REFORMING THE MECHANISM FOR SCREENING PROSECUTORIAL
CHARGING DECISION IN TAIWAN

BY

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DISSERTATION

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ABSTRACT

For years, prosecutors in Taiwan have been faced with criticism from scholars, lawyers, and judges over the abuse or errors of prosecutorial charging decision where there is insufficient evidence to indict a case or there is an ill or unjustified motivation or consideration behind the charge, whether those charges are intentionally or erroneously made. These criticisms strongly suggest that the current screening mechanism does not function effectively as a shield to protect the accused and to scrutinize prosecutorial charging decisions. As a result, not only does unwarranted charging inflict a discriminative effect upon defendants, but it also burdens our criminal justice system with inflated caseloads and fosters mistrust of the system by the citizens.

The prosecutorial system in Taiwan mainly adopts mandatory prosecution, which means that prosecutors are obligated to charge once the requirement of mandatory prosecution is satisfied, i.e., sufficient evidence to entertain a suspicion that the defendant committed the crime is reached, in felony cases. But in practice, prosecutors retain a large measure of decisions that permit abusive or erroneous charges to be filed. Therefore, the effective screening of prosecutorial charging occupies a critical stage in criminal justice to prevent potential wrongful prosecution and conviction. However, one may infer that the system is seldom being employed to screen charging decisions, given that both the overall offense and the corruption offense dismissal rates are much lower than 1%. Although these statistics are not determinative, they still strongly imply the screening system in Taiwan is ineffective. As such, the current screening mechanism does not
function effectively as a shield to protect the accused and scrutinize unwarranted charging decisions.

The current body of research does point out the problems of prosecutorial charging decision, yet it does not address any prospective solutions. Moreover, it does not propose any reforms to the current screening mechanism or has any evaluation of the current screening mechanism. It is, therefore, the goal of this dissertation to analyze current deficiencies of the mechanism and to institute potential alternatives for screening mechanisms in order to eradicate unfounded or erroneous prosecution.

In achieving this goal, the methodology of “comparative analysis” is the major underpinning. Legal theories from various bodies of research are referenced in order to identify the characteristics of the major systems of the United States and France, as well as address the advantages and disadvantages of those screening mechanisms, such as the grand jury and preliminary hearing mechanisms in the United States, and investigating judges (juge d’instruction) in France. These features are then compared and contrasted to Taiwan’s current system to discover the defects in the design of its screening mechanism, including the screening procedure, screener neutrality, evidentiary rule, the right to counsel, the threshold to screening, and discovery. Furthermore, screening mechanisms from different countries originated from different historical backgrounds as well as different legal cultures, which are explored to determine if the resulting procedures provide a potential vehicle for Taiwan to reform its current screening system.
Eventually, the proposed reform of the screening mechanism would adopt adversarial-style procedures that emphasize an evenhanded process for both parties, more participation and input from the defense, and independent screening procedures that allow the screening judge to hold a hearing. Both structural reform to the screening procedure and adding an adversarial component to improve the screening would lead to a comprehensive and improved solution for Taiwan. Through the external improvements, the system would scrutinize prior to charging, increasing the chances of weeding out unfounded prosecutions.
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Life is a series of dazzling journeys that will never cease to thrill and amaze me. I had dreamed of becoming a doctor in the field of Law since the onset of my practicing as a public prosecutor, though I never seriously entertained the possibility of that dream becoming a reality. This particular story began when, whether by design or fate, my innate curiosity met with my passion for learning in 2009 when I decided to hope against all odds and apply to the J.S.D. program at the University of Illinois at Urbana-Champaign. Little did I know at that time what a wonderful journey and abundant feast of knowledge and learning it would be for me. Even though I was now, contrary to all expectations I had for myself, on the path to achieving my dream, I almost decided to give up due to my deteriorating health condition. It is said that “no man is an island” and this was especially true on this journey. I could never have completed this dissertation and achieved my dream of becoming a doctor without the love, encouragement, support and help of so many. I would like to take this opportunity to express my sincere gratitude to those who played such a big part in my achieving this dream.

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provide me with the best opportunity to exploit the knowledge I have gained from my time at The University of Illinois at Urbana-Champaign, as well as provide for my personal welfare and happiness.

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Now a message to myself . . . There is nothing wrong with setting high standards and lofty goals for yourself and always striving to achieve perfection, but always remember it is the journey and how we navigate the obstacles in our path that makes us who we are, and that perfection is not attainable.

Tzu-Te Wen at Urbana-Champaign, IL.

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CHAPTER 1 INTRODUCTION

I. Problems Presented

For years, prosecutors in Taiwan have faced criticisms from scholars, lawyers, and judges over the abuse and poor judgment of prosecutorial charging decisions where there is not sufficient evidence to indict a suspect or there is an unjustified motivation or consideration behind the charge, whether those charges are intentionally or erroneously made. Additionally, the current screening mechanism is criticized for not functioning effectively as a shield to protect the accused and to scrutinize prosecutorial charging decisions. As a result, it is believed that unwarranted charging inflicts a discriminative effect upon defendants, burdens the criminal justice system with inflated caseloads, and fosters mistrust of the judicial system by our citizens. These beliefs have a detrimental effect on the image of the prosecutors’ professionalism, neutrality, and independence.

The prosecution system in Taiwan mainly adopts mandatory prosecution, which means that prosecutors are obligated to charge when the requirement of mandatory prosecution is satisfied, i.e., in felony cases, as soon as there is sufficient evidence to entertain suspicion that

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the charged committed the crime, in felony cases.\textsuperscript{2} In theory, the underlying principle for the adoption of mandatory prosecution was to shield prosecutors from political or improper influence and abuse of power. Moreover, legislators want to prevent administrative hierarchical intervention, demand for unitary application of law, and consistency of decisionmaking.\textsuperscript{3}

In practice, whether prosecutors’ decisions are really independent of external influence is still in question, especially when they retain charging decision power, can abuse it, and breach the requirements of mandatory prosecution. Thus, under a mandatory prosecution system, abuse of mandatory prosecution or errors of judgment by prosecutors regarding the decision to prosecute still in exist. After all, the laws in books sometimes differ from the laws in action. Therefore, the effective screening of prosecutorial charging remains a critical stage in criminal justice to prevent the potentially wrongful prosecution and conviction.

The mechanism for supervision of charging decision was added to the Code of Criminal Procedure Article 161 in 2002. Since then, Taiwan has not had any additional regulatory efforts and institutional checks to reform or examine the mechanism. It is uncertain that the new system functions as originally designed. Moreover, there is no existing academic work that examines the effectiveness of the newly promulgated mechanism. Whether the new screening mechanism is a sufficient mechanism for reviewing the prosecutors’ charging decision or error of judgment is unknown. We might a better picture from empirical data.

\textsuperscript{2}Here, it refers to offenses that are not listed in the Taiwan Code of Criminal Procedure article 376. Offenses enumerated in article 376 are applied by discretionary prosecution.

\textsuperscript{3}Yu-Xiong Lin, Jian Cha Guan Zai Su Sung Fa Shang Zhi Ren Wu Yu Yi Wu [The Prosecutor’s Mission and Obligation in the Criminal Procedure] in Jian Cha Guan Lun [The Prosecutor], 26-28 (1999) (Taiwan).
First, the system may seldom be used to screen charging decisions, because both the overall offense and the corruption offense dismissal rates are much lower than 1% (See infra Appendix A, Table 1, and Table 2), especially when the corruption offense conviction rate is disproportionately low, about 63% (See table 3), when compared with the overall offense conviction rate (See table 4). Comparatively, in New York State, the grand jury dismissal rate is 5.9%, which suggests that the screening mechanism is employed positively to remove unwarranted cases. Even when the U.S. Federal grand jury dismissal rate is only 0.4% in 1984, the rate is also much higher than that of Taiwan.

Second, because the overall offense dismissal rate in Taiwan is so low, ranging from 0.0025% to 0.03%, one might deem that either the prosecution is of extraordinary high quality or the screening mechanism is not used properly. Perhaps prosecutions in Taiwan have a very low dismissal rate because they know their decisions are subject to the screening mechanism and,

4Given the data and information from judicial authority gathered, the annual dismissal rate is far less than 1%. see Di fang fa yuan xing shi di yi shen an jian cai pan jie quo-an nian bie fen [Results of Judgments and Rulings of Criminal First Instance Cases by the District Courts – by Year], in JUDICIAL YUAN, JUDICIAL STATISTICS YEARBOOK tbl 62 (2011) (Taiwan), available at http://www.judicial.gov.tw/juds/index1.htm (last visited Sep.10, 2012); Di fang fa yuan xing shi di yi shen an jian cai pan jie quo-an zui ming fen [Results of Judgments and Rulings of Criminal First Instance Cases by the District Courts – by Offenses], in JUDICIAL YUAN, JUDICIAL STATISTICS YEARBOOK tbl 64 (2011) (Taiwan), available at http://www.judicial.gov.tw/juds/index1.htm (last visited Oct.10, 2012).
5From May, 2008 to May, 2012, the conviction rate of corruption offense is 63.1% while the overall offense conviction rate is 95.7%. see Ge di fang fa yuan jian cha shu tan du an jian 97 nian 5 yue qin ji quan ban xian an ding zui lu ge nian du tong ji biao[Corruption and overall criminal cases conviction rate of national prosecutors office from May, 2008 to 2012] in MINISTRY OF JUSTICE, Statistic of Justice, available at http://www.moj.gov.tw/public/Attachment/273111445976.pdf (last visited Aug. 21, 2012).
6See Ric Simmons, Re-Examination the Grand Jury: Is There Room for Democracy In The Criminal Justice System?, 82 B. U. L.Rev.1, 31-32 (2002), for a discussion that the federal grand jury dismissal rate is 0.4 % in 1984 and the state grand jury in N. Y. dismissal rate is 5.9%; Roger A. Fairfax, Jr., Grand Jury Innovation: Toward A Functional Makeover Of The Ancient Bulwark Of Liberty, 19 WM. & MARY BILL RTS. J. 342 (2010).
7Simmons, id. see also U. S. Department of Justice, Executive Office for United States Attorney, Statistical Report United States Attorney’s Office Fiscal Year 1984, (1984)(reporting the trial conviction rate that was convicted by trial is 80%).
therefore, only bring charges that are very strong. In such a case, we would expect the final conviction rate for these charges to be quite high. If we examine the overall conviction rate throughout these years, the conviction rate is in fact quite high\(^8\); however, the overall conviction rates are broken down into distinct felonies, like corruption, a different picture emerges. For example, the conviction rates for corruption offenses, including facilitation of payment and favoritism averages only 59.48\% and ranges from a low of 49\% to a high of 68\% from May 2001 to 2012\(^9\) (See Table 3). Then, by comparing the conviction and dismissal rates within the same year for the corruption offense, the dismissal rates are mostly zero\(^10\) (See Table 2).

Although all these statistics are descriptive and inconclusive, they nevertheless suggest that the new screening mechanism is underemployed. This dissertation is convinced that some non-guilty cases should not enter trial in the first place, and that the screening mechanism is rarely effective in dismissing the cases. Obviously, some cases shall not be brought to court, and shall be weeded out before the onset of trial.

Furthermore, one empirical project was outsourced to a private institute, Decision-Making Research, by the Ministry of Justice in Taiwan to examine the reason for low conviction rates.

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\(^8\) From May 2008 to June 2012, the overall offenses conviction rates are 95.7\%, 95.4\%, 95.6\%, 96.1\%, and 96.1\%. See Ministry of Justice, Statistic of Justice, available at http://www.moj.gov.tw/public/Attachment/273111445976.pdf(last visited Aug. 30, 2012).


rates in corruption offenses and to seek ways to improve the conviction rate.\textsuperscript{11} They collected opinions of judges, prosecutors, and attorneys, by sending questionnaires to the prosecutors’ offices, courthouses, law firms, and by collecting the feedback anonymously from these three groups.\textsuperscript{12} From the 295 judges who provided reasons for “not guilty” verdicts\textsuperscript{13} 279 judges (94.6\%) considered the main reason to be insufficient charging evidence, 29 judges (9.8\%) found the probative value of all presented evidence not sufficient to prove the elements of the charged crimes, 17 judges (5.8\%) found that major evidence was excluded, 20 judges (6.8\%) provided other reasons, such as different interpretations of the law, the charged act constituted no offense, etc., and 2 judges (0.7\%) refused to give an answer (See Table 5). Considering the extremely high number of answers, it strongly suggests that corruption prosecutions often fail due to insufficient evidence.

Judges were also asked whether prosecutors abuse the charging power. Among 353 of judges who answered this question,\textsuperscript{14} 6.5\% of judges answered yes, very serious, 19.8\% yes, quite serious, 52.4\% of judges considered the abuses do exist but not serious, 14.7\% answered not at all, 6.5\% of judges had no comment (See Table 6). To sum up, all the answers acknowledging some level of prosecutorial abuse of charging power is 78.7\%, and about 26.3\% of judges thought that abuse was “very” or “quite serious.”

\textsuperscript{11}\textit{FA WU BU, DIAO CHA JI GOU: JUE CE DIAO CHA GU FEN YOU XIAN GONG SI} [Ministry of Justice, Research Institute: Decision Making Research], Taiwan Dì Qu Gong Wù Yuán Fàn Tàn Duì Zì Dīng Zì Lù Zī Wén Juan Dìao Cha [Taiwan conviction rate of government officials corruption questionnaire and research], 1-2 (2008)(Taiwan) (Among the judges group, they sent out 1562 questionnaires and recalled 506 copies, excluding invalid samples, there are 498 valid samples).
\textsuperscript{12}\textit{Id.} at 3-6.
\textsuperscript{13}\textit{Id.} at 49 (noting this is multiple choices question).
\textsuperscript{14}\textit{Id.} at 56.
With regard to low conviction rates 498 judges responded, and the following summarizes their answer\textsuperscript{15} (See Table 7). Three hundred thirty-two (66.7\%) judges deemed that the prosecutor did not conduct detailed investigation and prosecuted the case recklessly; 296 (59.4\%) judges stated that judges adopt very high standard of proof in corruption cases due to the seriousness of the penalty; 209 (42\%) judges thought that the prosecutors or investigators did not conduct proper investigation; 166 (33.3\%) considered that both prosecutors and investigators are incapable of investigating these cases; 88 (17.7\%) judges considered that some of the judges lack relevant social experience and expertise to handle these cases; 84 (16.9\%) judges considered litigating prosecutors’ poor performance at trial; 32 (6.4\%) judges stated other reasons, such as the corruption crime nature makes it hard to collect evidence, the prosecutor charged on the basis of merit of promotion, or performance, etc.; and 10 (2\%) judges refused to give an answer. Once again, judges considered that prosecutors are not committed to their job and close cases in reckless ways. These figures demonstrate the severity of the abuse of prosecution in corruption cases and suggest how urgently Taiwan needs reform. They echo the society’s call for the restraint of this power.

Moreover, in a case, recently revealed and condemned, a defendant was charged with rape and burglary of a victim at knifepoint. The prosecutor charged the defendant without a DNA test report, but merely on the basis of his confession and victim’s identification. The defendant was in custody until trial. During the trial, the DNA (extracted from the victim) examination came out and proved that the offense was committed by another. The court eventually cleared

\textsuperscript{15}Id. at 68, 75 (noting this is multiple choices question).
the defendant.\(^{16}\) As a matter of law, a mere confession could not prove a defendant’s guilt beyond reasonable doubt without corroborating evidence.\(^{17}\) The community and the accused’s family condemned the prosecution for abuse of prosecutorial power.\(^{18}\) In another case, the prosecutor charged a theft offense on the basis of a confession where nothing had been stolen. It was revealed by the judicial reform foundation to caution the Ministry of Justice for rock solid prosecution and establishment of concrete measures to prevent such abuses of power.\(^{19}\)

Finally, in a panel discussion held by the Judicial Reform Foundation, then a High Court Prosecutors’ Office prosecutor, Eric Chen, and a famous criminal field attorney, Wellington L. Koo, both pointed out that the new screening mechanism adopted in 2002 would not function to weed out the cases because of the threshold issue.\(^{20}\) Koo predicted that as long as the prosecutor proceeds with the charge, chances that a judge would exercise her screening authority are not high.\(^{21}\) Therefore, the current screening mechanism does not function effectively as a shield to protect the accused and scrutinize unwarranted charging decisions. Thus, Taiwan’s major problem in the field of charging decisions is that the “screening mechanism” is ineffective at

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\(^{17}\)Xing shi Su song fa[The Code of Criminal Procedure] art. 156(2013)(Taiwan).

\(^{18}\)Dong Hai Zhi Lang Luo Wang Ji Fu Ren Jia Shu Han Yuan [The rapist of the Tung hai University student was captured, the original accused’ family call for investigation of the prosecutor], Zhong Yang She[CNA NEWS](Taiwan), Nov. 8, 2011, available at http://n.yam.com/cna/sociaty/201108/20110813059953.html (last visited Aug. 30, 2012).


\(^{21}\)Id.
removing cases that do not warrant trial. Conversely, an effective filter would shield the innocent from unfounded prosecutions, and it would also function as a cost-saving valve that protects defendants’ rights and prevents social and financial costs.

The current body of research points out the problems of prosecutorial charging decisions, yet it does not address possible solutions. Moreover, reforms to the current screening mechanism are not found in the literature, nor are there any evaluations of the current screening mechanism. It is, therefore, the task of this dissertation to analyze current deficiencies of the mechanism and to institute potential alternatives that eradicate unfounded or erroneous prosecutions.

II. Methodology

In achieving the goals of this project, the methodology of “comparative analysis” is the major underpinning. Current legal theories from various bodies of research are referenced to identify the characteristics of the major systems of the United States and France. Furthermore, the advantages and disadvantages of the screening mechanisms are addressed, such as the grand jury and preliminary hearing mechanisms in the United States, and investigating judges (juge d’instruction) in France. Comparative studies not only compare and contrast the different origins and ideology of legal systems, different exercises of the affected institutions, legal actors with which a system is involved, and legal culture that a system generates, but also aim to

22 Wang, supra note 1, at 359.
achieve effective transplant in the receiving countries.\textsuperscript{24} As Judge Richard Posner stated, “It is important, however, to adapt the imported code to the local culture, a task for local, not foreign, lawyers who know something about the country whose law they are borrowing.”\textsuperscript{25} He indicated that “both foreign law and application of local customs as formal law are well-tried methods by which a nation can adopt a legal code without starting from scratch.”\textsuperscript{26} Professor Vernon Valentine Palmer said that “[a]s an abstract matter, comparative law has but one method to compare and contrast norms, institutions, culture, attitudes, methodologies, and even entire legal systems.”\textsuperscript{27} The legal transplant construction includes interpretation and reinterpretation of the legal procedural traditions, the roles and functions of participant personnel, and the practice of those who are informed by existing legal cultures.\textsuperscript{28} After all, blind transplantation is ineffective if those factors are not properly considered.

Borrowing of foreign law, i.e. legal transplant, is not unfamiliar in Taiwan since Taiwan was once colonized by Japan. The historical path of Taiwan’s criminal procedure system is an example of the imposition of an external system through colonization. Later on, the Taiwan criminal justice system was modeled after the German system until a recent shift leaning towards the adversarial system of the United States, starting around a decade ago.\textsuperscript{29} Many of the

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\textsuperscript{26} Id. at 6.
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transplant processes of legal institutions in criminal procedure of Taiwan echoes Judge Posner’s axiom that it is important to adapt the foreign laws to local culture and customs.

The data obtained from the judicial authorities and the empirical project indicate that cases that bore insufficient evidence have been screened out in extremely low numbers when compared to the total number of cases being prosecuted, together with the conviction rate of specific types of felonies, such as corruption, being quite low in comparison to other types of cases. This reinforces the idea that the newly enacted screening mechanism is rarely being used by judges and is simply not functioning effectively in Taiwan. It may be the case that local judges are unfamiliar with this new law borrowed from abroad or are not trained to use it. Alternatively, it could be, as Judge Posner warned, that it is failing because it was not adapted to local culture and customs.

To reform the current institution, this dissertation illustrates the structure of prosecutorial systems and screening mechanisms of the United States and France, along with Taiwan’s current system, including the screening procedure, screener neutrality, evidentiary rules, right to counsel, the threshold to prosecute, and discovery, in the analysis of the deficiency of our mechanism. Comparing the screening mechanisms from different countries, because they originated from different historical backgrounds as well as different legal cultures, could provide a potential vehicle for Taiwan to reform its current screening system.
III. Structure

The current screening mechanism for prosecutorial charging decisions is ineffective at removing cases that do not warrant trial. This presents a series of questions: Could there be an alternative mechanism that would achieve the goals of the screening process and regain public’s confidence? Could we extract some guiding principles from alternative screening mechanisms to reform our own structure? What are the components of other alternatives that enhance and effectuate the screening mechanism?

This dissertation is divided into five chapters. Chapter 2 examines different legal systems, their underlying ideologies, legal institutions, roles of the legal participants, interplay of authority of the participants within each system, and legal cultures among these participants. It not only focuses on the differences of two legal families, the common law family and the continental law family, but also on the law in action as well. In other words, this dissertation conducts a systematic analysis of the prosecutorial systems in the United States, France, and Taiwan to examine the variance of each country and to grasp comprehensively the prosecutorial organizational structures, underlying legal ideologies, roles, charging function, personnel, and authority that the prosecutor has, which interact with her behavior in performing her duties, and exerting her authority. Only through a full understanding of the decisionmaking and its context could we know what kind of screening mechanism and what kind of procedure should be adopted in weeding out the unfounded prosecutions.
Chapter 3 then analyzes the screening mechanism of the United States, Taiwan, and France, focusing on the goal, operations, procedures, evidentiary rules, right to counsel, right to call witness, etc. It discusses advantages and disadvantages of those screening mechanisms, such as the grand jury and preliminary hearing mechanisms in the United States and investigating judges (*juge d’instruction*) in France. The proposed reforms of the U.S. grand jury procedures are analyzed in order to gain a more comprehensive picture so that we might use our understanding of these reforms as a vehicle for Taiwanese reform. Some of the disparities in states-level preliminary hearings, which differ from federal preliminary hearings, are included in this chapter for a clearer picture. With regard to the French judicial investigating, it is not a screening mechanism in the sense of “screening” a case; rather it is a judicial investigation. The reason it is included as a potential object for discussion is because this process functions as a check and a review to the investigation conducted by the police and prosecution.

This dissertation also looks at the law in action of the French investigating judge, its operation, function, and effectiveness. Given criticisms of the investigating judges’ relationship with the prosecutor and, accordingly, doubting their neutrality, we also illustrate recent calls for abolishing the position. In addition, the legal culture formed amongst the prosecutor, investigating judge, and trial judge is as a judicial family, i.e., judicial corps, which might influence its supervision function and contribute to recent proposed reform, this dissertation quote one empirical study that comports the former idea as an essential cause to consider in the application of this mechanism.
Chapter 4 analyzes the reform of the screening mechanism that adopts adversarial style procedures, which emphasize mandatory and independent screening that occurs before the trial. This is distinguished from the pretrial procedure, which incentivizes the screening judge to review, and emphasizes evenhanded, more participatory process from the defense, the right to counsel, evidentiary rules, illegal means of acquiring evidence, screening time, discovery, and independent screening procedure. This part identifies the structural defects and adopts its resulting reform, which could lead to a comprehensive solution for Taiwan. Eventually, it is our intention to provoke thoughts that active participation and the installation of independent procedure will lead to the effective reform of the system. This might ideally galvanize the judges into the using the screening function, and bring about meaningful effects on criminal justice.

Chapter 5 concludes that the current screening mechanism is ineffective and is indeed a paper tiger that could not deter unfounded prosecutions. Only through a comprehensive procedural and structural reform in screening process could Taiwan achieve the goals of protecting the innocent, eliminating of the caseloads, advancing the prosecution quality, and diminishing the social costs.
CHAPTER 2 THE PROSECUTOR

I. Major Criminal Justice Models

As a comparative matter, two major legal systems of modern criminal justice exist around the world. The common law system features are most similar to the adversarial style, and it is followed in England, the United States, Canada, etc., each with their own distinct features. The continental law system, mostly including continental Europe, ranges from nonadversarial (the Netherlands), to less strongly nonadversarial (Germany), to a mix of adversarial and East Asian influence.\(^{30}\) The continental law system is more like a hybrid or mixed system and is no longer strictly inquisitorial.\(^{31}\)

Although these two legal systems basically comprise the whole world’s criminal justice systems, there are no two countries that adopt identical systems. However, a gravitation toward converging the different systems has become an ongoing trend. Systems are becoming more or less adversarial around the world.\(^{32}\) In continental Europe, for example, Europeans often describe their systems as mixed, in that the initial investigative phase is primarily inquisitorial, and the trial phase mainly accusatorial, with the prosecutor serving as one party.\(^{33}\)

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\(^{32}\) See Frase, *supra* note 30, at 787 (noting most of the countries around the world have rules of exclusion of some illegally seized evidence).

Even though continental Europe is still depicted and labeled as an inquisitorial system, it is no longer indicative of the term’s original meaning in ancient Europe as traditionally inquisitorial as expounded above. Hence, this dissertation replaces “inquisitorial”, as used in the traditional comparative sense, with “continental” model of criminal procedure to distinguish the criminal justice system of contemporary Europe from that of ancient Europe, but this dissertation uses the term “inquisitorial” when it refers to ancient style of criminal justice system in Europe.

This chapter examines different legal systems, underlying ideologies, legal institutions, the roles of the legal participants, the interplay of authority of the participants within each system, the operation, and the legal cultures among these participants. In addition, Professor Damaska had proposed that differences in the procedure are related to the characteristics of organization of the authority in continental Europe and the English-speaking world. The ideology underlying the different legal systems also affects the incentive of prosecutors and their agents. The basic ideas, organizations, personnel, roles, and authority of participants interact within each system, as well as affect the structure of the process. Prosecutorial organizational structure, roles that the prosecutor plays, and functions she performs interplays with her behavior in performing her duty and exerting her authority. Understanding the variations of the two major

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34 In Taiwan, academia has various ways of interpreting the inquisitorial style, also name in Mandarin “jiu wen zhu yi” as traditional sense of no procedural right afforded to the defendant or coerced investigation in the Middle Ages in Europe. After the French revolution in 19 centuries, in Europe, the accusatorial system was adopted that the defendant is entitled to right against self-incrimination, public trial and was presumed to be innocence before conviction. Therefore, there is no point to distinguish the inquisitorial and accusatorial system nowadays. The modern continental Europe model is prevailed with “zhi quan zhu yi”, which specifically refers to the dominant role of trial judge rather than the prosecutor. See Jaw-Perng Wang, Dang shi ren jin xing zhu yi zheng zhi ping yi[Discussion of the debate Over the Adversarial System], 43 XING SHI FA ZA ZHI[CRIM. L. J.](No. 4) 32, 34-35(1999) (Taiwan).

legal systems is critical in grasping, comprehensively, the role, function, authority, and exercise of power by the prosecution.

1. Continental System

The distinctive feature of a continental system is the procedural structure and authority of trial judges in contrast to that of an adversarial system. The term “inquisitorial” in the ancient sense, often referred to a system of coerced means of investigation to extract confessions, or investigating and trial powers held by identical authorities in carrying out the investigation and adjudication of cases, or where the trial judge makes a ruling on the basis of the case files. Some also consider that “inquisitorial” refers to judges playing an active role in the conducting of trials and investigating the facts. There is no doubt that coerced means of investigation have been abolished in modern times and banned by modern criminal procedure whether in the continental, mixed, or adversarial systems. There should be no traditional inquisitorial style of system in existence in the modern world. The inquisitorial style of criminal justice system that prevailed in ancient Europe has been markedly transformed. “Inquisitorial” refers to “proof-taking used in continental law, where the judge conducts the trial, determines what questions to ask, and defines the scope and extent of the inquiry.”

36Goldstein & Marcus, supra note 33, at 242-243. see also Craig M. Bradley, The Convergence of the Continental and the Common Law Model of Criminal Procedure, 7 Crim. L. F., 471, 472,477-478 (1996) (noting that “Americans tend to equate inquisitorial systems with coercive interrogation, unbridled search, and unduly efficient crime control”) (‘an inquisitorial system of justice was inextricably linked to torture and unreliable results”).
37 GLENDON, ET AL., supra note 31, at 198.
38 BLACK’S LAW DICTIONARY 655 (Bryan A. Garner et al. eds., 8th ed. 2004).
The roles and functions of prosecutors in continental systems differ from those of their counterparts in adversarial systems. Their roles and functions inextricably intertwine with their authority in any part of criminal procedure in either system, with the wax and wane of the power between judges and prosecutors within the two major systems defining the line. Under a continental system, the actor who carries responsibility for putting the evidence and facts together and identifying the truth is the judge. She is expected to arrive at the true facts by combing through evidence, examining witnesses, and questioning the defendants. Continental Europe refers to most of their criminal justice system as a mixed system, usually with the adoption of the accusatorial principle by the bifurcation of the trial stage, by trial judges, and the prosecution and investigation stages by prosecutors.

The emergence of prosecutors was a reformation to the conventional combination of the prosecutorial function and the adjudication function into one inquisitorial judge on the basis of her own investigation. The German prosecutor was actually created to reduce the court’s role from being in charge of the investigation to merely being an impartial function of adjudication. However, worry still existed that prosecutors would overzealously charge the accused. Then, the Prussian minister of justice, Savigny, prevented this overzealous role by investing prosecutors with an impartial judicial character. This means that the prosecutor is asked to be objective in the administration of her power and justice.

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39 Even though there are variations, such as “the public prosecutor may substitute for or share with the judge the responsibility for pretrial investigation.” see Goldstein & Marcus, supra note 33, at 242.  
40 There are some variations in European countries. For example: French has a different setting that investigating judges conduct felony investigations, which differs from that bifurcation.  
42 Id. at 449.  
43 See id. (noting that prosecutors retain the impartiality by investigating both inculpatory and exculpatory evidence, and prosecutor can appeal on behalf of the defendants if she considered that the adjudication was error).
In the continental law system, criminal investigation is conducted by a neutral judicial officer, i.e., the prosecutor who collects and proffers both favorable and unfavorable evidence in the case file, i.e., dossier. The prosecutor is charged with an obligation to investigate, while the trial is dominated by the judge. What matters to the prosecutor is to complete investigations, search for the truth, collect the evidence, and prepare dossiers. Given the impartial role, a dossier contains inculpatory and exculpatory evidence as well as complete information of any prior criminal record of the charged defendants. The right of defense counsel to investigation is not recognized by law, and is limited in action even if the defendant actually conducts her own investigation. During the investigation, the dossier is closed to everyone and the investigative phase is under the protection of the secrecy principle. The defense has full right to access of the dossier once charged.

The presiding judge reviews the dossier and informs the defendant of the accusation. She advises the accused of his right to silence and then hears the accused’s account of the accusations. She is in charge of calling witnesses for examination, the order in which witnesses will be examined, and conducting most of the questioning of the witnesses. “Witnesses at trial are witnesses of the court, not of the parties, and are questioned in a way that

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45Defense counsel does not have the sense of their version of investigation because of lacking of technical methods, and lacking of legal authorization.
47Pizzi & Marafioti, supra note 44, at 12; see also Richard S. Frase, Main-Streaming Comparative Criminal Justice: How To Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses, 100 W. VA. L. Rev. 773, 777 (1998) (claims that “trial judges are considerably more active in other foreign system (e.g., Germany), and they completely dominate trials in the most traditional “Civil Law” systems(e.g., France”).
is designed to produce balanced, rather than biased, testimony.\textsuperscript{48} Courts in the continental model choose and examine the expert witness. Counsel is limited to supplementing the judges’ examination of witnesses.\textsuperscript{49} Prosecutors and defense attorneys play limited role at trial. Unlike procedural and evidentiary rules in the U.S. adversarial style, witness examination is informal and subject to fewer rules at trial, accompanied by occasional questioning from the prosecutor and defense attorney.\textsuperscript{50}

Trials are carried out by a panel of judges, formed by a presiding judge and fellow judges, all of whom have full access to the file and are required to write the reasoned judgments that clearly illustrate how their decisions are reached. The presiding judge’s role is active during the trial. It is the judge, not the prosecutor, who positions himself opposite the defendant and plays an active role in the process. The judge conducts what is tantamount to continuous investigation at trial. The trial is brief and supposedly works quite efficiently.

Continental ideology demands centripetal decisionmaking. Since the unitary order is pivotal to hierarchical level of government, the exercise of discretion diminishes the demand, unless concrete directives for official action cannot be formulated.\textsuperscript{51} Professor Damaska has argued that the hierarchical model emphasizes certainty of decisionmaking, which demands

\begin{footnotesize}
\begin{enumerate}
\item Bradley, \textit{supra} note 36, at 472.
\item \textit{Id.} at 483.
\item Kessel, \textit{supra} note 46, at 424.
\item Damaska, \textit{supra} note 35, at 484-485.
\end{enumerate}
\end{footnotesize}
uniform policy and directives towards subordinate officials to pursue the unitary order nationwide, thus centralizing the authority of the ruler.  

Demand for centripetal decisionmaking makes the central authority issue general directives to subordinates handling specific cases. Public officials only administer guidelines and are not allowed to question these directives.  These normative criteria insulate officials from outside pressures and considerations, making decisionmaking more of a nonpolitical, technical task. Preference for determinative rules and precise standards to guide public officials is favored in the continental system. This explains the occurrence of compulsory prosecution arising out of the continental system, and also affects public officials’ perceptions of their roles. As Professors Pizzi and Marafioti depicted the basic features the continental law prosecutorial decision making:

The civil law emphasis on uniform results manifests itself in a strong aversion to prosecutorial discretion. The civil law system has no counterpart to the board prosecutorial discretion existing in the United States . . . . Prosecutors must file criminal charges whenever the evidence indicates that the suspect has violated the law. If, for example, some evidence indicated that a suspect committed a serious crime, but the prosecutor believed that

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52 See id. (argues that hierarchical model emphasizes certainty of decision-making, which demands uniform policy and directive towards subordinate officials to pursue the unitary order for nationwide, and centralizes the authority of ruler. Three attributes of such models are the following: (1) “precise delineation of the province of each official”; (2)”authority is allocated along a gradient of importance”; (3) same level officials’ interrelationship, and separation of offices and incumbent. Since the unitary order is pivotal to hierarchical model, the exercise of discretion diminishes the demand, unless “more precise guidelines for official action cannot be formulated.”); Pizzi & Marafioti, supra note 44, at 9-10.
53 Damaska, supra note 35, at 485.
54 Id. at 486.
55 Id. at 485.
there were reasons for not prosecuting the case, the prosecutor would be expected to file a formal criminal charge and seek dismissal of the charge by a judge, who has the authority to review the prosecutor’s decision.  

Examples can be seen in the German prosecutorial system. The German rule of compulsory prosecution was born in the mid-nineteenth century with the emergence of the public prosecutor. Prosecutors’ offices are hierarchically organized structures, with a chief prosecutor for each judicial district in charge of reviewing the indictment. The prosecutors and chief prosecutors are subjected to the review and direction of the prosecutor general and Ministry of Justice. Because of worries that prosecutors and chief prosecutors would surrender to political pressure in exercising the power to prosecute and not prosecute, the German compulsory prosecution system arose to insulate prosecutors from external power. German prosecutors are required by the Code of Criminal Procedure article 152 section II to prosecute “all prosecutable offenses, to the extent that there is a sufficient factual basis.” “Public prosecutors must press charges as part of their duty.” It leaves no leeway for prosecutors, including the prosecutors and chief prosecutors, to decide whether to charge or not in the administering of justice.

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57 Langbein, supra note 41, at 446, 449.
58 Id. at 449.
59 Id. at 450.
61 Damaska, supra note 35, at 503.
A few continental countries authorize non-prosecution with respect to all kinds of offences if the decision is consistent with public interest, namely the principle of expediency.\textsuperscript{62} Other countries that do not allow felony-charging discretion permit “non-prosecution for misdemeanors if the culprit’s guilt can be regarded as minor, and there is no public interest in prosecuting.”\textsuperscript{63}

Another feature of continental ideology is hierarchical ordering of agencies that are involved in the administration of criminal justice.\textsuperscript{64} It is the concept of hierarchy that dominates the continental prosecutors’ office, organization, and administration of justice. Both police and public prosecutors’ structure\textsuperscript{65} are under rigorous ordering of central authority. The refined stratification of the administrative governmental structure not only defines the authority and responsibility, but also achieves uniform policy and the predictability of decisionmaking. This hierarchical structure, together with the comprehensive reviewability of decisions, is obvious even when recruitment and promotion of personnel are considered.\textsuperscript{66}

One major example is the French governmental system in the post-revolutionary Napoleonic regime. It emphasized centralized power to rebuild political and social order to reform the pre-revolutionary \textit{Ancien Régime}.\textsuperscript{67} As Professor Hazareesingh described that distinct feature of Napoleonic France, it included:

\begin{itemize}
  \item \textsuperscript{62}Id. at 504.
  \item \textsuperscript{63}Langbein & Weinreb, \textit{supra} note 60, at 1562.
  \item \textsuperscript{64}Damaska, \textit{supra} note 35, at 487.
  \item \textsuperscript{65}Id. at 498.
  \item \textsuperscript{66}Id.at 500.
  \item \textsuperscript{67}JACQUELINE HODGSON, \textsc{French Criminal Justice A Comparative Account} of the \textsc{Investigation} and \textsc{Prosecution} of \textsc{Crime} in France, 15-16 (2005).
\end{itemize}
an emphasis on power, authority, and technical competence, a strict sense of
hierarchy, a clearly delineated system of rules, which were applied in a
uniform manner and a scope of intervention in matters both public and
private which was pervasive (in comparison with its predecessors). The most
important and durable feature of the Napoleonic system was the principle of
centralization, which Napoleon consciously adopted from the Jacobin
heritage of the 1790s. 68

The basic ideology, inevitably, would influence the prosecutorial structure and its
exercise of charging power. Likewise, adversarial ideology also dominated its structure and
exercise of power. Basically, the two systems hold different ideology and charging styles. The
following articulates the adversarial system and its underlying ideology, which must be
understand before analyzing Taiwan’s current system.

2. Adversarial System

Adversarial courts and legal practice often denigrate inquisitorial procedure by equating
it with the inhumane torture of medieval England and Europe, meant to extract confessions. 69
But today, the continental model has transformed gradually from its origins to a mixed model.
Some privileges, such as due process, the presumption of innocence, and those against self-
incrimination, guaranteed in the U.S. adversarial model, have prevailed in the modern

68 Sudhir Hazareesingh, Political Traditions in Modern France, 159 (1994).
69 Kessel, supra note 46, at 410.
continental model as well. As a preliminary matter, the adversarial model should be distinguished from a mixed model as described in the continental procedure. In this dissertation, the adversarial model indicates that of the United States.

An adversarial model basically emphasizes combat between two advocates or adversaries, fighting for a favorable decision, playing under rules of fair play, trying to convince a neutral fact-finder or decision-maker of his or her side of the story. The distinct feature of an adversarial system is that the judge does not conduct the factual and legal investigation, but relies on the basis of evidence and arguments presented by both sides. Each case, represented by the prosecuting attorney and challenged by the defense, will not be settled by the hands of judges alone. The system operates more like a dispute between prosecutors and defense attorneys before a non-active arbitrator. The state and defense supposedly play an evenhanded game in the beginning of the criminal process. The competing dynamics between prosecutors and defense attorneys continue until the final decision.

The adversarial model presupposes that antagonistic presentation of opposing truth is the best device for bringing out the truth. The participants’ active roles in adversarial criminal procedure are demonstrated by the dominant role of witness examination, mainly who will testify, in what order, and who conducts the examination. The skill of both parties does influence the outcome of the trial. “The inherent hostility that every government official feels

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70 Id. at 416.
71 Id. at 414.
toward the accused is displayed and openly challenged, rather than operating such silentio against the defendants.” 74 American criminal trial attorneys are more hostile and antagonistic than are the attorneys in the continental model; some critics have depicted the trial as “ritualized aggression,” and the trial goal as “winning the case.” 75

Comparatively, the prosecution has more personnel and law enforcement, such as professional police, and investigators, in fulfilling investigation, and gathering evidence. By contrast, the defendant is afforded with constitutional rights that could ensure him or her a fairer game against the state at various phases of criminal procedure. 76 Attorneys for both sides argue for the exclusion of evidence, and for the application of discovery rules to expose more inculpatory and exculpatory evidence so as to not skew the truth. Even choosing a favorable jury using the peremptory or for cause challenges can be a critical move toward the outcome of guilt or innocence, regardless of actual guilt or innocence.

Given the aforementioned costly and complex procedural rules and jury system, most cases settle in plea procedure due to the restricted resources that would prevent all cases from going to trial. On one hand, plea procedure and plea agreement may ease the burden on an overloaded criminal justice system; on the other hand, they can skew the truth-finding goal of criminal procedure where plea-bargaining vastly substitutes the authentic trial procedure.

74 Bradley, supra note 36, at 472.
75 Kessel, supra note 46, at 434-435.
76 Bradley, supra note 36, at 473.
In this sense, prosecutors have the goal of winning cases and securing convictions, and even maximizing sentences. This goal and mission in turn affects a prosecutor’s behavior at and prior to trial. Prosecutors are still judicial officers in an adversarial system, but not in the same way as they are in the continental model. Instead, they serve a dual role as advocate and minister of justice, while working for the executive branch.

In contrast to the role of judges in the continental model, the judge is a neutral fact-finder and plays a passive role at trial. Generally, the fact-finder role is filled by a nonprofessional jury, unless the defendant waives the right to a jury trial. Judges are not charged with the function of inquiring as to the facts, applying legal rules, or reaching a just result. Rather, American judges play a passive role and do not control the process to nearly the same extent as their continental counterparts.77

That which is depicted above primarily centers around the trial procedure. Professor Damaska has commented that the trial-centered model, i.e. adversarial procedure, fails to account for many other discrepancies between the two systems, arguing that differences in the procedure are related to the characteristics of organization of authority in continental Europe and the English-speaking world.78 Professor Damaska has depicted the U.S. system as “coordinate model of organization,” where a key feature of enforcement organizations is a parallel relationship instead of a hierarchical relationship.79 Federal criminal law enforcement and federal executive power adhere to the coordinate model, where criminal investigations are

77Kessel, supra note 46, at 431,437.
78Damaska, supra note 35, at 481.
79Damaska, supra note 33, at 509-512.
conducted by different agencies. These federal agencies are subordinated only to the Attorney General and the Deputy Attorney General, and they do not report to individual prosecutors, but only to their agency’s officials. Although Federal prosecutors and agency structures are centralized, the feature of hierarchical subordination is not as rigid as in the hierarchical model. In most states, public prosecutors are elected officials with authority to coordinate local law enforcement, although theses powers are rarely used.

This kind of institutional arrangement of the prosecutor and agent organizational structure implies one feature of Anglo-American ideology, that centrifugal decisionmaking is imbedded in all types of local or federal institutions. Even when officials are organized as one unit, they remain independent from the prosecutors’ office. Officials are not bound by predetermined rules; instead they tailor their decisions to individual circumstances. There are standards, but they are less precise and more flexible in the coordinate model. The officials’ discretion is essential to all aspects of official authority. Officials are not only rule appliers, but also the best rule creators with regard to each case. Officials’ discretion is critical to the operation of governmental organizations, since their decision-making depends not only on preexisting standards and rules, but also on designing the best solutions that cater to individual situations.

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81Id. at 756.
82Damaska, supra note 35, at 511-512.
83Id.
84Id.at 510.
Another feature of the adversarial model is the preference for discretion and flexible rules. American prosecutors monopolize the gateway to the criminal justice system. Victims are precluded from filing private prosecutions against culprits. Prosecutors have broad discretion to cope with local matters, which allows each United States Attorney or state prosecutor to determine the prosecutorial policy and enforcement priorities for particular offenses. Moreover, the United States has dual jurisdictions. At the state level, it contains fifty-one jurisdictions. The severity of an offense, frequency of the commission of that offense, and priority of enforcement varies by state and jurisdiction. It is neither possible nor practical to enforce unitary guidelines to each jurisdiction. Hence, the American district attorney remains an autonomous power with few constraints on her decision to press a charge or determine the number of charges.85

In order to maintain a system of checks and balances between the executive and judiciary, the design of separation of powers triggers judicial reluctance to review prosecutorial discretion with regard to non-prosecution. Professor Pizzi described “adversarial tradition in which judges are assigned a neutral and passive role with respect to charging decisions and the development of evidence at trial . . . . Except [where] . . . a prosecutor’s action violates the Constitution, an American judge has no power to reduce or reshape criminal charges to fit the evidence or the equities of a particular case.”86 This differs from its counterpart of the continental model as discussed above.

85 Id. at 510.
3. The Case of Taiwan

3.1. Historical Development of Criminal Justice System in Taiwan

Ancient Chinese attitudes towards law were deeply influenced by Confucianism. He emphasized propriety to resolve issues; in other words, he stressed conformity to prevailing social norms. Nonetheless, propriety can only resolve all existing problems in an ideal world. Law was an instrument to maintain order and provide for prevention of crime by deterring potential criminals with the threat of punishment. There existed no prosecutorial system. Criminal cases were complaints brought by victims. Victimless crimes, like treason, were initiated by the magistrates’ investigation and adjudicated on the basis of her information. It is thought that the power of adjudication and prosecution were tied together in the same local government official’s authority (as then called “parent official”); fu-mu guan) to make such a decision, which was the same as in the ancient inquisitorial system.

Prior to 1895, Taiwan’s legal system was ruled by Chinese legal tradition. In 1895, Taiwan was ceded to Japan by the Qing dynasty as a spoil of war. Japan maintained sovereignty
over Taiwan for the following fifty years, until being defeated in the Second World War in 1945.\footnote{See Nuno Garoupa, Veronica Grembi & Shirley Ching-Ping Lin, Explaining Constitutional Review in New Democracies: The Case of Taiwan, 20 PAC RIM L & POL’Y J.(No.1) 1, 5, 8 (2011) (noting since Qing dynasty, the legal system between Taiwan and China were separated).}

Prosecutors as court officials initially emerged from the Taiwan Residency General Court Statute in 1896.\footnote{WANG, supra note 89, at1-16-1-20.} Taiwan Residency General implemented a more inquisitorial-like procedural code, transplanted from Japan, which was also modeled after European Continent, by order 10 in 1905.\footnote{Id. at 1-21.} “The Japanese Code of Criminal Procedure was transplanted into Taiwan at the end of the Nineteenth Century. It adopted the French semi-inquisitorial system rather than the Anglo-American accusatory method in public trial. The procurator charged the suspect with certain crimes . . . as the French tradition treated judges and procurators as part of the magistrate.”\footnote{Tey-sheng Wang, The Legal Development of Taiwan in the 20th Century: Towards a Liberal Democratic Country, 5 WASEDA PROCEEDINGS COMP. L. 304, 328(2002).} The judge was active at trial, often extracting a confession from the accused rather than acting as an umpire.\footnote{Id. at 328.} The authority of prosecutors makes the justice more like prosecutors’ justice. Prosecutors could wield magistrate-like authority to detain suspects to secure their appearance.\footnote{See WANG, supra note 89, at1-20, 1-24 (noting after nearly a century, prosecutor’s power to detain a suspect was held unconstitutional and the authority to order pretrial detention by the prosecutor was repealed in 1997 by the Justice of Constitution Court).}

After the first half of the Twentieth century from 1895-1945, the colonization by Japan finally ended. Because of its defeat, Japan had to return Taiwan to China after World War II in 1945. Subsequently, a government originating from China ruled Taiwan in the second half of the century. “The troops of Chiang Kai-shek, President of the Republic of China (ROC) and
Director-General of the Chinese Nationalist Party (Kuomintang; KMT) as well as the Supreme Allied Commander in the Asia Region at that time, took control of Taiwan on behalf of the Allied Force in 1945. At that time, Taiwan received the legal system from China that had been westernized since the Qing dynasty.

While Taiwan was colonized by Japan, the parallel political regime of China was still ruled by the Qing dynasty. The Qing dynasty had instituted Da Li Yuan (the Supreme Court) and other levels of courts, namely trial courts, as well as a high court, by the Code of Da Li Yuan Court Organization in 1906, which set forth the institution of prosecutor for the first time in China. Four years later, the Code of Court Organization, modeled after the European Continental legal system, was enacted and issued by the government of the Qing dynasty. According to the Code of Court Organization, the Prosecutors’ office is an independent institution that is attached to each court, which is separated from the court concept. Prosecutors took the responsibilities of investigation, prosecution, litigation, and direction of execution of sentencing. To conclude that the prosecution system was settled in the Chinese legal system at the end of the Qing dynasty is not overstated.

The end of the Qing dynasty gave birth to the Republic of China in 1912. The prosecutorial system remained unchanged. In 1928, the Chinese government promulgated the first Code of Criminal Procedure, following the European continental model, instituted public prosecution as the principle of charging, and detailed streamlined criminal procedures. In 1932,

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96WANG, supra note 89, at1-39; Wang, supra note 93, at 304-305; Garoupa et al., supra note 90, at 8-9.
97WANG, supra note 89, at1-41.
98WANG, supra note 89, at1-40,1-42, 1-43.
the Chinese government promulgated the Law of Court Organization, which designed judicial hierarchy that was composed of three levels of courts: the district court, the high court, and the Supreme Court. Prosecutors’ Offices remained attached to each court. The Judicial system was effectively centralized under the Judicial Yuan, the highest judicial branch of government, with each of the three instances of court systems mentioned above containing criminal, civil, and administrative courts.

“Followed by Chiang’s defeat in the Chinese Civil War, the KMT-led ROC government declared martial law in Taiwan in May 1949, and then in the same year retreated from the Chinese mainland to Taiwan.” The Peoples Republic of China won the civil war and has reigned on the Chinese mainland from 1949, while the government of the Republic of China, led by then President Chiang Kai-Shek, ruled Taiwan. The legal system of the Republic of China has dominated Taiwan since the termination of colonization by Japan in October, 1945. The two jurisdictions converged into one for four years, before separating again in 1949. In 1949, the Republic of China central government shifted its seat of power to Taiwan, and the prosecutorial system remained the same under newly announced Marshal Law.

Martial Law in Taiwan, a symbol of the authoritarian regime imposed upon the Taiwanese people by the ruling KMT party, did not end until 1987 when it was lifted by President Chiang Ching-Kuo, son of the former president, Chiang Kai-Shek. A new critical

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99 Wu, supra note 87, at 42.
100 Garoupa et al., supra note 90, at 8-9.
101 WANG, supra note 89, at 1-69, 1-70.
political liberalization opened up a new epoch toward democratization in Taiwan. This transition in politics not only transformed Taiwan toward becoming a newly formed democratic country, but also brought reform-minded activists, such as judges, prosecutors, attorneys, and scholars to a new path of criminal justice.

3.2. Modern System in Taiwan

The traditional criminal justice system in Taiwan was influenced and transplanted from western law, including continental European law and Anglo-American law, with more influence coming from the former than the latter. Because both the Republic of China and Pre-World War II Japan had adopted continental European legal system before occupying Taiwan, Taiwan was more inclined to adopt their legal system.

The authoritarian regime in Taiwan, ruled by KMT party as well as strongman politics, continued from the post war period in 1949 to the end of Martial law in the late 1980s. The judiciary was basically a hierarchically organized structure, and retained judicial autonomy in economic areas. However, the judicial system was dominated and monitored by the political authorities as a means of disciplining judges, particularly in politically related issues. The political oppression of, and the constant clashes with, indigenous Taiwanese led to the arrest and execution of many political dissidents and prisoners.

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102 Garoupa et al., supra note 90, at 9.
104 Wang, supra note 93, at 305.
It was not until the lifting of Martial law in 1987 that the authoritarian regime of Taiwan’s legal system began to transform. The emancipation (liberation) of judges and prosecutors from tight political control,\textsuperscript{106} as well as the emergence of an active bar, established roots for a democratic system.\textsuperscript{107} As the percentage of those passing Taiwan’s bar rose, the number of attorneys sitting for the bar boomed, which led more advocates to not only challenge the existing authority, but also to spur more liberal claims, such as the right to speech and the right of assembly, to promote ideas of independence and democracy against the government.\textsuperscript{108}

As the political environment began to burgeon, the political control of the judicial systems seemed to relax as well. The administrative supervision of high courts and district courts also shifted the subordination from the authority of the Ministry of Justice to the Judicial Yuan during 1980. The Law of Court Organization was revised and all courts were apportioned to judicial authority.\textsuperscript{109} Only then did judges become independent from the Executive. The prosecutorial system, including administrative supervision, headed by the Ministry of Justice, became subordinated to the executive power, which is separate from judicial power. Prosecutors exerted the power of investigation, prosecution, litigation, and execution of the decision of penalty according to the Law of Court Organization act 60.

\textsuperscript{106} Lewis, supra note 103, at 658.
\textsuperscript{107} Ginsburg, supra note 105, at 47, 55-62.
\textsuperscript{108} See id. at 47, 56-57 (noting that bar exam was difficult for only few could enter the legal profession. The passers had no incentive to fight for a larger profession because of monopoly fee system. The passing numbers did not expand dramatically until 1989. The small private bar decreased the possibility of social movement litigation that challenged the government).
\textsuperscript{109} Wu, supra note 87, at 44-45.
Similar to a prosecutor in continental law system, the Taiwanese prosecutor was empowered to wield the authority of pre-indictment detention, as well as the power to issue search warrants and wiretapping warrants pursuant to the Code of Communication Protection for Surveillance. In one famous criminal investigation, a number of important politicians were forced to resign because of their involvement in corruption. Some were even put into pre-indictment detention, which brought about awareness that the authority prosecutors possess is extremely powerful and uncontrollable.\(^{110}\) Prolonged pre-indictment detention is heavily criticized by academics and the community, given that the prosecutor who investigates a case and searches for the truth will normally detain a suspect in order to obtain a confession or inculpatory leads. To seek evidence and to extract confessions by means of pre-indictment detention is a violation of human rights. One cannot expect that a prosecutor will play a neutral role in carrying out an investigation and deciding for or against pre-indictment detention like a judge does.

Around 1995, the Grand Justices of the Constitutional Court held it unconstitutional to place the pre-indictment detention power in the hands of the executive, and declared that the power would become ineffective two years following its announcement.\(^{111}\) In 1997, abiding by

\[^{110}\text{I}d.\text{at 48-49.}\]

\[^{111}\text{See J.Y. Interpretation, No. 392(1995)(The holding of interpretation of 392 of the Council of Grand Justice provides “Criminal procedure, the judicial proceeding to try criminal cases, is one of the powers held by the judicial branch. It is a process with the purpose of carrying out the penal power of a state. A criminal trial begins with an indictment, which resulted from investigations. When a judgment is final, execution of punishment is necessary to realize the content of judgment. Therefore, these steps, viz., the process of investigation, indictment, trial, and execution of punishment, are closely related to trial and punishment -- they are different stages of the process of criminal justice. In this process, the prosecutor's offices act on behalf of the state to investigate, indict, and punish. Since the duty and function of a prosecutor's office is to carry out its role in criminal justice, its conduct within this sphere of state action shall be deemed "judiciary" in an expansive sense. The term "trial" defined in Article 8, Paragraphs 1 and 2, of the Constitution means trial by court. He who has no authority to try a case cannot conduct this proceeding. The "court" defined in Article 8, Paragraphs 1 and 2, means a tribunal composed of a judge or a panel of judges empowered to try cases. According to Article 8, Paragraph 2, of the Constitution, if any organ other}\]
the holding of the Constitutional Court, the power was eradicated. The prosecutors’ power to issue search warrants was eradicated after several events in which prosecutors sought to investigate the infringements of intellectual property rights by searching the students’ dormitories of one national university, National Chen-Kung University, as well as searching Legislators’ dormitories and a major media enterprise. The authority to issue wiretapping warrants was also removed in 2007, given that the high approval rate of wiretapping applications could potentially invade privacy, as well as the doubtfulness that prosecutors would play an unbiased role in the initiation of tapping warrants. In a word, the authority to issue any warrants, except arrest warrants, has now been transferred to a more unbiased judicial system.

The above historical developments signal an ongoing revision of the authority of the prosecutor for the past decade, and one that demands any infringements of fundamental constitutional rights be screened by a neutral, nonbiased judicial authority, instead of by one who conducts the investigation and determines the warrant issuance.

Traditionally, the prosecutor was charged with investigation, prosecution, and preparation of dossiers. After the prosecution, the judge would review the dossier and inform the accused of the accusation. At trial, the prosecutor usually bore a much lesser burden of proof in a criminal

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112 Yu-Pi Tsai, Jing-Hao Chen Ji Lu Zheng Li [Documentation], Zheng Zhi Yu Fa Lu Qi Shi Mi Bu Ke Fen [Politics and Law are indispensable], E-News of the Political Science Alumni Association of National Taiwan University (Taiwan), available at http://politics.ntu.edu.tw/alumni/epaper/no7/no7_11.htm (last visited Jun. 12, 2011).
case, i.e. a formality of burden of proof, when compared with that of American counterparts. The judge would actively continue the prosecutor’s unfinished investigation. The judge did not have any notion of “screening” prosecutorial charging decisions. The prosecutor acted passively in court with regard to burden of proof; instead she just formally took a seat in the courtroom. The defense occasionally would defend at trial, but not always. As one scholar noted, “Historically, judges dictated trials: they held primary responsibility for questioning the defendant and witnesses, and the parties could directly question, or request the judge to question, witnesses only after the judge completed his inquiry.” The judge determined the final outcome after investigating and proving guilt or innocence.

According to conventional thinking in Taiwan, the term “jiu wen zhu yi” means the Middle Ages European “inquisitorial” kind of torture and ordeal interrogation. But the term is no longer used to describe the Taiwan pre-reform era; instead the term “zhi quan zhu yi” is used, meaning “ex officio system,” which refers to the modern Continental model. In a nutshell, it is more like a “judge dominant inquiry” system considering the degree of involvement of the judge’s authority.

Judges’ biased roles and their job of investigating criminal cases were criticized as being overly hostile to defendants, compared to the neutral role of judicial systems in other parts of the world. Critics urged Taiwanese authorities to institute a fair trial system, implant a presumption of innocence, reinforce the prosecutorial burden of proof, reduce the role of the judge in

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113 Lewis, supra note 103, at 651, 663.
114 Id. at 663.
115 Wang, supra note 34, at 32,34.
116 Lewis, supra note 103, at 664.
investigating the defendant, and thereby change to an adversarial system.\footnote{Wellington L. Koo, Xing Shi Shen Pan Ru He Chao Xiang Dang Shi Ren Jing Xing Yuan Ze Gian Jin? [How to advance towards to the adversarial model at criminal trial?], Cai Tung Fa Ren Ming Jian Si Fa Gai Ji Jin Hui [Judicial Reform Foundation](Taiwan), Jun. 15,1999, available at http://www.jrf.org.tw/newjrf/RTE/myform_search_result_detail.asp?txt=%E5%88%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%E6%B3%95&Submit=%E9%96%8B%E5%A7%8B%E6%90%9C%E5%80%8B&sel=%E5%8F%B8%E6%B3%95%E6%94%B9%E9%9D%A9%E9%9B%9C%E8%AA%8C&id=1869 (last visited Sep19, 2012).} This movement was prompted by many voices from the legal profession and the community, such as law professors, the bar association, the media, and the judicial reform foundation.

Eventually, Taiwan’s highest judicial authority, the Judicial Yuan, convened a nationwide conference, namely the National Judicial Reform Conference (hereinafter NJRC), in 1999. The NJRC reached conclusions, including criminal procedure reform from a continental system to a modified adversarial system. In 2002 and 2003, the legislative authority separately enacted new provisions and revised criminal procedure laws to enforce the judicial reform conclusions. NJRC conclusions were as follows: more party involvement in the process, protection of the defendants’ right to defense as a basic human right, and the need for reformers to look to the adversarial style of United States for insightful reformation.

Although Taiwan desired to borrow comprehensive criminal procedure from the United States, reformers actually built a new style of process, which included simplified procedures to substitute for some of the formal procedures and plea bargaining. The trial process also transformed significantly in 2003. The Taiwanese criminal justice system underwent a significant reformation, becoming a modified adversarial system instead of a continental system,
but critics have noted that the new system is “adversarial in name for all cases but only in substance for a small fraction thereof.”\textsuperscript{118}

As traditional continental ideology goes, the conventional judges’ role in Taiwan was fairly active at trial rather than passive. After the reform, the most critical characteristic of the new system is the neutral role transformation and the authority of the trial judge in possessing supplementary investigative powers under limited exceptions at trial. While the party-contested structure is adorned with the process of the presentation of each side’s story and balanced power to challenge each other, the reformed system still demands that the judge take the initiative to investigate evidence under the condition of ensuring fairness and justice, as well as for matters of significant interest to the defendant.\textsuperscript{119} In the meantime, new law has defined the role and obligation of prosecutors at trial, including bearing the burden of proof and the obligation of proving guilt beyond reasonable doubt. The prosecution must bear the burden of proof at trial instead of playing a dummy role (i.e. taking an empty seat) in the courtroom.\textsuperscript{120} Additionally, the presumption of innocence has been articulated for the first time in Taiwanese law, as announced many times by the Constitutional Court. Both of these are fundamental principles that comport with the ideology of adversarial procedure.

The reformation is inclined toward the adversarial process to enforce the balance of power between the parties and allowing both parties to present their evidence before a passive

\textsuperscript{118} Lewis, supra note 103, at 655.
\textsuperscript{119} Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 163 II (2013)(Taiwan).
judge. The prosecution’s evidence, including inculpatory and exculpatory evidence, are all included in the dossier and available to the defense. Each party is charged with direct examination and crossexamination of witnesses and the presentation of evidence. The revision also assures that the prosecutor bears the burden of proof at trial. The obligation of prosecutors to bear this burden of proof differs from the truth-finding obligations of judges in the continental model.

Normally, the judge plays a neutral role at trial, except for the demand that the judge maintain fairness and justice in a supplementary investigatory (official inquiry) role. They should not investigate the fact actively unless the fact finding affects the interests of the defendant or is to maintain fair justice. As a result, whether judges play an entirely neutral role at trial, as is anticipated in the adversarial system, is fiercely debated; the Supreme Court criminal division has convened a meeting to determine this issue (see infra chapter 3 II). Accordingly, the roles of prosecutors and judges, more or less, still confuse the outsider and the society. It is the tripartite role (judges, prosecutors, and defenses), and dynamic authority of participants in criminal procedure that actually construct the adversarial or non-adversarial features of criminal procedure. Whether the new reform is that of an adversarial system or not, it is affirmed by legislative documentation that an adversarial system is the intent of this revised legislation. It cannot be overstated that Taiwan’s new system represents more of a “mixed” model with an inclination toward the adversarial model.

In sum, different models dominate different procedural designs, and influence the tripartite role and authority among judges, prosecutors, and defendants. The functions of the
prosecutor will interplay with their goals and performance, which demonstrates their individual and distinctive incentive to better assist a prospective design of regulatory mechanism within the prosecutorial system. Basically, it is not possible to delve into the comparative screening mechanisms of the prosecution without first researching the fundamental intuition, structure, function, and charging power of the prosecutor in a comprehensive and comparative perspective between the United States, France, and Taiwan, or between the common law and continental systems. The following sections evaluate the functions and structures of prosecutorial systems to deepen our understanding of their operation in the United States, France, and Taiwan.

II. Structure and Institution of Prosecutorial System

1. The U.S. Structure

Since the adversarial system emphasizes combat between two parties, the sport metaphor symbolizes that the prosecutor intends to win the case and seek a conviction, or even maximum sentencing. As scholars noted, “prosecutors aim at obtaining a conviction in such a way that the criminal compensates society for his crime (hence achieving efficient deterrence of crime)[,] . . . the prosecutor is best characterized as a kind of lawyer who seeks the most efficient punishment in the interest of society.”\(^{121}\) This goal in turn affects her behavior at trial. Her role and goal influences how we should delineate the line for keeping them from being overzealous.

The power to investigate and to prosecute varies between countries and systems. Some are charged with both investigation and prosecution; others are charged mainly with prosecution and screening of investigators’ cases; still others are in charge of investigating and prosecuting ordinary cases, while the investigating judge is in charge of investigating and prosecuting felonies. The function and structure also interacts with the screening mechanism. For example, one prosecutorial decision has to be submitted and reviewed by many layers of the internal hierarchy before an indictment is initiated; this process might at least do away with some unfounded cases if the internal checks hold a stricter standard. The following begins with a detailed articulation of the prosecutorial structure and organizational control in the United States, France, and Taiwan.

1.1. Federal Prosecutor

According to the U.S. Constitution, the prosecutor is not part of the judiciary, but rather part of the executive branch. The dual prosecutorial jurisdiction of the United States is divided into federal prosecutors and state prosecutors, who are distinct in regard to their jurisdictions, statuses, and methods of selection.

In the Federal system, the Department of Justice (hereinafter DOJ) and Attorney General\textsuperscript{122} head the federal prosecutors across the country. The DOJ has several divisions, United States Attorneys, the National Security Division, the Criminal Division, the Litigation Division, the Civil Division, the Civil Rights Division, the Antitrust Division, the Tax Division, the

and the Justice Management Division. Originally, the position of Attorney General was created by Congress in the Judiciary Act of 1789. On July 1, 1870, given the boom of litigation after the civil war, Congress enacted the Act to establish the Department of Justice and positioned it as an executive department of the government of the United States, handling all criminal prosecutions and civil suits in which the United States had an interest.

Among the divisions, the Criminal Division is charged with the enforcement of all federal criminal laws, as well as the formulation and implementation of criminal enforcement policy. The Criminal Division attorneys prosecute many nationally significant cases. In addition, the division also provides advice and assistance. The Criminal Division is headed by the Assistant Attorney General, who oversees nearly 600 attorneys prosecuting federal criminal cases across the country and helps in developing the criminal law.

Other than the attorneys positioned in the Criminal Division of the DOJ in Washington D.C., the main actors across the United States enforcing criminal laws, pursuant to DOJ policy, are the U.S. Attorneys, who are the chief federal law enforcement officers in each federal judicial district and are responsible for federal criminal prosecutions and civil cases in which the United States has an interest.

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123. See The United States Department of Justice, Criminal Division: About The Division, available at: http://www.justice.gov/criminal/about/ (last visited July 6, 2011)

124. Id.
States government is a party. Aside from the Attorney General and Assistant Attorney General, there are 94 U.S. Attorneys located in federal jurisdictions. U.S. Attorneys serve as the nation’s principal litigators under the direction of the Attorney General. U.S. Attorneys are appointed by the President and must undergo a political vetting process, which requires the consent of Congress, and are in fact subjected to top-down political pressures, as well as the Attorney General’s direct control over enforcement policy.

U.S. Attorneys are authorized by statute and, pursuant to authority delegated from the Attorney General, have the broadest discretion in the exercise of such authority. Each U.S. Attorney exercises wide discretion in the use of his or her resources to further the priorities of the local jurisdictions and the needs of their communities. They have supervisory powers over federal prosecutors and over their performance and discretionary powers. Assistant U.S. Attorneys are appointed by the Attorney General and can be removed from office by the Attorney General. They are subject to the supervision of U.S. Attorneys in commencing criminal investigations and prosecutions.

Even though hierarchical structure ranks the Attorney General, United States Attorney, and Assistant U.S. Attorneys in a top-down streamline form, prosecutors at the bottom do not work their way up the career ladder as prosecutors in the continental law system do, given that

Office of United States Attorneys, available at: http://www.justice.gov/usao/about/mission.html(last visited July, 6, 2011) (Each United States Attorney is assigned to a judicial district, with the exception of Guam and the Northern Mariana Islands, where a single United States Attorney serves both districts. United States Attorneys have three statutory responsibilities under Title 28, Section 547 of the United States Code:1. the prosecution of criminal cases brought by the Federal Government;2. the prosecution and defense of civil cases in which the United States is a party; and 3. the collection of debts owed the Federal Government which are administratively uncollectible).
U.S. prosecutors are often not career prosecutors. U.S. prosecutors who reside in the lower ranks frequently work for benefits other than promotion. Instead, they work for future prospective careers.

According to manuals issued by the DOJ, U.S. Attorneys perform the functions of investigation, the direction of investigation, and the decision of whether or not to prosecute, mainly. Federal prosecutors possess discretionary power, so they are able to manage a heavy caseload with very limited resources to establish priorities among offenders, offenses, and law enforcement strategies. The DOJ does not use centralized authority to restrain local prosecutors; instead federal prosecutors at the U.S. Attorney level are subject to minimal supervision to make independent decisions that are not subjected to approval or direction. Most of the time, federal prosecutors are free to respond to local circumstances.

The core concept of the prosecutorial function is the decision to charge, to strike plea agreements, and to make sentence recommendations. Decisions regarding whether or not to charge, what to charge, and whether to bargain have been left in the prosecutors’ hands with very few limitations. The Supreme Court also supports that

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127 See United States Attorneys Manual, available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.010(last visited July 6, 2011)(enumerating the authority of United States Attorney: A. Investigating suspected or alleged offenses against the United States. B. Causing investigations to be conducted by the appropriate federal law enforcement agencies. C. Declining prosecution. D. Authorizing prosecution. E. Determining the manner of prosecuting and deciding trial related questions. E. Recommending whether to appeal or not to appeal from an adverse ruling or decision. F. Dismissing prosecutions. G. Handling civil matters related thereto which are under the supervision of the Criminal Division).
128 Goldstein & Marcus, supra note 33, at 242.
“prosecutorial decisions necessarily involve both judgmental and factual decisions that vary from case to case . . . . It is difficult to imagine guidelines that would produce the predictability sought by the dissent without sacrificing the discretion essential to a humane and fair system of criminal justice.”

Though the Supreme Court supports prosecutors having a wide range of discretion, there is still a need to restrain the exercise of that power. It cannot be exercised unfettered, misused in a way that creates unequal enforcement, or employed as a tool to attack opposing political figures. There are in fact limits that enforce these norms, although they are rarely used. The kinds of limitations placed on prosecutorial discretion to charge include judicial checks on selective and vindictive prosecution. However, these review standards brought by the defense are set quite high and may be brought only after a case is charged. In this sense, very few limitations on the exercise of discretionary power mean that the decision making undergoes minimal review. This type of screening to prosecutorial charging discretion differs from the one that this dissertation intends to reform.

Given this nature, federal prosecutors in America are subject to external control from judicial review and political power. On top of that, they are subject to internal policies and guidelines, which are an essential mechanism to assist in fulfilling their duties. In the next chapter, this dissertation will evaluate major external screening mechanisms designed to keep prosecutors’ charging power in check.

1.2. State Prosecutor

There are, in total, fifty states and one district, the District of Columbia, across the United States. Each state has one Attorney General. State Attorneys General are elected generally and are executive officers. Currently, the State Attorneys General in 43 states are elected. The State Attorneys General are appointed by the governor in 5 states: Alaska, Hawaii, New Hampshire, New Jersey and Wyoming, as well as the five jurisdictions of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.133 “In Maine, the Attorney General is selected by secret ballot of the legislature, and in Tennessee, by the state Supreme Court. In the District of Columbia, the Mayor appoints the Corporation Counsel whose powers and duties are similar to those of the Attorneys General of the states and jurisdictions.”134

The position of State Attorney General originated in the mid-thirteenth century in the office of England’s "King's Attorney," but nowadays, her typical powers include: representing the state and state agencies before the state and federal courts, handling criminal appeals, occasionally engaging in serious state wide criminal prosecutions, and instituting civil suits on behalf of the state.135

134Id.
135See National Association of Attorneys, General Frequently Asked Questions, What does an Attorney General do?, available at http://www.naag.org/what_does_an_attorney_general_do.php(last visited Nov.11, 2012) (Their other authority include to issue formal opinions to state agencies; act as public advocates; propose legislation; enforce federal and state environmental laws; represent the public's interests in charitable trust and solicitations; and operate victim compensation programs).
Under the State Attorneys General, there are around 27,000 local prosecutors vested in 2,341 jurisdictions, each of which is directed by one chief prosecutor. One state prosecutorial district is usually comprised of one or more counties. Chief prosecutors are usually elected, but some are appointed. 97% of prosecutors at the state level are elected public officials. Deputy and assistant prosecutors are selected by their chief prosecutors, and selections are based on their achievements, experience, and personal qualifications related to their ability to successfully perform the work of the office. According to the national survey of prosecutors, the number of assistant prosecutors in large districts ranges from 59, serving a population of a half million, to 151 in large districts serving a population of one million.

Chief prosecutors are responsible for all local prosecution. They are asked to manage the office for larger jurisdictions, while other prosecutors are asked to familiarize themselves with office structure, procedures, policies, the operation of local police agencies, and professional conduct. However, State Attorneys General are not always in charge of

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137 Pizzi, supra note 132, at 1367-1338.


139 See DEFRANCES, supra note 136, at 2 (noting the basis for hiring, promotion and retention decisions are assessed by their educational background, work experience, judgment, written and oral communication skills, trial advocacy skills, and other personal qualifications, such as time commitment). see also Darryl K. Brown, Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response, 6 OHIO ST. J. CRIM. L. 453, 460 (2009) (noting majority of states employ direct election of chief prosecutors at local level).

141 National District Attorneys Association, National Prosecution Standards, supra note 164, at 5.1-5.2,1-5.4.
prosecution. Such is the case in Alaska, Delaware, and Rhode Island, where it is the assistant attorney general who is charged with all criminal prosecutions.  

State prosecutors’ offices should develop policies and proceedings that guide the exercise of their discretion and assist in the performance of those who work in the prosecutor’s office. The main reason for regulating policy is the reduction of variation and the increase of uniformity. Although policies and guidelines are issued by all state prosecutors’ offices, there are varying resources and cultures in different states. Enforcement policies are set up according to local customs, enforcement priorities, available resources, and so on. Therefore, district attorneys employ a wide range of discretion that caters to the above goals. It is also the chief prosecutors who have to respond to the general public, as well as to the culprit, who ensure that justice will be done. Their subordinates are “not elected and often operate with remarkably little oversight.”

The election campaign forces prosecutors to articulate their office’s policy and present records that match their enforcement policies. Theoretically, the electorate will also scrutinize their enforcement decisions by comparing their actions to their records. In retaining their positions, they are faced with the pressures of being reelected. Under pressure from the public to establish their image as having a will to win and to combat crime, prosecutors must not only

142 Wu, supra note 87, at 54.
143 Id.
145See Mark Osler, This Changes Everything: A Call For A directive, Goal-Oriented Principle To Guide the Exercise of Discretion by Federal Prosecutors, 39 VAL. U. L. Rev. 625, 632-633 (2005) (noting election makes the District Attorney, i.e. state prosecutor, to articulate why should she being reelected, and to match her performance of employing discretion with her campaign promises).
146Id.
work to achieve a high performance record and maintain a high conviction rate to present to the public, but must also actively employ the power to prosecute whenever outcry from the community boils over after a particularly heinous crime, such as the murder of a child or child molestation by a repeat sex-offender. Academia claims that “prosecutors are susceptible to political influences and under the control of political power as an American political tradition.”147 Thus, scholars have argued that prosecutors are subject to political gains and follow political incentives when making decision.148 But in practice, scholars have argued that “district attorney’s electoral contests are rarely measured assessments of a prosecutor’s overall performance.”149

In a nutshell, district attorneys are subject to external political pressures merely because they want to be reelected and perhaps be moved to a higher position.150 For example, Los Angeles District Attorney Gil Garcetti, failing to convict O.J. Simpson, failed to continue his career in the 2000 election.151 On top of that, a state prosecutor is subject to external review just as its counterpart in federal jurisdictions. But the external reviews, such as reviews on the basis of selective and vindictive prosecution, seem to be ex post, and are less direct means of supervising the prosecution. Therefore, some more direct institutions or mechanisms are essential in order to evaluate the exercise of their charging power. In fact, the direct judicial ex ante review of the charging power, i.e. the preliminary hearing and grand jury plays a major role in the supervision of the exercise of such power (see infra chapter 3).

147William T. Pizzi, supra note 132, at 1338-1339.
149Bibas, supra note 144, at 961.
150Id. at 983.
151Id. at 984.
2. Taiwan Structure

As illustrated above, the role, goal, authority, and major ideology of continental prosecutors differs significantly from those of their American counterparts. Taiwan’s historical transformation of criminal justice is patterned after the continental model; hence the roles, goals, and structures of the prosecutor are aligned closely with the continental model. As Professor Damaska argued, the hierarchical structure of the prosecutor and centralized decisionmaking dominates enforcement agencies that administer criminal justice. The prosecutorial offices and organizations are rigorously organized under this top-down structural institution. Such devices intend to achieve uniform and consistent decisions.

The following part analyzes the current structure and judicial attributes of prosecutors, as well as features from the career ladder within the structure, to comprehensively grasp institutional culture, which generates the underlying ideology that affects its charging decision making.

Taiwan has no federal and state jurisdictions, but there is a unitary centralized prosecutorial institution that heads various levels of prosecutors’ offices. Theoretically, the prosecutor is subordinate to the Ministry of Justice, one department subject to the Executive Yuan (Execution branch). However, the prosecutor is not to be classified as a pure executive officer, as is her counterpart in the United States. The reason originates from the legal origins of the prosecutorial institution that can be traced from the Japanese system imposed through its
colonization of Taiwan. After World War II, even though Taiwan was returned to China within a short period of time, the colonized criminal justice system did not collide with that of China’s system, because it is the continental law system after which the Qing dynasty was modeled in China. It is, therefore, the continental law system, and its institutions, such as structure and personnel, that constructs the criminal justice system in Taiwan. The continental legal system influence permeates even after the criminal justice system underwent dramatic transformations in 2002 to 2003. It could be readily identified with typical features expressed in the continental system.

First, the prosecutorial system in Taiwan is a centralized structure with a strong hierarchical control over the organization. The system is headed by the Ministry of Justice (hereinafter MOJ), composed of numerous units: the Legal Affairs Committee; the Department of Legal Affairs; the Department of Prosecutorial Affairs; the Department of Corrections; the Department of Prevention, the Department of Rehabilitation and Protection; and the Department of Government Employee Ethics. The MOJ is in charge of administration of the system of prosecutors and the legal affairs of the Executive Yuan and its subordinate organizations. The MOJ is headed by the minister who is responsible for the Legislative branch. To set up prosecutorial policy and to supervise prosecutorial administrative affairs is crucial to the administration of the system of prosecution. Often, the prosecutorial administrative affairs involve policies of the comprehensive agenda of national enforcement policy, such as the

152See Fa Wu Bu[Ministry of Justice], Zu Zhi Jia Gou[Organization and Structures](Taiwan), available at: http://www.moj.gov.tw/ct.asp?xItem=21441&CtNode=11390&mp=095 (last visited Sep. 20, 2011) (Some supporting setups are as follows: the Secretariat, Department of General Affairs, Department of Personnel, Department of Accounting, Department of Statistics, and Department of Information Management. In addition, there are some committees to fulfill special tasks).
domestic codification of international human right conventions, annual drug enforcement policy, enhancement of the convictions of corruption charge, and so on. These policies are general directives of enforcement policy or investigation of specific offenses, such as corruption, human trafficking, hit and run, and so on.

The Minister heads the Ministry of Justice, who also supervises the prosecutorial system, through means such as performance evaluations, promotions, chastisements, and personnel transfers, but does not internally supervise the prosecutor in individual cases.\textsuperscript{153} If the Minister desires to issue a directive regarding individual cases, she could only refer it to the Prosecutor General, who is not obligated to direct the subordinate unless she agrees with the directive.\textsuperscript{154}

The Prosecutorial system is attached to the court system. Each level of the prosecutorial structure is attached to each court, but functions independently from the court. The Supreme Prosecutors Office operates at the highest level of prosecutorial offices. The second tier of prosecutorial bureaucrats consists of the Taiwan High Prosecutors Office, with their offices at Taichung, Tainan, Kaohsiung, and Hualien. Kinmen Island sets up a Fu Cheng High Prosecutors Office. Hierarchically in the lowest level of prosecutorial system, there are 21 District Prosecutors Offices.\textsuperscript{155} The Prosecutor General is nominated by the President, with the consent of the Legislative Yuan, but she is not responsible for the Legislative Yuan except on the annual

\textsuperscript{153}LIN, supra note 3, at 188-191.  
\textsuperscript{154}Wu, supra note 87, at 63-64.  
budgets act.\textsuperscript{156} She heads and supervises the whole prosecutorial system in regard to the criminal investigation and prosecution of specific cases. This design offsets the influence of political control and makes her status more independent from politics in cases of investigation and prosecution.

As a continental law system, the prosecutorial system puts heavy emphasis on centripetal and uniform decision making. This puts the whole prosecutorial system under the unitary command of the Prosecutor General of the Supreme Prosecutors Office in crime investigation, prosecution, assisting in private prosecution, undertaking private prosecution, directing the execution of criminal sentences, and performing other mandatory duties. Given the concepts of uniformity and stability of decision making, the Prosecutor General not only may unify the opinions of specific legal issues in handling specific types of cases, but also may directly order specific instructions to specific cases, as well as supervise the performance of prosecutors.\textsuperscript{157}

According to the Code of Court Organization Articles 63 and 64, the Prosecutor General, or chief prosecutor in each district, has the authority to direct and supervise subordinate prosecutors and district prosecutors’ office prosecutors. Subordinate prosecutors are obligated to follow directives and supervision. Meanwhile, both the Prosecutor General and chief prosecutors may take over the cases anytime, or transfer the cases from the current managing prosecutors to other prosecutors. The MOJ issued a project on “Transparency program on the

\textsuperscript{156} Code of Court Organization art.66 (2011)(Taiwan).
Unitary Prosecutorial System,” which listed the possible scenarios in which they would take over a case or transfer it as follows: (1) the unification of appropriate application of law and prosecution standard when considered necessarily by the Prosecutor General or chief prosecutors; (2) there is a factual basis to recognize the existence of the managing prosecutor breaching current law, prosecutorial bias, or prosecutorial misconduct in exercising prosecutorial power; (3) at the request of managing prosecutors to ask for such exercise of authority when conflicts of opinions against superiors occur.\(^{158}\) The authority to takeover the case or transfer the case to another prosecutor strengthens the prosecutorial system’s ability to carry out the unified will of the superiors. Even though the unitary prosecutorial system is already a law, the justification of this mechanism remains disputed in Continental Europe.\(^{159}\) The hierarchical superior prosecutor is entitled to take the case over, but the superior prosecutor remains subject to the demand of mandatory prosecution in the decision of prosecution.

Each prosecutorial office is headed by a chief prosecutor. The Chief prosecutor in the Taiwan High Prosecutors Office heads the first and second instance of district prosecutors’ offices. The Chief prosecutor has the authority to direct and supervise the performance and decision making of prosecutors in that district. She is empowered to supervise and direct the cases that are investigated by the investigating prosecutor or transfer the case to another prosecutor to perpetuate uniformity and stability. A district prosecutors’ office is composed of many different units managing different type of offenses, including economic crime, corruption unit, intellectual property crime, child, and women protection unit, organized crime, etc. A unit

\(^{158}\)Shou-Huang Chen, Jian Cha Yi Ti Xin Dong Li[New Momentum of Unitary Prosecutorial System](Taiwan), available at http://www.judicial.gov.tw/work/work07/work07-01.asp(last visited July, 24, 2011).

\(^{159}\)LIN, *supra* note 3, at 115-127.
that is comprised of more than six prosecutors will be assigned a unit head prosecutor. Both the Chief Prosecutor and unit Head Prosecutor lead the district prosecutors’ office in that jurisdiction. This kind of structure creates a density of supervision and strengthens the uniformity of decision making.

Theoretically, unitary structure and top-down hierarchical control enhances the identical application and interpretation of the law.\textsuperscript{160} Traditionally, the continental system denies prosecutorial discretion to prevent prosecutors from political or improper influence. Through such rigid structures and supervision from top bureaucrats, the prosecutorial policies and specific orders could be enforced and secured as well. In reality, different outcomes of identical types of cases handled by different prosecutors are not unusual events. Even though supervision should maintain the system’s operation as unitary, the chief prosecutor is not able to keep close watch on all of the performances and works of subordinate prosecutors.

Secondly, the recruitment, training, and selection of prosecutors are similar to what is seen in continental law countries. Unlike prosecutors in the United States, prosecutors in Taiwan are neither elected nor appointed; they are governmental officials who pass the annual National Judiciary Examination, the most competitive judicial examination in Taiwan.\textsuperscript{161} They are not “attorneys” as are their counterparts in the United States, rather another group of civil servant or

\textsuperscript{160}Wu, supra note 87, at 65.

\textsuperscript{161}See Kao Xuan Bu[Ministry of Examination], Kao Xuan Tong Ji Nian Bao[Examination Statistics](Taiwan), available at http://wwwc.moex.gov.tw/main/content/wfrmContentLink.aspx?menu_id=268 (last visited Oct. 12, 2012)(The passing rate of judiciary exam ranges from 0.99% to 4 % for past decade).
government official.\textsuperscript{162} Still, they are the agent or representative of the government. As Professor Langbein noted, the position of prosecutor was the result of separating the investigative function from the judicial function of an inquisitorial judge.\textsuperscript{163} In other words, whether one is a judge or prosecutor is simply a matter of exerting different judicial functions under the original judicial conception.

Third, the promotion of the prosecutor in a continental model is merit based. Climbing up the career ladder paves the way to top official ranking, which incentivizes most of the newcomers and tenured prosecutors, if not selecting of transferring the tenured track to become a judge. According to the newly enacted Judges Act, which also applies to prosecutors, the appointment, promotion, evaluation, suspension of official status, and discharge of judges and prosecutors are determined by prosecutorial personnel evaluation committee. Only by having committed a felony or having been issued severe disciplinary sanctions can judges or prosecutors be suspended from their positions. Without the consent of judges and prosecutors, they cannot be transferred to other positions.\textsuperscript{164} Under the same law, prosecutors are as secure in life tenure as judicial officers once they finish the probationary period of five working years, and garner their tenure status. The newly instituted Personnel Evaluation Committee plays the role of scrutinizing the performance and work \textit{ex post} of both judges and prosecutors. The Personnel Evaluation Committee evaluates and reviews the appointment, promotion, evaluation, suspension of official status, and discharge of prosecutors.


\textsuperscript{163}Langbein, \textit{supra} note 41, at 446.

\textsuperscript{164}Judges Act, art. 42, 43, 89(2011)(Taiwan).
The new epoch is marked especially by the external checks and direct reviews of judges and prosecutorial duty and accountability, as well as a response to the outcry of society to weed out what the society called “dinosaur judges.”\(^{165}\) Much of this classification is the product of long-term discontent with some judicial decisions in finding defendants not guilty, as well as lenient sentences imposed on defendants with regard to sexual assault cases. Moreover, it adds new mechanisms to removing disqualified judges and prosecutors from their positions that would influence the incentives and behavior of other judges and prosecutors in exercising their authority. It is without any doubt that the law or legal institution would have an effect on human behaviors and even alter their behaviors. What is unknown is the extent of the influence the new law would have and how the system and institution would respond to such transformation.

3. French Structure

The French government went through several changes from the traditional ancient authoritarian regime, the monarchy, the church, and the nobility, to the First French Republic, which was to take place under the leadership of Napoleon Bonaparte in 1799.\(^{166}\) Conventionally, the French Republic emphasized the sovereignty of the French people, and believed that the power is exercised by its representative, the nation.\(^{167}\) Napoleon envisioned the country to be a

\(^{165}\) In some sense, the judges crown by such term in a way to demonstrate society’s anger towards judges that are known to be making ridiculous decisions that is totally alien to the society, for example, one decision vacate lower court decision of sexual assault cases in demanding lower court in finding the fact that whether a seven years old girl consent to the sexual behavior. This kind of decision is contradict to the common idea of society, and be judged as prehistoric ideology.

\(^{166}\) HODGSON, supra note 67, at 65.

\(^{167}\) Id. at 15-16.
strong centralized state, under a rigid hierarchy and a finely delineated rule of government.\textsuperscript{168} Under this traditional notion of the state-centered ideology, the early state ensured that the magistrature was subject to political authority and that the judiciary was applying technical law mechanically.\textsuperscript{169} It is, after all, the concept of state-centered government that dominates the judiciary and the criminal justice ideology.

Under the state-centered notion, the prosecutor has been included in the larger judiciary circle.\textsuperscript{170} Historically from the Ordonnance Criminelle 1670, the investigation, prosecution, and trial were controlled in the hand of a single official, lieutenant criminal.\textsuperscript{171} The procureur (hereinafter prosecutor) was then bifurcated from the authority of the single person’s power.\textsuperscript{172} The prosecutor is part of the judiciary, the French magistratures. The prosecutor is responsible for reviewing evidence and determining whether or not to pursue a prosecution. She is also “responsible for directing the police investigation and overseeing the detention of the suspect in police custody, including the protection of their due process rights.”\textsuperscript{173} The magistrature, as part of the civil service and a judiciary official, is envisaged as law machinery to which interpretation and application of law is delegated, as well as policy enforcing under the hierarchical structure of the prosecution.\textsuperscript{174} Therefore, there is a legally structured framework of supervision within prosecutorial nature.

\textsuperscript{168} See id. at 16, 65-72 (discussing the French magistrature represents the judiciary and includes three kinds of judges, the prosecutor, the investigating judge and the trial judge).
\textsuperscript{169} Id. at 17.
\textsuperscript{170} Id. at 68.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 75.
\textsuperscript{174} Id. at 18-19.
France’s prosecutorial official system, like many in Continental Europe, is a centralized, hierarchical system that adopts the career judiciary system. Entrance into the judiciary is through competitive examinations, followed by collective training before graduation. Trainees choose one of three judiciary careers and may move from one to the other. Through such professional and intensive training, the trainees bond together with a similar ideology in becoming members of the judiciary, i.e. *magistrats*, which relaxes what might otherwise be a “check and balance” relationship between the prosecution and trial.

In addition to the historical development, ideology, and role played, there remains the overlapping authority and structure within the *magistrats*. The whole prosecutorial system is headed by the government minister, the Minister of Justice, together with the *procureur generaux* and the *procureur de la Republique* to the lower part of hierarchical pyramid. Each prosecutor is part of the *Ministere Public* and works within each local *parquet* (the collective name for prosecutors, known as ministère public) area (district prosecutor office), under the name of the *procureur de la Republique*. The prosecutor is in charge of the prosecution of the cases under the hierarchical structure led by the Ministry of Justice, while the sitting judge maintains her independence from the executive branch.

As Professor Hodgson has written, in order to ensure the democratic accountability of the prosecutor and the centralization and uniformity within the *parquet*, the hierarchical model

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175 Id. at 69, 75.
176 Id.
177 Id. at 69-70.
178 Id. at 228.
179 Id. at 229.
180 Id.
controls and defines the exercise of prosecutorial discretion. As a continental law system, the prosecutorial system puts heavy emphasis on subordination to upper level authority and the Minister of Justice in France, especially when the Minister of Justice is able to issue instructions in individual cases, as well as to influence the promotion of the prosecutor.\textsuperscript{181} Also, the hierarchical accountability of the prosecutor is a form of democratic accountability of subordinates to assure consistent application of the law.\textsuperscript{182} But this hierarchical accountability creates loopholes for political interference, which creates tension between the ideas of independence of the prosecutor and the democratic accountability to the government minister.\textsuperscript{183} Since 1993, any instructions with regard to a case must legally be in written form and kept in the dossier, but the hierarchical culture of instruction ensures that the new law is not followed in practice.\textsuperscript{184}

In order to divide the functions of prosecutor and investigating judge, the 1958 French Code of Criminal Procedure (hereinafter FCCP), a redrafting of the Code d’instruction criminelle in 1808, established the independence of juge d’instruction (hereinafter the investigating judge) from the public prosecutor.\textsuperscript{185} However, the investigating judge is also charged with a judicial function, which causes confusion, especially since more complex and serious crimes are in her authority to investigate.\textsuperscript{186} She conducts a neutral and wide range investigation while reviewing whether the case is founded or not, which can create conflict in its function and role-playing. The investigating judge is entitled to conduct any lawful investigation

\textsuperscript{181}Id. at 76.  
\textsuperscript{182}Id. at 80.  
\textsuperscript{183}Id. at 80.  
\textsuperscript{184}Id. at 76-77.  
\textsuperscript{185}Id. at 27.  
\textsuperscript{186}Id.
that she deems will assist in the discovery of truth and, unlike the prosecutor, is not subordinate to hierarchical control over the investigation.\textsuperscript{187} Structurally, she is not subordinate to the Ministry of Justice.

As a nation with continental law tradition, the rigid hierarchical structure and democratic accountability to the government minister is intended to create a uniform, hierarchical, and indivisible entity through which criminal policy may be applied consistently, which comports with the hierarchical model of criminal justice noted by Professor Damaska.\textsuperscript{188} However, in a highly demanding uniform and hierarchical criminal justice system, the French prosecution adopts no mandatory prosecution, as articulated in the next section regarding the function of the prosecutor. This, in turn, may intensify the systematic control over the prosecutor in order to maintain the ideology of uniform enforcement and consistent decision making.

III. Function of Prosecutor

This part will illustrate the charging function and charging discretion of the United States, Taiwan, and France. When making comparisons of one function amongst different countries, this dissertation adopts a broader systemic perspective for the features of each country, because a pure “functionalism” or “functional equivalence” approach fails to capture the structural and legal cultural differences of the systems’ participants and their interrelationships.\textsuperscript{189} Accordingly,

\begin{itemize}
\item \textsuperscript{187}Id. at 209.
\item \textsuperscript{188}Id. at 229.
\item \textsuperscript{189} For “system analysis” is a standard feature by decoding each element of one nation’s criminal justice because every parts interacts with other parts of criminal justice within the system. See Richard S. Frase, \textit{Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why

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this section looks broadly into investigation and charging, both in theory and in practice, to better understand how charging decisionmaking also intertwines with investigations, because the prosecutor makes the first screening in sifting out the cases. Because the historical developments, structures, roles, legal cultures, and ideologies embedded in the prosecutorial system within different systems have been addressed in the former sections, the related parts will not be analyzed here.

1. Prosecutorial Charging Function in the United States

1.1. Charging

American prosecutors’ primary responsibility is to seek justice, to ensure that the guilty are held accountable, to protect the innocent from wrongful conviction, and to respect the rights of all participants, not merely to convict. The functions of the U.S. prosecutor are investigation, charging decisionmaking, litigating at trial, plea-bargaining with the defendant, and making sentence recommendations. Basically, the critical authority of both federal and state prosecutors can be divided into three categories: investigation, prosecution, and litigation at trial. While charging is monopolized by the prosecutor, investigation and its direction are often conducted by government agents who control investigative resources, and often use their own

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Should We Care? 78 CAL. L. REV. 539, 548-549 (1990). For “functionalism” or “functional equivalence” approach, it is an approach that assumes the legal system of every country faces essentially identical social problems, and focused on the function of law in resolving the social conflicts proposed by other countries. Nonetheless, not every society face identical problem, even in social and economic alike conditions, and not all legal rules or laws are related to social life. It reduced the law to a conflict resolution, regardless of its moral and political background. See Gunter Frankenberg, Critical Comparisons: Re-thinking Comparative Law, 26 Harvard International L.J. 411, 434-439(1985).

discretion in determining whom to arrest and investigate. In reality, the investigations are conducted and developed by agencies, and eventually agencies have to pass the monopoly power to prosecutors to take the case and to seek convictions. It is typically not prosecutors who control the tactics, resources, and the extent to which the investigation reaches or develops.

In a streamlined process, the prosecutor has enormous discretion to decide whether to take cases and review the cases to evaluate how the measures and tactics employed in the case would play out at trial. During the trial, plea-bargaining and plea agreement are constantly deemed as the best tools for ensuring convictions. With a common phenomenon that 90% of cases are settled by plea-bargaining, this not only alleviates prosecutors’ burden of proof, but also makes the best use of prosecutorial resources.

Usually, prosecutors could enhance their discretionary arsenals to solidify their position in deciding whether or not to reach plea-bargaining with the defendant. They possess exclusive knowledge about favorable and unfavorable information, as opposed to the defense. Presumably, the prosecutor would not charge if the government really possessed information that would exonerate the defendant. However, it would be possible as well that the defense may not be well informed of what exculpatory evidence and information is in the possession of the

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191 See Daniel Richman, supra note 80, at 751,755, 756, 758, 759 (noting that federal investigative agencies are not all housed in Department of Justice. The Secret Service and the Customs Service are positioned in Department of Homeland Security. The agents in Internal Revenue Service report to Secretary of the Treasury. Postal inspectors are located in Postal Service. FBI, DEA and Bureau of Alcohol, Tobacco, Firearms and Explosives report crimes to their agency head, instead of prosecutors).
192 Id. at 758-759.
193 Id. at 778.
prosecutor, and may be misled by this disadvantageous situation. The defense is more likely to take the plea if the defense does not know about the favorable evidence. Normally during the pretrial discovery, due to the demand by the Brady ruling (a right that the Constitution provides as part of its basic fair trial guarantee), the prosecutor needs to disclose exculpatory evidence to the defense.195 The principle is that had the Brady material been known to the defendant, he or she might choose to go to trial and might not be found guilty.196 However, the Supreme Court has taken a hands-off position in the plea bargain procedure and deemed that the federal prosecutor is not obligated to disclose impeachment information relating to any informants or other witnesses to a defendant before entering into a binding plea agreement.197 It leaves a loophole whereby a defendant who pleads guilty could demand Brady material that contains non-impeachment evidence that is both favorable and material to the accused.198 If a defendant is not informed of the prosecution’s evidence before pleading guilty, it is not overstated that the defendant sometimes pleads guilty to what he or she has not committed.199

Although one could argue that all plea bargains must be approved by the judge who has the authority to reject plea bargains, usually such rejection is not a common occurrence in that ratifying a plea bargain is the only way to keep the judge in control of her dockets.200 In addition, the preliminary hearing occurs before the plea and is actually not set up to ensure the

196Andrew D. Leipold, Patrolling the Fenceline : How the Court Only Sometimes Cares about Preserving Its Role in Criminal Cases in THE POLITICAL HEART OF CRIMINAL PROCEDURE, 177, 185 (Michael Klarman, David Skeel and Carol Steiker ed., 2012).
198Leipold, supra note 196,at 183-184.
199Id. at 185, fn 20.
200Pizzi, supra note 195, at 1356-1358.
defendant acquires sufficient information.\textsuperscript{201} One could consider that prosecutors possessing the authority to plea bargain is a force nudging prosecutors into more of an adjudicator role. It shifts the prosecutorial role from the party of an adversary to a role more like that of an adjudicator, namely a judge.

With a common phenomenon that 90\% of cases are settled by plea bargaining,\textsuperscript{202} this also means less than 10\% of cases actually enter into the trial and are tested by opposition. In this sense, to assure proper charging decisions, so that only warranted cases are allowed to open the gate of trial, is critical in every case because there is very likely to be no adversarial testing of the charging decision later. Consequently, the crucial stage hinges on charging decisions and functions. Only by a better institutional design that actually functions to sift out unfounded cases is the innocent person not induced to plea just because of being charged or being afraid of being punished for not taking a plea. Hence, controlling and reviewing charging and charging discretion is a way to prevent wrongful convictions. In the next section, a brief analysis of the charging discretion of prosecutors in the United States will be articulated.

1.2. Charging Discretion

Unlike the continental law system, which adopts “compulsory prosecution,” greatly confining prosecutorial discretion, the United States adopts a model of prosecutorial discretion that gives prosecutors enormous power to decide what the criminal law really means in their

\textsuperscript{201}Leipold, \textit{supra} note 196, at 186.
It is difficult if not impossible to enforce one set of guidelines in so many jurisdictions, given that the United States has dual jurisdictions. The severity of offenses, frequency, and priority of enforcements vary by state and even by jurisdiction within a state. It cannot be a requirement that the same set of guidelines applies to every place. Contrasted with the continental law system, the U.S. system itself tolerates more inconsistency in the enforcement of law and emphasizes individualized scenarios. Flexibility in enforcing the criminal laws in the United States is a must, but that does not mean it is not subject to abuse.

There is no doubt that the entire criminal justice system from arrest to sentencing is filled with discretionary decisions, from police deciding to arrest a suspect or any other investigative agencies’ decision whether to refer cases to prosecutors, to the screening of the arrestee’s case (referred case) by a prosecutor who decides whether to accept or decline the case, to the decision of a grand jury to return an indictment, to the decision whether or not to plea bargain with the defendant, to the determination by a jury of guilt, to the sentence imposed by the judges.

It is widely agreed that prosecutors have the power with regard to whether to charge, what to charge, how to charge, and when to charge. Scholars have noted that “prosecutors exercise substantial discretion in deciding whether to charge crimes that require the mandatory minimum sentences and in deciding the severity of the charges under presumptive sentencing

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204 During the composition of this dissertation, there was a big event occurred about police discretion case which provoked the heat debate across the United States. A black Harvard University professor Henry Louis Gates Jr. was arrested at his own house because a break-in report was made to the Cambridge police officers. The professor showed some identification to prove his legal residence. Being accused of disorderly conduct, the professor was arrested, and taken to the police station. It is actually maybe more like a racial-bias case where discretion was exercised reportedly by the professor based on racism. *see* Charge Against Harvard Professor Dropped, available at http://www.cnn.com/2009/CRIME/07/21/massachusetts.harvard.professor.arrested/ (last visited Aug 4, 2009).
guidelines.” But discretionary processes tend to operate invisibly, out of judicial review, and “threaten the ability to channel and control official behavior through law.” The decisionmaking of the prosecutor is also criticized for being too political in order to satisfy the public’s expectations and for bringing cases that are poorly investigated. The most frightening aspect of the use of power is to hold political bias against opposing party members in politically-related cases or against those exercising civil rights.

The Supreme Court and the American Bar Association both express different standards of prosecution threshold. The Supreme Court in *Bordenkircher v. Hayes*, stated that “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely within his discretion.” The U.S. Department of Justice issued Principles of Federal Prosecution as internal guidelines in “Part C. Selecting Charges.” “Except as hereafter provided, the attorney for government should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.” As its commentary states, prosecutors have to “produce admissible evidence sufficient to obtain and to sustain a conviction, or else the government will suffer a dismissal . . . .” Defendants should be charged with the most serious offense that is encompassed by [their] conduct and . . . to result in

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210 *Id.* at 322.
sustainable conviction.” The goal is to charge the precise crimes that reflect the defendants’ criminal conduct without overcharging or undercharging.\textsuperscript{211}

Similarly, the National Prosecution Standards states “a prosecutor should file charges that he or she believes adequately encompass the accused’s criminal activity and which he or she reasonably believes can be substantiated by admissible evidence at trial.”\textsuperscript{212} As Professor Abrams stated, the nature of discretion is the difficulty of including all the pertinent circumstances and law into general rules, and statutory law is not always easily adapted to the changes in public attitudes.\textsuperscript{213} There should be some flexible rules, leaving open the possibility for law enforcement to make alternative decisions to respond to the changing values of society.

While there is a demand for flexibility and adaptability in law enforcement, there is also demand for certainty, consistency, and stability.\textsuperscript{214} While one emphasizes flexibility, the other stems from the society’s need for the stability of the law and consistency of the law enforcement and cannot be ignored. Any legal system should be able to balance between the two demands to refrain from extreme arbitrariness or absolutely static law enforcement.

\textsuperscript{211}When mentioning “over” or “under” charging, we already know the part that is “over or under” compared to that of the ordinary part, the former lack sufficient evidence to prove the “over” part. As for the “under” part, there will be more than enough evidence to prove the undercharged case. It could be argued that if the prosecutors know exactly what the law is and how to apply it, why do prosecutors choose to overcharge or undercharge? We have no doubt that undercharging will not undermine the rights of the defendant to mount a defense or subject him to a disadvantageous status. After all, it will benefit the defendants as well as prosecutors. For prosecutors, they need less strength to prove beyond a reasonable doubt and easily achieve the end result needed to convict a defendant. For the defendants, they will either just enter into a guilty plea because of the lesser degree of offense charged against them, or still prepare to go to trial. But the lesser charge will make it easier for them to defend themselves or receive lighter sentencing.

\textsuperscript{212}ABA Standards for Criminal Justice: Prosecution Function and Defense Function, supra note 190, at 4-6.

\textsuperscript{213}Norman Abrams, Internal policy: Guiding the exercise of prosecutorial discretion, 19 UCLA L. REV. 1, 2-3 (1971).

\textsuperscript{214}Id. at 3.
Due to the intrinsic nature of human weakness, unguided and uncontrolled discretionary power can easily damage justice. Standards, guidelines, and ethics codes regulate the discretion of prosecutors and guide prosecutors toward unified decisions within the prosecutors’ office. However, these guidelines are not laws that were enacted by Congress. They simply provide general guidelines for professional conduct. Consequently, prosecutors are not bound by these guidelines, which create little incentive for following them. What this standard does is simply reaffirm the prosecutor’s broad discretion without strong binding effect or any sanction attached to it.

If the existing standard could have any impact on prosecutors, it would be like professional discipline sanctions. Professor Gershman, a former prosecutor, noted numerous instances of infamous prosecutorial misconduct, none of which resulted in sanctions for the prosecutors. Eventually, these references are more like a paper tiger, or a placebo to cure the prosecutorial practice and conduct.

In a nutshell, charging plays one pivotal function of prosecutors in that it not only opens the gateway to trial, but also heralds to society the content and contour of criminal law. Along with the charging function, discretionary charging also magnifies the prosecutor’s power. It is beyond dispute that there is a need to restrain discretionary prosecutor-dominated charging power. External or institutional check from outsiders is one means of achieving supervision of prosecutors’ charging discretion or prevention of unfounded charging or zealous charging. Additionally, one should look to alternatives beyond resorting to professional standards because

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215 KENNETH CULP DAVIS ET AL., DISCRETIONARY JUSTICE IN EUROPE AND AMERICA, 8 (1976).
internal checks and professional guidelines garner no confidence from outsiders. Hence, chapter 3 evaluates external institutional controls to improve the screening or supervising mechanism.

2. Prosecutorial charging function in Taiwan
   2.1. Charging

Prosecutorial charging decisions and the threshold to prosecute are heavily related to the design of the screening mechanism, in that the screening mechanism supervises that decision. If weak or groundless charges are not screened and dismissed, defendants may face unlimited hardships, and every legal participant becomes involved in a meaningless procedure. Only when we look into how the prosecutorial charging decision is made will we, accordingly, discover the flaws of the screening mechanism and thus be able to devise an effective screening system. This section articulates prosecutorial charging functions both in law and in practice in Taiwan, and how it interacts as a preliminary screening for police work.

Because Taiwan’s criminal justice system is in transition towards a modified adversarial system, the role of prosecutors is hybridized, combining nonpartisan and advocate characteristics of investigation and trial. In the phase of investigation, prosecutors play a neutral role that demands objectivity and impartiality. At trial, the prosecutor is one party of the adversarial

\[^{217}\text{Frase, supra note 189, at 625.}\]
\[^{218}\text{Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 2(2013)(Taiwan)(providing that any public law enforcer who enforce criminal law shall emphasize equal footing to conditions both favorable and unfavorable to an accused. An accused may request the public law enforcer specified in the preceding paragraph to take necessary measures favorable to the accused).}\]
process, and is still required to play a nonpartisan role. However, the trial itself bears the nature of combat and seeks to convict the accused. This turns the prosecutor into an advocate, especially since the conviction and correction rate is considered as part of a comprehensive annual evaluation of her performance.

Assuming that the prosecutor charged the defendant without sufficient evidence, and if the screening mechanism does not weed out the case, the case enters trial. By what role should the litigating prosecutor deal with the case? Based on its nonpartisan role, the prosecution shall be dropped if the prosecutor retains an unbiased role in the case. By contrast, as an advocate, if prosecutors try to negotiate with the charged to extract a guilty plea or to plea bargain with the accused, the prosecutor may eventually obtain the conviction. Hence, the role does affect the exercise of the authority the prosecutor plays. Owing to this modification, the role of the prosecutor in Taiwan is slowly transforming. Prosecutors positioned in such a hybrid system face an identity crisis of sorts and a conflict of roles between playing the objective role and playing the advocate role in the justice system.

On the one hand, the prosecutor considers themselves a part of the judiciary, one who actively investigates. On the other hand, they advocate actively and achieve as many convictions as possible at trial. Through analysis of the function of Taiwanese prosecutors, there are some conflicts in the ideology that are embedded in the Taiwan system. Consequently, there exists

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219 Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 3 (2013) (Taiwan) (providing that the term "party" of this Code refers to a public prosecutor, a private citizen who files a complaint, or an accused).

220 One Taipei district litigating prosecutor pointed out his attitude towards the accused, when facing the kind of case that he himself would not prosecute, but was prosecuted otherwise by other prosecutor, and chose to be silent in the face of an unjustified embezzlement case instead of being an advocate at trial. see Guang Chen, Mao Dun De Gong Su Ren [Contradictory litigating prosecutor], 66 She Tuan Fa Ren Zhong Hua Min Guo Jian Cha Guan Xie Hui Jian Xie Hui Xun [The Prosecutors Association Note ROC] (Taiwan), 15 (2011).
doubt that a legal transplant will alter the legal practitioners’ thought and practice. The prosecutor accustomed to a continental law model may have trouble adapting to adversarial procedures.221

On the onset of the criminal process, the prosecutor is obligated to investigate any criminal offense upon knowing the suspect is accused of crime or occurrence of crime.222 Police officials have the duty and power to initiate an investigation to assist the prosecutor. The prosecutor has the authority to direct police officers to conduct a preliminary investigation. Judicial police officers shall bind over the case file after their investigations, including the evidence within the file, to the prosecutor to continue a consecutive secondary investigation.223 The prosecutor normally conducts the secondary investigation to oversee the legality of the police conduct and to decide whether the police officials have gathered sufficient evidence, as well as to determine whether officers have conducted an illegal search or seizure or obtained evidence through illegal means. In addition, the prosecutor can conduct a secondary investigation, such as subpoenaing witnesses to testify under oath, questioning defendants, ordering laboratories to conduct scientific tests, blood tests, DNA tests, and gathering more comprehensive evidence in order to prepare for trial.

221See Pizzi & Marafioti, supra note 44, at 4-6 (Professor Pizzi mainly depicts that Italy, a civil law tradition nation, leap from a classic civil law system to the one system that incorporated adversarial trial system into civil law structure).
222Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 228,paragraph 1 (2013)(Taiwan)(providing that if a public prosecutor, because of a complaint, report, surrender, or other reason, finds a suspicion of an offense having been committed, she shall initiate an investigation).
223Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 229, 230, 231(2013)(Taiwan)(providing that the officials who shall be deemed as judicial police officers and are obligated to assist a public prosecutor in investigating an offense).
Prosecutors may work closely with the police to investigate the offenses, or direct them upon finding criminal activity. Nonetheless, the fact-oriented investigation for evidence collection is actually commenced by police due to their professional training, scientific methods in examining the evidence, personnel, and resources.²²⁴ It is usually in complex and high-profile cases involving crime ring, financial crime, or official corruption cases that the prosecutor is deeply involved with the investigation from the onset of the investigation. The prosecutors’ duty is legal-oriented investigation, including the oversight of police investigations from the legality perspective, evidence sifting, law application, and charging decision making.²²⁵ As discussed above, the evidence presented and investigation conducted by the police is often incomplete and insufficient to charge, the witness testimony is not made under oath in pursuant to the Code of Criminal Procedure article 159, and bank statements or other written evidence is incomplete, and so on. In addition, evidentiary rules, such as the exclusionary rule, demand that the prosecutor look into the police misconduct and to assess the means by which the evidence is obtained during the preliminary investigation. The prosecutor is obligated to wrap up the entire investigation and is in charge of decision making. Upon completion of the investigation, the prosecutor then decides the outcome of the investigation, whether to charge, defer, or discharge prosecution.

According to Code of Criminal Procedure article 251, if the outcome of investigation demonstrates “evidence obtained by a public prosecutor in the course of investigation is sufficient to show that an accused is suspected of having committed an offense,” she is obligated to charge, which is called “mandatory prosecution” or “compulsory prosecution.” There should be no discretionary prosecution in principle in Taiwan. In a system with heavy concern for

²²⁴JAU-YIH HWANG, XING SHI SU SONG FA[Criminal Procedure], 141-142(2d.ed., 2009)(Taiwan).
²²⁵Id.
uniformity and consistency, few freedoms are afforded the prosecutor to shield prosecution from political and improper influence or abuse of power, to prevent administrative hierarchical intervention, and to demand for unitary application of law and consistency of decision making.226 Prosecutors’ judgment is solely based on evidence and law. By mandatory prosecution, the prosecutor should be immunized from administrative and political influence, which leaves no leeway for superior prosecutors to control and direct concrete instructions. In other words, the mandatory prosecution not only binds the managing prosecutor, but also binds the higher-ranking prosecutorial officials, Prosecutor General or chief prosecutors, in their supervision of the subordinate performance. In addition, such a system could prevent prosecutors from arbitrariness in the outcome of decision making.

In practice, the prosecution is required to review the evidence in order to judge whether the case is supported by the evidence and to apply the facts to the law. Usually, she is bound by mandatory prosecution and has no leeway, unless she ignores, misjudges, or intentionally abuses the mandatory prosecution. In the face of the above situations, whether the prosecutor abuses prosecution or not, there should be a gatekeeper for the protection of the innocent.

2.2. Charging Discretion

In most continental countries, i.e. Germany, France, and Italy, discretionary power is exercised for reasons similar to those supporting it in the United States.227 Taiwan is no exception when it comes to prosecutors exercising their powers of discretion. The compulsory

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227 Goldstein & Marcus, supra note 33, at 280.
prosecution principally applies to all crimes except those offenses that are enumerated and allowed in deferred prosecution and discretionary dismissal categories. In other words, the prosecutor in Taiwan has no discretion in charging felony cases.

There are several exceptions to mandatory prosecution in pursuing the purpose of “general prevention,” “specific prevention,” and “resource constraint,” to divert some suspects earlier from the criminal justice system in order not to stigmatize the suspects. Scholars elaborate that Taiwan adopts mandatory prosecution in general with the exception of the prosecutorial discretion system. The following provides a nutshell summary of instances of prosecutorial discretion in Taiwan.

First, prosecutors have discretion with cases involving certain specified crimes that are minor offenses that carry a maximum penalty of imprisonment for no more than three years, or are other offenses that are enumerated in article 376. The Code of Criminal Procedure article 253 states “If a public prosecutor considers it appropriate not to prosecute a case specified in article 376 after having taken into consideration the provisions of article 57 of the Criminal Code, he may make a ruling not to prosecute.” Article 57

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228 Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 253(2013)(Taiwan)(providing that if a public prosecutor finds it appropriate not to prosecute a case specified in article 376 after having taken into consideration the provisions of article 57 of the Criminal Code, she may make a ruling not to prosecute); see also art.253-1 (Taiwan)(see infra footnote 236).
229 LIN, supra note 3, at 16-18; Different opinion indicates that the offenses enumerated in article 376 account for the majority of the cases. The prosecutor has considerable discretion in handling these cases. Hence, the opinion is not appropriate saying. Hwang, supra note 218, at 304.
230 Zhong Hua Min Gao Xing Fa[Code of Criminal Law], art.57(2014)(Taiwan)(providing the sentencing factors before a judge make a sentencing, and the factors are as follows: 1. the motive and purpose at the time of commission of the crime; 2. the stimulation of commission of the crime; 3. the manners of the crime; 4. the life condition of the perpetrator; 5. the character of the perpetrator; 6. the education of the perpetrator; 7. the relationship between the perpetrator and victim; 8. degree of the breach of the duty; 9. the harm done by the actus reus; and the attitude after the crime).
lists sentencing factors for the judge to evaluate the degree of severity of the sentence. Here, the law requires the prosecutor to consider both the offenses enumerated in law and sentencing factors before the prosecutor chooses not to prosecute. The offenses enumerated in article 376\textsuperscript{231} of the Code might not be prosecuted after the prosecutor has taken the circumstances of article 57 into consideration. Since it was exercised by discretion, it should be named “discretionary dismissal.”\textsuperscript{232}

Another type of discretionary dismissal is grounded on the execution of a felony conviction. When the accused has committed several offenses, one of which is a felony and has been convicted, and the other offense is minor and has not been indicted, to charge and convict the minor makes no difference to the felony conviction because the minor offense is not enforceable given the Code of Criminal Law. Hence, at the discretion of the prosecutor, she could choose not to prosecute the minor offense. For example, the defendant committed murder and theft. If the murder is convicted for life sentence, the theft sentencing is therefore not enforceable when it comes to the execution of the sentencing. The sentence is not enforceable because the first felony sentence is life imprisonment with or without a conviction for the minor offense.\textsuperscript{233} Even though the goal that discretionary dismissal intends to achieve is of great importance, both to the accused and the whole criminal justice system, the discretionary dismissal composes a minimal amount of cases disposed by the prosecutor.

\textsuperscript{231}These offenses are not felonies offenses because a felony refers to the offense that the minimal imprisonment is for five years or more.
\textsuperscript{232}Wu, supra note 87, at 154-156 (noting this as “easy dismissal”).
\textsuperscript{233}YU-XIONG LIN, XING SHI SU SONG FA XIA CE GE LUN PIAN[Criminal Procedure : Specific Provisions] 67(4th ed., 2004) (Taiwan); Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 254(2013)(Taiwan)(providing that if an accused commits several offenses for one of which is a felony and a final judgment has been finalized, the public prosecutor may decide not to prosecute if she finds that prosecution for another misdemeanor offense will not substantially affect the execution of finalized sentencing).
The last type of the exception is “deferred prosecution.” It is intended to digest a great amount of cases to alleviate the mounting caseloads. The category of offenses that fall within the deferred prosecution realm are those offenses excluding those punishable by death penalty, life imprisonment, or with a minimum punishment of imprisonment for not less than three years. The prosecutor is entitled to defer prosecution if she holds that deferred prosecution is appropriate after considering article 57 of the Code of Criminal Law and the maintenance of public interest. Both article 57 of the Code of Criminal Law and the element of maintenance of public interest contain uncertain and abstract factors that afford the prosecutor broad discretion to defer the prosecution. Critics have claimed that such standards are vague and obscure and lack objectivity. Others have claimed that article 57 should be limited to the circumstance of light culpability of the defendant; otherwise if the act is brutal and the criminal motive is ill, the deferred prosecution should be disallowed.

Although the prosecutor is entitled to defer prosecution, she may not abuse and take advantage of the authority to adopt deferred prosecution unless the suspect is actually guilty of the offense charged. Otherwise, the prosecutor shall not impose the deferred prosecution on an innocent suspect. After all, deferred prosecution still bears conditions that require the suspect to perform or comply with certain disadvantageous conditions in exchange for deferred prosecution.

234 Hwang, supra note 218, at 312.
235 Lin, supra note 233, at 71.
236 Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 253-1(2013)(Taiwan) (providing that if an accused has committed an offense other than those punishable with death penalty, life imprisonment, or with a minimum punishment no less than three years imprisonments, the public prosecutor, after considering the conditions specified
To summarize, under the mandatory prosecution system, prosecutors may abuse charging power; instead of abusing charging discretion power. In the States, it is beyond dispute there is a need to restrain the discretionary prosecutor-dominated charging power. In Taiwan, it is the prosecutorial charging power that is in need of screening and checking whether the charging standard is satisfied. Hence, screening mechanisms in two major criminal justice systems look into distinct parts of exercising the charging power; rather than examining identical concepts of charging power.

3. Prosecutorial Charging Function in France

The French criminal system uniquely emphasizes pretrial investigation in preparing the dossier and collecting complete evidence and information by the prosecutor in ordinary cases and the investigating judge in felony cases, rather than centering the trial on the examination of the dossier; thus, the pretrial investigation takes charge of investigation of the case and the trial performs only a procedural formality in France.\(^{237}\) Once the investigation and verification of the

\(^{237}\)See Hodgson, supra note 67, at 222 (noting this is an inquisitorial procedure and the instruction process characterizes the roots of French criminal procedure).
This section examines the prosecutorial charging function and its interplay with the operation of investigation, both in law and in practice, in France.

3.1. Charging

The prosecutor is in charge of the decision to prosecute as well as the decision to bring the case on appeal.239 Unlike the prosecutor in continental countries, the French prosecutor herself does little investigation even when a case is not referred to the investigating judge.240 Instead, the prosecutor relies more on the police dossier. Even though the prosecutor seldom investigates directly, and infrequently directs the police to investigate, the prosecutor serves to review the exercise of power by the police.241 She is responsible for reviewing the evidence, determining whether or not to pursue a prosecution, directing the police investigation, and supervising the detention of the suspect in police custody, including the protection of their due process rights.242 Therefore, the supervisory role is built within its function.

Historically, in order to divide the function of prosecution and investigation, the 1958 FCCP established the independence of the investigating judge from the public prosecutor. The decision to charge a felony is required by the supervision and review of the investigating

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238 See id. (noting the acquittal rate in the cour d' assises is extremely low, and also quoting that several investigating judges told that only two or three out of all the cases sent to trial results in acquittal during the past ten years).
240 Goldstein & Marcus, supra note 33, 261.
241 Frase, supra note 189, at, 557-558.
242 HODGSON, supra note 67, at 75.
judge. Actually, the investigating judge also plays investigating, reviewing, and prosecution functions in felony cases. The stage of judicial investigation is to bring the case to judgment, and is mandatory in a felony case, optional for a misdemeanor case, and exceptional for a petty offense. The investigating judge conducts her investigation and verifies the police and prosecutor dossier to decide whether the evidence will warrant the charges or will support a lesser charge, delict (hereinafter misdemeanor) or contravention (hereinafter regulatory crime), and she may dismiss the case or transfer the case to a correctional or police court. Only when the investigating judge concludes that the offense is a felony will she present the case to another screening chamber. In other words, both the investigating judge and the prosecutor are charged with the prosecution, investigation, and review of the dossier in different categories of offenses.

3.2. Charging Discretion

Contrary to the perception of the continental prosecution system, French prosecutors embrace broad discretion in the decision of whether or not to charge, and whether to charge more or less serious offenses than the evidence warrants. French prosecutors frequently lower or decline charges by discretionary power as do their counterparts in the United States. But as a

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243 Frase, supra note 189, at 625.
244 Juliette Tricot, France in TOWARD A PROSECUTOR FOR THE EUROPEAN UNION-A COMPARATIVE ANALYSIS, vol. 1, 227 (Katalin Ligeti ed. 2013).
245 See Hodgson, supra note 67, at 75 (noting that French police are expected to prepare a complete, and inclusive case file that includes both exculpatory and inculpatory evidence, whether the offense is misdemeanor or most serious crime).
246 Id.
247 Frase, supra note 189, at 602, 610-611; Goldstein & Marcus, supra note 33, at 244; see also the Code De Procedure Penale [C. Pr. Pen.] art. 40 (France).
248 Frase, supra note 189, at 602.
nation with continental tradition and ideology, France still emphasizes the rigid hierarchical structure and uniform decisionmaking in the exercise of their authority. Instead of adopting the mandatory prosecution model to achieve the goals of uniform and consistent decisionmaking, France imposes hierarchical control that defines and constrains the exercise of the prosecutors’ decisions. Within each prosecutor’s office, all decisions are under review by his or her superiors. Other than the control by high-ranking hierarchy, the announcement of official guidelines with regard to national policy (politi
tique penale) is another way of maintaining the uniformity and equal treatment in their decisions. Although these policies are not legally binding, they are implemented locally by the procureur de la R’epublique, and the procureur g’en’eral.

In practice, the procureur de la R’epublique, and the procureur g’en’eral tend not to intervene with the charging decision, regardless of those guidelines, in the interest of respecting the autonomy of the each prosecutor. Those guidelines are applied in quite different ways according to local resources and political inclination of the procureur de la R’epublique. In addition, local variance of the criminal offenses in different regions influences the policy and local prosecution adapts accordingly. Such disparities are often criticized by the prosecutor,

249 HODGSON, supra note 67, at 229.
250 Id.
251 Frase, supra note 189, at 560.
252 See Frase, supra note 189, at 560 (noting the prosecution policy is issued at high level officials); HODGSON, supra note 67, at 229.
253 Id.
254 Id.
255 Id.
256 See id. at 230 (noting empirically, it is the resources that marks the differences amongst different regions. In larger area, the prosecutor would not pursue minor offense given the fact the resource are apportioned to felony).
claiming that justice invites variability in different areas, and by scholars, claiming that it goes beyond the limits of acceptable local interpretation and undermines the certainty of law.\textsuperscript{257}

According to Professor Hodgson’s research, some senior prosecutors interviewed noted that their authority is flexible, and includes discretion to demand the defendant to compensate the victims, to satisfy the society without court procedure, and to choose not to prosecute when they deem that the decision to prosecute would worsen the current situation.\textsuperscript{258} By contrast, the research indicates that junior prosecutors are subject to more of the hierarchical influence where senior prosecutors provide guidance in handling the cases.\textsuperscript{259} Here, although the French practitioner’s legal ideology suggests that laws are to be applied stringently by the prosecutor, who is subjected to national-wide hierarchical structure and superiors’ supervision,\textsuperscript{260} the practice seems to be in contradiction with the unitary enforcement.

So, are those charges reviewed like their counterparts in the United States? In fact, for cases that are misdemeanor and contravention, these are not subjected to review before trial. Only felony charges, which make up a small part of all trials, are screened for their bases.\textsuperscript{261} Professor Frase offers possible justifications, including their hierarchical training, supervision, and specialization, decision to charge often made within weeks and made after complete investigation, and lack of \textit{nolle prosequi} and plea bargaining, which incentivizes the prosecutor’s

\begin{footnotes}
\item[257] \textit{Id.} at 231.
\item[258] \textit{Id.} at 233.
\item[259] \textit{Id.} at 233-234.
\item[260] Goldstein & Marcus, \textit{supra} note 33, 247.
\item[261] According to Professor Frase, there were 2255 convicted in felony trial, of total 1,029,432 convictions. \textit{See} Frase, \textit{supra} note 189, at 626.
\end{footnotes}
The judicial investigating process and the investigating judge’s operation in examining felony charges will be discussed further in the next chapter.

To summarize, prosecutorial charging decisions and discretion in France depend upon many variables that define and delineate the constraints on that authority. The local hierarchy, local resources, and local crime rate are the major factors in the exercise of the authority. France is a combined case with its discretionary prosecution system under the continental model. The hierarchical control indeed might intensify the systematic control over the prosecutor in order to maintain the uniformity of legal order. Nonetheless, as the empirical study mentioned above demonstrates, the hierarchical high-ranking official would rather maintain the prosecutor’s autonomy. If the case is like this, then it seems that the kind of internal control and screening as adopted in the United States as a means of supervising and checking unfounded charges disappears. Besides, even relying on internal checks and professional guidelines often raises some doubts. Only in felony cases does it appear that the investigating judge could add another layer of reviewing the prosecution. Does the judicial investigation function as a screening mechanism to the felony prosecution or does the investigating judge work closely with the prosecution and side closely with the prosecution? In the next chapter, this dissertation examines different external institutional screening mechanisms in the United States, Taiwan, and judicial investigation in France, so as to extract and identify essential components for reform of Taiwan’s screening mechanism.

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262 *Id.*
CHAPTER 3 SCREENING MECHANISMS

Whether positioned in a continental (civil law) or common law system, prosecutorial charging decision-making still remains a mysterious Pandora’s Box-like symbol in the view of the public. Even after the adoption of compulsory prosecution in the continental system, the decision process remains veiled. Compulsory prosecution makes corruption of prosecutors less likely to occur and achieves the goal of unitary exercise of prosecutorial power. However, compulsory prosecution in a continental law system mandates prosecution when prescribed requirements are met. It therefore lacks the ability to elevate the quality of the decision-making because the prosecution standard is set at a level that provides no assurance of conviction. By contrast, discretionary prosecution in the United States inherently makes such decision-making processes more complex, more unknown to outsiders, and a less standardized process to follow.

As a consequence, the implementation of screening mechanisms prior to trial is strikingly important, not only to counteract the various disadvantages brought by the prosecution, but also to shield the innocent from unfounded prosecution. Screening mechanisms theoretically consists of external and internal screening of prosecutorial decision-making. Internal screening means systematic administrative supervision of decision-making from higher-ranking officials within the bureaucracy. Given the dispersed bureaucratic official structure and dissemination of the governmental power in the United States, systematic bureaucratic control and supervision of prosecution is inherently not a plausible way to effectively check prosecutorial charging power. As for the Continental system, although subject to highly demanding hierarchical and unitary control within the bureaucracy, it is less trusted by outsiders. Moreover, external screening often
bolsters public confidence in carrying out such checks on governmental power. This dissertation therefore reviews and delves into the current external screening mechanisms in the United States, consisting of the preliminary hearing and grand jury; the judicial dossier-review screening in Taiwan; and the judicial investigation by the investigating judge in France, who conducts investigations neutrally and reviews cases presented by prosecutors and the police in felony cases.

By delving into the research on the history, procedures, and evolution of screening practices and the exercise of the mechanisms used, laden with the advantages and disadvantages of each as perceived by scholars, judges, and attorneys, this dissertation seeks to provide insight into the essential structure, procedures, and institutions of an effective screening mechanism. In reforming the screening mechanism in Taiwan, the comparative analysis affords comprehensive views for more solutions, alternatives, and possibilities. Through the examination and extraction of ideas from the American and French systems, this dissertation could generate new proposals for the reformation of screening mechanisms in Taiwan.

I. Screening Mechanisms of the United States

As known in the U.S. legal history and Anglo-American legal systems, the grand jury is noted for its manner of fighting against oppression and setting a bulwark between the government and its citizens. The grand jury was embedded in the U.S. criminal process by brandishing the flag of protecting innocent citizens in two historical cases against the British government during the U.S. colonial period. Historically speaking, with an indictment by a
grand jury, people are more likely to have confidence in the decision to indict, it having been made by the people and democratic processes. The grand jury was instituted to create a check on the power of government by the people in the community, and to create a check on the law imposed by central government that was enacted by the Crown.263

The role that the grand jury plays today remains quite similar to its praised historical role. Its effectiveness, however, is in doubt.264 Despite skepticism and criticism from the community and scholars as to the effectiveness and non-independence of the grand jury, it is well supported by the Supreme Court and Congress.265 Whether the grand jury really functions in practice as it was originally designed is a debate among scholars, but the mechanism or its revised version could be a viable plan for Taiwan’s reform.

Aside from the grand jury, preliminary hearings put forth another layer of screening. In the sequence of criminal procedure, a preliminary hearing is held by a magistrate, usually within one or two weeks of the arrest, to decide whether the charge is based on probable cause. A preliminary hearing provide an initial screening of the charge before an indictment or information is filed. Normally, only after the magistrate screens the initial charges is the case then bound over to the grand jury. Unlike the grand jury, however, a preliminary hearing is not constitutionally required for felony prosecution, and the prosecutor sometimes avoids the need for a preliminary hearing by first acquiring an indictment. The following part articulates both

264 See id. at 2337(criticizing the grand jury lost the role as “the voice of community”, which harmed members in poor and minorities. Reform should be focused on making grand jury less independent of the people in local community); see also Andrew D. Leipold, Why Grand Juries Do Not (And Cannot) Protect The Accused, 80 CORNELL L. REV. 260, 264-265 (1995) (Professor Leipold argues that grand juries do not and cannot protect the defendant against the charge and argues the problem lies on grand jurors).
265 Leipold, supra note 264, at 269.
screening mechanisms of the United States in the sequence they occur in U.S. criminal procedure.

1. Preliminary Hearing

1.1. Purpose of Preliminary Hearing

As a preliminary matter, the initial appearance of an arrestee before the court comes after a suspect is arrested. The initial hearing occurs promptly within 48 hours after the arrest. The goal of a Gerstein hearing is to determine whether there is probable cause for an arrest if the arrest is pursuant to a warrantless arrest, and also whether pretrial detention is needed. The magistrate will then schedule the preliminary hearing. In the case of felonies, the judicial officer or magistrate then informs the arrestee of the right to a preliminary hearing if the arrestee has not yet been indicted. Such a right to a preliminary hearing is not required by the Constitution. If the prosecution has obtained an indictment before the scheduled date of preliminary hearing, the preliminary hearing is mooted.

At the initial appearance, the magistrate will advise the arrestee of charges, appoint counsel, and set bail if the magistrate decides not to continue to detain the arrestee. The preliminary hearing must be held within ten days of the first appearance if the suspect is in custody. If the suspect is not detained, the preliminary hearing is set within twenty days. After the screening, if the prosecution has established probable cause by sufficient evidence, the case is then bound over to the grand jury in federal jurisdictions, as well as in those state jurisdictions
that adopt the grand jury mechanism. In state jurisdictions that adopt the information stage, the case is bound over to the trial court. If the arrestee has been indicted, then the arrestee is subjected to no preliminary hearing review.

The preliminary hearing is meant to check whether there is sufficient evidence to proceed to trial. The magistrate judge at such a hearing determines whether there is probable cause to believe “the crime” has been committed and the “defendant” committed the crime.266 If there is no probable cause, the defendant is discharged and the case is dismissed. While its purpose is clearly to conduct another layer of screening of charges, its screening threshold is identical to the initial encounter by the magistrate to review the arrestee’s case.267 However, preliminary hearings bear additional features. First, the preliminary hearing is conducted in an adversarial process, so that the defendant may test the prosecutor’s story.268 Both parties may elicit the witnesses’ testimonies, and preserve their testimonies for subsequent use to impeach the witnesses if inconsistent testimony occurs at trial.

Second, the adversarial hearing advances a reliable determination of probable cause more than the initial ex-parte appearance before the magistrate.269 In addition, the preliminary hearing decision-making is made by professional judges, who are experienced in the legal determination of probable cause. The independent review by a magistrate at least expels the doubt that such reviews are controlled by law enforcement. Whether we trust the system or not, the legal

266 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE, §91 (2007).
267 See id (noting that preliminary hearing is regulated by Rule 5.1, and initial appearance is regulated by Rule 5. The latter one is non-adversarial proceeding that occurs within 48 hours after the arrest).
268 See id (noting that probable cause is the only official function of the preliminary hearing, and discovery is the by-products).
determination of probable cause at least lies in the hands of neutral experts that bring a measure of confidence to the outcome.

Third, the preliminary hearing adds another layer of review before trial to ensure that the initial decision of putting a suspect in custody was warranted. Now the magistrate has not only heard the government’s theory of criminality in a case, it has seen some of the witnesses and reviewed some of the evidence that is likely to be presented at trial.

Even though the purpose and function of the preliminary hearing advances additional review of the charging decision and benefits the defendant’s right to an unbiased screening, it is not required by the Constitution.\(^\text{270}\) In federal jurisdictions, the federal law has granted the right to a preliminary hearing for a felony charge.\(^\text{271}\) According to the Federal Rules of Criminal Procedure, the prosecutor has leeway to bypass the hearing by bringing an indictment before the scheduled hearing. If an arrest was made after the prosecutor obtains an indictment, a preliminary hearing is mooted.\(^\text{272}\)

In state jurisdictions, eighteen of them demand felony prosecution by indictment, but grant right to preliminary hearing within a specified time after an arrest.\(^\text{273}\) However, their

\(^{271}\)Fed. R. Crim. P. 5.1(a)(stating “In General. If a defendant is charged with an offense other than a petty offense, a magistrate judge must conduct a preliminary hearing unless: (1) the defendant waives the hearing; (2) the defendant is indicted; (3) the government files an information under Rule 7 (b) charging the defendant with a felony; (4) the government files an information charging the defendant with a misdemeanor; or (5) the defendant is charged with a misdemeanor and consents to trial before a magistrate judge.)
\(^{272}\)WRIGHT & LEIPOLD, supra note 266, §91.
systems allow prosecutors to circumvent such hearings by the acquisition of an indictment.\textsuperscript{274} In information states, which allow felony prosecution brought by either information or indictment (although two totally deny the prosecutor the ability to charge by indictment), preliminary hearings are either abolished or exist as a merely theoretical tool that is rarely used.\textsuperscript{275} In a majority of information states, the State’s rules or laws demand a preliminary hearing as a prerequisite for prosecution by information.\textsuperscript{276}

The suspect may waive the right to a preliminary hearing for several reasons. The suspect may try to avoid having the evidence exposed in a public hearing and avoid giving the government the opportunity to find curable defects in its own case.\textsuperscript{277} In addition, if the defendant is willing to plead guilty to the charge, the defendant usually waives such a hearing to have an expedited process to reach a plea deal with the prosecutor.

1.2. Screening Procedure

The preliminary hearing is a formal, adversarial pretrial proceeding, held in open court before a magistrate. The defendant is entitled to the assistance of counsel at the hearing.\textsuperscript{278} Unlike the adversarial proceeding at trial, the magistrate supervises the procedures and has the power to terminate the questioning once probable cause is reached or if cross-examination tries

\footnotesize{\textsuperscript{274}Id.  
\textsuperscript{275}Id. at 1011-1012.  
\textsuperscript{276}Id.  
\textsuperscript{278}See Fed. R. Crim. P.44(a)(stating “A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.”)
to focus on other questions.\textsuperscript{279} The procedure begins by the introduction of evidence by the
government, and the burden ends with the obligation of proffering testimony, as much as is
needed, to establish probable cause for holding the accused for further action of the grand jury.\textsuperscript{280}
The prosecutor must present evidence in a public proceeding and, in so doing, provide the
defense a chance to hear the prosecutor’s story as well as to discover some of the prosecution’s
witnesses or evidence. The defense may challenge the prosecutor’s case, present witnesses,
introduce the defense’s evidence, and demonstrate that probable cause is lacking. But the
defendant is unlikely to offer affirmative evidence unless such defense could substantially
undermine the probable cause established by the prosecution.\textsuperscript{281}

There are strategic evaluations that both sides will consider before the hearing. First, a
preliminary hearing can be treated by the defense as an informal means of discovery.\textsuperscript{282} Whether
or not to reveal the prosecution’s ace card to the accused earlier in the preliminary stage may
change the outcome of the trial, especially if the prosecution has already provided enough
evidence to establish probable cause. The prosecutor has to provide the names of key witnesses
and the substance of their testimony to the extent that it establishes probable cause, which allows
the defense to peek into the prosecution’s theory.\textsuperscript{283} Therefore, whether to reveal witnesses to
prove each element of a case becomes a critical strategic question.

\textsuperscript{279} WRIGHT & LEIPOLD, \textit{supra} note 266, §92.
\textsuperscript{281} WRIGHT & LEIPOLD, \textit{supra} note 266, §92.
\textsuperscript{282} See U.S. v. Hinkle, 307 F. Supp. 121 (D.D.C.,1969) (noting the hearing affords “the defendant not only the
opportunity to contest the issue of probable cause, but also to use the preliminary hearing as a discovery vehicle for
production of the government's case”).
\textsuperscript{283} Andrew D. Leipold, Preliminary Hearing, Encyclopedia of Crime and Justice, available at
Second, testing the government witnesses at a preliminary hearing by cross-examination could afford the prosecutor a chance to find out the potential defects of her case, and inform the prosecutor of any incorrect theories or reveal the defense’s story.\textsuperscript{284} Although the scope of cross-examination is circumscribed within the testimony of the direct-examination, as it is at trial,\textsuperscript{285} a complete cross-examination of a witness provides both parties with vital impeachment materials for future benefits at the trial. A witness’s prior testimony under oath could be a sharp weapon if the witness changes his position and the testimony is inconsistent at the preliminary hearing and at trial. A sharp cross-examination may push the witness to harden his position in favor of the government and inform the prosecutor of the flaws in the testimony.\textsuperscript{286} As a result, whether to conduct a harsh cross-examination really depends on a strategic judgment by the defense.

In addition, the witness’ prior statement, which is testified to at the preliminary hearing, will be admissible under the condition that the witness is unavailable at trial to testify, but only if the defendant has the opportunity to cross-examine the witness during the preliminary hearing.\textsuperscript{287} Under this condition, the prosecution could introduce the prior testimony as substantive evidence in proving her case; therefore, she perpetuates the witness testimony earlier in the beginning of the criminal process to prevent the unavailability of a witness at trial.

\textsuperscript{284}Id.
\textsuperscript{285}WRIGHT\& LEIPOLD, supra note 266,§92 (quoting Coleman v. Burnett, 477 F. 2d 1187, 1201(C. A. D. C. 1973)).
Third, a preliminary hearing affords a chance for both parties to weigh the strength of both sides’ case to seek a potential plea agreement. The government could also modify its charge if it finds out it does not have a solid ground for conviction, and may reach a plea agreement earlier. By contrast, the defense could learn the prosecutor’s case as well so that it could give in and be ready to concede if the government has a solid basis.

Magistrates ensure that the cross examination aims at the establishment of probable cause, and, therefore, can cut-off cross examination when it seems to acquire more information than simply to test the witness’ testimony. Such questions may include: seeking the source of information, fishing for an informant’s identity, exploring the extent of the investigative procedure, obtaining discovery material, and probing for possible defenses.

In summary, the adversarial style of preliminary hearings accentuates the participation of the defense and allows the defense to review the basis and grounds of prosecution. The defense is not merely a subject of prosecution, nor is it unarmed in showing that the prosecution is without probable cause. However, to achieve the adversarial hearing is inseparable with the right to counsel, since the hearing relies much on professional lawyers and technicalities to counterbalance the power of the government.

289 KAMISAR ET AL., supra note 273, at 1030.
290 Id.
1.3. Right to Counsel

Since there are strategic considerations and professional judgments involved in whether to present witnesses, to cross-examine, and to present a defense, etc. at preliminary hearing, it should be noted that nothing could be achieved without the assistance of defense counsel. The Supreme Court has held that the Sixth Amendment right to the assistance of counsel applies to the preliminary hearing as it applies to every other critical step in the proceeding against the defense.291 The Court has said “the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution formal or informal, in court or out, where counsel’s absence might derogate from accused’s right to a fair trial[,]”292 and expressed that the right applies to critical stages in the proceedings, including the preliminary hearing.293 The Court listed critical defense goals as follows:

Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer’s skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State’s witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover

the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.294

Given the many ways that counsel may influence the screening outcome, the preliminary hearing is considered a critical stage to which the right to counsel applies. The Supreme Court has made it clear that a person has a Sixth Amendment right to the assistance of counsel “at or after the time that judicial proceedings have been initiated against him whether by way of formal charge, preliminary hearing, indictment, information or arraignment.”295 In other words, “once adversarial proceedings have commenced against an individual, he has right to legal representation when the government interrogates him.”296

1.4. Evidentiary Rules

Evidentiary rules often determine what information an adjudicator may base her decision on at trial. Likewise, the rules determine what evidence the preliminary hearing magistrates may access in deciding the sufficiency to justify a trial. Generally, in federal jurisdiction, the evidentiary rules do not apply to preliminary hearings according to the Rule of Evidence. The

294 Id.
295 See Brewer v. Williams, 430 U. S. 387 (1977) (Williams was arraigned on the warrant before the judge in Davenport court, and he had been ordered by the court to confinement in jail. During the trip that transferred Williams back to jurisdiction in Des Moines, Williams was questioned by the police officer in the car without the assistance of counsel. Thusly, Williams was deprived of his constitutional right to counsel).
296 See id. at 401(citing Massiah v. United States, 377 U.S. 201 (1964)).
1972 Advisory Committee Notes acknowledged the need for the evidentiary rules to be as flexible in the preliminary hearing as they are in grand jury proceedings; otherwise, the federal prosecutor will bypass the preliminary hearing and proceed to the grand jury directly. The rules eventually rejected the admission of evidentiary rules because it increases administrative burdens and impedes the administration of justice.

The evidence most affected by the adoption of evidentiary rules at the preliminary hearing is hearsay evidence and illegally obtained evidence. For the former, in some state jurisdictions, rules of evidence apply at their preliminary hearings. In others, no limitation is placed at the hearing. These states often prescribe that the “finding of probable cause may be based upon hearsay evidence in whole or in part.” The remaining jurisdictions either prescribe that certain hearsay is admissible, such as “experts’ written reports,” or that all hearsay is inadmissible unless specific exceptions apply.

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297 See 3C Charles Alan Wright, Peter J. Henning, Nancy J. King, Susan R. Klein, Andrew D. Leipold, Sarah N. Welling, Federal Practice and Procedure Appendices-Tables-Index, 73 (2007) (noting the 1972 Advisory Committee Note had admitted that it had been urged, at preliminary hearing, evidentiary rule shall adopt identical evidentiary rules applicable at trial in that the purpose of preliminary hearing should be to determine whether sufficient evidence to put the accused through the harshness of trial).

298 See Patricia W. Weinberg & Robert L. Weinberg, The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968, 67 Mich. L. Rev. 1361, 1398 (1969) (noting that the application will increase the continuances of the preliminary hearing); see also Wright & Leipold, supra note 266, §92 (noting that the Rules of Evidence rejected this view majorly because of “administrative necessity and the efficient administration of justice”).

299 See Notes, The Function of the Preliminary Hearing in Federal Pretrial Procedure, 83 Yale L. J., 771, 779 (1974) (noting that Arizona, California, Connecticut, Massachusetts, Michigan, Nevada, New York all apply evidentiary rule at preliminary hearing); see also Kamisar et al., supra note 273, at 1028-1029 (noting that there are a somewhat larger group of states consider that rule of evidence is “largely applicable” to the preliminary hearing and allows the magistrate to consider certain types of inadmissible evidence).

300 Kamisar et al., supra note 273, at 1029.

301 See generally Kamisar et al., supra note 273, at 1029-1030 (noting such exceptions are when the law prescribes “it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge” or “there is substantial basis for believing the source of the hearsay is credible and for believing there is a factual basis for the information furnished”).
For the latter one, Federal Rule of Criminal Procedure 5.1 (e) stipulates that “At the preliminary hearing, the defendant . . . may not object to evidence on the ground that it was unlawfully acquired.” The 1972 Advisory Committee Notes admits that current law in federal jurisdictions provides that it is in appropriate to bring the issue of unconstitutional means of acquiring evidence. Many states also do not apply exclusionary rule objections. Only in a few states, defendants allowed to raise objections at preliminary hearings like a suppression hearing. However, whether evidentiary rules are adopted or not, the law does not preclude the magistrate from demanding a demonstration that evidence would be admissible at the time of trial.

Whether the rules of evidence apply to the preliminary hearing, and the extent to which the rules apply to the hearing, depends on the policy makers’ desire to screen out certain kinds of information that supports the prosecution. However, only by adopting stricter evidentiary rules can a system achieve the original goal of protecting the innocent from government harassment and pre-stigmatization.

1.5. Threshold of the Preliminary Hearing Screening (Bind-Over Standard)

The threshold standard of proof required to bind a case over determines the degree to which a case should be prepared by the prosecutor before sending it further in the process. In the United States federal jurisdictions, the magistrate screens the case on the basis of the probable

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302 See WRIGHT ET AL., supra note 297, at 73(noting the law is supported by many Supreme Court decisions).
303 KAMISAR ET AL., supra note 273, at 1030.
304 WRIGHT & LEIPOLD, supra note 266, §92; WRIGHT ET AL., supra note 297, at 74.
cause standard, i.e. the bind-over standard, which sends the case to the grand jury stage.\textsuperscript{305} As Federal Rule of Criminal Procedure 5.1 (e) provides, “If the magistrate judge finds probable cause to believe an offense has been committed and the defendant committed it, the magistrate must promptly require the defendant to appear for further proceedings.” Although the context of the statute manifests as probable cause to “believe an offense has been committed” and “the defendant committed a crime,” the probable cause determination actually bears various alternatives among various states. In other words, there are different standards for qualifying the threshold in different states. The first alternative is the “\textit{prima facie} case standard.” In one case in Pennsylvania, the lower court dismissed on the ground that there was insufficient evidence to establish substantial impairment of the capability to safely operate an automobile.\textsuperscript{306} The Superior Court of Pennsylvania held as follows:

“A pretrial petition for writ of habeas corpus is similar in purpose to a preliminary hearing. The focus of the pretrial habeas corpus petition is on whether the Commonwealth possesses sufficient evidence to require a defendant to be held in government custody until he may be brought to trial. A petition for writ of habeas corpus is the proper means for testing the finding that the Commonwealth has sufficient evidence to establish a \textit{prima facie} case. Proof of \textit{prima facie} case consists of the following: the Commonwealth is required to present evidence with regard to each element

\textsuperscript{305}In the United States, there are two phases to which a probable cause standard applies. The probable cause standard sets the baseline of suspicion degree at which an arrest, search warrant be initiated against a suspect. Then the screening magistrate screens the case on the basis of probable cause standard, i.e. bind-over standard. Thusly, first probable cause standard is a standard to which an arrest or search warrant applies.\textsuperscript{306}See Com. v. Lutz, 661 A. 2d, 405 (1995) (Pa. Super. 1995) (noting the defendant was arrested on charge with driving under the influence of alcohol following an automobile accident. At a preliminary hearing, the charge was held over for trial. Defendant then filed a petition for Habeas Corpus with the allegation that the government failed to establish a \textit{prima facie} case) (alteration omitted).
of the charges and to establish sufficient probable cause to warrant the belief that the accused committed the offense.\(^\text{307}\)

The government presented evidence that the defendant drove an automobile intoxicated and the prosecutor presented testimony of the experienced officer on the scene. The court recognized that the government proffered evidence as to each material element of the charge and established probable cause to warrant a belief that the accused committed the offense.\(^\text{308}\)

Another court in Pennsylvania held that the *prima facie* standard was established by viewing the evidence presented by the commonwealth in the light most favorable to the commonwealth because “all reasonable inferences based on that evidence which could support a guilty verdict.”\(^\text{309}\) This standard does not weigh the credibility of the witnesses and does not rise to the level of that required to sustain a conviction.\(^\text{310}\) This standard, when applied in the preliminary hearing, more closely resembles the ruling on a motion for a directed verdict after the prosecution has presented its evidence.\(^\text{311}\)

There is another prong that considers probable cause determination; whether the evidence is sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.\(^\text{312}\) In Michigan, a defendant was charged with felonious driving. The district court refused to bind the defendant over for trial after the preliminary

\(^{307}\)Id. at 407.

\(^{308}\)Id. at 408.


\(^{310}\)See id. at 552(citing Commonwealth v. Lutz to state credibility is not an issue at pretrial proceeding).


\(^{312}\)People v. Yamat, 714 N.W.2d 335 (Mich. 2006).
hearing because the prosecution had not established the defendant’s conduct.\textsuperscript{313} The Supreme Court of Michigan held that “the prosecutor must establish probable cause, which requires a quantum of evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt on each element of the crime charged.”\textsuperscript{314} In this case, the prosecutor had met the standard, because she had shown that the defendant had actual physical control of the vehicle at the time of the incident.\textsuperscript{315}

The Michigan court in another case ruled that to satisfy the preliminary hearing standard, the prosecution “must present some evidence of each element. If the evidence conflicts or raises a reasonable doubt concerning the defendant's guilt, the defendant should nevertheless be bound over for trial, at which the trier of fact can resolve the questions.”\textsuperscript{316}

According to Professor LaFave, this standard is the most common type of probable cause required and is applied the same as the Fourth Amendment standard of probable cause for an arrest.\textsuperscript{317} However, this does not mean that the magistrate will duplicate the probable cause to arrest decision; instead, this only indicates the quantum of evidence to prove probable cause that is used in the preliminary hearing, which is identical to that used for arrest.\textsuperscript{318} In addition, the evaluation procedure of probable cause in a preliminary hearing is adversarial, which differs from the procedure adopted at an initial appearance, which is an ex-parte hearing. Such a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{313} Id.
\item \textsuperscript{314} See id. (noting the district court erroneously define the term of “operate” under Michigan Vehicle Code 257. 626 c. and the Supreme Court of Michigan interpreted that the plain language of “operate” requires only “actual physical control”, not exclusive control of a vehicle).
\item \textsuperscript{315} See id. at 339, 340 (noting the defendant grabbed the wheel and caused the car to drive off the road constitutes actual physical control).
\item \textsuperscript{316} People v. Redden, 799 N.W. 2d, 195 (Mich. App.2010).
\item \textsuperscript{317} LaFAVE, supra note 311, at 219.
\item \textsuperscript{318} Id. at 220.
\end{itemize}
\end{footnotesize}
screening assessment is more refined than that of the initial appearance and plays a more active screening role as to the charging decision than the initial reviewing of the complaint. For example, one twin brother commits an offense, and when identified by witnesses both may be arrested as the probable cause to arrest standard cannot distinguish between the two. But after a closer look at the preliminary hearing, the witness will have to give detailed testimony and will be subjected to cross-examine to find out which one is the actual offender. Thus, the probable cause at a preliminary hearing requires more than just that the person probably committed the crime, as with the probable cause to arrest standard; rather, it requires the magistrate to entertain a reasonable belief of the accused’s guilt of the charged.

1.6. Credibility or Affirmative defense issue

Although the defense is permitted to cross-examine prosecution witnesses at the preliminary hearing, it typically may not fully attack the government’s witness to weaken the credibility of the testimony. The preliminary hearing does not decide guilt or innocence. Given that the goal of the screening is to evaluate the sufficiency of the prosecution’s evidence, most courts say that disputes about fact or credibility are to be resolved at trial.\(^{319}\) Any cross-examination of the witnesses may be cut off if the magistrate considers that such a question is linked to credibility issues or is aimed at eliciting affirmative defenses.\(^{320}\) The limitation on questioning does not trigger a constitutional violation, in that the Supreme Court has noted that confrontation with witness is not constitutionally required at the preliminary process.

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\(^{320}\) Id.
While some affirmative defenses are directly related to an acquittal, courts find that those do not negate the probable cause finding in many jurisdictions. In other jurisdictions, magistrates allow the accused to present evidence of affirmative defenses, and make judgments of credibility.\(^{321}\) In People v. Redden & Clark, defendants Robert Lee Redden and Torey Alison Clark were found with 1.5 ounces of marijuana and 21 marijuana plants by police officers executing a search. Both defendants turned over documents regarding their use of marijuana for medical purposes. These documents were dated March 3, 2009, a date after Michigan Medical Marijuana Act (hereinafter MMMA), MCL 333. 26421 took effect. At the preliminary hearing, both defendants asserted the affirmative defense pursuant to §8 of the MMMA, and presented a doctor’s testimony in support of their defense.\(^{322}\) The court quoted another case to recognize that “affirmative defenses in criminal cases should typically be presented and considered at trial and that a preliminary hearing is not a trial.”\(^{323}\) The court specifically noted that in a situation where the defense is complete and there are no conflicting facts regarding the defense, it could be argued that there would be no probable cause to believe a crime had been committed.\(^{324}\) The court then expressed the following:

The district court must consider not only the weight and competency of the evidence, but also the credibility of the witnesses and it may consider evidence in defense. As noted, however, the district court cannot discharge a defendant if the evidence conflicts or raises reasonable doubt concerning a

\(^{321}\)See id. (noting that charges that are challenged by such defense with little chances of success at trial should be dismissed).


\(^{323}\)People v. Waltonen, 728 N.W. 2d, 881 (Mich. App. 2010).

\(^{324}\)Id.
defendant’s guilt because this presents an issue for the trier of fact. There was evidence in this case that the defense was not complete and there was colorable issues concerning whether a bona fide physician-patient relationship existed, whether the amount of marijuana defendants possessed was reasonable under the statute, whether the marijuana in question was being used for medical purposes, and whether defendants suffered from serious or debilitating medical conditions.\textsuperscript{325}

Even though the court in Michigan allows the presentation of an affirmative defense, it is strictly applied and any conflicts in defense should be resolved at trial.

1.7. Dismissal or Bind over

If probable cause is found or reached, the case is bound over to the next stage and the magistrate must promptly require the defendant to appear for further proceedings.\textsuperscript{326} If probable cause is not found, the defendant is discharged. Such a decision (also called dismissal without prejudice) does not bar reinitiating subsequent charges for the same offense, as the Fifth Amendment Double Jeopardy protection has not attached yet.

Such a probable cause finding is reviewable by motion in the district court, but such procedure is rare and is usually mooted by a subsequent indictment.\textsuperscript{327} Even when the court reviews the probable cause finding, a decision upholding that finding is not a final judgment and

\textsuperscript{325}Redden, 799 N.W. 2d, 195-196.
\textsuperscript{326}Fed. R. Crim. P. 5.1(e).
\textsuperscript{327}WRIGHT & LEIPOLD, supra note 266,§92.
is not appealable. In the event of a dismissal of the defendant, the prosecutor will often take the case to the grand jury and the grand jury may still indict, despite the dismissal of the case.\textsuperscript{328} Appeal of the dismissal of the charge is grounded on the statutory prescription, and such appeal is within the jurisdiction of the district court,\textsuperscript{329} as is the probable cause finding.

1.8. Conclusion

First, it is unknown generally what the dismissal rate or the bind over rate is; therefore, it is hard to decide how effective the screening mechanism is. Maybe one should look into the nature of adversarial procedures where both parties participate in the process and contribute input into the procedure, thus bringing the decision closer to the truth and making the screening more effective, instead of hearing only one version of the story. In addition, without active application of the constitutional right to counsel in providing a professionally knowledgeable defense, the adversarial procedure will not work and screening will become a rubber stamp for the prosecution. The screening determination by professional magistrates represents a much more unbiased, independent, and neutral model than that of the grand jury, as analyzed in the next section.

Second, the preliminary hearing varies in its evidentiary rules and procedures in different jurisdictions in the United States. The effectiveness of a specific kind of procedure is the major concern of this dissertation, but it is difficult to compare the effectiveness of each jurisdiction.

\textsuperscript{328}LAFAVE, supra note 311, at 223.  
\textsuperscript{329}Id.
According to analysis by Professor Leipold, factors that will affect screening function are as follows,

“(1) the extent to which cases in the jurisdiction are plea bargained before the preliminary hearing; (2) the extent to which prosecutors carefully evaluate their cases before the preliminary hearing, rather than using the hearing itself as a means of evaluating the charges; (3) the time and attention magistrates give a preliminary hearing; (4) the extent to which the prosecutor can introduce hearsay and other evidence that would be inadmissible at trial; (5) whether defense counsel is permitted to introduce affirmative defenses at the preliminary hearing.”

These factors could well serve as a template for any system undergoing legal transplantation for its screening mechanism.

2. Grand Jury

Since its inception in Britain, grand juries have provided critical protections against some political and vindictive prosecutions against citizens. It was instituted not only to reflect the will of the community, but also to integrate an element of democracy into the decisionmaking of the prosecution. It provides an opportunity for the community to express local views, even in

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331 See Washburn, supra note 263, at 2342 (noting “Democratic and populist elements of the jury may be critical in maintaining trust in the criminal justice system among the citizens”).
cases involving national law. Furthermore, it was intended by the anti-federalists to be a check on federal power against intrusion into state sovereignty.

Thus, exploring the grand jury from a historical or reformative prospective illuminates the institution of screening against erroneous and abusive prosecutorial judgment power, and provides a potential vehicle towards Taiwan’s reform. Moreover, Taiwan has been undergoing a tremendous judicial reform since the emergence of criticisms towards lenient sentencing of sexual offenders. The outcry of the community for judicial reform to impose harsher sentencing on sexual offenders has resulted in several heavier than usual judicial sentences. Several social campaigns have advocated the need to pay attention to community voices and to demand a more participatory role of citizens in criminal justice. The mainstream and new-born thought, if applied to the reviewing of charging decision, could only be found in the grand jury mechanism, not in preliminary hearings or any other institutions. Would Taiwan be inclined to transplant the mechanism of the grand jury, due to its democratic element and civic participation? Whether this would be suitable for Taiwan requires further examination.

332Id. at 2338-2339.
333See Bai Mei Gui Xin Sheng, Fa Guan Ting Dao Le Ma?[White Rose Voice, Does the judge listen to it?], China Times Editorial(Taiwan), Sep. 27, 2010, available at http://www.jrf.org.tw/newjrf/RTF/myform_detail.asp?offset=320&cid=2724 (last visited Sept., 10, 2011) (The so called “White Rose Activity” (Bai Mei Guì Yún Dong)tries to call for attention of judges to face their judgments that either impose over-lenient sentencing on sexual offender or apply the law erratically on sexual assault types’ of cases.) (This movement jeopardizes the independence of judicial system, which will influence the decision making. Critics worry populism is not the right path towards the reform).
2.1. History of the Grand Jury

Criminal charges were originally, and for a substantial period in history, pursued by private complaint. The “appeal of felony” was instituted by victims or their relatives as criminal prosecution during the pre-Clarendon era.\footnote{John H. Langbein, Renee Lettow Lerner and Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions, 29, 32 (2009).} During the reign of Henry II, the system was changed. Henry II desired to boost revenues through the judicial system, where justice was accessible only to those with the ability to pay; he also sought to curb the ever-growing power of the ecclesiastical realm, not being satisfied with sharing power with the church to which criminal cases were often brought, or with the practice in which clergy were not subject to being accused and tried before a state court.\footnote{Helene E. Schwartz, Demythologizing The Historical Role Of The Grand Jury, 10 Am. Crim. L. Rev. 701, 704-705 (1972).} Wrestling with the Church’s power and feudal reign over judicial jurisdiction, the forerunner of the modern grand jury was made part of the English judiciary during the ruling of Henry II in the twelfth century. In 1164, Thomas Becket, the Chancellor of England and first prelate of the English Church, signed the Constitutions of Clarendon, a document recognized by Church hierarchy concerning the rights of the English King.\footnote{Id. at 703-706.} In Chapter 6 of the Constitutions of Clarendon, the accusing jury was charged with preventing abusive charging to bring a layman in ecclesiastical courts.\footnote{See Id. at 707 (noting that “later the Assize of Clarendon receives all of the credit as the ancestor of modern day grand jury).}

Henry II also pressured the English barons to accept the Assize of Clarendon. In the Assize of Clarendon, Henry II established a new “presentment” system, the jury of accusation,
providing a group of society to present its accusations. The accusing body was composed of twelve men from the hundred and four men of the township. The accusatory entity was in use during the reign of Henry II in the twelfth century. As originally conceived, the grand jury was not a barrier intended to protect citizens; instead, it was “government machinery” imposed for reign over feudal power, and was intended to satisfy the King’s desire for absolutism by taking away the power of feudal barons and weakening the ecclesiastical courts. During the King’s reign, citizens feared the grand jury, as it controlled a great deal of power in criminal justice.

During the fourteenth century, the jury system was divided into two bodies: the petit jury, which was established to render a verdict of guilt or innocence at trial, and the indicting jury, which consisted of twenty-four knights chosen by the sheriff and had the responsibility of accusing alleged criminals. As mentioned, the grand jury was not instituted as a protecting institution against government. Its function of protecting innocence had not arisen at this time, and would not do so until the seventeenth century. The following historical case is a proper example to translate this new development.

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338 LANGBEIN, supra note 334, at 38.
339 See id. at 708-709 (noting that “the Assize of Clarendon made this accusatory body part of judicial machinery in all civilian cases affected by its provisions”).
341 Helene E. Schwartz, supra note 335, at 709-710.
343 SARA SUN BEALE ET AL., GRAND JURY and PRACTICE, VOLUME 1, §1-2, 1-9 (2nd ed.2012).
Anthony Ashley Cooper, the First Earl of Shaftesbury and a member of the Church of England, originally supported the King, but later discovered Charles II’s true intention to proclaim the Roman Catholic Church the supreme religion in England. In June 1680, upon learning of Charles’ attempt to restore England to the realm of Rome, Shaftesbury presented a bill of indictment against Charles’s brother James, the Duke of York, to keep him from the throne. The King stopped the grand jury from acting on the bill and struck back by initiating prosecution against supporters of the Protestants.

In 1681, grand juries refused to indict Protestants Stephen Colledge and the Earl of Shaftesbury for treason, despite the power of Charles II. Faced with political pressure from the Crown and the judge, two grand juries in London still returned no bill despite having been warned that they would be considered criminals if they failed to indict. Charles II later sought indictment from a grand jury in Oxford, where grand jurors stood closer to the King, and won the indictment against Stephen Colledge for treason who was then convicted and executed. Anthony Ashley Cooper eventually fled the country before the King acquired another indictment.

344 See generally Schwartz, supra note 335, at 713 (noting the Cavaliers suspected the King’s ecclesiastical goals, with the alert to the potential succession of Charles’s brother, James).
345 See id at 712-714 (noting Charles II, a secret Catholic to restore England to the realm of Rome, led the country in the opposition direction of what mass citizens and members of both houses of Parliament in England held, which was anti-Catholic, and strengthened the Church of England).
346 Id. at 713-714.
347 See id (noting the reason for rejecting to indict is that the London populace was mainly Whig and was reluctant to indict a fellow of Cavalier cause); See generally RICHARD D. YOUNGER, THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES1634-1941, 1-3 (1963).
348 See BEALE ET AL., supra note 343, §1:2, 1-10 (The author notes that the presiding judge asked the jury to explain its failure to indict, and the foreman of the jury was questioned and imprisoned in the Tower).
349 See Schwartz, supra note 335, at 715-716(noting that Oxford, “a second grand jury was convened, which was known to be populated with more pliable citizens.”); see also Leipold, supra note 264, at 282 (noting that “second grand jury, again with a measure of official pressure, indicted Colledge.” “During the proceedings the King’s counsel and the witnesses were shut in the room with jurors, apparently even during the deliberations”); Washburn, supra note 263, at 2342.
This case and the following case heralded not only the role and function of the grand jury to be independent of political and executive pressure, but also the insistence of guarding citizens against arbitrary prosecution. Some critics have taken a contrary viewpoint, that the Stephen Colledge case remains proof of the vulnerability of the grand jury to be manipulated under interference by corrupt royal members.\footnote{Schwartz, supra note 335, at 719-720.} But had the grand jury not been corrupted and manipulated by King Charles II with the selection of new grand jurors in a different venue, the outcome of the historical event would have been different. There would have been no second indictment as well as no malfunction of the gatekeeper function as a protection against oppression. As a consequence, the grand jury could maintain its fame for protection of innocent lives.

Not until the end of the seventeenth century was the grand jury viewed as “a protector of liberty of English citizens.”\footnote{Leipold, supra note 264, at 283; BEALE ET AL., supra note 343, §1-2, 1-8; Sullivan &Nachman, supra note 340, at 1048.} Just as one jurist, Lord Chancellor Somers, analyzed “the source of the grand jury’s power [is] in the people, rather than the executive, so as to protect the people from unjust prosecution.”\footnote{Schwartz, supra note 335, at 720.} The idea that the grand jury symbolized a barrier between the accused and accuser later travelled to America where it became a more independent body against government, and even served as a quasi-legislative and executive body during the American colonial period.\footnote{See Leipold, supra note 264, at 283 (noting an example that “a New Jersey grand jury proposed a tax on livestock and slaves”).} English colonies in America all adopted this accusing jury in instituting criminal charges, with an expansive role in administrative tasks.\footnote{BEALE ET AL., supra note 343, at §1-3, 1-11.} The first grand jury in America was held in Massachusetts in 1635 and soon took root in other colonies. At the time, it
not only checked government by preventing overzealous criminal accusations from being charged, but also assisted local government.\textsuperscript{355}

Prior to the inclusion of this legendary body into the Bill of Rights, another famous case of screening and protecting citizens from colonial government by the grand jury arose. John Peter Zenger was a newspaper publisher in New York in 1734.\textsuperscript{356} During the revolutionary period, grand juries played an opposition role against the British government and frustrated royal efforts to enforce unpopular laws.\textsuperscript{357} John Peter Zenger published the New York Weekly Journal, criticizing New York Governor William Cosby. Governor Cosby sought to indict Zenger for seditious libel, but three successive grand juries refused to indict.\textsuperscript{358} Once again, the grand jury played an important role against government oppression and political pressure. But under the protection of the grand jury’s decision, it is unknown whether the government failed to prove Zenger’s act constituted libel offense, or whether the indictment was disapproved of by the grand jury because the grand jury disagreed with how the law was being applied.

As Professor Beale has noted, “the refusal to indict in these cases appears to have been based on the jurors’ approval of the conduct in question, and not on a finding that the defendants were innocent of the conduct charged against them.”\textsuperscript{359} During the Revolutionary period, grand juries also adopted patriotic resolutions denouncing the British, urging support of a war, and

\textsuperscript{355} Leipold, supra note 264, at 283-284; see BEALE ET AL., supra note 343, at §1-3, 1-12 (noting that evidence of using grand jury traced back as early as 1625 in Virginia).
\textsuperscript{356} Leipold, supra note 264, at 284; Washburn, supra note 263, at 2343.
\textsuperscript{357} BEALE ET AL., supra note 343, at §1-3, 1-11, 1-14.
\textsuperscript{358} Id.
\textsuperscript{359} Id.
approving of new state constitutions.\textsuperscript{360} The grand jury was adopted by each of the new states as an important procedural safeguard, but not guaranteed as a right to be indicted by grand jury, except in North Carolina, Pennsylvania, and Delaware.\textsuperscript{361} In 1789, James Madison submitted amendments to Congress, including one amendment that stated “in all crimes punishable with loss of life or member, presentment or indictment by grand jury shall be an essential preliminary,” which as modified was ratified on December 15, 1791 as the Fifth Amendment to the United States Constitution.\textsuperscript{362}

As new states were admitted, each adopted the grand jury system, which guaranteed that no one could be held to answer serious criminal charges unless he had been indicted or presented by a grand jury.\textsuperscript{363} Grand juries were particularly active in the new trans-Appalachian territories, where they performed functions in addition to approving criminal charges, and were independent, leading to clashes with prosecutors and judges.\textsuperscript{364}

By the middle of nineteenth century, voices arose to criticize and abolish the grand jury as an expansive and cumbersome relic, being a threat to individual liberty because of inquisitorial procedure; these criticisms reached their peak at the end of the nineteenth century.\textsuperscript{365} The Supreme Court in Hurtado v. California\textsuperscript{366} ruled that prosecutions by indictments are not

\textsuperscript{360}YOUNGER, \textit{supra} note 347, at 36.
\textsuperscript{361}BEALE ET AL., \textit{supra} note 343, at§1-3, 1-17.For detailed historical discussion of adoption of grand jury in states constitutions in each state, see \textit{id.} at §1-4, 1-15-1-20.
\textsuperscript{362} See \textit{id.} at §1-3, 1-19(The Fifth Amendment provides “ No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”).
\textsuperscript{363}BEALE ET AL., \textit{supra} note 343, at §1-4, 1-20.
\textsuperscript{364}Id. at §1-4, 1-20.
\textsuperscript{365}Id. at §1-5, 1-21; Decker, \textit{supra} note 342, at 346.
\textsuperscript{366}Hurtado v. California, 110 U.S. 516 (1884).
applied to states criminal prosecutions either by the Fifth Amendments or by the Fourteenth Amendment due process clauses. In other words, state prosecution, whether the indictment is mandated or not, is governed by state constitution, statutes, and procedural rules.\footnote{367}{BEALE ET AL., supra note 343, at §8-1, 8-14.} It was not until this time that some states started to add more options for prosecutors to prosecute through information. Currently, twenty-seven states have eliminated mandatory grand jury screening, adopting prosecution by information in at least some types of cases. The remaining twenty-three states continue to be indictment states unless waived by defendants.\footnote{368}{Id, at §8-2, 8-15.} In federal jurisdictions, the constitutional requirement of charge by indictment for capital and infamous crimes is an essential procedure in felony prosecutions.\footnote{369}{Infamous crime refers to imprisonment for more than one year.}

\subsection*{2.2. Screening Function of the Grand Jury}

From an historical perspective, what makes the grand jury most desirable and reputable as an institution is its protective role against oppression from the Crown or the government. However, as a closer examination of historical examples demonstrates, the grand jury can be both protective and abusive against the citizens; this is seen in the Colledge case, where the government could always look for a different grand jury to indict. Moreover, as Professor Leipold has stated, “even when a grand jury did act as buffer, their decisions appear to have been based more on the political nature of the charges and ideology of the jurors than on the strength of the accusation.”\footnote{370}{Leipold, supra note 264, at 287.} Thus, its major function seems to strengthen shielding against political accusation and persecution instead of ordinary criminal cases. It is unknown whether the grand
jury provides a screening function in normal criminal cases, although many believe that it does not.

Based on empirical evidence from official statistics in federal jurisdictions, of all 17,487 cases in 1984, the grand jury returned 17,419 indictments and only screened out 68 cases.\textsuperscript{371} The empirical statistics more or less show that the grand jury fulfills some screening function, and its role as a shield stands firm in the view of the judicial eyes. The United States Supreme Court so far remains a supporter of the institution, upholds that the traditional function it played is effective even when faced with sharp criticism, and has recognized more than once that the grand jury shields citizens against government.\textsuperscript{372} A complete study of the mechanism and procedure of the modern grand jury, as well as the insights of proposals by reformists to modern grand jury procedure, may be able to advance the effectiveness of the proceeding as well. Both are analyzed to further my alternatives to reform Taiwan’s current situation.

2.2.1. Inquisitorial Nature of Screening Process

In the federal criminal justice system, the right to a grand jury indictment in felony cases is protected and mandated by the Fifth Amendment to the Constitution, unless waived by the defendant. In federal jurisdictions, the grand jury performs both investigating and indicting functions. In states jurisdictions, the investigating grand jury may be specially convened, while


the indicting grand jury may be convened regularly, such as every month. After the grand jury finishes the investigation and/or prosecution, it will return a true bill or no bill. The trial will be activated by an indictment, namely a true bill with a signature by prosecutors in federal jurisdictions and state jurisdictions whose jurisdictions adopt grand jury mechanism.

One striking feature of the grand jury is the inquisitorial nature of its procedure, which differs from a jury trial. Unlike the adversarial jury trial or preliminary hearing, no rival parties may be present during the grand jury session, which permits only prosecutors to present a one-sided story without ever hearing the defense or a counterargument by the target. What prosecutors may present are witnesses’ testimonies, material facts, and documents. The one-side story presented may be the truth, a partial truth, or largely false, and is highly likely to be a biased story. Given that the prosecutor is not obligated to present favorable evidence or exculpatory evidence, the facts will not be tested or challenged by the target, i.e. the prospective defendant. As a consequence, the grand jury is exposed to a single version of the facts and asked to apply a legal standard - is there “probable cause” to believe that the suspect committed the crime-to those facts.

Additionally, there are not many procedural safeguards to protect the prospective defendants. The prosecutor is the exclusive legal expert who dominates the whole proceeding; there is no judge present to protect the target’s rights during the investigation or screening. The

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target of the investigation may not know she is being investigated in the current procedure. It is fair to conclude that the target’s fate is in the prosecutor’s hands even with the screening filter of the grand jury. The ex parte feature sounds a cautionary note to prosecutors to stand by neutrality, and to remember that the interest of criminal prosecution is not simply winning the case.

The non-rivalrous, ex-parte procedure makes the mechanism seem less effective in that no balancing mechanism exists for the protection of the target. Moreover, the Sixth Amendment right to counsel is not applicable in grand jury proceedings because the right attaches only when adversarial judicial proceeding commences. Being devoid of the right to counsel and the right to defend oneself (i.e. the right to testify) undermines the fundamental value of procedural fairness, which in turn makes the process inquisitorial in nature and unable to shield innocent citizens. This puts a target in an unfair proceeding where she has no legal right to challenge the charge or defend oneself before the grand jury, but only to rely on the discretion of the grand jury to allow her to testify on her own behalf if she wants to do so.

A target indicted by the

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375 United States Attorney’s Manual, Title 9-11.153 prescribes that when a target is not called to testify the prosecutor, in appropriate cases, is encouraged to notify such person a reasonable time before seeking an indictment to afford him or her an opportunity to testify before the grand jury, subject to the conditions set forth in USAM 9-11.152.

376 See James F. Holderman & Charles B. Redfern, Preindictment Prosecutorial Conduct In The Federal System Revisited, 96 J. CRIM. L. & CRIMINOLOGY, 547-548 (2006) (noting that United States Attorney Manual states “The prosecutor’s responsibility is to advise the grand jury on the law and to present evidence for its consideration. In discharging these responsibilities, the prosecutor must scrupulously fair to all witnesses and must do nothing to inflame or otherwise improperly influence the grand jury”).

377 Id. at 556.

378 Id. at 553. But United States Attorney’s Manual, Title 9 §11.152 prescribes that:

“Accordingly, under normal circumstances, where no burden upon the grand jury or delay of its proceedings is involved, reasonable requests by a “subject” or “target” of an investigation, as defined above, to testify personally before the grand jury ordinarily should be given favorable consideration, provided that such witness explicitly waives his or her privilege against self-incrimination, on the record before the grand jury, and is represented by counsel
The grand jury suffers comprehensive unfairness and disadvantages in such an *ex parte* process. It is not an overstatement to say that the grand jury investigation and screening adopts an inquisitorial procedure.

### 2.2.2. Grand Jury Process

Theoretically, the grand jury has dual functions, but the functions are not separate in its procedure. The mixed function of the grand jury enables the grand jury both to investigate the potential crime as well as screen the evidence. Thus, the grand jury has the authority to call witnesses themselves, question witnesses, subpoena additional documents, and discuss the case with the prosecutor regarding the facts and evidence.\(^{379}\) The goal is to determine whether the threshold of the prosecution’s burden of probable cause has been satisfied, whether the charge is warranted and to determine whether there is sufficient evidence to believe that the target committed the specified crime.\(^{380}\)

In practice, prosecutors call witnesses one at a time into the room, ask questions, and present documentary evidence.\(^{381}\) In some simple cases the prosecutor may only call one witness, the law enforcement agent who is managing the case, to brief facts and to summarize other witnesses’ testimonies, which is in the form of hearsay evidence.\(^{382}\) Prosecutors control the

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\(^{379}\) Leipold, *supra* note 264, at 266, 305.

\(^{380}\) *Id.* at 294.

\(^{381}\) *Id.* at 266; Holderman & Redfern, *supra* note 376, at 548-549.

evidence that will be disclosed to the grand jury and present inculpatory evidence that constitutes probable cause to believe the target committed the crime. After the case is fully presented *ex parte*, the witness and court reporter leave the room to allow the jurors to deliberate; their task is to decide whether to accept the prosecutor’s recommendation and return a true bill charging the suspect with a crime. If the grand jury finds sufficient evidence to establish probable cause, it will indict; otherwise, it will return a no bill.

Theoretically, grand jurors are allowed to take the following information into consideration in deciding whether to indict:

“(1) in most jurisdictions, in keeping with historical tradition, grand jurors are authorized to consider any information known to the grand jurors personally; (2) grand jurors can ask their own questions of witness offered by the prosecution; (3) grand jurors have authority to insist that additional witnesses or physical evidence be subpoenaed; (4) many jurisdictions recognize a supervisory authority of the court to insist that the grand jury consider particular evidence where that is needed to prevent a miscarriage of justice; (5) in those jurisdictions that place an obligation on the prosecutor to present to the grand jury material exculpatory evidence known to the prosecutor, a prospective defendant may seek to take advantage of that obligation by making such evidence known to the prosecutor; and (6) although the grand
jury traditionally is an *ex parte* proceeding, a few jurisdictions give the prospective defendant a right to testify before the grand jury.\textsuperscript{383}

Although a grand jury can take a different approach in state jurisdictions, most protective procedural safeguards are not available in federal jurisdictions. In addition, the grand jury is composed of lay citizens without legal training or education, and it is doubtful that it could operate independently from the dominance of prosecutors. The grand jury appears to be a rubber stamp for the prosecutor and for whatever charges she wishes to pursue. Furthermore, the function seems to be more dampened because the prosecutor is not required to turn in exculpatory evidence or favorable evidence to the grand jury, as was declared by the Supreme Court.\textsuperscript{384} Without reform, it is unknown whether the grand jury can fulfill its intended role as a protective force against unfounded prosecution in modern days. Other than the democratic and participatory features that attract attention, unlike the preliminary hearing, the grand jury allows no right of defense, nor the right to cross examination of the witness as an adversarial procedure does. Most obviously, the grand jury requires a greater degree of procedural fairness and participation of the party whom is being investigated before it can play a true screening role.

2.2.3. Threshold of the indictment

The threshold level of evidence for a grand jury to indict is not identical to that for the petit jury. Whether prosecutors have proved guilt beyond a reasonable doubt at trial is different to that of whether prosecutors have presented sufficient evidence to establish probable cause that

\textsuperscript{383}LAFAYE ET AL., *supra* note 311, at 241(alternation in original).

\textsuperscript{384}See infra Williams case.
the target committed the crime. What the threshold level for indictment should be depends on the goal the screening mechanism intends to achieve. Obviously, the lower the standard, the less effective the screening function and the fewer cases eliminated. Conversely, the higher the standard, the more the screening mechanism comes into play.

How much evidence satisfies the sufficiency requirement may differ from jurisdiction to jurisdiction. The basic rule of sufficiency demands that prosecutors establish probable cause to believe that a defendant has committed the crime. The probable cause standard originally arose from judicial screening by magistrates, before or after an arrest, which is only permitted under the Fourth Amendment if there is probable cause to believe that the defendant has committed the offense. It not only constitutes a first screening that looks into whether the alleged suspect is about to commit or has committed the offense, but also protects the factually innocent by checking whether probable cause has or has not been found. However, mere probable cause is a “weak screen for factual guilt, i.e. the accused who actually commits the substantive criminal law offense with the requisite intent without any excuse or justification, because it focuses on whether the defendant committed the proscribed conduct.”

If the pretrial screening is aimed not exclusively at factual guilt, but at demanding the state to meet the legal guilt requirement, the higher the threshold is set for evaluating legal

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385 See Brinegar v. United States, 338 U. S. 160, 175-176(1949) (noting probable cause to arrest “exists where the facts and circumstances within knowledge and of which the reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested”).
386 See Arenella, supra note 269, at476-479 (noting factual guilt accused means the accused who actually commits the substantive criminal law offense with the requisite intent without any excuse or justification. In order to determine factual guilt accused, procedural mechanism must be provided to judge the legal and factual issues).
387 See id. at 479 (noting legal guilt means the final result of that criminal process).
guilt before indictment, the more screening value it could achieve. Currently, there is no threshold distinction between the preliminary screening and the Gerstein hearing or the issuing of an arrest warrant. Some courts claim that the probable cause to arrest is identical to probable cause to indict.\textsuperscript{388} Because there is no evidentiary limitation by which the magistrate considers the existence of probable cause, evidence that is excluded and suppressed at trial is freely used in the two screening phase.\textsuperscript{389} If the grand jury screens on the basis of an identical standard to determine whether the government’s evidence would warrant a reasonable person to believe the accused has committed the crime, then it is to be expected that the grand jury cannot effectuate the screening function. As Professor Arenella noted “Whether the grand jury screen factual or legal guilt depends on the type of probable cause standard it applies and what evidence it considers.”\textsuperscript{390} It is senseless to adopt identical screening standards in two chronological phases of the pretrial process. As mentioned previously, the probable cause to arrest standard is functionally incapable of screening legal guilt because it considers all types of evidence, including inadmissible evidence.\textsuperscript{391}

A viable solution would be for the grand jury to raise the screening standard to improve its function for weeding out both factual and legal innocence cases that cannot withstand the more stringent evidentiary rules applicable at trial. For example, some state courts have suggested the use of a \textit{prima facie} evidence of probable cause, which requires prosecutors to prove the case to a degree where the evidence amounts to a \textit{prima facie} case that a potential

\textsuperscript{388}See \textit{id.} at 485-486 (noting that some courts limited the grand jury screening to factual guilt by equating both probable causes).
\textsuperscript{389}\textit{Id.} at 478-479.
\textsuperscript{390}\textit{Id.} at 485.
\textsuperscript{391}\textit{Id.} at 478.
defendant had committed a crime.\textsuperscript{392} New York, for example, provides “The grand jury may indict person when evidence before it both establishes all elements of crime and also establishes reasonable cause to believe that accused committed crime to be charged; [the] first prong requires that people present prima facie case and [the] second prong dictates degree of certitude which grand jurors must possess to indict.”\textsuperscript{393}

Although the \textit{prima facie} standard brings much more confidence to the screening process, it is debatable whether such a standard requires evaluation of the quantity of the government’s evidence and expertise of application of evidentiary rules to the offense. Despite being fraught with technical difficulties and the need for expertise, the probable cause decision made after adopting stricter and higher standards would be much more reliable and would bring the decision closer to being correct and to the degree of legal guilt that warrants a future conviction. While advocating a higher standard, one also cannot ignore the fact that a grand jury indictment is not a conviction reached at trial. To demand the prosecution to reach beyond reasonable doubt in the screening stage imposes unnecessary harshness on the prosecution as well. The reasonable point is somewhere in between.

2.2.4. Evidentiary Rules

To prove that a person is legally guilty demands strict evidentiary rules applied at trial, where only admissible evidence that could withstand strict suppression hearing may be used to

\textsuperscript{392}See \textit{id.} at 487 (quoting that dismissal of an indictment because the indictment was not supported “by any evidence, competent or otherwise, to establish a prima facie case”); \textit{LAFAVE ET AL., supra} note 311, at 241.

\textsuperscript{393}People v. Jennings, 504 N.E. 2d 1080 (N.Y. 1986).
prove guilt beyond reasonable doubt. Both hearsay evidence and unconstitutionally obtained evidence are inadmissible to convict the accused. The use of illegally obtained evidence or unconstitutionally obtained evidence in violation of the Fourth and Fifth Amendments jeopardizes the integrity of criminal justice and dishonors defendants’ constitutional rights. To deter police misconduct, strict evidentiary rules bind the admissibility of evidence at trial in adjudicating guilt. However, to indict a person is not the equivalent of convicting a person. Should identical evidentiary rules be applied to the grand jury proceeding as well?

The Fifth Amendment requires that federal prosecution for felonious crimes must be initiated by grand jury indictments or presentments, but there is nothing more in the language of the Constitution. The Supreme Court has rejected an argument that an indictment should have been quashed because the grand jury had relied on “some,” not “all” inadmissible evidence.\textsuperscript{394}\textsuperscript{\textsuperscript{3}} Whether an indictment wholly based on inadmissible evidence should be quashed is still in question. Moreover, the extent of the adoption of evidentiary rules at the grand jury stage differs among jurisdictions. Federal and state evidentiary rules in the grand jury differ as well. It depends on the goal and function that a screening system intends to achieve. The more screening a system wishes to accomplish, the more that the evidentiary rules applied at trial should equally apply to the screening phase.

As our analysis proceeds, we will find out if the benefits of such an application outweigh the associated costs. On the one hand, the adoption of complete evidentiary rules is not practical in that there is no suppression hearing commenced at the grand jury, there is no sitting judge to

\textsuperscript{394}\textsuperscript{3}Holt v. United States, 218 U.S. 247-248 (1910).
decide the admissibility of evidence, and adoption would make the screening a replication of the trial, which is an unnecessary process. On the other hand, judging from effective screening and the avoidance of wrongful indictments, the application of evidentiary rules enables a more correct charging evaluation and brings the outcome closer to the outcome of the trial.

In federal jurisdictions, the Supreme Court has demonstrated antagonistic views towards application of evidentiary rules in grand jury. First, the Court has declined to quash an indictment because it was supported by incompetent evidence.\textsuperscript{395} In Costello v. United States,\textsuperscript{396} the defendant challenged an indictment that was based solely on hearsay testimony by three investigators who had not directly witnessed the alleged transactions. The three witnesses only summarized the vast amount of evidence of the transactions and presented hearsay evidence. The Court expressed two major reasons to knock down the challenges. Starting from America’s English ancestor, the Crown, the grand jury’s freedom to consider unlimited information should not be hampered by rigid procedural rules that aim to ensure a fair determination of guilt or innocence.\textsuperscript{397} Therefore, such unlimited information and evidence enables the grand jury to evaluate a prospective defendant’s guilt, and the kind of screening function it exercises will be only to single out factual innocence, not legal innocence.

The Court also noted the potential pretrial delay as an adverse consequence in the determination of the adequacy and competence of evidence if such evidentiary challenges were allowed. The Fifth Amendment does not require the grand jury to look into evidence on that

\textsuperscript{395}Id. at 245.
\textsuperscript{396}Costello v. United States, 350 U.S. 359 (1956).
\textsuperscript{397}Arenella, supra note 269, at 492.
issue. Besides, such evidentiary inquiry ensures no assurance of a fairer trial because the rules of evidence would be applied to the trial as well. The Court concluded that “a legally constituted and unbiased grand jury, like information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits.” As a consequence, there was justification in rejecting application of “rigid procedural or evidentiary rules” that were designed to ensure fairer decisions of legal guilt in the adversarial procedure. This is a reflection of the Supreme Court’s view that the grand jury is set to single out factual guilt.

The Supreme Court concluded that judicial supervision of the quality and quantity of the evidence relied upon by the grand jury “would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules.” The Court’s rationale does not support the notion of challenging the indictment based on the competency or adequacy of evidence. Rather it obviously conveys that the goal of grand jury screening is not to weed out the legally innocent, but only factually innocent citizens. The Costello decision has had an influence, not only on the admissibility of hearsay evidence in grand jury screening, but also to other incompetent evidence that could not be used otherwise at trial.

In its subsequent Calandra ruling, the Court followed the Costello philosophy and rejected challenges to the indictment on the basis of evidence obtained in violation of Fourth

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398Costello, 350 U.S. at 359.
399Id. at 362.
400Arenella, supra note 269, at 492.
401Costello, 350 U.S. at 364.
402Arenella, supra note 269, at 493.
Amendment. The Supreme Court again found that the adoption of the exclusionary rule would impede the grand jury in the performance of its investigative and accusatory functions, which could be inconsistent with its historical role.\textsuperscript{403} The Court declined to extend the rule to the grand jury because it would render no great deterrent effect to illegal police conduct, but would sacrifice the historical role of the grand jury.\textsuperscript{404} The Court concluded “the grand jury’s sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered.”\textsuperscript{405}

Historically, the grand jury was an accusing body, which did not play the role it plays today as a shield against the government; instead, it acted as a tool of the Crown. With the occurrence of a few famous historical events between the government and citizens, it transformed into a protective entity against oppressive government power. By analysis of the historical transformation to shield against unfounded charges in England, the grand jury should not indictment on the basis of the hearsay evidence, since the nature of hearsay evidence is unreliable and its use easily results in unfounded charges. To be sure, if the grand jury intends to be a buffer between the government and citizens, cases that bear the impossibility of acquiring legal guilt (conviction) should be eliminated; otherwise screening functions are impeded by the admission of these types of evidence.\textsuperscript{406}

\textsuperscript{403}See United States v. Calandra, 414 U.S. 344-345 (1974)(noting “an indictment valid on its face is not subjected to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence; or even on the basis of information obtained in violation of a defendants’ 5th Amendment privilege against self-incrimination”).

\textsuperscript{404}Id.at 351-352;United States v. Williams, 504 U.S. 50 (1992).

\textsuperscript{405}Calandra, 414 U.S. at 344-345.

\textsuperscript{406}Arenella, supra note 269,at 495.
Justice Powell argued that most prosecutors would not indict based on illegally seized evidence because they are unlikely to request an indictment where a conviction would not be obtained. But to rely on governmental self-restraint in order to rebut this attack against indictments is not likely to withstand criticisms. The screening mechanism is required because oppression and abuse of government power do exist in modern days. An example is the Supreme Court’s fashioning of the exclusionary rule to deter police misconduct in obtaining evidence. If we trust that the police would not encroach on the Fourth Amendment right of the people, there would be no need for the Supreme Court to fashion the exclusionary rule to restraint the police misconduct. Obviously, such an analogy applies to the prosecutor as well. Checks and balances are constantly required to review authority because self-regulation may not occur.

Most states follow the federal rules by state statutes or judicial rules; they do not bar the grand jury from considering inadmissible evidence and disallow judicial review of the evidence. For example, in Illinois, the exclusionary rule does not bar the grand jury from hearing illegally obtained evidence and use of illegally obtained evidence does not warrant dismissal of the indictment. There are also states that reject a “no review” rule. For example, New York’s Criminal Procedure Law § 190.65 (1) states that “Subject to the rules prescribing the kinds of offenses which may be charged in an indictment, a grand jury may indict a person for an offense when (a) the evidence before it is legally sufficient to establish that such person committed such

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407 Calandra, 414 U.S. at 351.
408 People v. Delaire, 610 N.E.2d 1277 (Ill. App. 2 Dist. 1993).
409 See Arenella, supra note 269, at563; see also N. Y. CRIM. PROC. LAW§ 210.30 (4) (Consol. 2013)(stating “If the court determines that there is not reasonable cause to believe that the evidence before the grand jury may have been legally insufficient, it may in its discretion either (a) deny both the motion to inspect and the motion to dismiss or reduce, or (b) grant the motion to inspect notwithstanding and proceed to examine the minutes and to determine the motion to dismiss or reduce”).

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offense provided, however, such evidence is not legally sufficient when corroboration that would be required, as a matter of law, to sustain a conviction for such offense is absent, and (b) competent and admissible evidence before it provides reasonable cause to believe that such person committed such offense.\footnote{See N. Y. CRIM. PROC. LAW§70.10(1) (Consol. 2013)(defining clearly that “Legally sufficient evidence” means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent”).} Therefore, New York bars the use of inadmissible evidence in support of the indictment and provides an ideal model for the grand jury system by restricting the nature of evidence that should be admissible and competent; otherwise, an indictment might be dismissed.

To rely solely on trial to vindicate all adversarial principles seems to undermine core values we try to protect and to delay the protection of the integrity of justice as well as delaying the deterrence of law enforcement misconduct. Pretrial screening would be effective if some strict evidentiary standard were to be adopted, and we could be assured that not only factually innocent would be shielded from trial, but that the legally innocent would not be subjected to a harsh trial and the consequential costs.\footnote{Andrew D. Leipold, How the Pretrial Process Contributes to Wrongful Convictions, 42 AM. CRIM. L. REV. 1123, 1124(2005).} Procedural safeguards and rigid evidentiary rules adopted at trial are equally important in the screening process, even though the trial has not commenced yet. The state should be obligated to present admissible evidence to accuse a person. The aforementioned values should be equally applied in the criminal justice process earlier to reduce the wrongfully indicted from being convicted. Through such stringent processes we could ensure the indictment does not stigmatize any innocent, but only the legally guilty who deserve criminal punishment.
2.2.5. Judicial Review of the Sufficiency or Competency of Indictment

Judicial review of the grand jury proceedings is often raised at the stage after indictment but before trial commences, although there are still some limitations imposed on the scope of the review due to the grand jury secrecy requirement. In other words, judicial review of an ongoing investigation should be restricted under the demand of secrecy and not obstruct the grand jury investigation. According to Federal Rule of Criminal Procedure 12(b)(3)(A), pretrial motions regarding defects in the grand jury “instituting of prosecution” must be raised prior to trial. Given that the scope and extent of this dissertation is the evidentiary basis and sufficiency of evidence in supporting the indictment, the judicial review discussion is circumscribed within the topics of “sufficiency” and “competency” issues.

Whether to adopt the probable cause to indict or *prima facie* standard, “sufficiency” and “competency” of evidence to support the indictment is a critical question for pretrial procedure. Criminal defendants often seek to challenge the validity of indictments on the basis of sufficiency or the competency of the evidence. But after Costello, all federal courts refused to review indictments on the basis of evaluating the sufficiency of the evidence. The Costello

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412 See BEALE ET AL., supra note 343, §9:19, 9-82-9-84 (enumerating four reasons that influenced the scope of the judicial review of grand jury proceedings. The first is being independent actor of the prosecutor or the court. The second is the grand jury secrecy. The third is the court’s reluctance to impede the grand jury investigation while the case is still under investigated. The fourth is the doctrine of separate of power that to impose restrains in reviewing the conduct of the prosecutor).

413 Id. at §9:19, 9-84.

414 See Arenella, supra note 269, at 487-488. (noting historically the rule of evidence at trial applied to the grand jury by quoting United States v. Reed, 27 F. Cas. 727, 735 (C.C. N. D. N. Y. 1852)).
Court not only permits the incompetent or inadmissible evidence to support an indictment, but also rejects judicial review of the indictment on the basis of such evidence.\textsuperscript{415}

In states, there are different practices that allow challenges to the sufficiency issue by judicial review. For the majority of states, however, an indictment is not subject to the kind of challenges that leads to dismissal of the indictment.\textsuperscript{416} Those states that adopt the federal Costello rule reject motions to dismiss the indictment on the grounds that the grand jury did not have sufficient evidence before it.\textsuperscript{417} Several others modify Costello minimally and “allow the challenges based on the total absence of evidence establishing a necessary element of the crime or challenges based on the absence of any testimony from a witness competent to testify.”\textsuperscript{418} In Illinois, courts have determined that it is not necessary to present evidence for each element of the offense charged in the indictment.\textsuperscript{419} The court has expressed that it will not consider the adequacy or sufficiency of evidence in dismissing an indictment except for a challenge on the grounds of “wholly” inadequate or incompetent evidence.\textsuperscript{420} In both types, courts recognize that the prosecutorial misconduct exception applies to these challenges.

For those states that reject Costello, the challenges of sufficiency or competency of evidence are permitted through statutes and judicial decisions. They have held that the defendant

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\item[\textsuperscript{415}]Id., at 493.
\item[\textsuperscript{416}]LAFAVE ET AL., supra note 311, at266.
\item[\textsuperscript{417}]Russell v. Commonwealth, Ky., 405 S.W. 2d 683, 684 (1966); State v. Blakey, 635 N.W. 2d 748, 751 (S. D. 2001).
\item[\textsuperscript{418}]LAFAVE ET AL., supra note 311, at266.
\item[\textsuperscript{419}]People v. Young, 581 N.E.2d 245 (Ill. App. 1 Dist. 1991).
\item[\textsuperscript{420}]See id. at 242, 245(noting that defendant was charged with possession of more than 10 and less than 30 grams of cocaine. The police conducted a random sample testing of the suspect substances weighed only 1.86 grams of the total amount of 16.87 grams substances. When the validity of the testing is sustained, it was proper for the officer to testify that the substances tested positive for the amount of 16.87 grams).
\end{itemize}
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with substantial grounds for dismissal of an indictment should not be compelled to enter trial. The court will not dismiss the indictment simply because the grand jury had considered the incompetent evidence; instead, the court will sustain the indictment if there was sufficient competent evidence to support a charge.421 However, “where the inadmissible evidence was so prejudicial as to necessarily have influenced the grand jury, the indictment may be dismissed notwithstanding otherwise sufficient legal evidence.”422

In New York, it provides the judicial review that the court could dismiss or reduce the indictment before trial when there is legally insufficient evidence to establish that the accused committed the offense.423 In People v. Bello, the court ruled that the reviewing court could consider the following:

Whether the evidence viewed in the light most favorable to the People, if unexpected and uncontradicted, would warrant a conviction by petit jury. Legally sufficient evidence is defined in CPL 70.10(1) as “competent evidence which if accepted as true, would establish every element of an offense charged.” In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt. The reviewing court’s inquiry is limited to “whether the facts, if proven, and the inferences that logically flow from those facts supply

421 LAFAVE ET AL., supra note 311, at266.
422 Id.
423 See N. Y. CRIM. PROC. LAW§ 210.30 (4) (Consol. 2013)(stating “If the court determines that there is not reasonable cause to believe that the evidence before the grand jury may have been legally insufficient, it may in its discretion either (a) deny both the motion to inspect and the motion to dismiss or reduce, or (b) grant the motion to inspect notwithstanding and proceed to examine the minutes and to determine the motion to dismiss or reduce”).
proof of every element of the charged crimes” and whether “the Grand Jury could rationally have drawn the guilty inference.”

In another case, the court indicated “On a motion to dismiss, the reviewing court's inquiry is confined to the legal sufficiency of the evidence and the court is not to weigh the proof or examine its adequacy. Indeed, all questions as to the quality or weight of the proof should be deferred”.

In Alaska, the court expressed that a court could dismiss an indictment where the presentation of inadmissible evidence and the “remaining evidence is insufficient, or the probative force of admissible evidence was so weak and the unfair prejudice engendered by the improper evidence was so strong that it appears likely that the improper evidence was the decisive factor in the grand jury’s decision to indict.”

In addition, while many lower courts follow the Costello-Calandra rule, some allow an exception where there is prosecutorial misconduct that affects the decision to indict. The prosecutorial misconduct theory refers to the court supervisory authority to preserve the integrity of the judicial process by dismissing indictments that were based on prosecutorial misconduct that mislead the grand jury. These state courts will “review the evidence support for an

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426 The defendant’s prior bad acts evidence testified by two persons was barred and inadmissible evidence to prove “attempted” kidnapping and sexual assault offense and the court dismissed the two counts in that the evidence was likely the “decisive factor” in the decision to indict on these two counts. See Clark v. State, 953P.2d 159, 163 (Alaska App. 1998).
427 BEALE ET AL., supra note 343, §9:25, 9-104.
428 LAFAVE ET AL., supra note 311, at260.
indictment in conjunction with challenges based on prosecutorial misconduct or on a violation of the defendant rights by the grand jury itself.\textsuperscript{429}

Lastly, perjured testimony before the grand jury may be related to the sufficiency issue. Read strictly, Costello would bar such challenges, because they are related to the sufficiency or quality of evidence, and some courts will refuse to dismiss the indictment as long as the grand jury hears some other competent evidence.\textsuperscript{430} The reasoning is that the place to decide the reliability of evidence or testimony lies at trial, not in the screening procedure.

But growing discomfort over the philosophy of Costello to rely on the trial to cure errors of the grand jury prompted other federal courts to adopt a different approach. Some federal and state courts have followed “due process” approach, while others prefer “court’s supervisory power” approach.\textsuperscript{431} For example, in United States v. Basurto,\textsuperscript{432} the court indicated that the “Due Process Clause of the Fifth Amendment is violated when a defendant has to stand trial on an indictment which the Government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached.”\textsuperscript{433} The Circuit court reversed the conviction and established that the prosecutor’s constitutional duty is to inform the grand jury of the perjured testimony and not to allow the case to be tried based in part on

\textsuperscript{429}BEALE ET AL., supra note 343,§9:26, 9-142-9-143 (2nd ed.2012).
\textsuperscript{430}Arenella, supra note 269, at 545-546; Coppedge v. United States, 311 F. 2d 128, 131-132 (D.C. Cir. 1962).
\textsuperscript{431}BEALE ET AL., supra note 343,§9:8, 9-38.
\textsuperscript{432}492 F.2d 781 (9th Cir. 1974).
\textsuperscript{433}See id. at 785(The accused was indicted for violation of statutory offense because of perjured testimony).
perjured testimony.\textsuperscript{434} In Illinois state court, “courts could properly dismiss an indictment based upon perjured testimony if the denial of due process is established with certainty.”\textsuperscript{435}

However, the Basurto ruling is only one deviation from Costello. After Basurto, different circuits adopted different approaches. The Ninth Circuit has changed Basurto, so that judicial review of the evidence at the grand jury has resulted in dismissal of an indictment only in flagrant cases where known perjury relating to a material matter has been presented to the grand jury.\textsuperscript{436}

The Sixth Circuit had used the “court’s supervisory power” to dismiss an indictment when long standing misconduct had been demonstrated. It concluded that the court should review the untainted part of the evidence to decide if there was still sufficient evidence to support a conviction only if it was satisfied that the government could meet the burden of proof.\textsuperscript{437}

The Supreme Court in Bank of Nova Scotia v. United States adopted a different approach.\textsuperscript{438} The trial court dismissed all 27 counts, one of which was the claim that the state knowingly presented misinformation to the grand jury. The Court set up the prejudicial standard for non-constitutional errors in the grand jury proceedings where, unless such errors “prejudiced”

\textsuperscript{434}Id. at 786.

\textsuperscript{435}State v. Rivera, 390 N.E. 2d 1259, 1267 (1979).

\textsuperscript{436}See Arenella, supra note 269, at 548 (noting the Supreme Court rejected two appeals to indicate that only when the perjury leads cases to the issue of materiality, should the trial judge dismiss an valid indictment); United States v. Kennedy, 564 F. 2d 1329, 1338 (9th Cir. 1977); see also United States v. Bettencourt, 614 F. 2d 214, 216 (9th Cir. 1980) (noting that prosecutorial misconduct must be flagrant that violates the due process).

\textsuperscript{437}United States v. Adamo, 742 F. 2d 927, 940, 941 (6th Cir. 1984).

\textsuperscript{438}The district court dismissed an indictment on the ground of prosecutorial misconduct and irregularities in the grand jury proceedings. See Nova Scotia v. United States, 487 U.S. 250, 251 (1988).
the defendants, the district court could not dismiss an indictment.\textsuperscript{439} The Court also defined prejudice to mean that “the violations substantially influenced the grand jury’s decision to indict” or “if there is grave doubt that decision was free from such substantial influence.”\textsuperscript{440} According to the ruling, the Court categorizes such acts as prosecutorial misconduct and applies the harmless error standard. Therefore, for lower federal courts, it is still unclear whether the due process standard remains.

There is no doubt that an indictment based on perjury, knowingly presented by prosecutors, constitutes prosecutorial misconduct. However, if the indictment is based on sufficient and other competent evidence; it may still establish probable cause even if the perjury is presented at the grand jury. But, if such perjury testimony is material to the indictment and influences the decision to indict, should the defendant be granted a motion to dismiss an indictment?

Normatively, we could not accept that any innocent person is charged on the basis of false testimony that influences the decision to charge. As noted earlier, the prospective defendant is not allowed to confront or cross-examine his or her accuser at the grand jury. To detect whether testimony is perjury or not usually relies on other contradictory witness’ testimony, or cross-examination, in discovering inconsistencies or problems of credibility. Such judgment of perjury requires procedural safeguards such as the right of confrontation, i.e. cross examination, and right to counsel, which are attached to an adversarial trial. Without procedural

\textsuperscript{439}Id. at 255.
\textsuperscript{440}See Id. (The Court also noted that for constitutional error that makes the proceedings fundamental unfair, constitutes the presumptive prejudice. The court is not required to access the prejudicial impact).
safeguards, the detection of any perjury before the returning of an indictment is not possible, nor is it possible for the grand jury to find any viable means to discover perjury. Since procedural safeguards, like cross-examination, are not available to the defense in the grand jury, the pretrial screening mechanism is not able to screen \textit{ex ante} the perjury testimony. The perjury testimony is more suitable to be resolved at trial because such issues are highly related to credibility, but not related to admissibility or competency.

Because the grand jury is not adept at conducting an appropriate investigation of whether the testimony was falsely made, the defendant should be allowed to file a motion to dismiss an indictment that is grounded on such material perjury that influences the decision to indict. The judicial review of the indictment on the challenge of perjury testimony should be permitted to one where the perjury testimony substantially affected the decision to indict and the prosecutor had reason to know such testimony was perjured. Only then could we safeguard the innocent from being falsely accused and prevent them from entering trial.

2.3. Shortcomings of Grand Jury Mechanism

As put forth in previous sections, it does not take much effort to identify the shortcomings of the grand jury. Major criticisms focus on the effectiveness of the screening function rather than the investigative function. Many doubt the capability of grand jurors to play such a role in the determination of charging decisions, especially where complex crimes and complex legal issues are involved. Many also doubt the independence of the grand jury from the control of prosecutors in the absence of the assistance of the judiciary. It goes without saying
that these doubts are not groundless, as demonstrated by the famous saying in 1985 by the Chief Judge of New York State, Sol Wachtler, who noted that “a grand jury would indict a ham sandwich.”

Analysis of the grand jury defects may be divided into two categories. One category consists of the procedural defects; another consists of the defect in the ability to determine the threshold issue. The former part is the procedural unfairness that is embedded in the characteristics of the grand jury, including the inability of the target to be present during the grand jury session to testify, to cross examine witnesses, and to present a defense. The latter refers to the fact that the legal threshold of probable cause might be indistinguishable from the former stage of investigation, i.e. arrest, or preliminary hearing. These two defects need to be addressed and reformed to improve the current system.

The most striking part of the grand jury, also the part that condemns it, is its inquisitorial-like procedure. As many are enchanted with the adversarial style of criminal procedure in the United States and elsewhere, it is commonly recognized that the distinguishing features of the adversarial system emphasize procedural rights that uphold constitutional values and afford adequate remedies. Both parties are entitled to present their version of the stories. The prosecution bears the burden of proof and presents admissible evidence at trial. The truth will come out after debates back and forth by opponents during the proceeding to reshape and to

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441 See Washburn, supra note 263, at 2336 (noting this metaphor becomes a cliché).
442 See William T. Pizzi, The American “Adversary System”? 100 W. Va. L. Rev. 847, 852 (1998) (noting that there is no dispute that European trial systems have been influenced by the United States legal system with regarding to the rights of accused at trial and rights of the suspect during the investigation).
443 See Frase, supra note 30, at 786 (noting that the role of attorney becomes more active in several European countries and several countries have replaced the judge-dominant trial with partial adversarial proceedings).
amend the charging facts presented by prosecutors. What makes the adversarial procedure appealing is the balance of power between the rivalries.

A conviction demands stringent procedural safeguards to guard the individuals’ rights and strict evidentiary rules in admitting evidence and evaluating the probative value of evidence to prove guilt beyond a reasonable doubt. Typically, the adversarial model assures the right of the accused to confront witnesses, the right against self-incrimination, the presumption of innocence, as well as the need for proof beyond a reasonable doubt. However, no constitutional requirement mandates an adversarial nature in other parts of criminal procedure, such as in screening mechanisms, or the investigation stage. The Supreme Court in Gerstein acknowledged that an adversarial procedure is not constitutionally mandated to make a probable cause to arrest decision, but adversarial procedure might “enhance the reliability of probable cause determination in some cases.” As far as the adversary is concerned, the grand jury screening mechanism maintains the traditional form of accusing body and the inquisitorial process, which only allows the accusing side a voice, without affording an equal status and evenhand to the accused. Is it an institution out of date?

The Supreme Court, especially from the Warren Court, instituted many rights of defendants, in order to shield suspects from overreaching and overzealous law enforcement during investigation. Given the nature of preliminary hearings, it would be easy to recommend that a more adversarial style or at least some form of adversarial procedure should be applied to the grand jury. If that is the case, the two screening mechanisms become similar and redundant.

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Certainly, it is not desirable that multiple identical screening mechanisms are necessitated to double check the prosecution by an identical reviewing procedure. This argument should not be taken as a support for the view that the grand jury should maintain *ex parte* proceeding, however; the grand jury mechanism should arrange for more procedural safeguards or rights to promote fairer procedures to the potential defendant. Exactly as Professor Leipold has noted, “we are left with a situation that each additional procedural protection is desirable, but full procedural protection is undesirable. What is needed is a logical stopping point for the procedural critique.” The following analyzes major defects individually.

2.3.1. Inferior Status of the Target with Uncertainty of Evidentiary Rule

During the grand jury investigation, only one witness or only one target is allowed to be present at a time during the session, and defense counsel are never permitted in the grand jury room. Targets have no right to testify for themselves in federal cases; hence, no right to defend themselves, regardless of whether the benefits of testifying outweigh the cost of not testifying, or whether testifying makes facts clearer for the jurors. If they do appear before the grand jury, the powerless target or witness, without legal expertise and legal counsel, could not recognize whether to answer grand jurors’ or prosecutors’ questions or not, or whether he or she is entitled to exercise the Fifth Amendment right against self-incrimination.

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445 See Leipold, *supra* note 264, at 290 (noting the Supreme Court has held that the grand jury does not encroach upon the legal rights of witnesses called before it).
446 See United States v. Mandujano, 425 U.S. 564, 581 (1976) (noting that right to counsel does not attach when prospective defendant was questioned in the proceeding).
Those Supreme Court rulings worsen the prospective defendant’s status in a grand jury hearing, in that she has no right to present favorable evidence, to challenge the admissibility of evidence, or even to present a defense; this circumscribes the function of the grand jury. Given the rulings, the target is investigated in a more damaging inquisitorial-like environment. All these obstacles expose grand jurors only to the government’s story as presented by prosecutors, doing away with any defense and possibly skewing the facts. Accumulatively, these obstacles render the grand jury not only an unfair, but also an ineffective screening institution.448

Screening should protect more than just the factually innocent, it should also preclude the legally innocent from undergoing the trial in an effort to reduce the social cost. According to Costello-Calandra rule, a screening procedure may only single out the factual guilty to trial; but it should not exist exclusively for “factual guilty” screening.449 After all, a correct conviction is the ends of criminal justice. A wrongful conviction is what a criminal justice system attempts to avoid. If the screening procedure evaluates and selects, cautiously, defendants that more closely satisfy the threshold of legal guilt, the screening could prevent the occurrence of wrongful convictions.

Following this vein of thought, the same set of evidentiary rules should be adopted at the pretrial phase as at trial, as a fair procedural protection in considering whether prosecution could support a conviction or not. As Professor Arenella has noted “any pre-indictment evaluation of legal sufficiency will be complicated by the uncertain admissibility of some of the government’s

448 See Bernstein, supra note 382, at 579 (noting that the collapse of indicting grand jury occurred with the acquiescence of the Supreme Court in Costello); see also Fairfax, Jr., supra note 6, at 342-344 (noting that around 95% of cases indicted by federal grand jury).
449 Arenella, supra note 269, at 492.
evidence, an uncertainty that will be resolved only after indictment.\textsuperscript{450} Thus, the reform proposals of the grand jury, or reform of Taiwan’s screening mechanism, must advocate moving in such a direction.

The goal for the grand jury is to weed out cases that bear insufficient evidence to support a conviction, including cases that rely on inadmissible evidence, weak cases that could not support a conviction, or cases that might arise from political issues that result in political persecution which is inherently unwarranted. Thus, the grand jury, as an intermediate switch between trial and investigation, should be redesigned in a way that actually distinguishes groundless cases from those supported by sufficient evidence. In order to effectively screen cases, the better way would be to provide fair procedures that equalize the parties and affords prospective defendants more procedural protections, such as the right to assistance of counsel and the right to testify. While being cautious not to replicate the petit jury in grand jury screenings,\textsuperscript{451} the intent is only to afford more rights to present opposite versions of the same event, as in the adversarial style.

2.3.2. Threshold Problems

Another defect of the grand jury concerns the screening (proof) threshold determination. Whether the prosecutor proffers sufficient evidence to prove probable cause is one thing, but whether the evidence has risen to a standard that convinces grand jurors of the screening

\textsuperscript{450}Id. at 480.
\textsuperscript{451}Leipold, supra note 264, at 289.
threshold is another. Grand jurors are lay citizens without legal experience in weighing evidence to decide probable cause after prosecutors present the facts and evidence. In reality, grand jurors have no idea of the quality of charges and the quantity of the evidence. The grand jury basically is unable to review the case without the assistance of prosecutors. It is predictable that jurors will align with what prosecutors, the only legal experts, present during the grand jury proceeding and conclude that probable cause exists to support a true bill.\textsuperscript{452}

By comparison, for petit juries, proof beyond a reasonable doubt is a more succinct and simple judging standard because any reasonable doubt should undermine the standard and result in an acquittal. If petit jurors find proof that satisfies this standard, they find the accused guilty. Even though the jurors have less experience in assessing evidence, weighing credibility, and nailing down flaws in testimony, such a task requires no special legal skill.\textsuperscript{453} The legal level of proof beyond a reasonable doubt is the maximum in quantity and quality. In any event, the petit juries are able to determine the level of proof beyond a reasonable doubt.

In contrast, screening threshold or probable cause determination “is qualitatively different than a trial jury’s verdict, and these differences are crucial to the ability of the two panels to perform their respective functions.”\textsuperscript{454} Since there is no way to quantify screening thresholds, no one can define how much evidence is sufficient to amount necessary to surpass the screening threshold. Certainly, grand jurors without legal training and experience could not decide on the threshold alone. The problem lies in the uniqueness of the screening threshold, which is

\textsuperscript{452}Id. at 294.
\textsuperscript{453}Id. at 296.
\textsuperscript{454}Id.
different from reasonable doubt. The notion of probable cause or a screening threshold requires more complex calculations, applications, perceptions, and explanations, an uneasy task for laypersons. Therefore, it is doubtful that the grand jury could play such role in weighing screening thresholds or probable cause determinations as its sibling, the petit jury, does with reasonable doubt.

There are several other instances where the “probable cause” standard is applied in other phases of criminal procedure. One is the arrest of a suspect by police before applying for an arrest warrant; another is the decision by a magistrate whether to issue a search warrant; yet another is the preliminary hearing to review a prosecution by a magistrate. All apply identical standards by professionals who handle professional decisions routinely. One-time grand jurors or even several-times jurors with several months experience, rely on prosecutors in the grand jury room for their determinations, instead of their own evaluation or judgment. Unlike the jury trial, defendants are not afforded the right to counsel and jurors cannot listen to the defense’s argument to counteract prosecutorial bias. Grand jurors do not hear from an adversarial defense before determining the screening threshold and are not afforded an independent legal expert to assist them to make such determinations.

2.4. Abolition of the Grand Jury

Modeled as a check on prosecutorial charging discretion, the grand jury in modern days has not garnered the fame it did in the past. On the one hand, skepticism repeatedly raises its head. The death knell of the grand jury has never ceased to be tolled by both the abolitionists
and reformers. On the other hand, voices argue that the grand jury should be maintained in its original form, a sentiment echoed in current Supreme Court rulings.

The abolitionists are skeptical of the modern grand jury’s independence and ability to filter out cases to shield the innocent.\textsuperscript{455} Judge William J. Campbell suggested replacement of the grand jury by prosecutorial information and a full preliminary hearing before a magistrate judge.\textsuperscript{456} However, abolition would not be a viable plan because the elimination of felony prosecution by a grand jury conflicts with the mandatory requirement enshrined in the Fifth Amendment of the Constitution. As originalism of the Constitution illustrates, the aim of the grand jury is to hear the voice of community, to resist the authority from the central government, and to protect innocents from political oppression. As such, the grand jury clause is viewed as an “anti-federalist” check on federal power.\textsuperscript{457}

There is no conclusive evidence to prove that the current federal grand jury fails in the function of screening and aids in unfounded accusations.\textsuperscript{458} As two practitioners noted in their article, of all defendants indicted, 65.2% pleaded guilty or \textit{nolo contendere}, 12.5% were convicted at trial, 3.5% were acquitted at trial, and 18.8% were dismissed.\textsuperscript{459} In a conservative estimation, prosecutors have a conviction rate of over 85%, which indicates no widespread error or abuse as to whom to indict by the federal prosecutor.\textsuperscript{460} Practitioners also described how “experienced grand jury members ask incisive questions of witnesses, make helpful suggestions

\begin{footnotes}
\item[456] Id.
\item[457] Washburn, supra note 263, at 2346.
\item[458] Sullivan & Nachman, supra note 340, at 1052.
\item[459] Id. at 1058.
\item[460] See id. at 1059 (The authors noted that the dismissed part covers various situations, including prosecutors dismiss an indictment because of insufficient evidence).
\end{footnotes}
as to which witnesses or documents the prosecutor should subpoena and which leads the prosecutor should pursue. In addition, the grand jury gives the prosecutor a preview for how the case will appear to a petit jury.\textsuperscript{461} The institution represents community voices towards the target investigated or the issue in question in that specific case.\textsuperscript{462}

The last and most important question is whether the participation of the grand jury helps to prevent overzealous prosecutors during the secret procedure. Citizen participation plays a critical role in shielding the accused from oppressive power or authority when the legitimacy of the law or its application is in question. If a valid law is evil in and of itself, then mechanical application of general law would lead to injustice and bring about an evil result that caters to the needs of authority or government. It would be too late to amend the law by the time the Congress abolishes it or the Supreme Court announces it unconstitutional. Therefore, from Shaftesbury to Stephen Colledge to Zenger, the grand juries had vetoed prosecutions by returning no bills. It showed the will of the community not to charge offenses which were unpopular or unjust,\textsuperscript{463} regardless of whether these political dissidents committed the charged offenses or not. In other words, the grand jury not only screens the sufficiency of evidence, but also reviews the legitimacy of laws intended to be applied and the legitimacy of the application of general laws in the specific case.\textsuperscript{464} Also, the Supreme Court has expressed that “the grand jury is not bound to indict in every case where a conviction can be obtained.”\textsuperscript{465} This expression is a clear indication that the grand jury operation can be representative of the political nature and

\textsuperscript{461}Id. at 1052.
\textsuperscript{462}Fairfax, Jr., supra note 6, at 352.
\textsuperscript{463}See Washburn, supra note 263, at 2346 (noting that speech of criticizing government, which Zenger was charged, ought not to be illegal).
\textsuperscript{464}Id. at 2346.
ideology of the jurors where the legitimacy of the application of law is in question in the view of the community.

Citizens’ collective participation in the decision not to indict would enhance the democratic value and the legitimacy of the decision. The peoples’ will is the bedrock of the legitimacy of law. Peoples’ involvement in the criminal justice system increases the democratic process of the decision and supports the prosecutor when a true bill is returned in high profile, corruption, or cases involving political figures. It can be used to prevent an opponent’s accusation of bias in the charging decision-making. Even in ordinary cases, peoples’ involvement as a check on prosecutorial power enhances the system’s democratic value. By contrast, a non-indicting decision by the grand jury acknowledges that the case presented was not considered a crime by contemporary social norms. Supporters have consistently recognized this role and function since establishment of the body.

Idealistically, the image of citizen participation in criminal justice is a valuable institution in a democratic society. The kind of idea is not new; jury trials are a common practice in common law countries. Likewise, having a grand jury to check on government power is identical to peer-review to assure that the judgment is not manipulated by external influence. Citizen participation by peers also gives rise to confidence and trust, in that the citizens’ direct input in the determination of the prosecution means that citizens share the responsibility that traditionally was attributed to government power, thus bringing the decision closer to public morality.\footnote{Washburn, \textit{supra} note 263, at 2340-2341.}
2.5. Reform of the grand jury

Other grand jury critics advocate that reform would be the most plausible way to afford new life to the screening mechanism. Reformers, such as the House of Delegates of the American Bar Association, recommended that grand jury witnesses be afforded the right to counsel. The laypersons of the grand jury, in seeking the truth and evaluating factual guilt, are aided only by prosecutors without a fair counter-balancing voice in evaluating the whole story. It is not only the nature of the grand jury that is unable to screen out unfounded cases, but the procedure it operates that is inadequate for the task. As Professor Leipold points out, “the flaw is structural.”

Probably, one challenging notion with which reformers are faced is the concern of the Supreme Court that any reform of the grand jury procedure might not only delay the return of the indictment, but also redundantly repeat the trial jury’s work. Such concerns are reasonable.

The U.S. criminal process retains an accusatory process that encompasses adversarial trial procedures as well as proof beyond a reasonable doubt, elaborate pretrial evidentiary screening, the rigorous evidentiary standards of the trial, privilege against self-incrimination, and lay adjudication. Although the grand jury also plays an investigative and not just an adjudicative role, the grand jury screening function is rather more like a pre-adjudicative role. As the adversarial procedural model affords more procedural safeguards for the accused when

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467See Norval Morris, A Plea for Reform, Book Reviews, 87 YALE L. J. 680, 681-682 (1978) (noting the House of Delegates voted 186 to 93 to recommend that grand jury witness be afforded that right. Prosecutors are against these reforms for the easiness of acquiring a return of true bill or investigating crime).
468Leipold, supra note 264, at 311.
470Id.; Arenella, supra note 269, at 465-466.
compared to that of the inquisitorial model, it is well understood that reform to the grand jury procedure, leaning toward the adversarial style, is preferable to one that is fashioned after the inquisitorial model. Professor Leipold has noted that, “unless there is a clash of adversaries, grand juries composed of non-lawyers will be left to make a foregone legal conclusion, and thus will be a shield in name only.”

This requires reform more oriented toward party participation and adversarial procedures. The procedure that was devised to screen the prosecution should adopt to some extent the adversarial style and afford the accused (target) more of an even-handed arsenal to evaluate the prosecution. While it would be unwise to comprehensively replicate the adversarial process, adoption of some adversarial procedures would provide a fair process for the target and effectuate the screening mechanism in an unbiased way.

Besides, in the United States, where a guilty plea is often the norm, the pretrial procedure becomes the critical venue in adjudicating the defendant’s guilt. Therefore, Professor Arenella argued the “pretrial process should provide greater protection of the accusatorial values embodied in our legal guilt requirements.” As Professor Arenella borrowed Professor Packer’s terminology of “legal guilt” in describing the safeguards in whole criminal process:

“our system’s legal guilt requirements are the most distinctive for their attempt to maintain a fair accusatorial process before conviction (a fair balance of advantage between the state and the accused) by safeguarding the

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471 See Leipold, supra note 264, at 311, 313 (noting “as long as the grand jury proceedings is non-adversarial and as long as the jurors are asked to make a legal determination based on a single set of facts, there will be no reason to believe that prosecutors will refrain from submitting cases because they fear a no bill”).

472 See Arenella, supra note 269, at 468-470 (noting proving a factual guilty beyond reasonable doubt, i.e. conviction, requires fairness process which generates reliable outcome and requires the state to satisfy a fair process before reaching the outcome).

473 Id. at 473.
individual’s rights during the investigatory process and by requiring a reliable and independent adjudication of guilt before application of the criminal sanction.\textsuperscript{474}

These fundamental values should be equally applied to the pretrial process and the indicting process, to afford the accused the ability to challenge the accusation against oneself.

Currently, the capability of the accused to present evidence is seriously dampened under grand jury practice. In addition, the state is not obligated to present reliable and legally obtained evidence, which deteriorates the fundamental values we desire to achieve. Justice Stevens observed that “the prosecutor’s duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury.”\textsuperscript{475} As the Court of Appeals for the third Circuit recognized:

But the costs of continued unchecked prosecutorial misconduct are also substantial. This is particularly so before the grand jury, where the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact

\textsuperscript{474}See id (noting his version of legal guilt means the final result of that criminal process, which differs from the usage by Professor Packer who used the term to indicate procedural requirements that is not related to factual question of the actual person involvement in the charged offense).

\textsuperscript{475}United States v. Williams, 504 U.S. 62, 63 (1992).
that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened.476

That being said, to effectuate the screening function, avoid delayed pretrial process, and the inefficiency of a repetitive trial, there are three major fields that should be reformed to cater to these goals. First, adopting the evidentiary rules that are applied at trial to exclude hearsay evidence and illegally obtained evidence. Second, requiring a higher screening standard to enhance the quality of the government’s case, and incentivize the prosecutor to offer better evidence so that the grand jury can evaluate the prosecution on grounds that could potentially support a conviction. Third, in order to check whether the government complies with those rules during the grand jury process, a post indictment motion to dismiss by the accused should be available to challenge compliance and screen the sufficiency of the government’s case.

Neither hearsay evidence nor unconstitutionally obtained evidence is admissible in the determination of guilt or innocence at trial. Hearsay evidence is often unreliable, and illegally obtained evidence should be excluded despite its reliability to preserve other constitutional values. Both hearsay evidence and illegally obtained evidence should be excluded from being presented to the grand jury based on the same reason, unless pursuant to specific provisions that

admit such evidence. Application of these evidentiary rules that are designed to ensure fairer decisions of legal guilt in the trial would be much more effective and reliable in the determination of the indictment.

Prosecutors should not present illegally obtained evidence in support of their indictment. Not only does admission of such evidence undermine the integrity of justice, but also it could indirectly encourage unconstitutional misconduct by the police and other agencies. In allowing such presentation of evidence, the admission indirectly encourages such practice and provides a safe harbor for the prosecutor to bypass screening and move into trial. As noted above, around 90% to 95% of defendants plead guilty and do not stand trial in exchange for advantageous sentencing. Once indicted, if the defendant pleads to the charge, this kind of plea contributes to the miscarriage of justice and wrongful convictions if the relaxed screening mechanism plays no role in effective screening.

To avoid wrongfully convicting the innocent, proper screening aims to have such evidence taken away, thus providing a shield for the accused from repetitive damage, first from the illegal behavior by the law enforcement that obtained the evidence, and then from the use of the evidence to indict. Critics have suggested that in cases where doubts of constitutionality of

\footnote{Arenella, \textit{supra} note 269, at 559, 562, 563; Given the vast amount of reports or examinations conducted before trial, there are some specific provisions that allow some hearsay exceptions in states, such as in New York State. \textit{See} N. Y. CRIM. PROC. LAW§ 190.30 (2) (Consol. 2013)(allowing “A report or a copy of a report made by a public servant or by a person employed by a public servant or agency who is a physicist, chemist, coroner or medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, may, when certified by such person as a report made by him or as a true copy thereof, be received in such grand jury proceeding as evidence of the facts stated therein”);§ 190.30 (4)(Consol. 2013)(allowing “An examination of a child witness or a special witness by the district attorney videotaped pursuant to section 190.32 of this chapter may be received in evidence in such grand jury proceeding as the testimony of such witness”).}
the evidence gathering arise, the indictment should not be dismissed, but a reviewing court should disregard the particular evidence in the determination of “sufficiency.” Accordingly, the reviewing court should only exclude the particular evidence in the evaluation of the sufficiency issue. Dismissal will be issued in rare cases only when the indictment was based totally on such evidence.

Second, the screening threshold is directly related to the effectiveness of the screening, and the capacity of the total caseloads that a criminal justice system bears. The more stringent the standard is, the higher the possibility to gain conviction at trial, and the less wrongful convictions occur. In In Re Winship, the Supreme Court noted that

“the reasonable doubt standard is a prime instrument for reducing risks of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-the bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law. . . . Moreover, use of reasonable doubt is indispensible to command respect and confidence of the community in applications of the criminal law. It is critical that moral force of the criminal law not be diluted by standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of criminal offense without

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478 Arenella, supra note 269, at 564.
convincing a proper fact finder of his guilt with utmost certainty . . . . We explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

As Winship states, the standard of proof should not dilute the moral force of criminal law. If the grand jury intends to ascertain the potential target and shield innocent from unwarranted charges, the screening should raise the standard of proof to weed out cases unsupported by sufficient evidence and protect the legally innocent from being subjected to trial. The rule of sufficiency of evidence requires that prosecutors prove their case to a higher degree than is demanded by probable cause.480

The probable cause to arrest standard is a much lower standard for performing screening functions. The probable cause to arrest or search standard in the pretrial process could not actually screen out legally guilty defendants. In fact, it is mainly targeted toward the factually guilty person as Costello ruled. Actually, as Professor Arenella puts it, “probable cause may exist despite factual innocence if the defendant lacked the requisite criminal intent or acted under circumstances that justified or excused the conduct.”481 In addition, it is meaningless to have screening standards set to such a low level in the pretrial process.

480 See N. Y. CRIM. PROC. LAW § 210.20 (Consol. 2013) (stating “Motion to dismiss or reduce indictment.1. After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that: (a) Such indictment or count is defective, within the meaning of section 210.25; or (b) The evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense”).
481 Arenella, supra note 269, at 479.
Accordingly, one viable solution would be raising the screening standard to improve its function. Some state courts have adopted the *prima facie* case of probable cause, which demands some evidence in proving each element of the offense, which if not rebutted, would be sufficient to support a conviction. Where adopted, the *prima facie* standard could result in a more reliable decision and bring the prosecution closer to the degree of the legal guilt requirement that warrants a future conviction at trial.

Third, one barrier to reforms such as these in the United States is the rule in Costello, the Supreme Court case that barred judicial review of indictment based on the quality of the grand jury evidence. Nonetheless, an institutional design that requires motions to dismiss an indictment on the basis of legal insufficiency of evidence should be required to review the transcripts of the grand jury to decide whether the government has presented evidence pursuant to the new proposed evidentiary rules and the threshold standard.

Many U.S. states reject Costello, and have not had the problems that supporters of the Costello rule fear. Neither before nor during the grand jury session is there a way for the accused to challenge inadequate submission of evidence and the insufficiency of the indictment issue; thus, there should be relief set up after the post indictment phase. New York criminal statutes have given trial judges the power to dismiss the indictment before trial if the evidence presented was insufficient to support the charges. New York state courts have also ruled that

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482 See *id.*, at 493 (the Supreme Court not only permits the incompetent or inadmissible evidence to support an indictment, but also rejects judicial review of indictment on the basis of such evidence by court’s supervisory power in federal).

483 See N. Y. CRIM. PROC. LAW § 210.30(4)(Consol. 2013)( stating “If the court determines that there is not reasonable cause to believe that the evidence before the grand jury may have been legally insufficient, it may in
the reviewing standard is to inquire and consider whether the evidence viewed in a light most favorable to the prosecution, if uncontradicted, would warrant a conviction by petit jury.\textsuperscript{484} Post-indictment screening allows the court to review the grand jury record and the evidence considered to decide whether to dismiss an indictment.

3. Conclusion

Through the analysis and comparisons of the disadvantages of these screenings, this dissertation sides with many other critics to suggest that a dramatic, or at the very least, a marginal reformation of the grand jury is an essential way to effectuate the screening function. Otherwise, the operation of the grand jury and its associated cost of exercise will not be paid off if those rudimentary structural defects are not eliminated and corrected. Notwithstanding the grand jury being intended to be a buffer between the citizens and the state, given the limited safeguards afforded by the grand jury screening, a limited screening function is played out in its process. Besides, research shows that the dismissal rates screened by preliminary hearings are much higher than those screened by the grand jury,\textsuperscript{485} not to mention the procedure safeguards with adversarial procedures, especially in states such as New York that vindicate the core values of criminal justice and result in a more reliable outcome of the screening mechanism. As a result, the preliminary hearing is much more of a model for the reform of the screening

\textsuperscript{484}Bello, 705 N.E.2d, at 1210-1211; People v. Galatro, 639 N.E.2d 8(N.Y. 1994).
\textsuperscript{485}See RONALD JAY ALLEN ET AL., supra note 371, at 962(noting that the dismissal rate of the grand jury appears to be less than one percent).
mechanism in Taiwan. In the following part, this dissertation will examine the contemporary Taiwan screening mechanism.

II. Screening Mechanism in Taiwan

As mentioned in chapter 2, criminal charging in Taiwan adopts a mostly mandatory prosecution system. This system actually emerged from distrust of prosecutorial authority in continental system and was created to bar the abuse of prosecutorial charging power. The continental systemic ideology emphasizes the uniform and unitary order in the exercise of power and averts discretionary exercise of it.

Theoretically speaking, prosecutors in Taiwan have no discretionary power in charging of felony cases. However, when the prosecutor exercises her charging powers, she could abuse the charging power, even though they operate in a mandatory prosecution system. For example, the prosecutor charges with insufficient evidence that does not meet the charging threshold, which is a violation of the mandatory requirement, yet nevertheless files the prosecution; in such a case there has been an abuse of the charging power. Conceptually, this is not abuse of discretionary power; instead it is abusing the charging power. Other than the type of abusing the charging powers, charging decisions may be erroneous decisions in judging mandatory requirements or in evaluating the threshold requirements.486

486 Criminal law is one way of supervision of prosecution when the prosecutor intentional abuses their charging power. However, criminal law is not direct supervision; rather an ex post supervision. This supervision is not the procedural screening to the prosecution which directly affects the indictments’ validity. See Zhong Hua Min Gao Xing Fa(Criminal Code of Republic of China] art. 125 (2010)(Taiwan).
In 2002 and 2003, the Legislature in Taiwan separately enacted new provisions and revised criminal procedure to enforce the NJRC conclusions. In order to have more party involvement in the process and protection of right to defense, as well as to reestablish the trust of citizens, reformers look to the adversarial style of the United States for insights. One of the critical characteristics of the newly enacted system is to establish the role and obligation of the prosecutor at trial, including bearing the burden of proof by the prosecutor and ascertaining that the burden rests on proof beyond a reasonable doubt. Additionally, the presumption of innocence was codified in law for the first time, as already announced many times by the Constitutional Court before the new legislation. Both of these are basic principles of modern criminal procedure in many International Covenants and advanced countries.

Because the law clarifies that the prosecutor bears the burden of proof, the judge discontinues the prosecutor’s investigation at trial. The judge’s interest, role, and duty theoretically are no longer aligned with those of the prosecutor. Judges play mostly a neutral role at trial, except in limited situations where the judges are required to conduct inquiry, as expressed in the conclusions of the Supreme Court’s criminal division’s meeting.487 In order to review prosecutors’ charging decisions and supervise the requirement of mandatory prosecution, Taiwan enacted screening mechanism for prosecutors’ charging decisions in the Code of Criminal Procedure, Article 161,488 which affords judges the power to prohibit cases that do not

487 See Zui Gao Fa Yuan [The Supreme Court], Zui Gao Fa Yuan Yi Bai Ling Yi Nian Du Di Er Ci Xing Shi Ting Hui Yi Ji Lu [The 2th the Supreme Court Criminal Divisions’ Meeting Conclusion Transcript 2012](Taiwan), Jan. 17, 2012, available at http://tps.judicial.gov.tw/faq/index.php?parent_id=589 (noting obligation of the prosecutor to bear the burden of proof ought to be disentangled with obligations of the judges’ fact-finding or judicial inquiry on the basis of the judges’ impartial role. The judge’s inquiry therefore is circumscribed at the interest of the defendant to maintain a systematic interpretation).

488 Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 161(2013)(Taiwan) (stating that preceding to the first trial date, if the court finds that the method of proof indicated by the public prosecutor is obviously insufficient to
meet the requirement of mandatory prosecution from proceeding to trial and also to afford the accused another opportunity to challenge the prosecution.\footnote{LIN, supra note 233, at 112.} The following lay out detailed illustrations of the goal of the mechanism, and procedures of screening, evidentiary rule as well as any drawbacks of the design.

1. Purpose of the Screening

Under the demand of mandatory prosecution, once there is sufficient suspicion to believe the accused has committed the crime, the prosecutor is obligated to prosecute. This also symbolizes the “obligation of the prosecutor’s proof.”\footnote{LIN, supra note 3, at 164.} As described, the prosecution is subjected to compulsory prosecution principle to restrain its charging discretion. Theoretically speaking, there is no abuse of such decision as long as the prosecutor adheres to the mandatory requirement. But, how could we be sure of the mandatory prosecution not being abused or misused? If the prosecutor misjudges or violates the requirement of mandatory prosecution and charges the accused, i.e., there is no sufficient evidence to hold a suspicion to believe the accused has committed the crime, should the judge proceed to the trial? If the prosecutor is negligent in carrying out her job, should the judge step into the role of the prosecutor at trial? Would the judge lose her neutral character if she is obligated to gather evidence? If there is no distinction between the obligation of evidence gathering and investigation by the prosecutor and judges’ official inquiry, then the judge has to officially inquire as to the truth, and replace the prosecutors’

\footnote{establish the possibility that the accused is guilty, the court shall rule the public prosecutor to supplement additional evidence within a specified time period; if additional evidence is not supplemented within the specified time, the court may dismiss the prosecution. Once the ruling to dismiss the prosecution becomes final, no prosecution can be reinitiated for the same case, unless specified conditions in the article 260 exist).}
obligations. Would this system undermine the society’s confidence and discredit the judge’s objective role?

Considering the U.S. screening mechanisms, the goal of screening is not to decide whether the accused is guilty but rather to provide protections against unfounded prosecutions and to check whether “sufficient evidence” exists to proceed to trial. Likewise, when the prosecutor submits insufficient evidence to justify a trial, the judge should supervise the prosecution to prevent the abusive prosecution and to check the prosecutor’s decision. In a word, the first goal of a screening mechanism is to justify entering into a trial, to warrant a trial, and to prevent the abuse and erroneous use of prosecution.

The second goal emphasizes that the prosecutor bears the burden of proof at trial. Most considered that this revision resulted from fortifying the prosecutor’s burden of proof. Thus, to further scrutinize prosecution by the use of a screening mechanism in order to strengthen the prosecutor’s burden of proof is one of the major objectives. Stated differently, a screening mechanism in Taiwan is to alter the traditional continental practice where both the judge and the prosecutor were used to play an active role in investigating the facts and gathering evidence, to one where the judge plays mostly a neutral role in evidence gathering.

491 Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 163 II (2013)(Taiwan).
493 Ching-You Tsai, Xing Shi Su Song Fa Di Yi Liu Yi, Di Yi Liu San Tiao Xiu Zheng Hou Zhi Xin Si Wei, Xin Zuo Wei[New Concept and Exercise of the Revised Code of Criminal Procedure Article 161 and 163], 1067 Si Fa ZHOU KAN[JUDICIAL WEEKLY](Taiwan), 2-3 (2002).
This goal is misguided because the screening mechanism has nothing to do with the “burden of proof” of prosecutors. Taiwan’s legislative intent seems to mistake the two as one. Critics noted that the revision rationale to ascertain and to strengthen the “burden of proof” is not justified to institute this screening mechanism. After all, the screening process is not meant to review whether the prosecutor’s proof justifies a conviction, but to ban abusive prosecutions or unfounded prosecutions at the pretrial stage. The legislative rationale seems to blend the two separate notions into one idea and insert the burden of proof into the wrong phase of the criminal procedure.

The third goal is to protect the innocent. If the prosecutor fails to convince the courts that the evidence is sufficient to prove the accused committed the crime, the prosecutor should dismiss the case. If she charges the accused anyway, it can result in many discriminatory and devastating effects to the accused. The accused might suffer losses and costs of all sorts. There should be a procedural phase installed between the investigation and the trial to check whether the prosecutor has provided sufficient evidence to justify advancing to trial. Otherwise, the accused shall be protected from harassment by the prosecution and shall not be subjected to trial. Thus, the goal of protecting the innocent is actually the most critical one of all because wrongful prosecutions contribute to wrongful convictions and wrongful imprisonments.

The last goal is also based on the idea of preserving limited resources. The criminal procedure can be a long and complex process that involves limited resources and personnel that could be deployed elsewhere. From investigation to conviction and enforcement, the prosecution

494 HWANG, supra note 224, at 373.
initiates the process to trial, and thus brings about all the associated costs. When the government
prosecutes meticulously, the trial court may convict the guilty.

2. Ex-Post Screening

Unlike the mechanisms in the United States and France, Taiwan’s screening mechanism
occurs after the prosecution has been initiated. In the United States and France, the screening
mechanisms or supervising mechanisms are installed as a safety valve between investigation and
trial. In the United States, prosecution undergoes different layers of screening right before
initiation of the charge.

Increasing the difficulty of obtaining an indictment would enhance the quality of
prosecution and reduce the number of prosecutions because the prosecutor would have to present
the best evidence and better-prepared cases that could withstand multiple layers of examinations.
It takes effort to convince external screening institutions that there is sufficient evidence to
justify the charge, and the prosecutor has every incentive to present her best evidence to persuade
the screener. Additionally, an indictment would be more warranted under many layers of
supervision, albeit at the cost of time-consuming procedures. Accordingly, critics have claimed
that the mechanism is supposed to occur before the prosecution begins in order to supervise and
prevent erroneous charging decisions.\textsuperscript{495} Altering the screening stage might incentivize the
prosecutor to strengthen and better prepare her case in order to obtain an indictment.

\textsuperscript{495}JAW-PERNG WANG, XING SHI SU SONG JIANG YI(Er)[CRIMINAL PROCEDURE II], 95 (2003).
Currently, based on the Taiwan Code of Criminal Procedure Article 161, the screening point is established “prior to the first trial date.” This means that the prosecutor has instituted an indictment before the screening takes place. As stated in chapter 2, with regard to the prosecutorial bureaucratic structure, an indictment is internally reviewed by her superiors, i.e., head prosecutor and chief prosecutor, before filing with the court. Formally, the superiors look over prosecutorial decisionmaking and give administrative directive over the case if they disagree with the decisions or demand more investigation, but the superiors too are subject to the constraints of mandatory prosecution and their directives cannot run contrary to those constraints. But in reality, how careful a hierarchical supervision is or whether it has been conducted is really an empirical issue that has not been researched. The extent to which an internal screening takes place depends on many variables that may not be found in books. Even assuming they do supervise correctly, the prerequisite of forming an indictment in Taiwan is that only one internal administrative screening has to be set before prosecution.

The superiors review the dossier prepared by the prosecutor in order to decide whether the charging decision is grounded in facts and evidence and to carry out the will of the chief prosecutor if she has specific directives. Once approved, the case is closed and transferred to the court without any additional external screening. After the prosecutor indicts the accused, the case goes public, which could bring about many discriminatory and disadvantageous effects to the accused.
To be sure, the system is better off with the screening device than without it, because it could indirectly deter the abuse of prosecutorial power under current law.\footnote{Id.} However, the screening mechanisms in countries like the United States and judicial supervision in France are set to review prosecution before it is made to the court to directly achieve the screening goals. By contrast, Taiwan’s design is set at the phase that could not perform the screening function before the case has made it to court. Hence, when the judge dismisses a case before the trial, much of potential harms and devastating effects caused by the indictment are realized and irreversible.\footnote{There are a few cases that defendants committed suicides after being indicted, which caused irreversible regret. There is even suspect to commit suicide while being investigated due to all kinds of reason, one of which is being investigated and revealed by the media. The wrongful charge itself does bring irreparable harm to the defendant. See e.g., Bai Wen Zheng Shen Wang Bei Xin Zui Shi Dao Huo Xian? Zi Sha Biao Qing Bai?[Wen-Cheng Bai Passed Away, The Offense of Breach of Trust Is theFuse? Committing of Suicide to Demonstrate Innocence?], Jin Ri Xing Wen Wang[Nownews](Taiwan), July. 4, 2008 http://www.nownews.com/2008/07/04/10844-2299386.htm, (last visit Jun. 22, 2012) (noting that Yuanta Securities ex-president Bai Wen Zheng committed suicide while being investigated with the suspected transaction of selling his stock shares in a high price to the Yuanta Securities involving with the offense of breach of trust).} Comparatively, the mechanisms of the United States and France function directly in achieving the goal of protecting the innocent, or reviewing the case to avoid an abuse of charging power, as well as erroneous prosecutorial judgments. Pre-indictment screening also sounds a notion of deterrence to the prosecutor to better prepare her prosecution.

In addition, the screening procedure is readily mixed with the pretrial proceeding, i.e., preparation of trial, if set “prior to the first trial date.”\footnote{Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 273(2013)(Taiwan) (providing that the preliminary preparation proceeding before the first trial date to arrange the following matters: 1. The prosecution and its scope and any circumstance that might change the offense charged with as cited by the public prosecutor; 2. Whether the accused pleads guilty to the crime charged and determines whether to apply summary trial procedure or summary procedure; 3. Main issues of the case and evidence; 4. Opinions regarding the admissibility of the evidence; 5. Informing the parties to motion for investigation of evidence; 6. The scope, order and methods of investigation of evidence; 7. The presentation of exhibits or evidential documents; 8. Other trial related matters).} The preparation of trial” is a pretrial session (conference) that arranges and coordinates the trial affairs, including inquiring whether
the defendant pleads guilty, if not, her defense, the opinion on the admissibility of evidence, the presentation of witness lists to be called at trial, exhibit lists, the investigation of admissibility of defendants’ confessions, and other main issues regarding admissibility of the evidence.

As a result, the screening procedure might be mixed with the pretrial proceeding. It is unknown whether the judge makes good use of the screening procedure in order to protect the innocent and weed out unfounded cases. As described in the U.S. preliminary hearing or the grand jury, independent screening procedure is a distinctive procedure unless it is waived. Independent phase also mandates the judge to play the screening function effectively. Since the goals of the screening procedure and pretrial proceeding are distinguished from each other, the screening ought to be carried out before the preparation proceeding in order to avoid unwarranted or abusive prosecution. If the case has proceeded to the pretrial proceeding, it is not appropriate to dismiss the case.499

3. Screener

As noted, before prosecution, the prosecutors’ decisions to charge are under no external check or supervision, only internal superiors’ review within the prosecutors’ office. Although internal hierarchical supervision may screen the decision, the extent and the effect of it is invisible to the public and, therefore, cannot win the public confidence. As Professor Jaw-Perng Wang has noted, the public has distrusted prosecutorial internal supervision in the past, even if

499LIN, supra note 233, at 112.
the internal screening was held to high standard. \textsuperscript{500} It is, therefore, concluded that to gain an indictment before trial in Taiwan is not difficult. To impose external supervision is a much more convincing method of supervision and screening, from the public’s perspective.

The screening is conducted by a three-judge panel who try the case in the subsequent trial. Neither the independent screening procedure nor the independent judge is set and exercised before prosecution. Therefore, the trial judge who tries the case is authorized to review the dossier (the case file and the evidence). Stated differently, no independent screening procedure and no additional panel of judges is set up for performing the screening function. Unlike Taiwan, both the United States and France position different judges, like magistrates in the United States, or investigating judges in France, to perform screening mechanisms or add another layer of neutral investigation. The grand jury screeners, composed of lay citizens, perform such a function democratically. Normatively, the screening performed by a third party or a different institution in an unbiased view bears much confidence, like those reviewed by the magistrate. Hence, the design in Taiwan that does not separate the trial judge from the screening judge might draw some doubts. As to the transplant of the grand jury as a screener institution, it is a bigger legal construction that could be achieved especially when the citizens lack the confidence of the judgment of the judiciary and strongly demand civic participation in the decisionmaking as well as inserting the democratic element into the charging. Since some doubts have been raised with regard to the grand jury independence and effectiveness, this dissertation does not advocate to transplanting the grand jury institution to Taiwan.

\textsuperscript{500}WANG, supra note 495, at 91 (noting that internal control is readily criticized that it is exercised under the black box even if the internal control holds high standard).
A second question is whether the trial judge who tries the case is also suitable to review the dossier, to decide whether to dismiss the case, and to try the merits of the case. Some professors claim that installation of the screening judge is a necessity, in that the maintenance of the impartial role of a trial judge is doubtful when she had found that the charge is warranted and prior to trial. Stated differently, the trial panel might be predisposed to convict the defendant simply because the case is justified by the screening. Therefore, some think to separate a group of judges as reviewers maintains the unbiased role. One Taiwan district court judge has argued that the best means is to separate the screening judge and trial judge in case handling to maintain the unbiased role, but from a practical perspective, it could be considered that having trial judges taking turns to play screening judges might be a solution when facing the contemporary problem of a shortage of judges.

4. Screening Procedure

The screening procedure adopts dossier review without any independent and public procedures. According to the Code of Criminal Procedure article 161, if the court considers that “the method of proof indicated by the public prosecutor is obviously insufficient to establish the possibility that the accused is guilty,” the court shall require the prosecutor to present additional evidence to reach the “obvious sufficient” threshold within a specified time period. If additional evidence is not presented within that period, the court may dismiss the prosecution by a ruling.

501 Yu-Xiong Lin, Lun Zhong Jian Cheng Xu-De Guo Qi Su Shen Cha Zhi De Mu Di, Yun Zuo Ji Li Fa Lun [The intermediate stage procedure: the Goal, Exercise and Legislative Perspective of Screening Mechanism in German], 88 TAIWAN BEN TU FA XUE [The TAIWAN L. REV.], 69(2002).
502 See Wu, supra note 492, at62-63.
The operating procedure is that the panel merely reviews the *dossier* to evaluate evidence sufficiency. As mentioned, current screening procedure is not an independent procedure; rather, it is a procedure affixed to the pretrial preparation. It, therefore, has two distinctive characteristics. One being that it does not afford the accused the right to participate. The other is that the accused have no legal rights to a screening. Hence, the accused are not entitled to challenge the indictment and to express their arguments with regard to the requirement of mandatory prosecution, evidence, and law application. The following analyzes the two parts.

First, from a comparative perspective, in the United States, the preliminary hearing accords the accused the right to call witnesses and question the witnesses until probable cause is found. Both parties could perpetuate the testimony and prevent the unavailability of or tampering with the witnesses before the trial. It could be deemed that the accused has a right to have the case screened. Even if the defendant is denied preliminary hearing, because the prosecutor takes the case directly to the grand jury, the case is still screened. Of course, in that case, it is done by lay jurors in secret rather than by a judge in a public proceeding. The defendant has the right to, at least, grand jury review (unless waived), and therefore it can be said that there is a right to have the case screened. As the analysis goes, given there is no independent screening procedure in Taiwan, there is no idea whether the judge does in fact wield her screening power to weed out unfounded charges. Because the law affords no legal right for the accused to a judicial screening, the accused could not request the screening and challenge the indictment; instead passively waiting for the judiciary screening. As a consequence, there is no way for the accused to know whether her charge was warranted, and there is no means to check
whether the judiciary has exercised its authority. Critics have advocated the legal right to apply for screening by the accused.\footnote{See id. at 61.}

Second, according to the Taiwan criminal procedure, the prosecutor has to indicate “method of proof,” i.e. different types of evidence to prove the elements of crime, in the indictment so that the judge can review whether the prosecutor has presented “sufficient evidence” to demonstrate the charging evidentiary basis. Nonetheless, this is not an indication that the screening court proceeds by a public proceeding, but only an indication of the prosecutor’s burden to point out the proof in the indictment in order to satisfy the reviewing threshold. Hence, the screening is without the participation of the accused.

Comparatively, in the United States, preliminary hearing allows more input from the accused. The accused can present the witnesses and crossexamine the prosecutor’s witnesses. In France, as addressed in the next section, the defense is allowed to present her witnesses, have the investigating judge conduct specific investigations, and have more input during the instruction process. In Taiwan, the accused is not entitled to take part in the screening or to challenge the indictment. Moreover, there is no adversarial proceeding in the screening that allows the accused to challenge the indictment. It is unknown whether the judge exercised the given authority because no check or independent hearing was set for the accused to express their challenges for indictment. That Taiwan could reform the screening procedure to allow more participation by the accused in bringing challenges to the indictment is an intuitively viable blueprint in making the screening function effective.
Third, when the court considers that the method of proof is obviously insufficient to establish the possibility that the accused is guilty, the court shall rule that the prosecutor must present additional evidence, i.e., to supplement additional evidence, to reach the “obvious sufficient” threshold. A ruling to demand additional evidence is essential before the court dismisses a case for insufficiency of evidence. Only when the prosecutor fails to comply with the court’s order could the court dismiss the prosecution’s case. The order to present additional evidence is not allowed by interlocutory appeal.\(^{504}\) A dismissal ruling may be appealed according to the Code of Criminal Procedure article 161 section (5). According to the legislative judicial committee hearing, some deemed that such ruling refers to the norm of prosecutorial authority to order the police officials to supplement additional evidence or continue their investigation.\(^{505}\) Likewise, the ruling to demand the police officials to present additional evidence is considered applicable to judiciary power to issue ruling to the prosecutor as well.\(^{506}\)

Critics have expressed that it is not appropriate for the trial court to rule what evidence should be supplied for the element of crime and what types of evidence are lacking. The screening mechanism aims to check whether the prosecution has abused or violated the requirement of mandatory prosecution. Regardless of whether a court is situated in an adversarial system or continental system country, it should play an impartial role in screening whether the

\(^{504}\)See Peng, supra note 492, at 299.

\(^{505}\)See generally Li Fa Yuan Di Si Jie Di Liu Qi Si Fa Wei Yuan Hui Xin Shi Su Song Fa Di Yi Bai Liu Shi Yi Tiao Ji Di Yi Bai Liu Shi San Tiao Xiu Zheng An Zeng Qiang Dang Shi Ren Jing Xing Zhu Yi Ji Cai Xing Xin Zheng Gong Kai Zhi Du Zhi Ke Xing Xing Gong Ting Hui Wei Yuan Hui Ji Lu[Legis. Yuan, 4th Term, 6th Sess., Judicial Comm. Public Hearing Minutes], 90Lì Fa Yuan Gong Bao[LEGIS. YUAN GAZ.] (No. 56) (Taiwan), 169-170 (2001) (statement from Professor Tsai Tun-Ming of National Taiwan University expressed the analogical thought of the supplement rule from the prosecutor and police work relationship).

\(^{506}\)Id.
prosecution has abused its authority and whether sufficient evidence justifies opening the
gateway to trial. Since it is clear that the judge shall maintain an unbiased role in reviewing the
prosecution’s case and shall firmly hold the presumption of innocence; the judge shall not direct
the prosecutor toward the “insufficiency” part of the evidence. Furthermore, the judge shall
not entangle herself with one party of the case nor indicate to the prosecutor which part of
evidence in the dossier is insufficient. This would result in the self-conflicting role of the judge
and breach the checks and balances relationship between the judiciary and the prosecutor.
Critics have mentioned that, from the outsider’s perspective, the judge and the prosecutor are
allied in combating the crime.

To be sure, the judge is not superior to the prosecutor to make such an order to present
additional evidence. This law creates the illusion that the prosecutor is subordinate to the
judge. The image of the two siding with each other to combat the crime also seems inappropriate
for the role of judiciary the law affords. Professor Jau-Yih Hwang noted that to require the
prosecutor to supplement additional evidence destroys the relationship between the judge and the
prosecutor because the judge guides the prosecutor to present specific evidence and becomes
hierarchically superior to the prosecutor.

507See id. (statement by Professor Ke Yaw-Cheng of National Chung-Cheng University expressed that the revision
violates the principle of presumption of innocence, and asks the judge to prejudge the case in violation of the
protection of human right).
508LIN, supra note 233, at 115; Wu, supra note 492, at 66-67.
509LIN, supra note 233, at 115.
510HWANG, supra note 224, at 375.
5. Evidentiary Rules

Evidentiary rules assist the criminal justice system in ferreting out the truth and set limits on what information an adjudicator can evaluate. The goal of evidentiary rules is to ensure accurate results because of mistrust of juries to search for the right facts. According to the Code of Criminal Procedure, article 159, section II, hearsay evidence is admissible in the screening procedure. Currently, the prevailing academia agrees that stringent evidentiary rules should not apply at the screening stage. The law keeps silent with regard to whether exclusionary rule of the illegally obtained evidence applies to the screening procedure as well. Professor Jaw-Perng Wang claims that trial evidentiary rules should not apply to the screening stage on the basis of the following reasons: (1) the different goals at the trial and screening stages; the trial is to decide whether a defendant is guilty, and, by contrast, the screening procedure is to decide whether the prosecution has adhered to the standards of mandatory prosecution. Therefore, screening process should not replicate trial. (2) avoidance of unfair outcome—exclusion of all out of court statements is unfair to the prosecution and to society. (3) the goals of the screening mechanism and exclusionary rule are different, in that the latter deters police misconduct, while the former is screening. Therefore, the exclusion of

512 Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 159(2013)(Taiwan) (states “Unless otherwise provided by law, oral or written statements made out of trial by a person other than the accused, shall not be admitted as evidence. The provision of the preceding section shall not apply to the circumstances specified in section II of Article 161, nor to the case in a summary trial proceeding or where sentencing is ordered by a summary judgment; the same rule shall apply to the review of the application for detention, search, detention for expert examination, permission for expert examination, perpetuation of evidence and other compulsive measures.”).
513 WANG, supra note 495, at110.
514 Id. at111.
evidence in the screening phase is inconsistent with the goal of this process.\textsuperscript{515} Since the law is silent to the evidentiary rules, it is unclear whether in practice the exclusionary rule applies to the screening process.

Comparatively, in the United States, the rules of evidence do not apply at the screening proceeding in federal jurisdictions and some state jurisdictions because it poses a great administrative burden and cost to administration of the criminal justice. But, in some state jurisdictions, rules of evidence apply at their screening hearings. This is actually a criminal justice policy choice concerning how much a system desires the screening function to achieve, and how much screening we want to institute in order to do away with unfounded cases. If evidence that shall be excluded at trial is admissible while screening, then unfounded prosecutions can result in entering into trials, thus leading to the very thing the screening is trying to avoid. It also depends on the purpose of the screening. Adoption of stringent evidentiary rules that are identical to trial and are meant to screen prosecution in order to reach a more correct outcome and bring the prosecution closer to the conviction is probably the better way to protect the innocent.

6. Threshold of the Prosecution and Threshold of Screening

The threshold question for the prosecution is to determine whether a case should be brought into trial. In Taiwan, sufficient evidence of suspicion that a suspect committed the offense in question triggers the prosecution. For example, the accused was found leaving the

\textsuperscript{515}Id.
victim’s residence with blood stains on his clothing and his leaving was caught on video camera, while one neighbor heard loud quarrelling inside the house before the accused rushed to leave. Then the prosecutor may collect the above evidence, including the video, clothing with blood stains on them, and witness testimony of the neighbor. Therefore, in this case, there is sufficient evidence to suspect that the accused committed the crime, and the prosecutor could prosecute the defendant for the crime of murder.

What if the accused just went by the victim’s house to pay a short visit and found his friend dead, the accused turned out to be shocked and then ran away? The accused tumbled over the body and got blood on his shirt, and the actual murderer had worn gloves to commit the murder, had just left before the friend came into the house, and had disposed of the murder weapon. Supposedly, the police had found the blood stained clothing, the video tape, and the witness testimony, could the prosecutor charge the friend? Should finding the murder weapon or a fingerprint on the murder weapon be necessary before prosecution?

There are different arguments with regard to the high or low threshold of prosecution. Professor Wang has noted that the charging threshold is obtained evidence that is sufficient to consider that the accused is suspected to have committed the offense. In one empirical analysis he interviewed 11 judges, 6 prosecutors, and 21 defense attorneys, with the exception of 6 interviewees, who considered that the quantification of the threshold is not possible, all other interviewees considered that the threshold is set where more than a 50% certainty the accused is

516 Wang, supra note 495, at102.
guilty is needed.\(^\text{517}\) But there were interviewees who held that the threshold should be 100% certainty.\(^\text{518}\) Professor Lin explained, from the German law perspective, that the threshold to prosecute indicates sufficient suspicion that evidence obtained through investigation is very likely to convict the accused (Hinreichender Verdacht) and suggests that as a threshold for Taiwan.\(^\text{519}\) Hence, the threshold of charging is a grey area that is at the discretion of different prosecutors. Currently, neither laws nor court precedents require prosecutors to prove a high degree of suspicion of commission of the offense.

Aside from the charging threshold, the screening threshold articulates a different standard of proof indicated by the public prosecutor is “obviously insufficient” to establish the possibility that the accused is guilty. The context obviously differs from the prosecution threshold in that the screening threshold is the “obviously insufficient possibility” to acknowledge that the accused is guilty.\(^\text{520}\) Professor Wang Jaw-Perng considered that this threshold is identical to *prima facie* of preliminary hearing in the United States.\(^\text{521}\) On top of that, he also noted that *prima facie* threshold is more predictable in context than “obviously insufficient” standard to establish the possibility that the accused is guilty.\(^\text{522}\)

The Judicial Yuan issued the guideline for the Code of Criminal Procedure Article 95 and


\(^{518}\)Wang, *supra* note 495, at102.

\(^{519}\)Lin, *supra* note 233, at 21; see also Lin, *supra* note 3, at 162-164 (noting from German’ perspective in the German Code of Criminal Procedure, article 170).

\(^{520}\)Wang, *supra* note 495, at102.

\(^{521}\)Id. at103.

\(^{522}\)Id. at104.
adopted an objective standard that the judge, by the objective, experienced, and logical rule, evaluate whether the evidence is obviously sufficient to establish possible guilt. This guideline is vague and uncertain. Different cases, screened by different judges, can result in different fates. Suppose, for example, the government prosecuted a sexual offense case on the basis of the victim’s testimony, pictures of the wounds, and the medical report regarding the wounds. A district court dismisses the charge. It is unclear whether such prosecution would be obviously insufficient to establish the possibility that the accused is guilty in the views of different judges. Certainly, a judge cannot draw any meaningful conclusions from the guidelines.

In another example, the prosecutor prosecuted a defendant for taking drugs and presented evidence of confession without the defendant’s urine report. Usually the judge will dismiss the charge since there is no corroborating evidence to prove the defendant was taking drugs outside of the confession. Under this example, it is clear such prosecution is obviously insufficient to establish the possibility that the accused is guilty of taking drugs. This conclusion, however, cannot be inferred from the guidelines.

As noted before, the screening standard is directly related to the effectiveness of the screening and the kind of evidence the screener could appraise, which is also related to evidentiary rule application. The threshold level that a system intends to adopt also depends on the goal the screening mechanism desires to achieve. A higher screening threshold brings more

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523Fa Yuan Ban Li Xing Shi Su Song Ying Xing Zhu Yi Shi Xiang Di Jiu Shi Wu Dian [Guidelines to the Criminal Court in Handling Criminal Procedure], art 95 (Taiwan).
524See Ping Dong Di Fang Fa Yuan [Ping Dong Dist. Ct.], Criminal Division,91Su Zi Di [No.] 251(2002) (Taiwan).
confidence that the system is weeding out both factually and legally innocent cases and ensures that a prosecution is more likely to warrant a conviction. Thus, this dissertation, in next chapter, will reexamine the different thresholds between the prosecution and the screening and the disadvantages they may bring, and then it proposes a new screening threshold that might be more efficacious.

There are two additional defects that are not addressed in current norm and have only been mentioned here. One is the right to defense counsel in screening mechanism; the other is that the discovery rule could become a legal loophole in Taiwan law if the screening mechanism is reformed, because the current norm of discovery adopts full discovery once the prosecution has been presented to the court. However, the legal loophole is required to be solved and adjusted accordingly once the law is reformed so that the screening procedure is an independent procedure and adopts an adversarial process. These relevant issues together with the necessary reforms are all addressed in next chapter.

III. Judicial Supervision of the Mechanism in France

1. Nature and Purpose of the Instruction

In the purely inquisitorial system, it is the state, rather than the adversary, that bears the responsibility of finding out the truth of the crime. The judge is charged with that responsibility, together with some variations that reallocate the authority to the prosecutor or share the authority
with the prosecutor.\textsuperscript{525} An inquisitorial system considers the judicial control of the investigation to be the key to overall judicial supervision.\textsuperscript{526} The investigation and prosecution are to be made by the judges or reviewed by them.\textsuperscript{527} Under such ideology, the French system adopts judicial control of the pretrial investigation in the case of serious crimes, while Germany entirely abolished the pretrial investigating judge notion in 1975.\textsuperscript{528}

In France, the judicial function embraces a broader sense than that defined in common law countries. The judiciary concept encompasses the investigative judiciary and adjudicative judiciary, also termed standing judiciary (parquet) and sitting judiciary (the juge d’instruction and the trial judge).\textsuperscript{529} As mentioned previously, the investigating judge, is authorized to undertake any lawful investigation, yet is not subjected to any kind of hierarchical control as is a prosecutor. The opening of the judicial investigation, which is mandatory in the most serious offenses, i.e. crimes that carry imprisonment for five years or more; named information or instruction, occurs when the investigation is passed to the investigating judge.\textsuperscript{530} To initiate the procedure is not up to the investigating judge, but is up to the prosecutor to refer the cases for investigation.\textsuperscript{531} This features the uniqueness that investigations of the most serious offenses have to be conducted by a judge, not by the prosecutor.

\textsuperscript{525}Goldstein & Marcus, supra note 33, 242.  
\textsuperscript{526}Id. at 247.  
\textsuperscript{527}Id.  
\textsuperscript{529}HODGSON, supra note 67, at 67; Hodgson, supra note 239, at 1367.  
\textsuperscript{530}HODGSON, supra note 67, at 209. See also Goldstein & Marcus, supra note 33, 250 (noting that this procedure represents a small proportion of criminal cases. For delit, offenses imprisoned from two months to five years, are tried in the Correctional court, the prosecutor has discretion to open a judicial examination).  
\textsuperscript{531}HODGSON, supra note 67, at 210.
In terms of the judiciary, the investigating judge is independent of the hierarchical control from the Ministry of Justice. The judge looks into the case to verify the evidence, confessions, and witness statements contained in the dossier, to check whether the accusation is clear, and many other issues with regard to evidence and procedure that have already been challenged and verified by her at the close of the instruction. The nature of the instruction is to review the prosecutor’s dossier as well as to conduct a wider investigation. The nature of judicial examination generally represents judicial authorization of investigation beforehand. In short, it entertains the screening function to review the prosecutor’s case and may proceed to a wider and broader investigation to warrant a trial.

French criminal procedure is historically characterized as an inquisitorial model, which centers on pretrial investigation in attaining the confessions and witness statements, and it formalizes the trial only by confirming the findings of the pretrial investigation. Therefore, during the instruction, the emphasis is imposed on “obtaining and evaluating all the relevant information during the pretrial, rather than the trial phase.” Ideally, the investigating judge is neutral, which justifies her dual investigative and judicial functions. Her position as a juge du siege (sitting judge) and her belief in her exercise of authority to define the public interest forms

532 Id, at 222.
533 Goldstein & Marcus, supra note 33, 250.
534 HODGSON, supra note 67, at 222.
535 See id. (noting one of the investigating judge said that:

“It is done in the public…what you need to understand by de’charge is that it is about checking aspects of the case that are favorable to the MEE. Yes, we do that…That is what the lawyer does in England. He tries to demonstrate to the court the aspects of the case that are favorable to the individual. We are judges in an office. It is in this way that we truly function as judges, because even in preparing the dossier, there is this idea of balance. We try to include in our investigation that which is favorable and that which is unfavorable….What is important is that this should be done by a judge”).

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her image.\textsuperscript{536} However, since the investigating judge and the prosecutor are both part of the judiciary, trained together, and even shaped by the identical ideology from the training institution as described above, the question arises whether the investigating judge can be a neutral evaluator or can just work with the police and prosecutor to fulfill their investigating goals?

Actually, the role and function that the investigating judge plays has encountered lots of criticism which is addressed after we examine the full process of the felony judicial investigation.

2. Instruction Procedure

The French \textit{instruction} procedure has been reformed, in 1993 and 2000 legislation, to enhance defense inputs to the investigation, to improve the imbalanced nature, and to nudge the investigating judge to listen to the voices of both sides. As Professor Hodgson describes, French criminal procedure has acquired some adversarial features, and he has emphasized that all parties are afforded an equal right to participate in the criminal process, which also brings the due process aspects in line with the European Convention of Human Rights.\textsuperscript{537} The path the reform took put a heavy emphasis on enlarging the participation of the defense and affording the defense the opportunity to take the initiative in the criminal process that is in line with the European Convention of Human Rights.\textsuperscript{538} European Convention of Human Rights article 6 (3) enumerates the minimum guarantees for anyone charged with a criminal offense to be entitled to

\begin{itemize}
  \item \textsuperscript{536}\textit{Id.} at 223.
  \item \textsuperscript{538}Field \& West, \textit{id.}
\end{itemize}
protection. The protections apply to pretrial procedures because the failure to abide by the provisions of paragraph 3 may endanger the fairness of the trial.

In France, an investigation is normally commenced by the police under the supervision of the prosecutor. However, in the cases involving serious crimes, the police must report to and prepare the dossier for the prosecutor, who then refers the case to a judge for judicial examination. But, it is the prosecutor who holds the authority to determine whether to initiate an instruction process. The prosecutor may not initiate a judicial examination because she ignores the aggravating factors and deems the offense to be of a lesser degree d’elit (misdemeanor); such prosecutorial decision is not without constraint. There are practical limitations restricting the decision making. As Professor Goldstein and Marcus analyzed:

If a defendant wishes to risk a higher sentence in the Court of Assize, because the acquittal rate there is higher or because there are more pretrial screens from which he may emerge uncharged, he may keep the Correctional Court from taking the case. If the victim seeks a greater penalty than the Correctional Court can impose, he may press his own criminal complaint,

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539 European Convention of Human Right (ECHR) art. 6 (3) (“Everyone charged with a criminal offense has the following minimum rights : a. to be informed promptly, in a language which has understands and in detail, of the nature and cause of the accusation against him; b. to have adequate time and facilities for the preparation of his defense; c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d. to examine or have examined witnesses against him and to obtain the attendance and examination of witness on his behalf under the same conditions as witnesses against him; e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court”).
541 Goldstein & Marcus, supra note 33, 247.
542 CODE DE PROCÉDURE PÉNALE [C. PR. PEN.] art. 80 (stating the investigating judge can investigate the cases referred by the prosecutor).
543 See Goldstein & Marcus, supra note 33, at 251 (noting the procedure named as correctionalization).
thereby enforcing examination before a juge. And the Correctional Court may itself decide that it would be inappropriate to try the case as d’élit because of the aggravating circumstances that the prosecutor has chosen to ignore provided, of course, that police and prosecutor have not omitted such circumstances from the dossier. But the most important limits on the prosecutor’s discretion are those imposed by the nature of a particular case. Some crimes are not “correctionalized” because they are complicated or serious or controversial. In some instances, judicial examination is regarded as appropriate because the case has been widely publicized or because political considerations are involved. In others, it is genuinely necessary because police and prosecutors have only limited powers to arrest, search, summon witnesses, and interrogate the accused.544

Once a serious offense is committed, and if it is one that could be tried before the Cour d’assises (criminal court which hears the most serious cases, hereinafter Court of Assize), it is of course brought to the attention of the procureur de la République (hereinafter vice president in the court of appeals), who refers the case to an instruction judiciaire (hereinafter judicial investigation).545 The request then goes to a separate body of judges, the Chambre de l’instruction, who are responsible for the prosecution.546 The three-judge panel appoints one

544 Id. at 251-252.
545 Lerner, supra note 23, at 801.
546 Id.
judge, the investigating judge, to investigate the case, delve into both exculpatory and inculpatory evidence, and question the witnesses.\textsuperscript{547}

The formal \textit{instruction} lies in the hands of the investigating judge. She delegates much of her investigatory power to the police by the \textit{commission rogatoire}, which affords the named police officer the right to specific inquiries for a limited time.\textsuperscript{548} She could direct the judicial police in gathering evidence and interviewing witnesses. She is also entitled to order arrests, searches, extract testimony under oath, and interrogate the accused.\textsuperscript{549} The investigating judge personally conducts certain acts that cannot be delegated to the judicial police, such as questioning the \textit{mis en examen} (MEE, hereinafter, the accused).\textsuperscript{550} When witnesses are interviewed by the judicial police, the entire process is recorded verbatim, so that the witness can read the transcript for accuracy through elaborate procedures for verifying and correcting the record.\textsuperscript{551} The adversarial parties are entitled to ask the investigating judge to undertake certain investigations in the interest for searching for the truth, to interview the witnesses, to ask specific questions, and to gather particular physical evidence.\textsuperscript{552} The investigating judge could reject those requests with reasoned rulings, which is also subject to appeal.\textsuperscript{553}

\textsuperscript{547}Id., at 802; see also Frase, \textit{supra} note 189, at 539, 575 (noting that “a judicial investigation is required only when the prosecution wishes to charge a felony…An \textit{instruction} is used only when further investigation is needed, when the case is politically sensitive, or when there is a need for an arrest warrant, pretrial detention, or pretrial supervision).

\textsuperscript{548}HODGSON, \textit{supra} note 67, at 212.

\textsuperscript{549}Goldstein & Marcus, \textit{supra} note 33, 247.

\textsuperscript{550}HODGSON, \textit{supra} note 67, at 212.

\textsuperscript{551}See Lerner, \textit{supra} note 23, at 802, 803 (noting only the investigating judge or her depute is permitted to question the witness according to the \textsc{Code de procédure pénales} [C. Pr. Pen.] art. 101, 102).

\textsuperscript{552}See id., at 803 (noting the authority is C. Pr. Pen. art. 82, 82-1, 156); see also Hodgson, \textit{supra} note 66, at 43 (noting that the parties could ask the investigating judge conducts the searches, the interception of mails).

\textsuperscript{553}HODGSON, \textit{supra} note 67, at 43.
The accused may be examined several times during the first of which the investigating judge must inform the defendant of the legal and factual basis of the offense investigated. If the defense attorney is present, the investigating judge could proceed with questioning. If the defendant is without an attorney, the investigating judge informs the defendant of her right to choose an attorney or have one provided by the legal aid institution. Then, the defendant is informed of her right not be questioned without her consent. The defendant is entitled to the right to remain silent, and she is strongly encouraged to do so by defense counsel. Defense counsel is entitled to access the dossier four working days before the judicial inquiry, and the accused is allowed to have a copy of the contents of the dossier. Although the law affords defense counsel more participation during the instruction than it does during the police investigating stage, it should be noted that the rights of the accused are not understood in the context of “adversarial” term and is part of the principle of “contradictorie.” The new idea comes from ECHR accentuating that both sides are equal in the right and opportunity to take part in the criminal process, giving equal right to request the investigating judge to call and confront a witness based on the contradictorie theory.

After the investigating judge wraps up the investigation, she must decide whether there is sufficient evidence to justify prosecution for a serious crime. She then transfers the dossier to the office of the vice president in the court of appeals, who then refers the dossier to the procureur général who represents the government before the Courts of Appeals (Cour d’appel).

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554 Lerner, supra note 23, at 803 (noting the authority is C. Pr. Pen. art. 116).
555 Id.
556 Id. at 803-804.
557 See id. at 803 (noting the authority is C. Pr. Pen. art. 114); Hodgson, supra note 67, at 117-120.
558 Hodgson, supra note 67, at 42-43.
559 Goldstein & Marcus, supra note 33, 247.
and handles prosecution in the Court of Assize. The procureur g’én’eral then files the dossier with a recommendation for further prosecution, to the Chambre de l’instruction, which consists of three high-ranking judges to decide whether there is sufficient evidence to charge. If the answer is positive, the Chambre de l’instruction issues the formal charge (mise en accusation) and transfers the case to the trial court of general jurisdiction of that geographical division.

In a nutshell, before a case is prosecuted in the Court of Assize, there are several checks in the pretrial proceedings by different groups of judges—among which the investigating judge is the most involved and who supervises the police and the prosecutor’s investigation in felony cases and remains in a neutral role, maintaining her independence from control of the executive branch.

Though not a screening mechanism in the screening of the sufficiency of evidence, through the investigating judge, the law sets up an ideal check on supervision and investigation for the most serious crimes to warrant sufficient evidence to charge. However, there are criticisms whether the authority and function the investigating judge performs achieves such design when the practice contradicts the law on the books because of the French criminal justice judicial culture and legal practice factors in when determining the effectiveness of judicial supervision in evaluating whether or not the investigating judge could play a neutral and effective role in leading the investigation. The following analyzes the judicial culture, ideology,

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560 See Lerner, supra note 23, at 805 (noting the authority is C. PR. PEN. art. 181).
561 See id. at 806 (noting the authority is C. PR. PEN. art. 806).
562 Id.
and relies on the study conducted by Professor Hodgson to illustrate the contemporary criticisms against the investigating judge and possible abolition of the investigating judge.

3. Judicial Supervision in Practice in France

Law in books sometimes varies significantly from the law in action. This dissertation is concerned that the legal transplant construction includes the legal procedural traditions, the role and functions of participant personnel, and that the role played by the participants be dictated by existing legal cultures. Therefore, this section looks beyond how the French criminal procedure operates on paper, and intends to delve into what they actually do in action.

To begin with, the French investigating judge could conduct pretrial investigation and supervision comprehensively in most serious crimes, but, as Professors Goldstein and Marcus claimed, “judges in inquisitorial systems do not control or supervise the investigation, prosecution or trial of most criminal cases much more closely than do judges in our own adversarial systems.” In reality, it is the prosecutor who determines and controls the initiation of the instruction. If she keeps the investigation out of the hands of the investigating judge, there exists no possibility for the investigating judge to intervene. Especially when the prosecutor could investigate the most serious cases as “correctionalized”—as a misdemeanor offense in order not to burden the system with judicial investigation, even if those offenses are chargeable.

as serious offenses. Although such “correctionalized” discretion alleviates the mandatory requirement of judicial supervision of the most serious crimes, it basically eliminates the opportunity of the judicial supervision for most serious cases and evades the law. Therefore, there are some concerns that judicial investigation and supervision might not be prevailing in the most serious types of cases. According to Professor Hodgson, only about 4% of cases are passed to the investigating judge for a wider investigation.

Second, the police investigations usually proceed without supervision by the prosecutor or the investigating judge, as well as without the judicial review by the ensuing trial judge. In some instances, the investigating judge could not work independently and individually of the police and the prosecutor. She delegates much of her investigation to the police through instruction to extend police powers in investigation, which turns the instruction into police-dominated investigation. For example, the investigating judge normally does not question witnesses herself. In this sense, it increases the chances that the investigating judge work closely with the police in reviewing and verifying the evidence that is offered by the police, and it makes the investigating judge less likely to view things from a perspective different from that of the police.

In other instances, if the prosecutor has decided to develop the case for a serious offense, she normally holds the case as long as possible before requesting the instruction in order to

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565 Id. at 1572.
566 Hodgson, supra note 239, at 1368.
567 Id. at 1573.
568 Hodgson, supra note 67, at 213.
569 Id. at 242.
maintain control of the investigation.570 Also, the prosecutor often intends to procrastinate opening the instruction procedure in order to prolong the denial of defense rights and the safeguard of the instruction procedure.571

If the investigating judge relies so much on the police and the prosecutor, the relationship may transform into the symbiotic entity wherein she may not review and investigate the dossier prepared by the police and the prosecutor objectively. As Professors Goldstein and Marcus claimed, the police complete most of the investigation before the intervention by the prosecutor and investigating judge and the police are well trained for those investigating technicalities.572 The investigating judge generally receives the police dossier, evaluates it, and may delegate more power to the police for further investigation. In such a case, how could a system anticipate an investigating judge to prepare the dossier and supervise the investigative conduct neutrally?

Third, the ideal notion is that the investigating judge entails dual investigative and judicial functions. That a judge can play both roles was simply based on assumption. Is she able to perform both functions? As mentioned, French judiciary includes the investigative judiciary and adjudicative judiciary, also termed as standing judiciary and sitting judiciary.573 They are trained and formed as a unit, and the prosecutor and investigating judge are simply job difference, and is a matter of personal selection. The common recruiting process, centralized institutional training, and ease of transferring from the initial selection of being a prosecutor to being an

570Id. at 213.
571Id. at 213.
572Goldstein & Marcus, supra note 33, 249.
573HODGSON, supra note 67, at 65-67; Hodgson, supra note 239, at 1367.
investigating judge, form a unique judiciary group and ideology. This unique judiciary group distinguishes itself from the defense attorneys as well.

Such legal culture formed by various legal members of one big judicial corps can generate the inner trust and confidence that in turn lessen the independence and checks on the investigation and prosecution. Originally, the investigation and prosecution are designed to be separated from the adjudication in order to have a system of checks and balances. The investigating judge is supposed to check the investigation and decide on the prosecution’s case objectively. However, the shared common status and close ideology that group them as a complete judiciary might obstruct the function of separation of powers. This kind of judicial ideology, therefore, undermines the judicial independence and judicial supervising power. Moreover, the close ideology and friendly relationships could result in a detrimental effect on the independence of the investigating judge as well as the defense’s ability to have an equal voice. For example, a French high-profile case, Outreau’s investigative report alleges that the prosecutor dominated the investigation and the investigating judge stood by the prosecutorial view by discovering incriminating evidence. This constitutes a judicial corps that cooperates in fighting against the defense and undermines the impartial role in any necessary reviewing and checking power.

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574 See Hodgson, supra note 67, at 69-70 (noting an interview conducted by author demonstrates that the unity of a single judicial corps that characterizes the image); Hodgson, supra note 239, at 1365.
575 Hodgson, supra note 239, at 1371-1372.
576 See id. at 1373-1374 (quoting the National Assembly Report that the investigating judge lacks a culture of control, and copied the prosecutor’s conclusion to highlight the malfunction of the investigating judge).
Simultaneously, the investigating judge prevents the defense from having input into the inquiry, even places the defense outside of the procedure, and deprives the defense of any opportunity to question the witness’s character.\textsuperscript{577} The overlapping function that combines the investigating function with judicial neutral function, integrates two conflicting characters into one investigating judge.\textsuperscript{578} Judging from the adjudicating role of a judge, she should maintain a neutral standing in appraising the guilt or innocence of the accused. An investigation, on the other hand, involves a one-sided advocate that may not be impartial and objective in its nature. An investigating judge has to conduct a “neutral” investigation, to appraise the evidence presented, to collect evidence in the \textit{dossier}, and to decide whether the charge is justified.\textsuperscript{579} The role is confused by the fact that she is both a player of the game as well as the judge of it.

The last point is attributed to her role of making the decision whether to authorize a coercive investigative action, which may include wiretapping, authorizing bail, or custody of the suspect under investigation before the criminal reform of 2000. The detention power during the \textit{instruction} in particular conflicts with itself as an investigator.\textsuperscript{580} This is the most disputed power she exercises in the pretrial detention, which led to the installation of the independent \textit{juge des libertés et de la detention} (judge of detention and liberty) in reducing the number of suspects held in custody during the \textit{instruction}.\textsuperscript{581}

\begin{footnotes}
\footnote{\textit{Id.} at 1375.}
\footnote{HODGSON, \textit{supra} note 67, at 70.}
\footnote{\textit{Id.}}
\footnote{\textit{Id.}, at 242.}
\footnote{Hodgson, \textit{supra} note 239, at 1369.}
\end{footnotes}
The major criticism is aimed at the judges’ dual roles and, thus, calls into question their neutrality.\(^{582}\) The main concern is that of demanding an investigator to make a neutral decision with regard to detention while conducting the investigation, if she is pre-judgmental that the accused is the actual culprit after reviewing the police dossier. In carrying out her investigation, the investigating might be more inclined to detain the suspect to search for the truth in the interest of the public. Would this not be a bias \textit{per se}? As Professor Hodgson put it “the concern is that the independence of the judicial function is undermined by having the investigator in the same professional grouping as the trial judge.”\(^{583}\)

All of these blur the line and demand reform.\(^{584}\) As the criminal justice reform was going on in France, the new voice that urges to abolish the investigating judge arose recently. The \textit{Le’gar} commission, in consonance with French President Sarkozy’s plan, proposes the abolishment of the investigating judge and supplants it by placing the public prosecutor in charge of all criminal investigations.\(^{585}\) The proposal of the \textit{Le’gar} envisions more than simply replacing the investigating judge with the prosecutor, but proposes that the \textit{juge du sie’ge} or the \textit{juge de l’enqueteet des libertes} (hereinafter judge of pretrial investigation and detention) judicially supervise the investigation by the prosecutor.\(^{586}\) It is unknown whether the reform could lead to a more independent review of the prosecutor and police investigation by the new judge of pretrial investigation and detention, or if the reform pays attention to the issue of the

\(^{582}\text{id.}\)

\(^{583}\text{id. at 71.}\)

\(^{584}\text{HODGSON, supra note 67, at 71.}\)

\(^{585}\text{Hodgson, supra note 239, at 1379.}\)

\(^{586}\text{See id. at 1384 (noting that the new judge will oversee the prosecutor’s decision and will authorize intrusive investigative action while extending the prosecutorial power).}\)
judicial legal culture as described before. The reform would change the investigation and supervision practice.

In sum, ideally the dual role of the investigating judge in carrying out investigation of most serious cases as well as in supervising the police and the prosecutor would function as designed, yet in practice, the analyses clearly identify the uneasiness of its neutral and impartial judicial supervision.

4. Conclusion

French criminal procedure has undergone several major reforms since 1993, with the goal of bringing the criminal process in conformity with the principles of European Convention of Human Rights.\textsuperscript{587} The reform of judicial investigation procedure drives toward the guarantee of the rights of the accused and sets up the principle of equal participation between the prosecutor and the defense. It not only broadens the application of right to counsel to judicial investigation, but also strengthens the substance of right to participation, such as discovery during the investigation, requests to call witnesses, etc. Notwithstanding the fact that judicial investigation is limited to a small number of cases, namely, felony offenses, the trend of its reform actually symbolizes the need of more adversarial voice and underlies the importance of the adversary system even during the judicial investigating stage.

\textsuperscript{587}See generally, HODGSON, supra note 67, at 40-60 (noting the reform was not based on the adversarial requirement).
This chapter’s mission is to look into the various screening mechanisms of the prosecution, the procedure it employs, the interplay, and inner-system relationships among the legal participants, and the legal culture or ideology that influences or frustrates the screening practice. The goal is to identify the advanced parts of the U.S. and French criminal screening or reviewing functions and to examine ineffectiveness and malfunctions of Taiwan’s screening mechanism. The next chapter addresses legal borrowing and reconstruction engineering in better constructing and achieving the screening mechanism and function in Taiwan.
CHAPTER 4 NEW SCREENING MECHANISM

I. Introduction

As mentioned previously, criminal charging in Taiwan adopts mandatory prosecution system in felony offenses. In theory, the prosecutor has no discretion with regard to charging of felony cases and must file criminal charges whenever there is sufficient evidence that indicates that the suspect is suspected in the breach of criminal law. But even while operating under a mandatory prosecution system, she retains the authority of whether not to charge. For example, when the evidence obtained is insufficient to prove the accused is suspected of having committed an offense, the prosecutor may still prosecute. In this case, she either has misjudged the mandatory requirement to charge, or she acknowledged the insufficiency issue that she should not otherwise prosecute but chose to prosecute anyway. In other words, the prosecutor presents insufficient evidence to support her charging decision, which is a violation of the mandatory requirement, resulting in the abuse of the charging power.

Consider a recent call for chastisement of the prosecutor because a defendant was charged with the rape and burglary of a victim at knifepoint. The prosecutor charged the defendant without the DNA test report, but merely on the basis of his confession and victim’s identification. The defendant was in custody until trial, and at trial, the DNA (extracted from the victim) examination proved the offense was committed by another person. The court eventually
found the defendant not guilty. The community and the family of the accused condemned the prosecution for abuse of power. The prosecutor, then, prosecuted the case in a swift manner as a signal of deterrence to the society. After the defendant was acquitted, the prosecutor faced even greater consequences in the face of criticisms and chastisement, in addition to the remedy paid to the wrongfully prosecuted defendant.

The criminal justice system should not focus only on criminal control; the core ideology of the criminal process should also emphasize the degree to which a system should prevent wrongful conviction, incarceration, and harassment of innocent people. As Justice Harlan puts the fundamental value determination of U.S. society, “it is far worse to convict an innocent man than to let a guilty man go free.” It is actually the prosecutor who holds the key to the door of both initiation of the criminal trial and the potential error of convicting an innocent. Correspondingly, the prosecution and screening are of equal significance in any criminal justice system.

Conceptually, the above example constitutes an abuse of charging power rather than an abuse of discretionary power. A prosecutor’s decisions may also be erroneous decisions in

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589 Yang Yi, Zhua Cuo Dong Hai Zhi Lang Jian Yuan Jiu Zheng Tai Zhong Jian Jing[Wrongful Arrest of the Rapist, Control Yuan Correct the Taichung Prosecutor and Police Agency], China Times (Taiwan), Jan. 12, 2012, available at http://tw.news.yahoo.com/%E6%8A%93%E9%8C%AF-%E6%9D%B1%E6%B5%B7%E4%B9%8B%E7%8B%BC-%E7%9B%A3%E9%99%A2%E7%B3%BE%E6%AD%A3%E5%8F%B0%E4%B8%AD%E6%AA%A2%E8%AD%A6-213000416.html (last visited Sep. 20, 2012).
590 Notes, supra note 299, at 784.
judging mandatory requirements or in evaluating the prosecutorial threshold requirements. Whether the decision is an abuse or an erroneous judgment, these should be the main types of charging through which a screening mechanism intends to filter. The question is whether the current screening system functions in such capacity?

One of the critical characteristics of the modified adversarial system is to ascertain the role and obligation of the prosecutor at trial, including bearing the burden of proof and the proof beyond a reasonable doubt. The trial is no longer a continuation of the prosecutor’s investigation as are the traditional Taiwanese judge inquiry system and the traditional trial model. The obligation of the prosecutor to bear the burden of proof ought to be disentangled from the obligation of the judges’ fact-finding or judicial inquiry. Under this notion, in order to review whether the prosecutors’ charging decisions are grounded and whether the prosecutor abuses the power or makes mistakes using the power, the screening mechanism shall afford the judge power over cases to review whether the charging is congruous with the mandatory prosecution and allows the accused an opportunity to challenge the prosecution as analyzed and extracted from the U.S. screening mechanism and French investigating judge mechanism.

This chapter connects the defects of Taiwan’s current mechanism, including deficient procedures, devices, screening threshold, and evidentiary rules from the comparative perspective, and proposes a new screening device as a potential vehicle for future reform.
II. Identify Ineffective Procedural Device and Solutions

1. Screening Timing

To begin with, in the United States and France, the screening mechanism or supervision of investigation are both installed as a safety valve before the opening of the trial. Since the purpose of the screening in Taiwan intends to achieve the protection of the innocent, to provide protections against unfounded prosecutions, to check whether “sufficient evidence” exists to proceed to trial, and to preserve limited judicial resources, a screening mechanism devised to contribute to a timely reviewing function before the prosecution is of significant importance. Once the prosecution has been presented in court, the prosecution is disclosed and become known to the public, the end that the screening mechanism serves to protect, such as the reputation of the innocent and other associated disadvantages that come along with the prosecution, seems to be unattainable.

To establish the ex ante screening before trial increases the difficulty of obtaining an indictment, which might enhance the quality of prosecution and lessen the quantity of prosecution because the prosecutor would present only the best evidence and prepare the best case that withstands multiple layers of examination. It takes effort from the prosecutor to convince the external screening institution that sufficient evidence exists, and she has every incentive to present the best evidence available to convince the screener. In order to gain an indictment, she is incentivized to present her case in the best way strategically in exchange for an
indictment. Additionally, an indictment would be more justified or warranted under many layers of supervision even at the cost of time-consuming efforts and procedures.

A screening mechanism is supposed to be set before prosecution to directly supervise those who charge.\textsuperscript{592} However, Taiwanese mechanism is ex post screening after the prosecution has been initiated. Normally, an indictment undergoes an internal review process conducted by the prosecutor’s superior, i.e., head prosecutor and chief prosecutor, before being filed with the court. The superior reviews the dossier to decide whether the outcome is grounded in facts and evidence, and whether the charging decision complies with the guidelines issued by the higher-ranking hierarchical official, or is congruous with the conclusion of the chief prosecutor if she has specific directives or considerations, even though prosecutors and superiors are both subjected to the demand of mandatory prosecution as well.

Once approved, the investigation is closed and the case’s dossier is transferred to the court without any external screening. Other than internal hierarchical review, the prosecution has undergone no review at all, and the ease with which the prosecutor is able to institute an indictment renders self-evident that the prosecutor may present a case that does not meet the threshold of suspicion that a crime has been committed by a suspect. Critics have noted the public distrust of prosecutorial internal monitoring, even when the internal control was held to a high standard.\textsuperscript{593} Despite the fact that the prosecution has been reviewed by the superiors,

\textsuperscript{592}Wang, supra note 495, at 95.
\textsuperscript{593}See id. at 91 (noting that internal control is readily criticized that it is exercised under the black box even if the internal control holds high standard).
because the process is both invisible and the extent of internal review is unknown to the society, it is usually trusted less by the society.

Moreover, the internal monitoring may not be working because the highly ranked government official may not screen if that official is also corrupt, and thus has an incentive to not screen effectively. Economists also noted an agency cost problem, which is that prosecutors’ self-interests may not align with those of the society. The prosecutor may not prosecute the case in the best interest of the public. Placing restraints on prosecutorial power from internal review by superiors’ supervisory power is an alternative to lower agency cost; however, the superiors are prosecutors as well. The higher officials may fail to screen the exercise of the charging power by the subordinates. Given that the superiors might mal-screen the subordinates’ cases and take a free ride with the fame and reputation through the prosecutions, the internal reviewing, in this sense, might not work as well. In this case, after the prosecutor indicts the accused, the case goes public, which could result in many negative effects to the accused. At this stage, even if the judge dismisses a case, the harm caused by the indictment has materialized and is irreversible. It is certainly justifiable that one be assured that there is institution of effective ex ante screening before the prosecution is filed.

Last, by comparison, the screening mechanisms of the United States and France function directly to protect the innocent or to review cases in the avoidance of abuse of charging powers as well as erroneous prosecutorial judgments. Additionally, ex ante screening also preserves limited judicial resources for once the gate is open, the cost of all is materialized.

In sum, as one professor noted for current situation, it is better for the accused to have the screening device than not to have it, in that it could “indirectly” deter the abuse of prosecution. This dissertation, of course, wants a genuinely effective screening mechanism to directly grapple with the problems and achieve the aforementioned goals.

2. Screening Process

2.1. Independent Procedure

As learned, a preliminary hearing in the United States allows more input from the accused, and hearing of more testimony by magistrates to decide the sufficiency of the charges. It accords the prosecution the power to call and question witnesses until probable cause is found. The burden rests with the prosecution. The accused is permitted to present witnesses and to crossexamine prosecutor’s witnesses. The magistrate supervises the procedures that make the final decision whether probable cause is found. Basically, the preliminary hearing adopts an adversarial process that allows the participation of the accused and emphasizes the equal footing for both sides.

In France, the instruction procedure also allows more input from both parties, especially from the defense, to demand that the investigating judge proceeds with certain investigation,

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595 WANG, supra note 495, at 95.
596 WRIGHT & LEIPOLD, supra note 266, §92.
including calling the witness, confronting the witness, and conducting specific medical reports, in order to incorporate ECHR’s spirit.

In this vein, an independent screening procedure should be separated from the pretrial proceeding. By contrast, in Taiwan, there is no way to check and review whether the judge screens for the benefit of the accused and achieves other goals. There is no independent procedure that allows the judge to screen the case and permits the accused to challenge the case. The result is often a mixture of the screening and pretrial proceeding, i.e., preparation of trial. Once the preparation for trial is finished, usually the trial date and case issues are both set, and the judge does not dismiss the case. The functions of the screening are invisible and forgettable under current law.

Since the goals carried out by the screening mechanism are so critical to the criminal justice system and to avoiding wrongful convictions of the innocent, to install a single mandatory screening procedure requires that the judge perform the screening function instead of being a “paper tiger” or an adornment, especially when the goal and function of screening and pretrial proceeding vary. If the prosecution cannot justify the case, it should be dismissed before prosecution, and the judge should not arrange the pretrial preparation proceeding.

2.2. Adversarial Procedure

The screening procedure in Taiwan provides for dossier review by a three-judge panel, which try the case at trial without any opening procedure. A document review merely examines
the *dossier* prepared by the prosecutor. In other words, there is no procedure at all, and outsiders find no way to check whether judges exercise their power.

Here, we should shift gears from screening back to investigation in Taiwan in order to better understand it. The accused has less input during the investigation. The only thing she contributes to the investigation is her statement or, in some cases, confession. Because the defendant plays no role in the investigation, the defense counsel is also unable to rely on the procedural and evidentiary rules that provides cross examination and a suppression hearing. The investigation is completely controlled by the prosecution and becomes entirely a one-sided story. As Professor Lewis’s research puts it, the defense in Taiwan lacks real investigative power during the investigation.\(^{597}\)

Opponents may argue that the current law in Taiwan allows the accused to request the prosecutor to call witnesses, and allows the prosecutor to have the witnesses cross examined by the suspect at her discretion. The prosecutor could reject such request without any reason. This proceeding is conducted in the investigating court before the prosecutor, instead of one before an unbiased trial judge. The investigating procedure differs from the trial procedure significantly and the accused’s involvement is very limited in the investigating procedure. If the accused is not entitled to take part in the investigation and there is no adversarial screening provided that allows the accused a right to challenge the indictment, then from the investigation to charging, the accused could be completely or partially excluded from presenting her version of events.

\(^{597}\)See Lewis, *supra* note 103, at 691(noting that answer was replied from a public defender in Taiwan).
Additionally, it is unknown whether the screening judge did review the prosecution under the current mechanism. To adopt an adversarial screening process and to allow more participation by the accused in bringing challenges to the indictment is an intuitively viable plan in making the screening function more effective. It has been argued that the screening procedure should proceed in closed court by dossier-review simply because the screening is to check whether the evidence is sufficient to meet the threshold.\textsuperscript{598} Yet, as suggested, independent and adversarial procedure allows more input by defense and provides an opportunity to examine witnesses and perpetuates the testimony. Otherwise, it is doubtful that current screening would function effectively. By contrast, the adversarial screening relies mostly on the defense participation to present or to cross examine prosecution’s witnesses.

Accordingly, this dissertation advocates an adversarial screening, one that allows for more involved defense participation. The nature of the adversarial process is that it is held in open court, which results in a case going public. A prosecution that goes through screening may be dismissed by the screening court, and the prosecutor might then choose to reinvestigate the case. In this case, the principle of secrecy (discussed later) is binding to all parties during the investigation in order to protect the reputation of the possibly innocent defendant and to prevent from witness tampering, etc.\textsuperscript{599} Then, the first-time adversarial screening might jeopardize the innocent if the screening proceeds in an open court. In this sense, should the adversarial screening process be held in an open court?

\textsuperscript{598}Wu, supra note 492, at 65.  
\textsuperscript{599}Xing Shi Su Song Fa[The Code of Criminal Procedure] art.245, Section 1 (Taiwan)(An investigation shall not be held in a public proceeding).
2.3. Public Hearing

The first question is whether the screening process should be held in an open court. According to the Sixth Amendment of the U.S. Constitution, an adversarial process, i.e., a trial, shall be held in open court as a fundamental right of the accused. Should it apply to an adversarial preliminary hearing? How does a system reconcile the adversarial process with the “secrecy principle”? Due to screening being set between the investigation and the trial, would a public hearing conflict with the “secrecy” principle demanded by the law?

The secrecy principle aims to protect the efficiency of the flow of investigation, which aims to preserve the physical evidence from being destroyed by the accused, to prevent the suspect from tampering with witnesses, and to protect the accused’s reputation, especially when the accused is under investigation, but has not yet been convicted.\(^{600}\) It refers to the fact that the investigation is closed to all during the investigation stage, while the trial is supposed to be open and fully informed procedure where both parties are well prepared and have equal footing in their preparation of trial. The prosecutor’s dossier is supposed to be fully open for the defense at trial. Nonetheless, during the screening process, which the prosecution has not filed yet, could we adopt an adversarial proceeding that is held in closed court in order to maintain the goals of the secrecy rule? If so, how could we reconcile the adversarial screening and the secrecy principle?

\(^{600}\) HWANG, supra note 224, at 132-134.
One of the major goals of the screening mechanism is to protect the innocent from false charges. In fact, the criminal justice system should avoid any wrongful convictions. The procedure that carries out this major criminal justice goal of protecting the innocent far outweighs other value or goal that are achieved by other procedural essentials. Besides, while Taiwan’s judicial authority also brandishes the flag to promote substantive equality for the adversary, it is proposed that the adversarial procedure afford the accused more procedural participation, more rights of defense, more rights to question, and, generally, to have input that equalizes the power of the parties.\(^{601}\)

Given that the investigation stage is finished by the prosecutor without much participation from the defense, and that, even though the accused is represented, the defense attorney often does nothing more than be present in the interrogation room to monitor whether the prosecutor’s interrogation violates the law, advise the suspect whether to exercise her Miranda right to remain silent, and requests the prosecutor to investigate specific evidence(such as questioning specific witnesses and the acquisition of other requested physical evidence, etc.). But the prosecutor is not legally obligated to conduct the investigation the defense requests, and, unlike in the French system, the defense is not afforded a right to appeal if the request is rejected by the prosecutor.\(^{602}\) The defense is also allowed to state the opinion with regard to the investigated crime. It is still far from being on equal footing with the prosecution during the investigation when both the accused and defense attorney are not permitted to mandate the prosecutor to investigate evidence that may be in their favor.


\(^{602}\)HODGSON, supra note 67, at 43.
Under the proposed screening process, the prosecution has not been screened, and it has not officially initiated the trial. In other words, the secrecy principle might still dominate the screening process. In order to reconcile the adversarial process while maintaining secrecy principle that aims to protect the reputation of the accused and other goals, the adversarial procedure could be held in a closed court proceeding while the screening procedure itself is closed to everyone except the parties. Through a closed adversarial device, not only could it hear the voice of the defense to achieve a greater value that adversarial process could bring, but also it could protect the basic goal the secrecy principle.

Comparatively, in the United States, a preliminary hearing is occasionally held in chambers in sensitive cases, such as sexually related offenses that involve underage victims.⁶⁰³ Besides, in New York, Criminal Procedure §180.60 provides “A hearing upon a felony complaint must be conducted as follows: . . . 9. The court may, upon application of the defendant, exclude the public from the hearing and direct that no disclosure be made of the proceedings.”⁶⁰⁴ Such a device balances both interests and achieves dual goals. Of course, after the case passes the screening judge’s scrutiny to proceed to trial, the accused remains entitled to her constitutional right to an open trial and is no longer protected by the secrecy principle.

Other than the adversarial screening process, there are rights and devices that facilitate equality of the adversary and participation in the screening procedure. The following explores the right to counsel in the reformed screening procedure, the right to cross examination in the

⁶⁰⁴ N.Y. CRIM. PROC. LAW § 180.60(Consol. 2013).
screening procedure, and the limited discovery device, which arms the defense with materials necessary to the basis of the prosecution in order to check the prosecution.

3. Accompanied Devices and Rights

3.1. Right to Counsel

The right to counsel in Taiwan is a much developed field ever since the borrowing of the Miranda warning as an essential part of criminal procedure. Any suspect is entitled to retain her choice of counsel at any stage of the criminal procedure. At trial, there is mandatory right to the assistance of counsel under the following six circumstances: (1) where the minimum punishment is no less than three years imprisonment; (2) where a high court has jurisdiction of the first instance; (3) where the indigenous defendant is indicted; (4) where the defendant is indigent; (5) where the accused is unable to make a complete statement due to unsound mind; and (6) where the presiding judge considers such appointment of counsel is necessary. During the investigation, the mandatory right to counsel is where a suspect is unable to make a complete statement due to unsound mind or the suspect is indigenous, the public prosecutor shall appoint a public defender or an attorney to defend the suspect if no defense attorney has been retained during the investigation. Therefore, because the current screening process is not listed as a mandatory stage that requires an attorney, this creates a loophole.

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605 In Taiwan, Miranda Warning is required to inform suspect when the investigation by polices and prosecutors and to inform the defendant once charged and subjected to the trial proceedings by the trial judges.
606 A defendant may retain defense attorney of his or her choice at any phase of the criminal procedure. A suspect interrogated by judicial police officers is entitled to the right to counsel as well. See Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 27 (2013) (Taiwan).
607 Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 31 (2013) (Taiwan).
Because the proposed adversarial preliminary hearing is devised to proceed as adversarial style, and the proposed procedure is a highly technical, professional process, the accused surely is not able to proceed without the assistance of counsel or proceed by self-representation unless the accused waives the right to counsel. As mentioned, the Supreme Court in the United States mentioned that preliminary hearing is a “critical stage” that requires counsel, and the counsel’s goals are exposing fatal weaknesses in the government’s case that may cause the magistrate to refuse to charge, cross examining of the witness, preserving of testimony that is unavailable, and effectively discovering the case against the accused.608

Because the screening has to be accomplished through a highly trained and professional expert that makes adversarial screening effective, such equal force and power in striking the government’s case is essential to examine the government’s case. Furthermore, to check whether the judgment and requirement of mandatory prosecution is satisfied, a counsel is required when the accused retains no counsel or the indigent accused could not afford counsel during the screening. As mentioned, the defendant has a mandatory right to counsel at trial under certain circumstances. Similarly, at the screening, the accused should be entitled to retain an attorney and be entitled to a mandatory right to counsel under identical circumstances. As this dissertation proposes in this chapter, the new screening is supposed to apply only to felony cases due to the allocation of the comprehensive criminal justice resources (see last section of this chapter). The mandatory right to counsel should also be applied in all felony case screenings where the minimum imprisonment is no less than five years imprisonment.

3.2. Right to Cross Examination

Under the new proposed mechanism, another main feature is to extend the right to confront the witness against the accused. Generally, this right afforded during screening is not as extensive as it is at trial; instead, there is a restriction of this right by two rationales: (1) such cross-examination should not be used as a discovery method and (2) the exercise of this right should not touch on the credibility of the witnesses, which is an issue to be solved at trial. 609

Comparatively, the magistrate is entitled to supervise and terminate the cross examination that aims to elicit more information from prosecution than is needed for probable cause in the United States. For example, when the defense cross examined a witness on whether other persons were present at the time the crime occurred or whether the witness had recovered her possession taken during a robbery, the court expressed that preliminary hearing is not pretrial discovery and sustained the magistrates’ ruling. 610 In practice, many magistrates allow the discovery type of questioning provided the crossexamination is brief. 611 Because the proposed new screening mechanism advocates limited discovery, the defense should garner the information she needs concerning her challenge of the prosecution from the examination procedure, and it should be strictly limited to cross examining the witnesses on questions the prosecutor has posed so as not to cross the line of discovery, to protect other values that the discovery restrictions intend to protect.

609 Kamisar et al., supra note 273, at 1030.
610 See id. at 1031 (citing People ex rel. Pierce v. Thomas, 334 N.Y. 2d 666(Sup. Ct. 1972) ).
611 Id.
Another example is if crossexamination accentuates the “general trustworthiness” of the witness, it goes beyond the need to establish probable cause. Currently, in most U.S. jurisdictions, mere conflict in testimony is not judged by the magistrate unless the evidence is overwhelming. One state court ruled that the magistrate is empowered only to judge the “plausibility of the story.” In any event, even though there are variances amongst the states, there is a sense that the magistrate is not an adjudicator, and that the preliminary hearing is not a trial. Therefore, the magistrate is limited with regard to looking into the witness credibility issue even if the defense has tried to dispute the credibility under cross examination. Credibility issues are just not suitable for the screener to judge. Judgment on this issue would supersede the core of the trial and trial judge, and it would make a trial a hollow process.

In Taiwan, the trial judge hears the evidence presented, examines physical evidence, and weighs the evidence comprehensively before making the decision. The credibility of witnesses often was credited or discredited by the testimony they gave, yet this issue is weighed after a thorough cross examination. Sometimes, the credibility is evaluated comprehensively after the witness is questioned by both parties. Such comprehensive evaluation of the testimony and its creditability cannot be achieved until after both parties rest their case. We cannot deny that the screening function has its limitations and is not intended to replicate a trial. The screening judge is not qualified to judge the credibility issue because the nature of screening accentuates the reviewing of whether the prosecution is founded. In addition, if the screening judge appraises the credibility during the screening, it also blurs the line between the determination of guilt and innocence, and the determination of whether the prosecution is justified or not. Therefore, under

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612 See id. at 1030 (citing Wilson v. State, 208 N. W. 2d 134 (Wis. 1973)).
613 Id. at 1026.
614 Id.
the proposed screening, it is not appropriate for the defense to raise the issue of credibility or even cross examine the witness in order to strike at the credibility.

3.3. Discovery or Review of the Dossier

The adversarial process bears an ancillary discovery effect that allows the adversary to acquire the prosecutor’s evidence and prepare to challenge it. In Taiwan, the dossier cannot be discovered until the case has made it to the trial court. If the adversarial screening procedure is adopted, should the discovery procedure apply to the screening procedure and, if yes, to what extent?

Taiwan adopts “full discovery” at trial once an accused is charged, and the defense is allowed to access the full dossier prepared by the prosecutor. Is full discovery applied as well during the screening process while a case is charged, yet not screened? Theoretically, in the United States, the preliminary hearing is not deemed as a discovery device, but discovery is an ancillary effect and is inevitable given the fact that the defense could look into some evidence of the prosecution’s case for the first time and cross examine prosecutor’s witnesses to “lock in” the testimony. The California Supreme Court ruled that the defendant could inspect writings and physical evidence in prosecutor’s possession, yet the court did not mention the right of doing so. In Los Angeles, the District Attorney allows access to the evidence in her file at the preliminary hearing, but such practice extends no further than extracting information from the

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616 People v. Cooper, 349 P. 2d. 964, 972-973(Cal. 1960).
investigator. In short, a wider discovery is a feasible alternative for the defense to find out what the prosecution has in possession. As Professors Graham and Letwin stated, “the efficacy of the preliminary hearing as a defense discovery device depends not only on the attitudes of the defense counsel and of the magistrate, but also on prosecutorial strategy.”

Strategically, the prosecutor could present as little evidence as she needs to prove probable cause or prima facie case, although multiple witnesses may testify at trial. In short, the prosecution does not disclose her witnesses completely in the preliminary hearing as the prosecuting strategy. In Taiwan, there is no discovery issue because of a clear-cut delineation that once a case is prosecuted and is at trial, the defense is entitled to full discovery except in very few exceptions (namely, when the discovery may jeopardize the witnesses’ safety and national security). By contrast, no discovery is allowed during the investigation.

The screening process must reconcile two interests. One is to keep discovery from the accused in order to prevent potential witness tampering and concealment or destruction of physical evidence. The other is to allow the defense to challenge the allegations against him or her on the basis of evenhanded information and to have both parties participate in the screening procedure. On the one hand, a screened case is not charged yet, and if the case is dismissed and the prosecutor intends to investigate further, the case’s dossier probably cannot be disclosed to the defense during this phase. On the other hand, as with the U.S. preliminary hearing, limited

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617 See Kenneth Graham & Leon Letwin, The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations, 18 UCLA L. REV. 916, 917-919 (1971) (noting the file includes defendant’s prior convictions, complaint, the police arrest report, the property report, witness testimony).
618 Id. at 923.
619 SCHIFFMAN, supra note 603, at §3:7.
discovery is an ancillary effect to the adversarial type of screening where the defense learns limited information and evidence from this proceeding. Additionally, in France, the defense counsel is allowed to have at least four working days to access the dossier before any judicial investigation begins, and the attorney can have a copy of the contents of the dossier. This legislation strengthens the rights of the accused under the notion of equality of arms and the increasing influence of ECHR.621

Since the proposed screening adopts adversarial procedures and emphasizes more evenhanded participation, the defense needs to acquire some information in the prosecutor’s dossier. If the concern that secrecy principle remains in application when the screening judge dismisses the case, and the prosecutor reinvestigates the case, we might need to maintain the secrecy principle. In order to harmonize such concerns, a limited discovery would be a viable means that caters to the necessity to provide the defense with more participation in the procedure and the material on which the prosecution was based. Besides, how could a system acquire more input from the defense if the defense is not afforded access to the prosecutor’s case?

Given that the proposed screening is limited to the finding of the prima facie case of the prosecution, a system could adopt “limited discovery” that extends limited information to the defense for that purpose only. A limited discovery is strictly circumscribed within the need to establish the prima facie case by the prosecution that the accused has committed the alleged offense. The extent of the discovery is under strict constraint decided by the prosecution to establish the prima facie case. The defense could acquire limited information from the

620HODGSON, supra note 67, at 120.  
621Id.
prosecutor in order to check the prosecution’s case. If the prosecution presents illegally obtained evidence, the defense is entitled to argue to exclude it. For example, if, in a drug smuggling case, a small amount of cocaine is obtained by warrantless search of luggage at a bus station without probable cause, it might violate the Fourth Amendment and be excluded based on illegal search. The defense should have it excluded and then challenge the indictment for unfounded prosecution if the drug (physical evidence) is excluded. Without the limited discovery by the prosecution, the defense could neither learn of such information in advance nor challenge the illegally obtained evidence. Likewise, it would apply to the hearsay evidence listed in the indictment, unless the prosecution presents and questions the first-hand-knowledge witness at the screening hearing. Otherwise, the defense could demand to exclude it.

In sum, this dissertation advocates adversarial screening procedure to allow defense participation, especially the defense voice and limited discovery to allow the defense to acquire some of the prosecution’s evidence to challenge the indictment in the hopes of effectuating the screening mechanism in Taiwan.

4. Screener

Currently in Taiwan, without independent screening procedures and a different group of judges to perform unbiased screening, the trial panel who tries the case is in charge of reviewing the dossier. Critics are concerned that without the division of another group of judges from trial, it may lead to an issue of “biased” opinion that the trial judges who try the case also hold the authority to review the indictment and to decide whether to dismiss the case. As Professor Lin
claimed, it is necessary to have the screening judge and trial judge in that it is doubtful whether a trial judge can remain impartial when also holds the screening authority.\textsuperscript{622} If a judge is both the screening and the trial judge, we worry that she may be predisposed to convict the accused, because she found the case to be warranted and that the prosecution has already proven the charges beyond a reasonable doubt.

Unlike Taiwan, both the United States and France position a different group of judges, like the magistrate in the United States or the investigating judge in France, to perform screening functions or supervise the investigation. In the United States, in addition to the magistrate, the grand jury which is a group of independent lay citizens, supposedly not under the control of any institution, also carry out the screening function. Judging from a normative perspective, the screening performed by a third party or a neutral institution would maintain the separation of powers and checks and balances, thus bringing about more confidence in the ultimate charge.

One judge has acknowledged that it is better to separate the screening judge and the trial judge in case handling, given that some judges would dismiss cases to lighten their caseloads.\textsuperscript{623} However, as analyzed in the empirical findings in chapter 1, the extremely low dismissal rate actually suggests that judges do not dismiss cases for such benefit. In fact, the dismissal rate has gradually decreased since the enactment of screening mechanism in 2002. The argument based on this possibility has been ruled out.

\textsuperscript{622}Lin, \textit{supra} note 501, at 69.
\textsuperscript{623}Wu, \textit{supra} note 492, at 54, 55.
If the screening is carried out by a different group of judges, the advantage is that a special group of judges would provide impartial screening instead of the trial judge who might mix both the screening and preparation of trial function into one proceeding. By this design, there is no longer the concern of the disappearance of the screening function, but there may exist the potential concern of judicial legal culture or judicial corps like that experienced in France, where even the judge does not effectively supervise the prosecutor’s cases and investigates the case neutrally given the fact that they both are members of the same judiciary organization. Because prosecutors and judges are members of the judiciary, recruited by centralized judicial examination and trained together, the cultivation and education form close underlying ideology. Similar to the judiciary in France, Taiwan’s judiciary also has a continental heritage; therefore, Taiwan’s judges and prosecutors may also render so-called “judicial coporatism” phenomenon that forms the unique underlying legal culture.624

As seen in the French experience, the investigating judge charged with supervision and investigation was criticized and doubted in wielding her authority with regard to impartial investigation. The research also points out that underlying ideology and judicial culture form a judicial corps that influences the separation of power and mitigates the checks and balances. The investigating judge receives the prosecutor’s dossier and might readily accept her theory of the case. Likewise, it is inevitable that similar problems would arise in Taiwan, a country adopts continental legal system as well, and might lead to the possibility that the judge is reluctant to

screen the prosecution because the underlying ideology, legal culture and mutual familiarity. As a result, the legal culture might actually undermine the checks and balances achieved by the screening mechanism, which is devised for checking the prosecution by the independent screening judge.

The only solution relies on the division of training of the judges and prosecutors. Currently, a division of the two groups of judges may improve the screening judges to exercise their authority independently because screening and trial functions would be clearly severed. The screening outcome might influence judges’ reputation and might demand the accountability for the screened cases screened even if screening judges have close bonds with the prosecutors.

In short, a set of screening judges who are separate from the trial judges is better policy when seeking to achieve the goal of independent and unbiased performance of one’s duties and functions, thus creating a workable systematic design. Moreover, if the recruitment and training of judges and the prosecutors could be separated, and the underlying ideology as one judicial corps could be eradicated, this would be a collaborative reform that would help to achieve the screening goal.

5. Evidentiary Rules

Evidentiary rules not only matter with regard to the information that a system allows an adjudicator to access to discover the truth at trial, but also with regard to the information that the preliminary hearing magistrates may review when appraising the sufficiency of evidence to
justify a trial. The preliminary hearing is a safety valve that allows a case with sufficient evidence to justify further proceedings and diverts a case without sufficient evidentiary support from the criminal justice. Those cases with sufficient evidence and which satisfy evidentiary rules bring with them a high possibility of a conviction. That indicates that in the avoidance of wrongful prosecution, by imposing trial-style evidentiary rules upon preliminary hearings, this design could elicit more correct charging and achieve a higher probability of conviction, in that evidentiary rules applied and evidence qualified as competent at trial are more reliable than most inadmissible evidence.625

Neither screening mechanisms in the United States apply the evidentiary rules in federal proceedings. It is believed that imposing the evidentiary requirement upon the preliminary hearing would increase the administrative pressure to avoid preliminary examination and that relaxed evidentiary requirements for preliminary hearing would advance the flow of the case, as discussed in chapter 3. However, in federal jurisdiction, the law does not preclude the magistrate from demanding that the prosecution present evidence that would be available and admissible at the time of trial.626 In some state jurisdictions, rules of evidence would apply at the preliminary hearing. Also, in France, in order to incorporate human rights and to allow the defense to take the initiative in the criminal proceedings, the defense is entitled to seek the exclusion of unlawfully obtained evidence.627

625Notes, supra note 299, at 779-780.
626WRIGHT & LEIPOLD, supra note 266, §92.
627Field & West, supra note 537, at 479.
Again, the extent to which trial evidentiary rules are applied depends on the interest a nation wants to protect and the criminal justice it desires to achieve. As Taiwan’s society is calling for more detailed prosecution, that evaluates the performance of individual prosecutors more closely and strictly controls the quality of the charging decision. It also demands more than just weeding out of unfounded cases. The society has high expectations of the prosecutor not to abuse the charging power by indicting the innocent. Otherwise it creates a situation where the prosecution forces the innocent to become involved in a criminal process in which he or she should not be involved.

The strict evidentiary rules may bring more improvement and confidence on screening the prosecutorial charging decision. If inadmissible evidence could be admissible while screening, then there would not be much screening, and an unwarranted prosecution could proceed to trial. This is true in cases involving hearsay evidence, which can turn on the reliability issue and should not be credited as trustful. Illegally obtained evidence violates fundamental and constitutionally protected human rights and undermines the values that a society most wants to preserve, and the exclusion of such illegally obtained evidence limits the overreaching of government power as a procedural safeguard. Thus, an indictment shall not be based on unreliable hearsay evidence and illegally obtained evidence. One may consider that a

screening mechanism is not a suppression hearing; therefore, the evidence shall not be suppressed at the screening procedure.

Basically, it is not until the screening stage that the defense has the opportunity to check the prosecution’s evidence for the first time since the start of the investigation under the proposed mechanism. In order to protect the defense’s right of participation in the screening procedure and to review the prosecution’s evidence and witnesses the prosecutor desires to call at the preliminary hearing, the defense should be allowed to have, in advance, a copy of the prosecution’s evidentiary list for the preliminary screening that is sent to the screening judge and accompanied dossier concerning the evidentiary list. This should be done for the purpose of participation in the screening mechanism, but not for the purpose of a suppression hearing or preparation for the trial.

Under the proposed screening procedure, the prosecutor has her main witnesses present before the screening judge, questioned and crossexamined under oath. Through direct questioning and cross examining of witnesses with first-hand knowledge, the testimony is no longer hearsay evidence after the witness has taken the stand before the screening judge, and the testimony is also preserved on the record. By hearing the first hand knowledge of key witness at the preliminary hearing, not only could the defense and the screening judge appraise whether there is a warranted prosecution and whether the threshold has been met, but also the defense and the prosecution could preserve the testimony for subsequent use in the future.
As to the illegally obtained evidence or other incompetent evidence, the defense is entitled to check whether the proffered evidence list provided for the screening process—including confession and other physical evidence—is acquired through legal means. For example, if the defense is dubious as to the admissibility or legality of the confession, she is able to file a challenge during the screening on the basis of information provided by the prosecution after limited discovery is served. She could ask for the exclusion of such evidence beforehand or during the screening in order to argue that the indictment does not meet the charging threshold at the screening hearing stage.

But, again, the screening hearing is neither a suppression hearing nor a complete proceeding that supersedes the trial. In the U.S. federal jurisdictions, the screening judge’s ruling on probable cause determination challenges has no binding effect in subsequent trial. But in some state jurisdictions, such as New York, the screening judge is entitled to look into both probable cause and the admissibility of the evidence because the law requires “legally sufficient” competent evidence that establishes each element of crime charged. In other words, the screening judge does review the competency of evidence. Thus, if the prosecution is partially based upon incompetent or inadmissible evidence, and such evidence is an “essential” part of the prosecution’s case, the screening judge should stand in the way and impede the case from passing through the screening; otherwise, during the suppression hearing, the trial judge could hold the evidence inadmissible on the motion to suppress the evidence and rule directly for a dismissal.
In light of the above, why bother to allow the case to enter the trial in the first instance? A screening hearing should accomplish more than merely to evaluate the “factually innocent” case and have the potential “legal innocent” go through the stigmatization of trial. As Professor Packer noted “by opening up a procedural situation that permits the successful assertion of defenses having nothing to do with factual guilt, it vindicates the proposition that the factually guilty may nonetheless be legally innocent and should therefore be given a chance to qualify for that kind of treatment.”

Current norms and the prevailing academic view in Taiwan hold that stringent evidentiary rules do not apply to the screening stage as stated in chapter 3. However, the argument is derived basically from emphasis on the formality of differences between trial and screening, including the goal and function. It might ignore that one of the most critical goals in any criminal justice system is to protect the innocent from wrongful convictions. It also leaves out that one of the most important goals a screening mechanism intends to reach is to protect the innocent. The argument does not address the problem of how to achieve this goal without investing in stringent evidentiary rules to insure that the evidence supporting the charge are be fully admissible.

Why are so many procedural safeguards and rights set forth in criminal procedure? Why does a system impose a heavy burden on the prosecution to prove a case beyond a reasonable doubt? And why does a system remedy the wrongfully convicted if it is later found and proven that the conviction was erroneous because of various causes, such as DNA evidence or wrongful

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identification? It all relies on the prosecution to bear the burden of proof and burden of persuasion, because no system designer desires to imprison and penalize the innocent unless it is corrupted and broken. It is necessary to burden the prosecution and install many impediments for prosecution in order to ensure that not only that factually innocent are free from harassment by the government, but also that legally innocent persons walk free when the government relies on its misconduct when trying to prove the case or intrudes upon the values a society or a nation cherish the most.

There are two advantages to adopting the evidentiary rule in Taiwan’s screening mechanism. First, the perpetuation of testimony for future use: if hearsay evidence is inadmissible at preliminary hearing, the prosecution has to call key witnesses during screening to justify her warranted prosecution. This rule enables the prosecutor to call the witnesses to testify and preserve and perpetuate their testimony, and to have it on the record for both parties. Under some circumstances, the defense could call her witnesses to testify and have testimonies on the record.

In the United States, the witness’ prior statements, testified to at preliminary hearing, would be admissible under the condition the witness is unavailable to testify at trial, and only if the defendant has the opportunity to crossexamine the witness during the preliminary hearing.\(^{631}\) Taiwan faces the same issue which allows a variety of ways to introduce and admit prior statements. However, it may cause many troubles for legal practitioners when different judges apply the law differently. Taiwan recognizes that the prosecutor is entitled to question a witness

during the investigation. The law admits the witness’s “out of court” testimony, stated to the prosecutor under oath during the investigation, as hearsay exception, unless there are circumstances that demonstrate its unreliability. There are different opinions concerning the admissibility of pretrial “out of court” statements. Some judge recognizes that the prosecutor is entitled to call witnesses and to extract testimony under oath. They believe that the prosecutor obeys the law and are unlikely to conduct coerced extraction; therefore the “out of court” testimony made before the prosecutor during investigation is admissible unless explicit unreliable circumstances exist. Taiwan’s Supreme Court acknowledges that “explicit unreliable circumstances” include the interrogative circumstance and witness state of mind, including coercive, fraud circumstances, but does not address whether the witness can be cross examined by the accused. More recently, other judges have acknowledged that such hearsay evidence is admissible if the witness has testified under oath and has been cross examined at trial, 

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632 Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 248(2013)(Taiwan) (stating an accused is present while a witness is examined during the investigation and she may examine the witness. If the question is an inappropriate one, the public prosecutor may prohibit the question. If it is foreseen that a witness cannot be examined at trial, the accused shall be ordered to be present unless such witness cannot testify freely in his presence). 633 Xing Shi Su Song Fa [The Code of Criminal Procedure] art. 159-1(2013)(Taiwan) (stating witness prior statements made out of court by a witness to the judge shall be admitted as evidence. Statements made during the investigation stage by a witness other than the accused to the public prosecutor, shall be admitted as evidence unless it is evidently unreliable); art. 159-2 (2013)(Taiwan) (stating if witness prior statements made during the investigation by a witness other than the accused to the assistant of public prosecutor, judicial police officer, or judicial policeman are inconsistent with that made at trial, the prior statements may be admitted as evidence, provided that specified conditions exist indicating that the prior statements are more reliable, and necessary in proving the facts of the criminal offense); art. 159-3 (2013)(Taiwan) (stating that witness prior statements made during the investigation by a witness other than the accused to the assistant of public prosecutor, judicial police officer, or judicial policeman may be admitted as evidence, if one of the specified conditions exist at trial and after proving the existence of a condition indicating its reliability and its necessity in proving the facts of criminal offense:
1. The witness died;
2. The witness has lost memory or been unable to make a statement given physical or emotional impairment;
3. The witness is unavailable due to the fact that he is in a foreign jurisdiction or whereabouts is unknown;
4. The witness has refused to testify at trial without justification).
636 Zui Gao Fa Yuan [Sup. Ct.], Criminal Division, 94 Tai-Shang Zi No.7132(2005) (Taiwan); Zui Gao Fa Yuan [Sup. Ct.], Criminal Division, 95 Tai-Shang Zi No.1585(2006) (Taiwan)
given the constitutional demand for right to cross examination or right of confrontation for the defendant in Taiwan.637

Therefore, there are some differences in admissibility of “out of court” hearsay evidence within Taiwan’s criminal justice system, which results in confusion. Whether the application of the hearsay law and the practice is repugnant to U.S. law and how does the confrontation clause apply in Taiwan is one question. If the prosecutor could present her first-hand witnesses under oath during the screening hearing and have the witnesses crossexamined by the defense, the hearing could not only screen the case to check whether the prosecution is founded, but also help determine whether such testimony is admissible.

Second, both sides could take advantage of the recorded testimony for impeachment purposes when any witness alters her position against any side, or makes any inconsistent testimony. Since the testimony is perpetuated, the witness’s unavailability or change of position is less likely to influence the outcome. In other words, it disincentiveizes perjury or other attempts to tamper with a witness after her first statements are made.

6. Supplementary Evidence Ruling

Currently, when the court considers whether the proof presented is “obviously insufficient” to establish the possibility that the accused is guilty (the screening threshold), the court may order the prosecutor to present additional or supplementary evidence before the court.

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dismisses the case. In so doing, it positions the court system in a biased role in screening, and it leaves the judge in a conflicting role that makes the judge stand by the prosecutor or direct the prosecutor to supply one-sided evidence instead of checking the prosecution impartially.

Such a ruling also incentivizes the prosecutor to ignore or to be reckless in performing her duty. The imbalance tips the government and implies the judiciary and the prosecutor still stand side by side to achieve crime control for society. As a matter of law, this is in contrast to the adversarial ideology that seeks to equalize both parties in the views of the law and adjudicator. Binding the judiciary with the prosecutor as a whole raises the concern that inquisitorial judiciary, one that groups the adjudication and prosecution together in one hand, might secretly return. The current law might actually tip the balance of the relationship among both parties and destroy the unbiased judiciary role.

The legislation that replicates the law of the prosecutorial directive to the police official is just a mistaken transplant from Taiwan’s internal criminal justice system in that both the prosecutor and the police officials are in charge of investigation and the prosecutor is in charge of the prosecution exclusively. They both share the same role as combatants against criminals and work as a team constantly and hierarchically during the investigation. Structurally, the prosecutor is entitled to supervise, direct, and order the police officials with regard to the investigation. She is also entitled to order the police officials to reinvestigate and supplement the dossier with the evidence as a hierarchically higher ranking official. Thereafter, the prosecutor is in charge of prosecution and has the final say concerning the evidence and the dossier.
In contrast to the hierarchical relationship between the prosecutor and her agents in Taiwan, the judiciary and the prosecutor are not hierarchically ranked in the same branch of the government or are not supposed to be ascribed as “partners” who work together. Rather, the relationship is one of checks and balances among the government powers in different branches of government. In this sense, the judiciary mission is to check the prosecutorial power instead of providing judicial directives to one of the party.

Comparatively, in the United States, there is special emphasis on the balance of power of both parties in the preliminary hearing so the judge shall not ally with the prosecutor. In addition, the magistrate checks the executive power, which is consistent with the idea that the prosecution is subject to the review of the judiciary. The judiciary checks the government’s power, but it does not play a role of a superior to the executive nor does it act as the government attorney, nor does it use inquisitorial power to demand the prosecutor to further her investigation.

In short, the supplementary ruling runs against the contemporary institutional design that achieves the check and balance between the separation of governmental powers as well as the adversarial style of even-handed screening procedure. Therefore, this device should be abolished in that it tips the balance of the adversarial-style procedure and relations of separation of powers. Without it, the imbalance in favor of the prosecution is avoided.
7. Charging Threshold and Screening Threshold

The threshold of prosecution determines the degree to which a case should be prepared by the prosecutor before sending it to the court. In the United States, the screening magistrate screens the cases on the basis of probable cause standard, which binds the case over to the grand jury stage. In federal jurisdiction, the court states that “probable cause signifies evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused’s guilt.”\(^{638}\)

In the United States, state jurisdictions approach the probable cause determination in different ways. Some states follow the federal approach, and others employ a stricter, \textit{prima facie}, standard, which requires a state to demonstrate sufficient probable cause to believe that the charged has committed the offense and all reasonable inferences from evidence could support a guilty verdict.\(^{639}\) The \textit{prima facie} standard requires no credibility weighing of the testimony and is not equated to the standard for a conviction.\(^{640}\) This standard, when applied in the preliminary hearing, where adversarial procedure is adopted, brings closer to the ruling on motion for directed verdict after the completion of presentation of evidence by both parties.\(^{641}\)

By adopting the \textit{prima facie} standard, a few criticisms may arise. One concerns timing: this standard may cause an arrested suspect to be held for a longer period of time while the case

\(^{640}\)\textit{Id.} at 548(citing Commonwealth v. Kohile, 502 Pa. 359, 466 A. 2d 991, 997 (1983) and stating that credibility is not an issue at pretrial proceedings).
\(^{641}\)LAFAVE ET AL., supra note 311, at221.
is being prepared and screened. The other criticism is that more states use the probable cause standard instead of this higher standard. As to the former criticism, it is inevitable that adopting the higher standard may take longer to complete the investigation. However, one may perceive the potential debate from a different perspective. Although the suspect may be detained for a longer time due to the prosecution preparing a case, a suspect may be cleared at the end of the investigation and released. In other words, the higher standard demands more elaborate investigation, which might lead to the benefits of obviating the erroneous prosecution and achieving justice. While a higher social cost is embedded within by adopting a higher screening standard, these benefits outweigh the cost. This might be what a proposed screening mechanism expects to achieve. As to the latter criticism, the rigidity of threshold is just a matter of choice as opposed to the value of “right” or “wrong.” A stringent screening assessment would be much more effective in the latter phase in criminal justice. This dissertation advocates that both factually innocent and legally innocent shall not go through the harsh trial and be diverted earlier from the criminal justice system. Higher screening standard is one natural way for a system to reduce wrongful charging.

In Taiwan, normally, the charging threshold is whether the evidence is sufficient to consider that the accused is suspected to have committed the offense. The screening threshold is “obviously insufficient” to consider the possibility that the accused is guilty. In other words, the threshold looks at the possibility of a guilty conviction unless the evidence is clearly insufficient. By comparing it with the prima facie standard, both are compared to the standard for a conviction. The difference lies between “obviously insufficient” and “prima facie” degree

642 Kamisar et al., supra note 273, at 1025.
643 Wang, supra note 495, at 102.
of proof. Although there is a proclamation that this threshold is identical to the “prima facie,” considering that the context “obviously insufficient” evidence to prove guilty, it is a threshold that demands much lower degree of proof than the prima facie standard because the context “obvious” is an important qualification.

While the degree of “obviously insufficient” is uncertain and vague in comparison to the current charging standard, the screening standard is set so low that there is hardly any comparison to the standard for conviction. Besides, the prosecution standard and screening standard have different thresholds that confuse the prosecutor as to which one should be followed. The standard is difficult for the defense to challenge and the screening judge to exercise. It would be better if the two thresholds are lined together in order to remove the gap between charging and screening. In addition, the two standards shall be raised up higher than the probable cause or suspicion that the offense was committed standards.

From normative perspective, the prima facie standard provides a clear-cut standard in application and case selection. As we previously noted, the prima facie standard is more predictable in context than “obviously insufficient” standard. Moreover, a higher threshold could sound a cautionary note to the prosecutor to conduct the screening more rigorously. Besides, the threshold incentivizes the prosecutor to consider whether the evidence supports her version of the facts and would support the conviction of the accused. Comparatively, Germany’s threshold to prosecute demands sufficient suspicion that evidence obtained through investigation

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644 Id. at 103.
is “very likely” to lead to a conviction of the accused. In other words, the prosecutor is required to prove to a degree close to conviction of the accused.

Set forth earlier in this chapter was an example of the prosecutor who indicted the accused for rape on the basis of a confession and victim’s identification without a DNA examination or other evidence. As a matter of law, a mere confession could not prove a defendant’s guilt beyond a reasonable doubt without corroborating evidence. Eventually, the DNA test report cleared the defendant. If a screening mechanism would entail *prima facie* standard, the case would be easily ruled out because prosecution evidence would not warrant a conviction due to the absence of the corroborating evidence required to verify the confession and victim identification. DNA evidence is currently required nowadays in almost every type of rape cases. The prosecutor should have concluded that the case bore insufficient evidence and failed to satisfy the requirement of the mandatory prosecution. The prosecutor should have also chosen not to charge until the DNA report was released. Obviously, a different and more correct outcome ensues when a higher standard is applied.

8. Pretrial Detention

Pretrial detention in Taiwan is divided into two parts. One is the detention made during the investigation by the judge through the filing of the application by the prosecutor. The other is decided by the trial judge simultaneously, together with the case filing at the trial court, if the

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645LIN, supra note 233, at 21.
646Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 156 (2013)(Taiwan) (The confession of a defendant, or an accomplice, shall not be taken as the only proof of a conviction; other collaborative evidence shall still be investigated and collected to check whether the confession is consistent with fact).
accused was held in custody during the investigation. Normally, the trial judge receives the case with the *dossier* and decides by a custodial hearing whether the accused should remain in custody or not once the prosecution is presented at court. For the former one, i.e., the detention made during the investigation, it was decided earlier in the criminal process and is irrelevant to the screening. For the latter one, i.e., the detention made after the case is filed at the trial court, it is related to the new proposed screening procedure and needs to be addressed.

Currently, the screening takes place after the case is filed, and the trial judges in charge of the case decides whether the continued detention is necessary if the accused is being held in custody during the investigation. Under the reformed screening perspective, the prosecution is screened by an independent screening judge. Should the screening procedure include the determination of the trial detention when the prosecution is filed or should both be separated? This question is irrelevant to the screening process, and it is a question that might mix with the screening procedure and attract the attention of judiciary community and society to resolve it. In addition, there is a tension that exists when the screening and detention decisions conflict with each other, especially if it is decided that the detention should continue during the trial and the case is then dismissed by the screening judge. Apparently, both decisions should be grouped together in case this type of situation occurs. If both decisions are evaluated and decided individually and separately, the inconsistency of the decisions might result in troublesome situations. Moreover, if the detention decision is made by trial judges, we are also concerned that these judges may be predisposed to convict the defendant. Would it be better that both decisions are determined by screening judges to avoid the inconsistency when the prosecution’s case is filed?
In light of this characteristic, the trial detention should be decided simultaneously by the screening judge. While the screening judge conducts an adversarial screening procedure, she has control over the dossier including witnesses and other physical evidence. She is also exposed to the witness testimony and cross examination. Thus, the decision whether the accused shall be detained further at the trial and whether the detention requirement is satisfied partially depends on the screening result that demonstrates that the accused is highly suspected of committing the offense. In the reformed screening mechanism, there may be two distinctive thresholds that a screening judge is required to consider. First, the screening threshold is set so that the state is required to demonstrate sufficient evidence to support a guilty verdict. Second, the detention threshold is set at a level that the judiciary holds a great suspicion of the commission of the crime and the likelihood of the accused to flee or destroy evidence, etc. (other detention requirements). It could be distinguished that the prima facie screening threshold entails a higher threshold than that of a detention. If a case meets the screening threshold, it seems that

647 Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 101 (2013)(Taiwan) (providing that an accused may be detained after a detention hearing by a judge and is greatly suspected of having committed an offense, given the existence of one of the following circumstances to indicate that there are potential difficulties in prosecution, trial, or execution of sentence unless the accused is detained:
1. She has absconded, or facts sufficient to justify an apprehension that he may abscond;
2. There are facts sufficient to consider that she may destroy, forge, or amend evidence, or tampering with a co-offender or a witness;
3. She has committed an offense punishable for a death penalty, life imprisonment, or a minimum imprisonment with no less than five years.
During the detention hearing, the public prosecutor may be present and present the reason for applying detention order and necessary evidence.); art. 101-1(Taiwan) (providing that an accused may be detained, if necessary, after detention hearing and is greatly suspected of committing one of the following offenses, and if there are facts sufficient to indicate that he may commit more of the same offense:
1. arson and the offense of constructive arson;
2. forced sexual intercourse, act of molestation, aggravated molestation. For the case chargeable upon a complaint, if a complaint is not filed or has been withdrawn, or if the charging period of filing the complaint has lapsed, then this section shall not apply;
3. obstruction of freedom in movement ;
4. forcing others to conduct certain acts, intervening others to exercise their rights and threatening to personal security; 5. larceny ;
6.robery; 8. extortion).
the charge would satisfy the “great suspicion” requirement of the detention threshold. However, this merely shows the degree to which the screening judge believes that the charge is likely to support a conviction. For the detention, a judge is still required to consider other factors required by law, such as the likelihood that the accused will flee or destroy the evidence, etc. Eventually, the screening judge could decide whether to detain the accused further on the basis of the information derived from the screening procedure and the dossier.

9. Reprosecution After Dismissal

Currently, when screening judges dismiss the prosecution’s case, the prosecution may directly appeal to the higher court and ask for a review of the dismissal decision. What causes the dispute is the restriction on the refiling of the case by the prosecution whether on the basis of the same evidence or not. According to the law, once the rule to dismiss the prosecution’s case becomes final, no prosecution can be filed for the same case, unless one of the circumstances specified in article 260 exists.648

The restriction to reprosecute is restricted in order to protect of the accused from being harassed by the state. A prosecution may be reinitiated, however, based on new facts or evidence discovered after the first prosecution or upon the following conditions: (1) the evidence on which the dismissal is based have been proven fabricated or modified;(2) the material

648Xing Shi Su Song Fa[The Code of Criminal Procedure] art. 161(2013)(Taiwan); art. 260(2013)(Taiwan) (stating if a ruling not to prosecute or if a deferred prosecution has been maintained by the superior prosecutor and become finalized, no re-initiation of prosecution of the identical case shall be allowed except under one of the following conditions:1. New facts or evidence is discovered; 2. Circumstances for retrial exist as specified in one of the condition 1, 2, 4, or 5 of section 1 of article 420).
testimony, or expert opinion on which the dismissal is based has been proven false; (3) the decision by any court on which the dismissal is based has been altered in a final decision; (4) the prosecutor who investigates or prosecutes the case commits crimes in her position and those offenses have been proved; or (5) the prosecutor neglected her duties in handling the case and had been administratively chastised, and the misconduct is sufficient to affect the original judgment. 649

In the United States, the prosecutor is not barred from refiling the case even on the basis of the same evidence. The basic notion is that the preliminary dismissal does not implicate double jeopardy clause in federal jurisdiction, and state law puts very few restrictions on refiling the charge. 650 For the minority of states that bar the refiling on the same evidence, they allow the prosecutor to refile the case if new evidence occurs. 651 Due to the difference of double jeopardy notion between United States and Taiwan, the prosecutor dismissal decision restricts itself from the second prosecution except on the condition of the newly discovered evidence and facts or those exceptions listed above. Likewise, under the new proposal, the screening dismissal applies an identical concept that such dismissal bars reprosecution unless those exceptions exist.

Theoretically, the prosecutorial dismissal of the case is not a judicial decision and has no binding effect; therefore, it is irrelevant to the double jeopardy consideration. However, concerning the prosecutor’s decision is deemed as a judicial decision with binding effect in Taiwan, to bar a second prosecution without existence of the aforementioned exceptions is

650 KAMISAR ET AL., supra note 273, at 1027.
651 Id.
rooted in our judicial culture. This dissertation does not argue any defective procedure concerning the refiling procedure, because it inherently is less related to the defect of the screening process.

III. Any Objections

Currently in Taiwan, the screening mechanism is equally applied to all offenses, ranging from minor offenses to felony, despite the fact that it is rarely used. As this dissertation advocates an adversarial screening, most objections arise from two rationales. One is the cost of the procedure. Second is the redundancy of the adversarial style of the screening hearing. Both involve several factors that boost expenses carried out by the proposed adversarial screening. The possible increased expenses include procedural costs, such as increases in hearing times and complexity of the process for the screening judge, and the administrative costs accompanied with the procedure, including personnel, defense attorney fees, and the cost to the witnesses.652

Seemingly increased expenditure accompanied with the reformed screening is inevitable, but it is affordable. Any reform inevitably brings additional expenses, and increased costs of all kinds. The proposed screening could at least bring in the following saved costs that make the system better off than that of a system without it. First, the accused may gain an earlier insight into the government’s case and weigh it, which might result in an earlier guilty plea or a plea bargain. If the accused is informed that the prosecutor has a solid case earlier in the criminal

652See Notes, supra note 299, at 790 (noting the factors result in the expenses in forward-looking preliminary hearing are hiring more qualified magistrates, both party manpower to prepare for the hearings, administrative fee for the judicial proceedings).
process, she might adjust her litigating strategy in exchange for a more favorable sentencing.\textsuperscript{653} Even if the accused decides not to plea or plea bargain, the hearing could facilitate the trial process. Either way, it reduces a great amount of time and expense at trial for both parties and trial judges. In addition, a higher prosecution standard may well inform the prosecution of the strength of its case concerning whether the accused could be convicted, and alternatively, save time and resources of that charge for a better one.\textsuperscript{654}

Second, administrative and procedural cost saving is an essential benefit. Given that the screening hearing entails questioning and cross examination of the prosecution witnesses, it perpetuates of witness testimony and its preservation for the subsequent use at trial if the witness becomes unavailable. So, the hearing not only reduces the time and expense at trial, but also ascertains the admissibility of “out of trial court testimony” lest “out of trial court testimony” leads to another debate at the suppression hearing.

Third, as Judge Posner stated, “how accuracy in fact finding relates to deterrence, notice that the expected cost of punishment is actually the difference between the expected cost of punishment if one commits a crime and the expected cost of punishment if one does not commit a crime.”\textsuperscript{655} He also noted that

“The more accurate the process of determining guilt is, the less random punishment will be, and so the greater will be the law’s deterrent effect . . . . So, inaccuracy can increase as well as reduce deterrence. But probably the

\textsuperscript{653} Anti-Corruption Act, art. 8 (Taiwan).
\textsuperscript{654} Notes, supra note 299, at 795.
latter effect will predominate in most cases . . . it will impose greater social costs the bigger the case."\textsuperscript{656}

Similarly, Professor Miceli stated that “err in the determination of guilt mitigates the deterrent effect of criminal punishment by reducing the expected cost of committing crime, or, equivalently, by reducing the benefit of being innocent.”\textsuperscript{657} Therefore, wrongful convictions lead to reduced deterrence and impose greater social cost on the person being wrongly convicted.

A wrongful conviction still conveys the deterrent effect to the rest of the society in spite of no specific deterrence to the wrongly convicted.\textsuperscript{658} For the society as a whole, the aggregate deterrence effect is not as great as that of a correct conviction to the whole society as well as to a specific convicted defendant. Therefore, the total deterrent effect is still reduced in this sense. For the wrongfully convicted person, society will have to pay for the loss for the wrongfully convicted person. For the nonconvicted culprit, either the actual wrongdoers will be arrested and tried in the future, or she will never be found. In the former case, society will pay the trial cost twice for the same offense. In the latter one, the expected cost of committing the crime is not realized; hence, the deterrent effect is reduced.

Wrongful prosecution opens the door to the wrongful conviction, and leads to reduced deterrence and a waste of social cost to prosecute, to litigate, to convict, and to imprison the wrong person. First, not identifying, investigating, and prosecuting the factually guilty person

\textsuperscript{656}Id. at 1484-1487.

\textsuperscript{657}3 Thomas J. Miceli, Criminal Procedure, in CRIMINAL LAW AND ECONOMICS ENCYCLOPEDIA OF LAW AND ECONOMICS 125, 141 (Nuno Garoupa eds., 2d ed. 2009).

\textsuperscript{658}This specific idea comes from Professor Leipold’s Memorandum after his review of my dissertation proposal.
has already allocated great amount of resources in the wrong direction and led to ineffective
deterrence. Second, the actual culprit might not be deterred and even commit more offenses. So
any wrongful prosecution reduces deterrence as well. A new occurrence of crime is another cost
that comes from the wrongful targeting and charging. As a result, a wrongful prosecution
generates much social costs and less deterrence to the criminal justice system. The proposed
adversarial screening procedure, would aim targeting at the guilty, avoid wrongful charging,
lessen burdens to the criminal justice system, and better obviate wrongful conviction from a
system.

IV. One Size Fits All?

While acknowledging above-outlined objections, the new reform mechanism should
address the costs and benefits and propose to apply the new reformed mechanism only in felony
adversarial screenings. This dissertation does not consider that the new reformed mechanism
does fit all. Rather, in order to balance the costs and benefits of the proposed system, the optimal
design may be to select specific group of offenses, usually felonies, for the potential candidate
under which to apply the adversarial screening on the basis of the following reasons.

First, as analyzed empirically, but not conclusively, in chapter 1, the conviction rate of
felony cases, especially for corruption offenses, has been quite low for years. Considering that
this kind of offense sometimes involves high-ranking government officials and political figures,
these cases attract more attention and publicity and usually involve more suspects or a ring of
suspects. These cases are also the ones that the government is especially interested in
prosecuting in order to gain personal reputation or personal fame. This may incentivize the prosecutor to charge not in the best interest of society and engage in less self-screening in the decision making. Moreover, concerning the internal screening, the internal hierarchical high-ranking officials, might not screen effectively because of their interests being aligned with the indicting prosecutor in order to take a free ride in gaining the fame as well. Thus, the nature of the offense inherently makes the charging decision a disputed issue and often brings doubts in society among different political parties. One example can be seen in the investigation and charging in 2008 of the former president of Taiwan, Chen Shui-bian, for corruption and money laundering at the conclusion of his presidency. The prosecution was questioned by his party and its supporters, alleging that the prosecution was politically motivated and lacked evidence. Not only did the supporters criticize it as political persecution, but also the former chairman of the American Institute in Taiwan, Nat Bellocchi, wrote in an open letter to the Ministry of Justice that “the prosecutors’ offices should avoid the appearance of targeting only one particular political group.”659 The nature of corruption case results in demanding more stringent and refined screening before the charge can be considered justified and warranted.

Second, it seems that the conviction rates of more ordinary offenses are significantly higher in comparison to corruption. From May 2008 to May 2012, the average conviction rate in

corruption offenses is 63.1% while the average overall offense conviction rate is 95.7%. Given that the overall dismissal rate is much lower than 1%—noting that the corruption offenses have a disproportionately low conviction rate when compared with the overall conviction rate—the central problem seems to fall on the corruption offenses. Even the Ministry of Justice noticed this question and committed to raise the conviction rate.

Moreover, misdemeanors and mid-level felonies are less complex in nature, and the evidence is easier to obtain in support of the prosecution’s case. Furthermore, offenses that are punishable by less than three year imprisonment are at the discretion of the prosecutor. The need for the refined screening for these kinds of offenses i.e., misdemeanor, and mid level felonies is at great expense to the criminal justice system.

Due to the limited resources and personnel, the adversarial type of screening should be allocated to felony cases only in order to prevent innocent persons being forced to stand trial and to protect their reputation. An adversarial screening is not intended to protect those who are actually guilty of committing the charged offense. With regard to the ordinary cases, the accused should still be entitled to a screening that adopts current screening procedures after balancing the costs to the pretrial system.

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CHAPTER 5 CONCLUSION AND IMPLICATION

Taiwanese prosecutors have been accused of abuse and errors in judgment in prosecutorial charging decisions where there has not been sufficient evidence to indict or where there were unjustified motivations behind the charges. Theoretically, in a hierarchical model of prosecutorial government, the prosecutorial decisionmaking accentuates organizational consistency and centralization of authority. Moreover, a mandatory prosecution system, like that of Taiwan, mandates the prosecutor to charge once there is sufficient evidence in felony cases. The prosecution should be subjected to no pressure or external influence. In reality, prosecutors retain their charging decision power that could either be abused or misjudged to breach the requirements of mandatory prosecution. Thus, abuse of mandatory prosecution or errors of judgment by prosecutors regarding the decision to prosecute still exist.

Accordingly, an effective screening of prosecutorial charging should be a critical stage in criminal procedure to prevent a potential wrongful prosecution and conviction, which inflicts discriminative effects upon defendants and burdens the criminal justice system with inflated caseloads, and breeds mistrust of the system by the citizens. It also diminishes the general and specific deterrent effects and increases social costs. In light of these characteristics, it is especially important that the mechanism for screening prosecutors’ charging decisions functions effectively. Although, Taiwan did enact the screening mechanism in the criminal procedure, the criticisms continue and no existing research examines the effectiveness of the newly promulgated screening mechanism.
The empirical data presented in chapter 1, suggests that the system is seldom being employed to screen charging decisions, given that both the overall offense and the corruption offense dismissal rates are much lower than 1% (See table 1 and 2). Judging from the overall dismissal rates in Taiwan ranging from 0.0025% to 0.03%, one might deem that either the prosecutions are of extraordinary high quality or the screening mechanism is not used properly. If we suggest the prosecution quality is quite high, the conviction rate should be accordingly high. When this dissertation examines the overall conviction rate throughout these years, this dissertation finds that the conviction rate is quite high. However, if we break down the overall conviction rates into distinct felonies, like corruption, for example, the conviction rates for corruption offenses, including facilitation of payment and favoritism, from May 2001 to 2012 are around 49% to 67% (See table 3), while dismissal rates for the corruption offense are almost zero (See table 2). Since the conviction rates are low, then, why do judges not screen out such cases in the first place? One may argue the reasons that contribute to the low-conviction phenomenon are quite varied.

Although these statistics are not conclusive, they are still suggestive that the new screening mechanism is underemployed. Furthermore, one empirical project funded by the Ministry of Justice in Taiwan examined reasons for low conviction rates in corruption offenses and sought improvement of the technicalities of investigating corruption cases, and found that 94.6% of judges considered the main reason for the low conviction rate to be insufficient evidence. In addition, the acknowledgement of the abuse of prosecutorial power in corruption cases is 78.7%.
The empirical information strongly suggests that the alleged problem of corruption prosecutions without sufficient evidence is a genuine problem. This empirical project especially demonstrates the severity of the abuse of prosecution in the corruption cases, and the corruption cases entail the problem of insufficient evidence, yet the dismissal rate is still so low, which suggests how urgent the new screening mechanism is in need of reform. The current screening mechanism might not function effectively as a shield to protect the accused and scrutinize unwarranted charging decisions, and this dissertation examines current deficiencies of the mechanism and offers potential alternatives and prospective solutions.

To begin with, this dissertation examines some major criminal justice systems and underlying ideologies for the prospective analysis of prosecutorial organizations, functions, and authorities of the United States, France, and Taiwan. Through analysis of various legal systems, this dissertation finds that legal participants, legal cultures, the prosecutorial organizational structures, and the roles the prosecutor plays, all affect her behavior in performing her charging authority. Regardless of whether the prosecutor operates in a continental system or the U.S. system, the charging authority entails the possibility of being abused or misjudged. The screening mechanism aims to prevent such abuses of prosecutorial charging discretion.

Preliminary hearings in the United States, whether in federal or state jurisdictions, adopt adversarial process that allows for equal footing for both parties. It entails the right to defense counsel, public hearings, and cross examination of prosecution witnesses, which are all aimed to determine whether the charge is appropriate. The burden rests on the prosecution to call witnesses and elicit testimony to meet the screening threshold, probable cause or prima facie
standard, is found. The magistrate supervises these procedures and terminates the questioning once probable cause is found.662 While the preliminary hearing adopts adversarial procedures, the grand jury mechanism’s traditional form remains intact and is somewhat similar to an inquisition procedure. Thus, various calls for reform of the grand jury also emphasize the adversarial inputs and strengthening defense rights of the target to redress current defects that puts heavy dependence on prosecutors and tilts the process of screening.663

On the other side of the Atlantic ocean, in France, the instruction procedure, i.e., judicial supervision led by the investigating judge allows more input, especially from the defense, to demand the investigating judge to proceed with certain investigation, including calling witnesses, confronting the witness, searching, and conducting phone surveillance in order to help establish the equality of arms. This pretrial process aims to incorporate fundamental safeguards of human rights as outlined in the ECHR.664

Therefore, adversarial participation and evenhanded involvement are essential components in discovering more balanced evidence and in protecting the innocent from squandering her overall cost to defend against unfounded accusations. The combination of these two components is a more trusted screening process than inquisitorial or one-party dominant systems could afford. While there is such a trend toward adversarial screening in the United

662WRIGHT & LEIPOLD, supra note 273, §92.
663See Leipold, supra note 264, at 311(noting that “unless there is a clash of adversaries, grand juries composed of nonlawyers will be left to make a foregone legal conclusion, and thus will be a shield in name only”).
664See HODGSON, supra note 67, at 42-44 (noting the reform adopted the idea of human rights, instead of the recommendation of adversarial ideology).
States, and there are demands for more party-participated judicial investigation in France, Taiwan’s screening mechanism bears opaque and ineffective features that are in need of reform.

By “opaque” this dissertation means that the screening procedure proceeds without holding an adversarial hearing and without an independent procedure that really mandates the screening. The screening is mixed with the pretrial preparation without distinct process that advances the goals of the screening mechanism. It seems like an almost invisible mechanism or procedure that is seldom being mentioned or employed. The “ineffectiveness” was analyzed from several perspectives, including the screening procedure, screener neutrality, evidentiary rules, the right to counsel, threshold for screening, and discovery. This dissertation then illustrates the current law and practice of screening mechanism in Taiwan and identifies major defects that are urgently in need of reform to create a better informed, more party-participatory procedure, and independent stage to conduct an independent screening of the charging decision.

In short, the appraisal that the current Taiwan screening procedure is ineffective depends on several factors. The screening procedure is set after the prosecution has initiated and gone public without actually extending the protection to the accused. Other than the screening procedure being invisible, the screener neutrality is at stake due to the directive to the prosecutor to supplement additional evidence before the judge could dismiss a case. This design endangers the impartiality of the screening judge and undermines the checks and balances relationship between the judiciary and prosecutors.
Moreover, the lack of evidentiary rules and the assistance of counsel inherently create ineffective screening that could not prevent the biased procedure and biased presentation of prosecution’s version of the criminal behavior. Besides, the proof threshold requirement poses another two questions: (1) whether the low and uncertain degree of the threshold both pose threats to the uniformity of screening threshold, and (2) whether the innocent are truly protected if such uncertainty maintains a low possibility of a conviction.

To effectuate reform of the current institution, the overhaul of the screening mechanism should adopt adversarial-styled procedures that emphasize an evenhanded process among both parties and more participation from the defense. Independent screening procedures should allow the screening judge to hold a hearing in order to screen effectively as opposed to an invisible procedure. Both structural reform of the screening procedure and incorporating adversarial components to improve the screening would lead to a comprehensive solution for Taiwan.

This dissertation, therefore, advocates the following reform path:

1. Screening should occur in an independent, ex ante screening procedure that differentiates itself from other procedures to inform the judge and allow her to exercise the screening power. Both parties should understand that the procedure should serve as a shield between the government and the citizens. At any rate, a procedure to screen the potential charge that is set before the initiation of the prosecution could provide a safeguard for the innocent, in case the prosecution goes public once charged, and also incentivize the
prosecutor to better prepare her case in the face of the possible challenges from the accused.

2. The screening procedure should be adversarial allowing the accused the chance to examine the prosecution’s case and to counterbalance the prosecutor’s investigation. In order to implement this more adversarial process, the screening procedure should convert to a process of equal party participation that allows the defense an opportunity to present her side of the case.

3. The proposed screening procedure should adopt fair procedures that emphasize that some procedural safeguards be equally applied to the screening process. Hence, some identical rules of evidence, such as the hearsay evidence, should be equally applied to the screening process to play the critical screening function to ensure the accurate outcome. In addition, to ban the use of unconstitutionally obtained evidence as the government’s proof of its case, i.e., exclusionary rule, assists the screening judge in evaluating the foundation of the government’s case. Both of these, when applied in the screening mechanism, assure the cases screened are more closely matched to the outcome of the trial.

4. When the screening threshold and the prosecution threshold adopt different thresholds, unpredictability and unfair outcomes can result. On top of that, a stringent screening threshold brings much more confidence that the accused is not the wrongfully accused and functions more effectively in sifting out the unfounded cases. As a consequence, the
proposed screening threshold should be the *prima facie* standard that could support a guilty verdict, but is still lower than the standard that would definitely sustain a conviction.
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APPENDIX A TABLES

Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Total defendants prosecuted during the year</th>
<th>Total defendants whose charges were dismissed during the year</th>
<th>Dismissal rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>158,187</td>
<td>49</td>
<td>0.0309%</td>
</tr>
<tr>
<td>2003</td>
<td>158,907</td>
<td>55</td>
<td>0.0346%</td>
</tr>
<tr>
<td>2004</td>
<td>134,956</td>
<td>33</td>
<td>0.0244%</td>
</tr>
<tr>
<td>2005</td>
<td>145,139</td>
<td>43</td>
<td>0.0296%</td>
</tr>
<tr>
<td>2006</td>
<td>173,720</td>
<td>147</td>
<td>0.0846%</td>
</tr>
<tr>
<td>2007</td>
<td>203,150</td>
<td>59</td>
<td>0.0290%</td>
</tr>
<tr>
<td>2008</td>
<td>219,456</td>
<td>50</td>
<td>0.0227%</td>
</tr>
<tr>
<td>2009</td>
<td>205,272</td>
<td>39</td>
<td>0.0189%</td>
</tr>
<tr>
<td>2010</td>
<td>198,159</td>
<td>13</td>
<td>0.0065%</td>
</tr>
<tr>
<td>2011</td>
<td>194,986</td>
<td>5</td>
<td>0.0025%</td>
</tr>
</tbody>
</table>

Table 2

<table>
<thead>
<tr>
<th>Year</th>
<th>Total defendants prosecuted during the year (Corruption offense)</th>
<th>Total defendants whose charges were dismissed during the year</th>
<th>Dismissal rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>969</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2003</td>
<td>1311</td>
<td>1</td>
<td>0.0762%</td>
</tr>
<tr>
<td>2004</td>
<td>701</td>
<td>1</td>
<td>0.1426%</td>
</tr>
<tr>
<td>2005</td>
<td>547</td>
<td>1</td>
<td>0.1828%</td>
</tr>
<tr>
<td>2006</td>
<td>840</td>
<td>105</td>
<td>12.5%</td>
</tr>
<tr>
<td>2007</td>
<td>832</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>845</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>886</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>721</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>777</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 3

<table>
<thead>
<tr>
<th>Year</th>
<th># of Defendants Indicted for corruption offense</th>
<th>Conviction Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>115</td>
<td>50%</td>
</tr>
<tr>
<td>2002</td>
<td>307</td>
<td>49%</td>
</tr>
<tr>
<td>2003</td>
<td>876</td>
<td>66.3%</td>
</tr>
<tr>
<td>2004</td>
<td>866</td>
<td>49.9%</td>
</tr>
<tr>
<td>2005</td>
<td>562</td>
<td>52.9%</td>
</tr>
<tr>
<td>2006</td>
<td>766</td>
<td>60.6%</td>
</tr>
<tr>
<td>2007</td>
<td>981</td>
<td>62%</td>
</tr>
<tr>
<td>2008</td>
<td>1390</td>
<td>67.6%</td>
</tr>
<tr>
<td>2009</td>
<td>Not listed</td>
<td>67.3%</td>
</tr>
<tr>
<td>2010</td>
<td>Not listed</td>
<td>62.9%</td>
</tr>
<tr>
<td>2011</td>
<td>Not listed</td>
<td>59.3%</td>
</tr>
<tr>
<td>2012(Jan. To Jun.)</td>
<td>Not listed</td>
<td>66%</td>
</tr>
</tbody>
</table>


(However, Ministry of Justice does not give the total number of defendants indicted since 2009)
<table>
<thead>
<tr>
<th>Year</th>
<th>Overall Conviction Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008 (May to Dec.)</td>
<td>95.7%</td>
</tr>
<tr>
<td>2009</td>
<td>95.4%</td>
</tr>
<tr>
<td>2010</td>
<td>95.6%</td>
</tr>
<tr>
<td>2011</td>
<td>96.1%</td>
</tr>
<tr>
<td>2012 (Jan. To Jun.)</td>
<td>96.1%</td>
</tr>
</tbody>
</table>


(Ministry of Justice does not give the total conviction rate before 2008 individually)
Table 5

Source

FA WU BU, DIAO CHA JI GOU: JUE CE DIAO CHA GU FEN YOU XIAN GONG SI[Ministry of Justice, Research Institute: Decision Making Research], Taiwan DI QU GONG WU YUAN FAN TAN DU ZUI DING ZUI LU ZHI WEN JUAN DIAO CHA [Taiwan conviction rate of government officials corruption questionnaire and research] (2008)(Taiwan).
Table 6

<table>
<thead>
<tr>
<th>Description</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes (Abuse of Charging Power Exists), Very Serious</td>
<td>6.5%</td>
</tr>
<tr>
<td>Yes (Abuse of Charging Power Exists), Quite Serious</td>
<td>19.8%</td>
</tr>
<tr>
<td>Yes (Abuse of Charging Power Exists), But Not Serious</td>
<td>52.4%</td>
</tr>
<tr>
<td>No Abuse of Charging Decision Power</td>
<td>14.7%</td>
</tr>
<tr>
<td>No Comment</td>
<td>6.5%</td>
</tr>
</tbody>
</table>

FA WU BU, DIAO CHA JI GOU: JUE CE DIAO CHA GU FEN YOU XIAN GONG SI [Ministry of Justice, Research Institute: Decision Making Research], Taiwan DI QU GONG WU YUAN FAN TAN DU ZUI DING ZUI LU ZHI WEN JUAN DIAO CHA [Taiwan conviction rate of government officials corruption questionnaire and research] (2008)(Taiwan).
Table 7

<table>
<thead>
<tr>
<th>Reason</th>
<th>Number of Judges</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judges deemed that prosecutors did not conduct detailed investigations and prosecute the case regularly</td>
<td>333</td>
<td>66.7%</td>
</tr>
<tr>
<td>Due to heavy family, the judge adhered to strict evidentiary rule to try the case</td>
<td>250</td>
<td>59.4%</td>
</tr>
<tr>
<td>Prosecutors and investigators do not delve into the real facts</td>
<td>266</td>
<td>33.3%</td>
</tr>
<tr>
<td>Prosecutors and investigators are incapable of investigating the case</td>
<td>196</td>
<td>42.0%</td>
</tr>
<tr>
<td>The judge lacks relevant social experience and expertise to judge the case</td>
<td>88</td>
<td>17.7%</td>
</tr>
<tr>
<td>Litigation prosecutors poor performance</td>
<td>88</td>
<td>16.9%</td>
</tr>
<tr>
<td>Others</td>
<td>32</td>
<td>6.4%</td>
</tr>
<tr>
<td>Refuse to answer</td>
<td>30</td>
<td>2.0%</td>
</tr>
</tbody>
</table>

Fa Wu Bu, Diao Cha Ji Gou: Jue Ce Diao Cha Gu Fen You Xian Gong Si [Ministry of Justice, Research Institute: Decision Making Research], Taiwan Di Qu Gong Wu Yuan Fan Tan Du Zui Ding Zui Lu Zhi Wen Juan Diao Cha [Taiwan conviction rate of government officials corruption questionnaire and research] (2008) (Taiwan).