § 2 (promulgated 2006, not effective) (Taiwan); Jan, *supra* note 95, at 147.

97. *The Draft* § 4, para. 1; Jan, *supra* note 95, at 148.

98. *The Draft* § 5, para. 1; *The Draft* § 6, para. 1; *The Draft* § 7, para. 1; Jan, *supra* note 95, at 149.

99. Zhonghua Minguo Sifa Yuan, *supra* note 95, at 2 (the note to *The Draft* § 6); Jan, *supra* note 95, at 149.

100. *The Draft* § 6, para. 5; Jan, *supra* note 95, at 150.

101. Fed. R. Evid. 702.

102. *The Draft* § 20, para. 1; Jan, *supra* note 95, at 156.

103. *The Draft* § 25, para. 2; Jan, *supra* note 95, at 158.

104. *The Draft* § 31; Jan, *supra* note 95, at 159.

105. *The Draft* § 34; Jan, *supra* note 95, at 160.

106. *The Draft* § 36, para. 1; Jan, *supra* note 95, at 161.

107. ZHONGHUA MINGUO XIANFA (中華民國憲法) [THE CONSTITUTION OF R.O.C.] § 81 (1947)

ROC Judicial Yuan in 2011 proposed another pending draft of lay judge system in which lay judges can only discuss and suggest a case with a panel of professional judges without deciding issues of culpability and sanction to replace the Draft.¹⁰⁸

C. *Problems with the Draft*

In addition to the potential violation of Constitution, there are still problems with the Draft. The most serious problem comes from lay participation in the fact-finding process. For example, while Paragraph 1 of Article 34 of the Draft requires professional judges to justify the Court's decision in writing, it goes back to the unresolved problem that lay judges are not suitable for deciding complicated scientific and technical issues. Although the participating non-professional expert judges may provide the professional judges important information about the disputed issues, it is questionable how the professional lay judges can be responsible for a written professional judgment since they still do not know the nature of the disputes. Similarly, if a written judgment is dependent upon understanding the issues, and the person charged with the task of justifying the majority opinion in writing cannot attain this understanding, then the written judgment "cannot bear any relationship to the truth, beyond that which is stumbled upon by sheer luck."¹⁰⁹ A worse situation will emerge when the professional judges dissent with the majority expert judges' decision.¹¹⁰ Moreover, when expert opinions are divided, professional judges will have difficulty deciding which side is more reliable. These results are similar to the current practice when there are more than two expert opinions in conflict.

In a sense the professional judges still have to largely draw upon the expert judges' opinions to justify their decision in writing. The fact-finding process provided in the new Draft will be almost identical to the current practice in Taiwan where the court is allowed to exercise its inquisitorial power to retain reliable experts to assist the court in deciding the material truth. The only difference between the current practice and the proposed draft seems to be that the experts gain their positions as judges. Nonetheless,

(Taiwan) (it provides: "Judges shall hold office for life. No judges shall be removed from office unless he has been found guilty of a criminal offense or subjected to disciplinary action, or declared to be interdiction. No judge shall, except in accordance with law, be suspended from office, transferred, or liable to salary cuts.")

108. Zhonghua Minguo Sifa Yuan (中華民國司法院) [Judicial Yuan of R.O.C.], *Guanshen Tiaowen* (觀審條文) [*The Proposal and the Draft for the Lay Judge System*], RENMIN GUANSHEN WANGZHAN (人民觀審網站) [THE WEBSITE OF LAY JUDGE SYSTEM], <http://www.judicial.gov.tw/Guan-Shen/intro03.asp> (last visited Sept. 24, 2015).

109. Fisher, *supra* note 63, at 47.

110. This will happen when the Court is composed of two professional judges and three expert judges.

the cost will be much higher than the current practice because the court only has to inquisitorially retain expert opinions but the proposed draft also asks the court to maintain the system of non-professional expert judges who will review expert witnesses' testimony at trial. It is important for the fact-finder to test the reliability of the disputed evidence on its own.¹¹¹ This change will not thoroughly save the professional judges from the current unresolved defects: lay professional judges have to make a written decision reasonably justifying how to resolve disputed scientific and technical issues. Although the Draft improves the fact-finding process in deciding the scientific or technical issues, it does not correct the traditional defects existing in current practice. It is unreasonable to expect lay fact-finders with very little scientific or mathematical background to learn the disputed subject matter during the course of trial which usually requires years of study by a highly select set of full-time students.¹¹² This study does not suggest passing the Draft because it is not reasonable to adopt a new institution with merely little improvement. In a word, improving the current expert evidence system should be done by other methods.

V. THE RECOMMENDED BLUE RIBBON EXPERT JURY

A. *The Need for a Competent Fact-finder*

While the major concern in dealing with expert evidence focuses on lay participation in deciding scientific or technical disputed issues beyond the professional judges' knowledge, how to prevent it deserves more attention. To be sure, as technologies become more and more complex, it is more and more difficult for lay fact-finders to comprehend the scientific and technical issues in finding the material truth. Even though the court can inquisitorially call upon expert officers or witnesses for facilitating comprehension, there are still many disputed issues far beyond the training and intelligence of the fact-finder which results in rational fact-finding to be almost impossible.¹¹³ Expert evidence is "both powerful and quite misleading because of the difficulty in evaluating it"¹¹⁴ for lay persons. Only after the fact-finders are sufficiently able to understand the disputed issues will they not "subject the parties to the arbitrary decisions that must necessarily result in."¹¹⁵ Thus, it is recommendable, if possible, to equip the fact-finders with sufficient and necessary knowledge that will enable them to understand the disputed

111. JACKSON & SUMMERS, *supra* note 2, at 75.

112. Fisher, *supra* note 63, at 52.

113. *Id.* at 1.

114. *Daubert*, 509 U.S. 579, 595 (1993).

115. Fisher, *supra* note 63, at 46.

scientific or technical issues.

While the United States Supreme Court in *Peters v. Kiff* required the jurors to be sane and competent during trial,¹¹⁶ “Due Process requires at least a minimum level of rationality in the adjudication process.”¹¹⁷ It seems probable that incompetent lay jurors could result in violation of the Due Process Clause of the Fourteenth Amendment since they are insufficiently knowledgeable and intelligent to see what is under dispute.¹¹⁸ Only when the fact-finders are able to comprehend the technology at issue can their decision-making be any more rational than that of an insane fact-finder.

B. *The Blue Ribbon Jury*

In a sense lay fact-finders are incompetent to determine highly complex issues of fact or law.¹¹⁹ Lay jurors are prone to be “overwhelmed, frustrated and confused by testimony well beyond their comprehension.”¹²⁰ Chief Justice Warren E. Burger of the United States Supreme Court once criticized lay jurors for their inability to understand arguments and evidence in technically complex cases.¹²¹ As a consequence, the use of ‘blue ribbon jury’ or ‘expert jury’ has long been proposed in the United States “as a way to restore fairness to the process and reduce the arbitrariness of result.”¹²² In general, the blue ribbon jury consists of “scientifically sophisticated members who comprehend technologically complex concepts.”¹²³ The blue ribbon jury may be empaneled to decide disputes involving medical, economic, or scientific evidence.¹²⁴ Jurors of the blue ribbon jury are selected from “a pool of individuals who possess the appropriate educational background, professional training, or other pertinent experience to render informed opinions on complex matters,” instead of being chosen from “a social cross-section reflected in voter registration or drivers’ license lists, tax records, or telephone directories.”¹²⁵ As suggested, a blue ribbon expert jury might be “the only realistic way” in deciding highly complicated scientific and technical disputes.¹²⁶

116. *Peters v. Kiff*, 407 U.S. 493, 501 (1972).

117. Fisher, *supra* note 63, at 47.

118. *Id.*

119. Michael Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC. REV. 123, 149 (1980).

120. Arthur Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51, 54 (1995).

121. John Guinther, *The Jury in America* 211 (1988).

122. Fisher, *supra* note 63, at 2.

123. Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 84-85 (2001).

124. *Id.* at 85.

125. ARTHUR T. VANDERBILT, *JUDGES & JURORS: THEIR FUNCTIONS, QUALIFICATIONS, AND SELECTION* 70 (1958).

126. Fisher, *supra* note 63, at 2.

In fact, the use of expert juries as a method of resolving complex factual issues has had a long history in common law.¹²⁷ It can be traced back to the fourteenth century¹²⁸ when trade disputes were sometimes heard by a jury of specialists.¹²⁹ For instance, because merchants were considered to “have better knowledge of the matters in difference which were to be tried[sic] than others could,” in 1645 “the King’s Bench used a jury of merchants to try a mercantile issue.”¹³⁰ The practice of empanelling special juries in an estate case was also early prevalent in Massachusetts.¹³¹ A former New York statute even “authorized a trial court to grant a motion for a special jury in any criminal or civil case which was sufficiently important, intricate, or widely publicized to warrant such a jury.”¹³² The United States Supreme Court also upheld the use of these special juries in *Fay v. New York*¹³³ and *Alexander v. Louisiana*.¹³⁴ According to *Taylor v. Louisiana*,¹³⁵ empanelling the blue ribbon jury would not necessarily violate “the requirement that a jury should represent a fair cross section of the community.”¹³⁶ In addition, the use of the blue ribbon jury system has held constitutional in the circuits.¹³⁷ Arguably, the United States military courts serve as blue ribbon juries since the military court members are “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament” according to 10 U.S.C. 825 (d) (2).¹³⁸ Even in criminal cases the state’s use of blue ribbon jury would not necessarily violate both the Due Process Clause and the Equal Protection Clause since a “mere showing that a class was not represented in a particular jury is not enough” to prove

127. *Id.* at 17.

128. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 42 (1901).

129. Fisher, *supra* note 63, at 18.

130. *Id.* (moreover, Lord Mansfield often empanelled a jury of merchants to try mercantile cases); J. H. Neuscher, *Use of Experts by the Courts*, 54 HARV. L. REV. 1105, 1109 (1941) (at least in 1815 a Massachusetts federal court used a special jury to try a mercantile case); Peisch v. Dickson, 19 F. Cas. 123 (Mass., 1815).

131. *Harvey v. Richards*, 11 Fed. Cas. 746 (No. 6183) (C.C.D. Mass., 1815).

132. Fisher, *supra* note 63, at 25 (this New York statute was repealed in 1978. Besides, “In the mid-1960s, New Jersey employed a grand jury selection system which favored highly educated jurors. Delaware currently has a statute authorizing a court to grant a request for a special jury in any ‘complex’ civil case. Such juries can be subject to specific requirements of intelligence, education, or occupation. The decision of whether to grant a special jury request is left to the discretion of the trial judge. In Colorado, for certain water drainage district cases, a statute mandates the use of special juries of landowners knowledgeable about farm drainage.”).

133. *Fay v. New York*, 332 U.S. 261, 296 (1947) (It held New York’s use of blue ribbon juries for select cases to be constitutional).

134. *Alexander v. Louisiana*, 405 U.S. 625 (1972).

135. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

136. *Id.* at 526, 538.

137. *United States ex rel. Jackson v. Follette*, 462 F.2d 1041, 1043 (2d Cir. 1972).

138. *United States v. Simoy*, 46 M. J. 592, 606 (1996) (in other words, those experienced military officers are appropriate members of the special jury); *United States v. Moore*, 26 M. J. 692 (1988).

discrimination.¹³⁹ More importantly, neither the accused's Sixth Amendment right to an impartial jury nor his Fourteenth Amendment rights to due process and equal protection would automatically be violated by the use of a blue ribbon jury.¹⁴⁰ Under *Fay*, experimental use of blue ribbon juries in resolving complex disputes which involves "intellectual property, toxic tort, product liability, or other technically complex arenas"¹⁴¹ in both federal and state levels has increased. The evolution of blue ribbon jury in the United States may provide the ROC lawmakers a whole new idea about how to decide highly complex scientific and technical issues.¹⁴²

C. *The Blue Ribbon Jury as a Better Solution for Taiwan*

Unlike the Sixth and Seventh Amendments to the United States Constitution, the ROC Constitution does not provide the right to trial by jury. Besides, the ROC Constitution does not guarantee the right to trial by professional judges as provided in Paragraph 1 of Article 27 of the Constitution of Republic of Korea.¹⁴³ Hence, as held in No. 639 of the ROC Judicial Yuan Interpretation,¹⁴⁴ the ROC Legislature Yuan has the discretionary power to adopt a new institution in order to try scientific or technical evidence in a different way. In other words, creating a new institution to try special cases is not necessarily against equal protection clause in Article 7 of the ROC Constitution if it is considered to improve the public interest and to accelerate the proceeding. While Article 81 of the ROC Constitution is similar to Paragraph 2 of Article 97 of the Basic Law for the Federal Republic of Germany,¹⁴⁵ and in "the German mixed courts lay and

139. *Jackson v. Follette*, 332 F. Supp. 872, 876 (S. D. N. Y. 1971).

140. *United States ex rel. Fein v. Deegan*, 298 F. Supp. 359, 366 (S. D. N. Y. 1967).

141. Rita Sutton, *A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury*, 1990 U. CHI. LEGAL F. 575, 593 (1990).

142. In fact, no one has introduced the blue ribbon jury system in Taiwan. In other words, this legal system has never been considered by the ROC lawmakers.

143. Daehanminkuk Hunbeob [Hunbeob] [Constitution of The Republic of Korea] § 27, para. 1 (1948) (S. Kor.) (it provides: "All citizens shall have the right to trial in conformity with the Act by judges qualified under the Constitution and the Act.")

144. Sifa Yuan Dafaguan Jieshi No. 639 (司法院大法官解釋第639號解釋) [Judicial Yuan Interpretation No. 639] (Mar. 21, 2008) (Taiwan), http://www.judicial.gov.tw/constitutionalcourt/EN/p03_01.asp?expno=639 (last visited, Mar. 29, 2015) (it held: "Articles 416, Paragraph 1, Subparagraph 1, and 418 of the The Code of Criminal Procedure, which only allow the detained to appeal to the court to have such measure set aside or altered, instead of making an interlocutory appeal, are reasonable restraints imposed by the legislature within the scope of its authority in order to accelerate the procedure. However, it is within the legislature's authority to determine, and hence there should be no violation of Articles 16 and 23 of the *Constitution*. Because an appeal to the court to have such measure set aside or altered will still be decided by an independent adjudicative court, the said Articles have already provided the detained with reasonable procedural protections, which do not conflict with the due process clause under Article 8 of the *Constitution*.").

145. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], § 97,

professional judges are merged in a single panel,”¹⁴⁶ allowing lay judges to decide issues of culpability and sanction on a case by case basis does not automatically and necessarily result in violation of Article 81 of the ROC Constitution because the Legislative Yuan is authorized to decide the organization of a court of law by Article 82 of the ROC Constitution.¹⁴⁷ It is fair to say that no violation of Constitution will result from adoption of the blue ribbon jury system.

On the contrary, adoption of the blue ribbon jury which is designed to solve complex scientific or technical disputed issues beyond the professional judges’ knowledge will result in an important advantage: no defect derives from the professional judges’ inability to understand the disputed scientific or technical issues. The fact-finding process will make more sense instead of being “stumbled upon by sheer luck.”¹⁴⁸ In addition, since the Blue Ribbon Jury plays a role as the fact-finder, each party is supposed to persuade the Blue Ribbon Jury whose opinion is not the target for both parties to object to. Although the Blue-Ribbon-Jury-employed fact-finding process would be quasi-inquisitorial, it is more trustworthy at scientific issues than that employed by lay professional judges. Without necessary scientific backgrounds, judges might abuse their discretionary power in any given fact-finding process. For instance, a 2001 survey shows that “inexperience judges are more likely to dismiss a case after a Daubert hearing to avoid a trial so that their weaknesses as trial judges will not be exposed.”¹⁴⁹ Because it makes only little sense to request lay professional judges to be convinced just during a very short term, such as the Daubert hearing, that an expert witness “speaks clearly and directly to an issue in dispute in the case, and it will not mislead the jury,”¹⁵⁰ judges should no longer be gatekeepers for the Blue Ribbon Jury regarding the respective disputed scientific issues.¹⁵¹

As a result, adoption of the Blue Ribbon Jury will correct the current major defect in the ROC criminal justice system because lay judges are no better equipped for the fact-finding task than the Blue Ribbon Jurors, and a

para. 2, May 23, 1949 (Ger.), <https://www.btg-bestellservice.de/pdf/80201000.pdf> (last visited: Mar. 29, 2015) (it provides: “Judges appointed permanently to full-time positions may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The Legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary.”).

146. LANGBEIN, *supra* note 4, at 119.

147. THE CONSTITUTION OF R.O.C. § 82 (1947) (Taiwan) (it provides: “The organization of the Judicial Yuan and the different grades of law courts shall be prescribed by law.”).

148. Fisher, *supra* note 63, at 47.

149. Krista M. Pikus, *We the People: Juries, Not Judges, Should be the Gatekeepers of Expert Evidence*, 90 NOTRE DAME L. REV. 453, 469 (2014).

150. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 43 F.3d 1311, 1321 n. 17 (9th Cir. 1995).

151. Pikus, *supra* note 149, at 474-75.

Daubert-like opinion or law would not impose on trial judges the obligation or the authority to become amateur scientists in order to perform their gatekeeper role.¹⁵² Besides, as “it is feared that expert witnesses can mislead judges and juries more readily than lay witnesses, because experts are more difficult to pick apart on cross-examination,”¹⁵³ adoption of the Blue Ribbon Jury might prevent this US-style defect since expert witnesses will not mislead the Blue Ribbon Jury. While the ROC criminal justice system is currently trying to selectively incorporate accusatorial and adversarial elements into its trial system, adopting the blue ribbon expert jury just fits this trend. The ROC lawmakers should take this institution into serious consideration as a better solution for the current expert evidence system.

D. *A Potential Problem to be Solved in Taiwan*

One potential problem might result from the current appellate procedure and undermine the Blue Ribbon Jury’s function if it is adopted. According to Article 364 of the Code of Criminal Procedure of the ROC which provides: “Unless otherwise provided in this Chapter, the trial of second instance shall apply mutatis mutandis the procedure of first instance,” an appeal “may be made for error in the application of law, error in the reasonableness of the sentence,] and error in findings of fact.”¹⁵⁴ While the process by which professional judges find facts on appeal is similar to de novo review,¹⁵⁵ appellate courts may “reverse a judgment, amend the judgment, and/or enter a new one for any such error”¹⁵⁶ since they are allowed to consider facts, assess credibility, and make their own factual determinations¹⁵⁷ by Article 364 of the Code of Criminal Procedure of the ROC. Although it is common in civil law jurisdictions for professional judges to review and find new facts on appeal, it is questionable to allow them to replace the Blue Ribbon Jury’s fact-findings because none of them can be more competent than the Blue Ribbon Jury to decide scientific disputes. As a result, the current appeal

152. *Daubert*, 509 U.S. 579, 600-01 (1993).

153. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1536 (1999) (in fact, expert witnesses “can hide behind an impenetrable expertise expressed in an unintelligible jargon. Even if they are demolished on cross-examination by a lawyer who has carefully prepared with his own expert, the jury may not understand the questions and answers in the cross-examination well enough to realize that the expert has been demolished.”).

154. Caleb Jon F. Vandenbos, *Patching Old Wineskins: Heightened Deference Towards Saiban-In Findings of Fact on Koso Appeal is Not Enough*, 24 WASH. INT’L L.J. 391, 408 (2015).

155. *Id.* at 409.

156. The Code of Criminal Procedure § 369, para. 1 (Taiwan) (“the court of second instance shall reverse the relevant portion of the original judgment and adjudicate the case upon finding the appeal meritorious or upon finding an appeal meritless but the original judgment is improper or illegal; provided that where the original judgment is set aside become of the trial court’s improper ruling on jurisdiction, exempt from prosecution, or case dismissed.”).

157. Vandenbos, *supra* note 154, at 408.

system is inappropriate for the proposed Blue Ribbon Jury system.

While no Blue Ribbon Jury may claim special competence to determine scientific issues over any other Blue Ribbon Jury, it is not a good idea to summon another Blue Ribbon Jury in appellate level to re-determine the scientific disputes. In a word, similar to the American jury trial, only one fact-finding process is allowed and no Blue Ribbon Jury should be applied in the appellate process. The Blue Ribbon Jury's fact- findings should not be replaced by either professional judges or another Blue Ribbon Jury on appeal. To ensure that the Blue Ribbon Jury's contributions will have a lasting weight on the respective case, it seems necessary to prohibit appellate courts from replacing facts on appeal.¹⁵⁸ Appeals of the Blue Ribbon Jury's judgments should be allowed only for errors in the application of law and the reasonableness of sentence.

VI. CONCLUSIONS

It is obvious the current ROC expert evidence system is defective. As shown in Ms. Zhang's fraud case, whether the respective knowledge is admissible into evidence at trial is up to the court's arbitrary power. Ironically, the court usually lacks the necessary background to determine if expert testimony is helpful in finding the truth. Judicial decisions are thus unreasonable and unpredictable regarding complex scientific or technical disputes such as those in arson cases, in impairing computer use cases, in medical malpractice cases, in copyright infringement cases, and in securities and futures cases ...etc., which usually go beyond the professional judges' knowledge.¹⁵⁹ Moreover, while the court has to justify its fact-finding in written judgments, it has to largely draw upon expert's written opinions to make those judgments. This practice often results in the court abandoning its judicial power to experts. In order to correct this disadvantage, the ROC lawmakers are drafting an Act which empanels the court with both professional and participating non-professional judges. Nonetheless, this proposed draft does not completely resolve the institutional defect in the current ROC expert evidence system.

It is not a good idea to ask professional judges to decide complex scientific or technical issues because it is difficult for them to master the disputed issue during the course of trial.¹⁶⁰ Instead of adopting the proposed draft, this study suggests that the ROC lawmakers should adopt the "Blue

158. *Id.* at 411.

159. Zhonghua Minguo Sifa Yuan, *supra* note 95, at 2 (the note to *The Draft* §§ 5, 6, 7); Jan, *supra* note 95, at 149.

160. Damon C. Andrews, *Why Patentees Litigate*, 12 COLUM. SCI. & TECH. L. REV. 219, 219 (2011).

Ribbon Expert Jury” to resolve highly complex scientific or technical issues. With this institution, the professional judges will no longer be responsible for justifying, in writing, their factual investigation and conclusions, into matters beyond their personal knowledge. Additionally, a blue ribbon expert jury will also help the fact-finding process, concerning complex scientific or technical issues, become more meaningful. Of course, it does not necessarily mean the accusatorial and adversarial process is always better than an inquisitorial proceeding in any other way. This study suggests that it is only because the blue ribbon jury is a more fruitful and reasonable fact-finding institution. It is assumed to lack most disadvantages in the current ROC criminal justice system when courts find themselves facing highly complex scientific or technical issues.

REFERENCES

- Alexander v. Louisiana, 405 U.S. 625 (1972).
- Andrews, D. C. (2011). Why Patentees Litigate. *Columbia Science & Technology Law Review*, 12, 219-254.
- Austin, A. (1995). The Jury System at Risk from Complexity, the New Media, and Deviancy. *Denver University Law Review*, 73, 51-68.
- Best, A. (2001). *Evidence*. New York: Aspen Publisher.
- Chien, H.-R. (2011). IP Court's Obligation to Disclose Opinions in Cases Involving Patent Validity. *International Law Office*. Retrieved from <http://www.internationallawoffice.com/newsletters/detail.aspx?g=ce126d87-b264-496a-8de3-8f93cf7edb62>.
- Chiu, Y.-T. (2011). Reform IP Legal System Deals Blows to Applied Materials and Lam Research. *IEEE Spectrum*. Retrieved from <http://spectrum.ieee.org/consumer-electronics/audiovideo/taiwan-patent-court-a-concern-for-us-tech-firms>.
- Daehanminkuk Hunbeob [Constitution of the Republic of Korea] (1948).
- Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579, 592 (1993).
- Daubert v. Merrell Dow Pharmaceuticals Inc., 43 F. 3d 1311, 1321 n. 17 (9th Cir. 1995).
- Epstein, R. A (1992). A New Regime for Expert Witnesses. *Valparaiso University Law Review*, 26, 757-764.
- Fay v. New York, 332 U.S. 261, 296 (1947).
- Fed. R. Evid. 702, Jul. 1, 1973, as amended to Dec. 1, 2015.
- Fisher, M. A. (2001). Going for the Blue Ribbon: The Legality of Expert Juries in Patent Litigation. *Columbia Science and Technology Law Review*, 2, 1-55.
- Friedland, S. I., Bergman, P. & Taslitz, A. E. (2001). *Evidence Law and Practice Appendices: Federal Rules of Evidence*. California: LexisNexis.
- Gross, S. R. (1991). Expert Witness. *Wisconsin Law Review*, 1991, 1113-1209.
- Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] (1949).
- Guinther, J. (1988). *The Jury in America*. U.S.: Facts on File Publication.
- Hand, L. (1901). Historical and Practical Considerations Regarding Expert Testimony. *Harvard Law Review*, 15(1), 40-58.
- Harvey v. Richards, 11 Fed. Cas. 746 (No. 6183) (C.C.D. Mass., 1815).

- Hodgson, J. (2005). *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*. Oxford: Hart Publishing.
- Jackson, J. D. & Summers, S. J. (2012). *The Internationalization of Criminal Evidence*. New York: Cambridge University Press.
- Jackson v. Follette, 332 F. Supp. 872, 876 (S. D. N. Y. 1971).
- Jan, W.-Y. (詹惟堯) (2005). *Zhuanjia Canshen Zhidu Zhi Tantaoh (專家參審制度之探討)* [Study on the Expert Acting as Lay Judge in Trial Proceedings] (Unpublished master thesis, Shih-Hsin University) (on file with Shih-Hsin University Library). Retrieved from <http://handle.ncl.edu.tw/11296/ndltd/25152005468432113684>.
- Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149 (1999).
- Langbein, J. H. (1977). *Comparative Criminal Procedure: Germany*. Minnesota: West Group Publishing.
- Langbein, J. H. (1985). The German Advantage in Civil Procedure. *University of Chicago Law Review*, 52, 823-866.
- Lee, E. I. (1997). Expert Evidence in the Republic of Korea and under the U.S. Federal Rules of Evidence: A Comparative Study. *Loyola of Los Angeles International and Comparative Law Review*, 19, 585-632.
- Lee, T. V. (1988). Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence. *Yale Law and Policy Review*, 6, 480-503.
- Lilly, G. C. (2001). The Decline of the American Jury. *University of Colorado Law Review*, 72, 53-92.
- McCarthy, M. C. (1992). Note, "Helpful" or "Reasonably Reliable"? Analyzing the Expert Witness's Methodology under Federal Rules of Evidence 702 and 703. *Cornell Law Review*, 77, 350-392.
- Mirilashvili v. Russia, Eur. Ct. H.R. (2008), para. 190.
- Neuscher, J. H. (1941). Use of Experts by the Courts. *Harvard Law Review*, 54, 1105-1127.
- Peisch v. Dickson, 19 F. Cas. 123 (Mass., 1815).
- Perrin, L. T. (1995). Expert Witness Testimony: Back to the Future. *University of Richmond Law Review*, 29, 1389-1395.
- Peters v. Kiff, 407 U.S. 493, 501 (1972).
- Pikus, K. M. (2014). We the People: Juries, Not Judges, Should be the Gatekeepers of Expert Evidence. *Notre Dame Law Review*, 90, 453-482.
- Posner, R. A. (1999). An Economic Approach to the Law of Evidence.

- Stanford Law Review*, 51, 1477-1546.
- Saks, M. & Kidd, R. F. (1980). Human Information Processing and Adjudication: Trial by Heuristics. *Law and Society Review*, 15, 123-160.
- Scheck, B. C. (1994). Expert Testimony, in Comparison of the Federal and New York State Rape Shield Statutes, A Symposium: Comparing New York and Federal Evidence Law. *Touro Law Review*, 11, 73-144.
- Sifa Yuan Dafaguan Jieshi No. 639 (司法院大法官解釋第639號) [Judicial Yuan Grand Justice Interpretation No. 639] (Mar. 21, 2008) (Taiwan).
- Strafprozeßordnung [StPO] [The Code of Criminal Procedure], Apr. 7, 1987, as amended by Apr. 2014 (Ger.)
- Sutton, R. (1990). A More Rational Approach to Complex Civil Litigation in the Federal Courts: The Special Jury. *University of Chicago Legal Forum*, 1990, 575-600.
- Taiwan Gaodeng Fayuan (臺灣高等法院) [Taiwan High Court], Xingshi (刑事) [Criminal Division], 90 Shang Yi Zi No. 2963 (90上易字第2963號) (2001) (Taiwan).
- Taylor v. Louisiana, 419 U.S. 522 (1975).
- United States ex rel. Fein v. Deegan, 298 F. Supp. 359, 366 (S. D. N. Y. 1967).
- United States ex rel. Jackson v. Follette, 462 F.2d 1041, 1043 (2d Cir. 1972).
- United States v. Moore, 26 M. J. 692 (1988).
- United States v. Simoy, 46 M. J. 592, 606 (1996).
- Younger, I. (1982). A Practical Approach to the Use of Expert Testimony. *Cleveland State Law Review*, 31, 1-42.
- Vandenbos, C. J. F. (2015). Patching Old Wineskins: Heightened Deference Towards Saiban-In Findings of Fact on Koso Appeal is Not Enough. *Washington International Law Journal*, 24, 391-418.
- Vanderbilt, A. T. (1958). *Judges & Jurors: Their Functions, Qualifications, and Selection*. Boston: Boston University Press.
- Weigend, T. (1999). Germany. In C. M. Bradley (Ed.), *Criminal Procedure: A Worldwide Study*. (pp. 243-272). NC: Carolina Academic Press.
- Wu, Y.-L. (2007). The Applicability of the Consumer Protection Law in Medical Malpractice Disputes in Taiwan. *Pacific Rim Law and Policy Journal*, 16, 805-834.
- Xingshi Susong Fa (刑事訴訟法) [The Code of Criminal Procedure], September 1, 1928, as amended February 4, 2015 (Taiwan).
- Zhahui Caichan Anjian Shenli Fa (智慧財產權案件審理法) [Intellectual

- Property Court Cases Adjudication Act], July 1, 2008, as amended 6, 2014 (Taiwan).
- Zhonghua Minguo 56 Nian Xingshi Susong Fa (中華民國56年刑事訴訟法) [The Code of Criminal Procedure of 1967], May 1, 1931, as amended January 28, 1967 (Taiwan).
- Zhonghua Minguo Sifa Yuan (中華民國司法院) [The Judicial Yuan of R.O.C.]. (2015). *Jianding Jiguan Cankao Mingce* (鑑定機關參考名冊) [*The Suggested Experts List*]. Retrieved from <http://www.judicial.gov.tw/work/work01/鑑定機關參考名冊.doc> (Taiwan).
- Zhonghua Minguo Sifa Yuan (中華民國司法院) [Judicial Yuan of R.O.C.]. (2006). *Zhuanjia Canshen Shishin Tiaoli Caoan Zong Shuoming* (專家參審試行條例草案總說明) [*Advisory Committee's General Note to the Draft of the Act of Empaneling the Court with the Participating Non-Professional Expert Judges*] (Taiwan).
- Zhonghua Minguo Sifa Yuan (中華民國司法院) [Judicial Yuan of R.O.C.]. (2015). *Guanshen Tiaowen* (觀審條文) [The Proposal and the Draft for the Lay Judge System], *Renmin Guanshen Wangzhan* (人民觀審網站) [*The Website of Lay Judge System*]. Retrieved from <http://www.judicial.gov.tw/Guan-Shen/intro03.asp>.
- Zhonghua Minguo Xianfa (中華民國憲法) [The Constitution of R.O.C.], Jan. 1, 1947 (Taiwan).
- Zhonghua Minguo Xing Fa (中華民國刑法) [The Criminal Code], July 1, 1935, as amended by June 18, 2014 (Taiwan).
- Zhuanjia Canshen Shishin Tiaoli Caoan (專家參審試行條例草案) [The Draft of the Act of Empaneling the Court with the Participating Non-Professional Expert Judges] (2006), not effective (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 29 Hu Shang Zi No. 196 (29滬上字第196號刑事判決) (1940) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], Pan Li (判例) [Precedent], 30 Shang Zi No. 2341 (30上字第2341號刑事判例) (1941) (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], 77 Niandu Di 2 Ci Xingshi Ting Huiyi Jueyi (77年度第2次刑事庭會議決議) [The Resolution of the 2nd Criminal Division Conference of Supreme Court of 1988] (Taiwan).
- Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 88 Tai Shang Zi No. 845 (88台上字第845號刑事判決)

(1999) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 88 Tai Shang Zi No. 5039 (88台上字第5039號刑事判決) (1999) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 90 Tai Shang Zi No. 3747 (90台上字第3747號刑事判決) (2001) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 92 Tai Fei Zi No. 338 (92台上字第338號刑事判決) (2002) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 93 Tai Shang Zi No. 1774 (93台上字第1774號刑事判決) (2004) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 93 Tai Shang Zi No. 4106 (93台上字第4106號刑事判決) (2004) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 94 Tai Shang Zi No. 3415 (94台上字第3415號刑事判決) (2005) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 95 Tai Shang Zi No. 2423 (95台上字第2423號刑事判決) (2006) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 96 Tai Shang Zi No. 430 (96台上字第430號刑事判決) (2007) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 98 Tai Shang Zi No. 7588 (98台上字第7588號刑事判決) (2009) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 112 (99台上字第112號刑事判決) (2010) (Taiwan).

Zuigao Fayuan (最高法院) [Supreme Court], Xingshi (刑事) [Criminal Division], 99 Tai Shang Zi No. 5846 (99台上字第5846號刑事判決) (2010) (Taiwan).

臺灣刑事司法制度中專家證據 之改革：美國法的借鏡

張 明 偉

摘 要

關於如何在訴訟中解決科學爭議，我國刑事訴訟法係採鑑定制度以為處理之機制。鑑於美國法制係以專家證人制度解決訴訟可能涉及之科學爭議，本文乃基於美國有關專家證人之法制與實務，分析檢討我國法制之不足。此外，本文更探討司法院過去曾提出的專家參審條例草案之所存在之瑕疵，並參照美國學說上之建議，主張應以專家陪審制度，作為解決訴訟中科學爭議之機制，期以有效與合理地解決相關爭議。

關鍵詞：專家證人、專家陪審團、專家證據、職業法官、
平民陪審團

