Justice Inc.:
The “how” and “why” of death sentences in Taiwan, 2006-2015

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Justice Inc.:  
The “how” and “why” of death sentences  
in Taiwan, 2006-2015  

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Abstract

If the judicial system is seen as a corporation, its main product is undoubtedly judgments, with justice as their selling point. My research aims at examining whether Justice Inc. fulfills its mission and manufactures satisfying products that achieve justice by focusing on the flagship product of Justice Inc. – the capital judgments in Taiwan of the past 10 years.

My research finds that the stories told in capital judgments are stripped of societal context and the defendant is often presented as an offender committing a crime in a vacuum without any trace of social structures. Among the 62 capital cases included in my research, I found that 10 were seriously flawed in terms of their core narrative, which I term the “evidence chain.” Research on organizational wrongdoing shows fatal errors begin as trivial, harmless episodes, but escalate over a process and interact with other irregularities, accumulating to the point of eventual disaster. Examining the process of decision-making in death penalty cases shows that the routine functions of the judicial system tend to foster the accumulation of errors and discourage their discovery and correction.

My research challenges the popular belief that death sentences are reached based on solid, indisputable evidence, and persuasive arguments and narratives, and only imposed upon those who deserve them. A close look at 10 years of capital judgments shows the death penalty is not immune to the many mistakes that happen at Justice Inc.
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Preface

On a roller-coaster of emotion

I remember clearly the first thought I had when I learned I was granted this fellowship. Knowing that I would spend three years in Europe reading and researching, I thought: “It’s now or never. Either I hurry and complete my book on Zheng Xinze before I leave, or there will be no book at all.”

Zheng was sentenced to death and I first read his judgment in 2009. I had doubts about it, but I was not sure about his innocence, either. I spoke to activists and attorneys and was told — politely — that Zheng must have done something wrong to receive a death sentence. My doubts grew into solid arguments as a team of attorneys organized and many professionals devoted their time and energy to studying his case, which was attracting increasing attention and concern. The Taiwan Alliance to End the Death Penalty (TAEDP) started campaigning for Zheng to raise public awareness and I gave dozens of talks on the topic.

I published my book on Zheng before pursuing my PhD, as I promised myself. But one day in my apartment in Budapest, I found myself feeling helpless thinking of him. In a few years I would complete my studies and earn my degree, while he would remain jailed in a detention center. I took out the flyer that we made to campaign for his cause and I placed it in a prominent spot in my apartment. I wanted the fact that Zheng was still longing for justice to harass my conscience.

On May 4, 2016, thousands of miles from Taiwan, I experienced the thrill of Zheng’s release without a time lag, thanks to the instant communication made possible by the internet. An activist dialed my number and handed her cell phone to Zheng. Zheng thanked me for being the first person to detect his innocence and fight for it, thus paving his way home. “I would have been dead if it were not for you … Hey, when do you plan on coming back to Taiwan? I will go to the airport to pick you up.” A smile spread across my face, although I knew he couldn’t see me. “It’s a deal,” I said.

Two days later, there was an execution. It was a 21-year-old college boy responsible for four deaths and twenty-four injuries in a random attack on the metro. His motivation remains unknown. What is known is his hatred for the public. And the public decided to hate him back.
This is what it is like for an abolitionist. Good news is as rare as a miracle, and bad news is around the corner when you celebrate. This thesis is written on a roller-coaster of emotion by someone who tries to tell herself not to crave good news and not to wither in the face of bad news.
Chapter One

Manufacturing Justice in Capital Cases

I. Justice Inc.

If the judicial system is seen as a corporation, its main product is undoubtedly rulings, with justice as their selling point. When a dispute happens, the parties involved seek justice in court, delivered in the form of a judgment. Analogically, the judicial system is a monopoly backed by state force aimed at achieving justice. “Justice Inc.,” to be short.¹

Like almost everywhere else in the world (Carp, Stidham, Manning, & Holmes, 2017; Foote, 2012; Gadbois, 2011), in Taiwan, Justice Inc.’s employees are social elites (Liu, 2002). Their qualifications are difficult to obtain, but they are valid for life, which makes Justice Inc. a desirable company for suitable candidates. These lifelong credentials contribute to the stability of Justice Inc., where personnel turnover is minimum and the values and organizational culture are therefore comparatively constant and persistent. At Justice Inc., employees communicate with one another in encrypted language that locks out outsiders. The employees wear robes and work in a theater-like space, bathed in a splendid aura built on a series of rituals that show the respect of their audiences, and assisted by people who handle their chores. The employees have command over armed staff and a set of regulations guaranteeing their safety.

There are 21 local branches (i.e. Taiwan’s district courts), six regional divisions (the branches of the High Court) and one headquarters (the Supreme Court). There are two hierarchies at Justice Inc. One is seniority, as determined by the year of graduation from professional school. When two employees meet, the first thing they ask each other, apart from their names, is: “To which cohort do you belong?” The second hierarchy is that employees at the headquarters are superior to those at the regional divisions, and the local branches are for rookies (Lin, 2010). A product manufactured at a local branch is sent to a regional division for examination, then sent to the headquarters for final approval. If the employees at the headquarters are not satisfied with what they see, the product is sent back to the regional division to be redone. This supervisory process can last forever until the quality of the product is accepted.

¹ The term “Justice Inc.” came to me as an inspiration from the Pixar animation “Monsters Inc.”, which I consider to be a perfect illustration of the mainstream criminology perspective on organizational wrongdoing. I will review the theoretical debate in Chapter Two, and elaborate on my stance in the debate in Chapter Five.
New employees start at local branches. They receive bad marks if their judgments are rejected and returned by the regional division. Those with bad marks receive poor evaluations, which kills any opportunity for promotion. There is peer pressure at Justice Inc.: If most of the people in a given cohort have been promoted to the regional division, those who are left behind feel embarrassed and anxious. What is worse, since employees at Justice Inc. always ask to know each other’s cohort, slow-movers are identifiable by everyone through their failure to keep up with their peers.

In addition to quality checks, quantity checks are another challenge for employees at Justice Inc. Those who fail to produce enough judgments are considered lazy and incompetent, and will not be promoted. The quantity is a more direct indicator than the quality of judgments, hence more salient. Notices that serve as warnings are issued to employees who do not produce enough.

The biggest challenge at Justice Inc. comes from the ingredients. As a manufacturer, Justice Inc. takes raw material from various sources — such as the testimony of defendants, witnesses and experts, or forensic test results — and assembles them into a product, the ruling. Unfortunately, some of Justice Inc.’s suppliers inevitably supply subpar materials, which eventually threatens the quality of Justice Inc.’s product if incorporated into the manufacturing. False testimony and test results can mislead a judge to formulate a flawed judgment. The most important mission of Justice Inc. is therefore to distinguish between valid and invalid sources of information in formulating its product.

Justice Inc. is bound to receive misinformation from various sources, and all parties involved may feed errors into the production line, purposefully or not; Justice Inc. is surrounded and soaked in errors. Detecting the errors and correcting them is critical to the manufacturer’s operations.

My research aims at examining whether Justice Inc. fulfills its mission and manufactures satisfying products that achieve justice. Focusing on the flagship product of Justice Inc. — capital judgments — I would like to explore the “how” and “why” of death sentences.

Regarding the “how”: How do the judgments look, from a sociological point of view? What are the characteristics of the narrative that Justice Inc. uses to take lives? What are the cultural implications of capital judgments? Is rectitude achieved by Justice Inc. in these cases?
Regarding the “why”: Why does the production line allow or encourage employees to produce such rulings? What dynamics lead Justice Inc. to fail at detecting mistakes and what kind of organizational culture facilitates this?

II. The death penalty: a vantage point

Among the many products of Justice Inc., my research chooses the death penalty as its focus. Why?

The death penalty is a controversy deeply embraced by many good-willed people, and strongly rejected by many other good-willed people. It is an artifact of the past in some regions of the world, existent only in history, and an ongoing cultural phenomenon in other regions, where people refer to it frequently and rely on it strongly as an effective placebo after a terrible crime. In this thesis I will not provide an overview of the debate between the supporting and opposing camps, but rather treat the death penalty as the hole in Alexis St. Martin’s stomach.

Alexis St. Martin unwittingly became part of the history of gastroenterology. He was shot by accident, but healed miraculously under the medical care of Dr. William Beaumont. By the end of St. Martin’s recovery, a natural fistula had formed in his stomach that allowed Beaumont to observe the living process of human digestion. After decades of study on St. Martin, Beaumont published groundbreaking results, thanks to the vantage point provided by St. Martin’s stomach hole (Braun, 2016 January 6).

The death penalty is a vantage point to study society in both legal and cultural aspects. The judicial systems in modern polities take various shapes, but all of them invariantly boast of their ability to produce “justice” for the people. (Whether this is a successful claim or not varies from state to state, though.) Among Justice Inc.’s many products, the more serious the penalty, the more caution is taken in manufacturing the judgment. In other words, the type of ruling that delivers the most serious punishment is Justice Inc.’s flagship product, consuming the most resources. Hence, examining such a judgment can provide an indication of the quality of the judicial system’s production line. In this sense, the death penalty is a vantage point for viewing the judicial system as a whole.

Not only that, the death penalty is closely associated with cultural or psychological concepts of conservatism, authoritarianism, openness, tolerance, and harshness, and has been incorporated into cultural and psychological studies (McCann, 2008; Stankov, Lee, & Vijver, 2014). In Britain’s recent “Brexit” referendum, a person’s attitude toward the death
penalty was found to be a better predictor than social class or income level of her/his stance on leaving the European Union. Support for capital punishment could predict with more than 70% accuracy whether someone voted for the United Kingdom to leave the European Union (Burton, 2016 July 17). Thus, attitudes toward the death penalty lie at the heart of cultural beliefs, to the extent that they correlate with essential choices people make for themselves, even in countries where the death penalty has been abolished. The link between capital punishment and the Brexit referendum shows that the death penalty is not an outdated issue that only involves retentionist states. It remains relevant for its power to symbolize the fundamental human desires for revenge or forgiveness. In this sense, the death penalty is a vantage point for studying the cultural ideas of a society.

The death penalty issue in Taiwan offers an opportunity for academic interests on a global scale. The information is transparent enough in Taiwan’s legal system to allow this research to be conducted. Like a fistula in the stomach, a close look at the death penalty in Taiwan offers not only specific knowledge about the topic itself, but also a general understanding of how the right to life is dealt with in a democratic polity.

III. The background and a general sketch
A. Between the inquisitorial and the adversarial

Taiwan entered modernity under Japanese reign from 1895 to 1945. The inquisitorial judicial model was introduced to and applied in Taiwan during these 50 years — until the end of World War II brought an end to Japanese rule. Starting from the war’s end — and reinforced by the Cold War that followed — Taiwan came under strong influence by the United States. This eventually led to a gradual shift from an inquisitorial to an adversarial system. The 2003 revision of the Code of Criminal Procedure was the cornerstone of the “modified adversarial system”. The modified adversarial system features a criminal procedure driven by the prosecutor and the defense, yet unlike the Anglo-American system, there is no jury and the judge is the fact finder and legal decision maker.2

There are three court levels: district courts, the high court and the Supreme Court. All capital cases in Taiwan proceed to all three. Under the Code of Criminal Procedure,

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2 It is an ongoing process to take another step toward the adversarial system to have lay people serve in the jury. The policy is in the stage of experiment.
Articles 271 to 318, when a suspect is indicted, the case goes to a district court. After the district court completes the trial, the case must proceed to the High Court, according to Article 344 of the Code of Criminal Procedure, which stipulates: “The original trial court shall report capital punishment or life imprisonment cases to the appellate court motu proprio without an appeal and notify parties,” and “under the circumstance specified in the preceding paragraph, it is deemed that a defendant has appealed.” At the High Court, a trial is held under Articles 361 to 374. Once the High Court issues its judgment, the case is reported motu proprio to the Supreme Court, where an appeal occurs under Articles 375 to 402. If the Supreme Court reverses the previous ruling, the case is remanded to the High Court. The High Court produces another judgment for the Supreme Court to review, and this process repeats until the Supreme Court rejects an appeal as meritless. The case is then closed and the binding rulings are the last judgment of the High Court and the last judgment of the Supreme Court.

In the course of transitioning from an inquisitorial to an adversarial system, many habits of legal practice, as well as historical residue, remained entrenched in the judiciary’s operations and mindset. The most salient phenomenon relevant to our topic is the unity of the judge and the prosecutor, in which they share the same qualifications, the same training, and the same office building, and form teams that develop a special affinity. In Chapter Five, I will describe in detail both the historical and contemporary features of this unity, and analyze how it has a profound impact on the organizational culture at Justice Inc.

B. The punishable and the punished

The death penalty in Taiwan is not reserved for murder. The last time the Supreme Court finalized a death sentence for a non-murder offense was in 2002 for drug trafficking. But the district courts and High Court have doled out the death penalty to 14 defendants since then for crimes other than murder, even if the Supreme Court ultimately commuted the sentences to lesser penalties (Chang, 2015). The crimes punishable by death are listed in

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4 Ibid, Article 344 V.
5 Ibid, Article 344 VI.
6 Ibid.
7 Ibid.
8 Zuigao Fayuan [Sup. Ct], 91 Tai-Shang No 4851 (2002).
Appendix 1. Most of the offenses on the list do not involve intent to kill, and many of them do not result in the loss of life.

In the past 10 years, from 2006 to 2015, 62 cases were finalized with the death penalty. A short moratorium was quietly carried out from 2006 to 2009, then came to an end when a legislator brought it up and successfully attracted a lot of public attention that resulted in a strong opinion in favor of the death penalty and regular executions. The number of executions each year is usually no more than 10. There are no written rules regarding the amount of time an inmate shall spend on death row, and the criteria for selecting who will be executed when remains mysterious.

C. The scope of the research

My research includes all finalized death penalty cases from 2006 to 2015 in Taiwan, shown in Appendix 2. Each case has multiple judgments — as few as three or as many as 25. Cases Nos. 4, 51, 52 and 59 went through the district courts, High Court and Supreme Court without any remands, meaning they were finalized within three judgments. Cases Nos. 26 and 46 have 11 remands each, meaning they accumulated 25 judgments in the process. The binding judgments are the last one, which is issued by the Supreme Court and deals with the application of law rather than fact-finding, and the second to last one, which is issued by the High Court and deals with factual issues. This High Court ruling is sustained by the Supreme Court and is also referred to as “the last factual judgment.” In most cases, the last factual judgment overrides the first ruling and adjudicates the case itself. Since the Supreme Court handles appeals of legal points and does not involve itself in fact-finding or evaluation of evidence, the last factual judgment best suits my research because it is rich in “stories.”9 For this reason, the major source for my research is the last factual judgment of each case. My supplemental sources include (1) other judgments before and after, where tracing changes in the stories is relevant; and (2) court files, where more information is desired to examine the coherence, fidelity and selectiveness of the story’s construction.

D. Human rights violations

The 62 cases finalized in the past ten years all involve murder. Among them, 30 were judged to be premeditated and 32 non-premeditated. Fifty were considered direct intent

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9 Exceptions are Cases Nos. 7, 17, 32, 52, and 60 in which the first judgments are sustained. It is trial de novo in the second instance, so the higher courts investigate on evidence and conduct fact-finding and produce judgments on their own. In that sense, in Cases Nos. 7, 17, 32, 52, and 60, the judgments from the last factual trials are still the most representative among the three binding judgments.
and 12 either indirect intent, unspecified, or ambiguous (Chang, 2015). A non-premeditated murder or murder with indirect intent cannot be considered “the most serious crime.” Therefore, 37 of the 62 cases are outright violations of the United Nations’ ICCPR, which stipulates that the death penalty is applicable only for “the most serious crimes.”10 My research finding suggests 10 of the 62 cases are seriously flawed: The core of the murder story is not supported or else is negated by the evidence.11

Other violations of human rights in Taiwan’s implementation of the death penalty are documented in a report initiated by the Death Penalty Project, an international NGO. According to the report, the death penalty in Taiwan suffers from the following procedural flaws:

- Some of the cases involved torture and related ill-treatment
- Some of the defendants didn’t have access to an attorney at the Supreme Court
- Most cases did not include oral debate at the Supreme Court
- None of the defendants were allowed to be present at their Supreme Court cases
- Procedures for seeking amnesty are not in place

*The Death Penalty in Taiwan* concludes: “The pivotal question about capital punishment is whether a system of justice can be constructed that reaches only the rare, right cases, without also occasionally condemning the innocent or the undeserving — and without violating human rights. The evidence in this report reveals that Taiwan remains unable to answer this question in the affirmative, and the evidence from other developed democracies that retain the death penalty suggest that the most informed answer to this question is ‘no’ (Chang, Johnson, Lehrfreund, & Jabbar, 2014, p. 52).”

IV. An interdisciplinary approach

My research spans the themes of the death penalty and miscarriages of justice, and bridges the disciplines of social studies and legal studies.

One of the questions frequently asked about my thesis is, “Are you researching the death penalty or miscarriages of justice?” As if they were two independent themes. My answer is always that, conceptually they are two subjects, but in reality, miscarriages of justice are an

10 Case Nos. 24, 26, 39, and 40 was judged to be both unpremeditated and with indirect intent, and Case No. 16 is unpremeditated, plus inconsistent in whether the defendant has direct or indirect intent; Case No. 45 and 46 are premeditated and unspecified in whether it is direct or indirect intent. So the number of cases violating the ICCPR = 32 + 12 - 7 = 37.
11 See Chapter Four for the ten problematic cases.
integral part of the death penalty. In every jurisdiction that retains the death penalty, if we take a closer look at the people on death row, we will see innocent people. We just do not know exactly how many there are, which are innocent and which deserve punishment; but we know that no judicial system can boast that it makes no mistakes, even in applying the death penalty. It is possible to research miscarriages of justice without emphasizing the death penalty, but it would be naïve to research the death penalty without paying adequate attention to miscarriages of justice that happen to people on death row.

Case No. 3 in my research is a perfect illustration of the above point. Before 2009, no one questioned the rectitude of this judgment; it was classified as deserved. In my first encounter with the judgment, certain doubts arose and the line between deserved and innocent started to blur. When we started the campaign to rescue Zheng Xinze, we believed he was one of the innocent people on death row, but to the general public, he deserved death. His attorney petitioned three times for a retrial and filed one special appeal. The results remained the same: The court and prosecutors office did not think Zheng could be innocent. As more information was gathered, more people — legal professionals and laypeople alike — began to question whether he had been wrongly convicted. After a good 10 years on death row, Zheng is now free while his case is retried. Both the prosecutor and the defense attorney believe he was the victim of a miscarriage of justice.

The rulings against Zheng — this product of Justice Inc. — have been brought to the attention of the manufacturer for a quality check. Yet this wrongful conviction passed such checks again and again. It can not be underestimated how easily a flawed product can fool Justice Inc., even in capital cases. The death penalty is not properly understood unless we acknowledge how closely intertwined it is with miscarriages of justice.

The literature reflects the same as proposed above. For example, the essential book on miscarriages of justice, *In Spite of Innocence*, is written as a strategic attempt to challenge the death penalty by documenting wrongful convictions in capital cases (Radelet, Bedau, & Putnam, 1992). A study on miscarriages of justice also found that in a legal environment with the death penalty, wrongful conviction is more likely, because the personnel involved are prone to develop assumptions about a defendant’s guilt (Gould, Carrano, Leo, & Hail-Jares, 2014). My research therefore deals with both the death penalty and miscarriages of justice, not because I am confusing the two, but because the two themes intertwine with each other.
My research also tries to bridge the disciplines of social studies and legal studies. The existing literature on capital punishment and miscarriages of justice comes mostly from legal studies, as will be discussed in Chapter Two. In Taiwan, as well as many other places in the world, the law is viewed as a specialized arena reserved only for professionals. Although document analysis is widely used in social studies, and judgments are documents, no academic effort has been made to develop an analysis of judgments by treating them as documents. As a result, the judicial system, or Justice Inc., has not been subjected to sociological scrutiny. My research utilizes document analysis to reduce rulings to codes and summaries that reveal their core arguments in a minimalist fashion, as will be discussed in Chapter Three. In so doing, I argue that the court, as an essential establishment of the mechanism of justice, should not escape sociological scrutiny. Justice Inc. is a central part of law enforcement as well as a social mechanism for dealing with disputes. Only an interdisciplinary perspective can therefore be adequate to understand it.
Chapter Two

The Judgment: A story as well as a product

Judicial systems use language to define and create social reality, a fact that has attracted increasing concern from sociolegal scholars (White, 1989; Posner, 1998; Amsterdam, 1994; Chestek, 2012; Foley, 2008). As Elizabeth Mertz puts it: “When rendering diverse realms of cultural experience in a common language, legal institutions use language as an important and integral part of a socially transformative process” (Mertz, 1992, p.149). The most visible way to use language is storytelling. Many scholars notice that storytelling lies at the heart of a trial. As James Boyd White puts it: “[T]he law always begins in story: usually in the story the client tells, whether he or she comes in off the street for the first time or adds in a phone call another piece of information to a narrative with which the lawyer has been long, perhaps too long, familiar. It ends in story, too, with a decision by a court or jury, or an agreement between the parties, about what happened and what it means” (White, 1989, P.168). Research has shown that storytelling has an impact on legal decision makers (Bennett & Feldman 1981, Rideout, 2008, Chestek, 2012), and it is widely agreed that the trial is a competition of storytelling between two parties, and the court will decide an authorized version endowed with a moral. Based on the insights in the previous literature, my research views court rulings as stories with the capacity to shape reality, and tries to analyze them by focusing on the construction of the stories.

With this in mind, my research lies at the intersection of three different fields: narrative analysis, the study of wrongful convictions and the study of organizational wrongdoing. Death sentences are viewed as stories powered with substantial impact on reality, so the research draws on narrative analysis for criteria to critique capital judgments. The study of wrongful convictions sheds light on mistakes made by judicial systems, so my research borrows these insights to identify and analyze such mistakes. And lastly, my research turns to studies on organizational wrongdoing to seek an explanation for why such mistakes accumulate throughout the judicial process rather than being corrected.

I. Narrative analysis
A judgment, or ruling, is the text produced by judges at the end of a trial to sum up the procedure and conclude a dispute. But a judgment is not merely a text, and speech act theory will help us better understand and analyze the nature of a judgment.

Speech and acts are contrasting concepts belonging to opposite sides of a dichotomy. As a Chinese proverb goes, “to sit and speak is not as good as to stand up and act.” This means speech is words uttered while sitting, while action is something that someone stands up to carry out. But linguist J. L. Austin found that in certain circumstances, speech has action as its effect. Sometimes the way to do things is not “to stand up and act” but rather “to sit and speak,” much as the way to apologize is to say, “I’m sorry.” Austin’s findings led to the groundbreaking book *How to Do Things with Words* (Austin, 1975), followed by John Searle’s research (Searle, 1979). This is the genesis of speech act theory.

Searle puts speech acts into five categories: directives (e.g. asking someone to do something), declaratives (e.g. an owner naming his dog or the head of a state declaring war), expressives (e.g. sending condolences); commissives (e.g. making a bet), assertives (e.g. conveying information, such as “this person committed theft”). The five categories are not mutually exclusive. Some speech spans from assertive to declarative. According to Searle, for example, a verdict is an “assertive declaration.”

Searle is referring to the UK’s common law system, in which a legal decision is made by the jury as well as the judge: The jury determines guilt or innocence and judge decides the sentence. When the jury announces, “We find the defendant guilty,” it declares the defendant will take legal responsibility and at the same time asserts the defendant did harm to the plaintiff. Thus, Searle considers it a declaration with assertion.

Taiwan is a civil law country. There is no jury — rulings are made by judges. All five categories of speech act are present in the judgment. It is a directive: A guilty defendant is subjected to the penalty ordered in the judgment, and a not-guilty defendant will be released. In addition to deciding the penalty, the judgment gives orders on two matters: how to deal with relevant objects, such as confiscating the murder weapon, and how to deal with relevant people, such as detaining them, putting them on probation or releasing them with limitations on their residence. It is a declarative: A person who wins has his or her name cleared and rights restored. A person who loses also loses his or her full status as a civil subject and is subjected to punishment by law. It is expressive: The judgment often expresses condemnation of the criminal and sympathy for the victim. It is commissive: The judgment commits to maintaining public security and reinstating social order. It is, above all,
assertive. The core mission of the trial is to make the following three assertions: (1) what happened; (2) what is the legal evaluation of what happened; and (3) what action should be taken regarding the person who caused the event to happen.

The assertion in a court ruling is not merely a description of the crime, but an authoritative announcement with legal consequences. When the media report “John Doe beat his wife,” it is speech rather than action. The report may result in John Doe being condemned by the public, or the truthfulness of the reporting may be challenged. The public effect of the news coverage depends on several factors, such as the credibility of the media, the general reputation of John Doe, cultural tolerance toward sexual inequality, and the audience’s activeness/passiveness. But when the court finds John Doe beat his wife, he is subject to punishment, be it imprisonment or fine, and the punishment will be imposed by the authorities. Although the judicial system is ridiculed or scorned by the public from time to time, it is nonetheless upheld by the prevailing force of the state apparatus, which ensures that the decision made by the court is truly carried out. Otherwise, the state would be considered a failed one. It is clear that a judgment is an act that has direct and immediate power to change reality. A journalist may claim freedom of speech for what he writes in a news article, but a judge would never claim freedom of speech for what he writes in a ruling, because a ruling is not speech but action.

I argue that a judgment is a judicial act achieved through the use of language. In order to analyze the judicial act, one must therefore examine its use of language, because that is how the act is achieved. This also means that when examining the use of language in the judgment, one cannot forget that it is a judicial act in which each word brings about legal consequences.

Speech act theory highlights the existence of “illocutionary” speech. A statement like, “It is hot in this room,” may sound like a description of the current temperature, but actually contains a hidden request: “Would you please open the window to lower the temperature?” Or when a flight attendant announces, “If you do not fasten your seatbelt, the flight will not take off,” it is not a plain statement, but a request that passengers obey the rules. The hidden meaning is the “illocutionary” aspect of speech. Carlos L. Bernal analyzes a murder case to show the illocution of a verdict includes: (1) making both parties of the trial accept the decision; and (2) establishing an institutional fact in a common law system so future cases will be tried accordingly (Bernal, 2007). H. L. Ho also demonstrates that a verdict not
only officially declares that someone has broken a specific law, but also condemns this person and sends him or her to his or her punishment: “The law is full of thick concepts that describe actions in morally loaded language” (Ho, 2008, p. 9). Robert Burns goes further, arguing that by defining “the other” in society and condemning them as criminals, the court defines who we, the law-abiding citizens, are: “On the other hand, the trial is not simply a forum for judgments about the morality of individuals and actions. It is a public forum in which the jury engages in important public action. Such action reflects and redefines public identity” (Burns, 1999, p. 172).

Due to the differences between the civil and common law systems, the analyses from Bernal, Ho and Burns may not be fully applicable to the cases presented in this book, but they provide insights that help develop a discussion about the illocutionary effects of death sentences. An overwhelming majority of such rulings say they are applying the death penalty to maintain social order, console the victims and their family, “demonstrate the power of the law” (in Chinese: 以昭天理), “issue a clear warning” (以昭炯戒), “warn other potential offenders” (以儆效尤), meet public expectations, or enhance the public good. The judges are conscious of the fact that a judgment not only has a legal effect but also a social impact and moral implications, and they actively use the judgment to achieve the social impact that they deem desirable. In addition to the parties and legal professionals involved in a given case, the judgment is meant to be read by the public. The judges engage in the social process of shaping and reshaping shared values by delivering judgments, and represent the judicial system as the line of defense for justice. The illocutionary force of death sentences is to reinforce the legitimacy of the judicial system, demonstrating to the public that court is where justice is carried out.

Considering its legal consequences and social impact, a capital judgment is, above all, a crime story. Using narrative analysis, I will explore how to adequately analyze and assess a capital judgment.

Kenneth D. Chestek defines a story as “a character-based and descriptive telling of a character’s efforts, over time, to overcome obstacles and achieve a goal” (Chestek, 2012, p. 102). Roberto P. Franzosi simplifies a narrative into two vital elements, time and sequence: “A story, then, refers to a skeletal description of the fundamental events in their natural logical and chronological order or sequence” (Franzosi, 1998, p. 567). Every ruling in a death penalty case describes the process by which the defendant harmed the victim. It
includes the actors (the offender and the victim), the event (the crime) and the sequence (the preparation, the killing and the consequences). Accordingly, a capital judgment can be considered a story. Why make such an argument? There is no better explanation than Walter Fisher’s words: “No matter how strictly a case is argued — scientifically, philosophically, or legally — it will always be a story, an interpretation of some aspect of the world that is historically and culturally grounded and shaped by human personality” (Fisher, 1987, p. 49).

Viewing judgments as stories points out that they are artificial constructs. Martha M. Umphrey says “trials turn past events into texts by rendering them in language” (Umphrey, 1999, p. 397). How is the trial’s final text constructed? Umphrey makes several propositions: (1) The text is based on information; (2) witnesses, attorneys, the jury and judges all help to organize the information in the production of the text; (3) the judgment as a text has to be formed in a coherent and logical way; (4) the text is addressed to a wider audience, including the press and the public.

To extend Umphrey’s arguments, one will find that the criteria for evaluating capital judgments are embedded in it. Firstly, it demonstrates that although a judgment is a story constructed in the course of a trial by the people involved, it has to be written based strictly on information obtained at trial. Groundless speculation or fiction are not allowed in the text. Richard Posner raises a similar point in *Law and Literature*. Thus, we come to the first criterion to assess a ruling: Is it constructed strictly on evidence? Secondly, the information in the text has to be organized in a coherent and logical way. This is the second criterion: Is the judgment coherent and logical?

Chris Rideout echoes this contention in his exploration of legal writing (Rideout, 2008). Many scholars notice that storytelling has a unique persuasive power in court, and Rideout argues that the strength of storytelling depends on the following three conditions: coherence, correspondence and fidelity.

Coherence refers to the way the parts of a story fit with one another. Or, as Fisher puts it, coherence means “narrative probability” — does the story sound “real” based on common sense? In the competition of storytelling, judges or legal decision makers have no firsthand knowledge of what really happened; the best they can do is pick a more “probable” story to believe. Rideout further breaks coherence down into two parts: internal consistency and completeness. Internal consistency means all parts of the story can be linked together
without contradiction. Completeness means all parts add up to the conclusion without missing links. Rideout’s “coherence” echoes the second criterion extended from Umphrey with an in-depth discussion.

Correspondence refers to the compatibility between the story and the knowledge of the legal decision makers. The reference point for correspondence, Rideout says, is not the truth but rather the experiences and beliefs that the triers acquired previous to the trial. They cannot know the truth. Rideout conceptualizes this as “narrative scripts.” Similarly, Amsterdam coins the term “story stocks” to refer to social knowledge or cultural prototypes that pre-exist the trial. A convincing story will have to fit into the “narrative scripts” or “story stocks.” Correspondence can be understood as “the rules of experiences” contained in Article 155 of Taiwan’s Code of Criminal Procedure. In my opinion, correspondence is better incorporated into “coherence,” since the judgment of “narrative probability” is strongly influenced by one’s past experiences.

Both coherence and correspondence are formal properties, while fidelity is a substantial property. Rideout explains fidelity by citing Fisher’s argument that a story has to “represent accurate assertions about social reality and thereby constitute good reasons for belief or action” in order to fulfill the condition of fidelity. Both Rideout and Fisher avoid problematic concepts such as “truth” or “reality.” Such a contention sets a goal of establishing a substantive criterion for legal storytelling, but Rideout himself has to admit that narrative fidelity is somewhat abstract (Rideout, 2008, p. 76). It is argued here that as slippery a concept as “truth” is, for the purpose of this research, the best definition of fidelity is to examine whether the firm beliefs expressed in the conviction are upheld by the evidence. Such an interpretation brings us back to the first criterion we extended from Umphrey.

Drawing upon Umphrey and Rideout, this research will critically read judgments issued in capital cases using the following criteria: (1) fidelity (whether the establishment of facts in the judgment is firmly grounded in evidence); (2) coherence (whether the narrative in the judgment is internally consistent and logical, corresponding to one’s experiences); and (3) my own addition, the selection of materials. During the trial, all information deemed relevant is collected and one of the tasks of the court is to distinguish valuable information from non-valuable information, and then embrace the former and avoid the latter in the judgment. Literary criticism argues: “What is important is not what the text tells you, but what the text does not tell you.” A ruling is the perfect text for discussing the selection of
materials. The author of the judgment is supposed to know everything contained in the court files, and is only allowed to develop the story based on what is compiled there. No wild imagination or information obtained outside the court proceedings are allowed to sneak into the judgment, and there is no excuse if the author claims to be unaware of information collected in the court files. Thus, the judgment is a text written strictly based on a distinct database — the court files — and the author does not enjoy the liberty to ignore or freely pick and choose from it. It is therefore possible to analyze inclusion or exclusion of material. Comparing what is in the court files to what is in the judgment will reveal the selections judges make in order to apply the death penalty. The inclusion and exclusion of information has a major impact on the story, and the selection of the materials should therefore be under scrutiny.

II. Wrongful conviction research and its inadequacies

The worst scenario for a failed legal story is a wrongful conviction, in which the person accused is not the person responsible for the deed. Justice is hampered in two ways: The true offender is at large and an innocent person is punished. The study of wrongful convictions provides insight into the mistakes that can happen in judicial systems. The inadequacies of such research will indicate the void where more work is needed.

The study of wrongful convictions can be traced back to 1913 by Edwin Borchard (Leo, 2005; Gould & Leo, 2010, p. 827) and it has flourished ever since (Harmon, 2001). In the 100-year old tradition, it has become clear that certain factors are part of a repertoire in most wrongful convictions, including the following:

A. False confessions

The confession is the most powerful evidence in court decisions, be it in the common law system or the European continental system (Kassin & Sukel, 1997; Kassin & Neumann, 1997; Leo & Ofshe, 1998; Drizin & Leo, 2004). It is well documented that self-incriminating statements sometimes outweigh other evidence and lead to conviction (Bedau & Radelet, 1987; Gross, Jacoby, Matheson, Montgomery, & Patil, 2005; Garrett, 2005). Such statements often trigger a bias against the defendant (Castelle & Loftus, 2001). As the California Supreme Court put it, “the confession operates as a kind of evidentiary bombshell which shatters the defense” (People v. Cahill, 1993). In a study of false confessions, 73% of the false confessions were accepted by legal decision makers and
contributed to convictions (Leo & Ofshe, 1998). The rate of erroneous convictions rose to 81% in a similar study (Leo & Drizin, 2004). In Kassin and Neumann’s experiment, jurors were easily influenced by confessions, leading to the conclusion that confessions are more “incriminating” than any other kind of evidence (Kassin & Neumann, 1997).

In most cases, false confessions come from coercion or other inappropriate behavior by authorities, including police and prosecutors. As the National Registry of Exonerations found: “The primary reason that innocent defendants confess is that they are coerced into doing so — frightened, tricked, exhausted or all three” (Gross & Shaffer, 2012).

Knowing the power of confessions, searching for “confession-based convictions” is a useful tool to help identify possible wrongful convictions and flawed judgments. Confession-based convictions were first mentioned by Leo and Davis, who explored how false confessions travel all the way through the trial, landing in the final decision of the court and causing wrongful convictions (Leo & Davis, 2010). A confession-based conviction, as defined in my research based on previous literature, is a conviction based mainly on the confession of a defendant or codefendant, despite weak inculpatory evidence or the existence of contradictory evidence. A confession-based conviction typically has plenty of room for reasonable doubt, and does not meet the criteria of fidelity or coherence. Many of the flawed judgments found in my research fall in this category by relying on confessions and neglecting contradictory evidence or counterarguments, as I will explain in detail in Chapter Four.

B. Mistakes in examination by experts

Research shows that mistakes by forensic experts account for a considerable number of wrongful convictions (Garrett & Neufeld, 2009; Gould et. al., 2014). Among the 873 cases of exoneration in the United States between 1989 and 2012, 24% were attributable to mistakes made in the course of examination by experts (Gross & Shaffer, 2012). Their most common mistakes are not factual errors but biased opinions, misleading testimony and overstating the accuracy of the methods used in the examination (Gould et. al., 2014; Eastwood & Caldwell, 2015). The National Academy of Sciences has noted that the forensic science system is dependent on law enforcement agencies — namely, police and prosecutors — to the point that it risks being biased against defendants (National Research Council U.S., 2009). Whitman and Koppl echo this observation and take it further, arguing that forensic biases are hard to avoid: “Forensic science evidence is often ambiguous, and the analysis is generally subjective. In spite of such ambiguity and subjective judgment,
forensic science testimony is generally categorical, essentially conveying a ‘match’ or ‘no match’ decision” (Whitman & Koppl, 2010, p. 71). The inherent subjectivity of forensic decisions is compounded by the fact that a sample of potential evidence is usually tested by one lab and interpreted by the same lab. Whitman and Koppl consider this a “twofold monopoly.” The subjective bias against the defendant enters the trial and enhances the court’s preconceptions. “In these instances, it appears that the state used forensic science merely to confirm its case rather than provide a rigorous, independent assessment of the defendant’s guilt,” Gould et al. boldly write (Gould et al., 2014). Mistakes in expert examination are also visible when reviewing capital cases, and are most salient in Case No. 41, to be discussed in Chapter Four.

C. Police misconduct

“Official misconduct is unlike the other contributory factors that we find. It’s not a type of evidence that might mislead a court and convict an innocent person, but a broad category of behaviors that affect the evidence that’s available in court, and the context in which that evidence is seen” (Gross & Shaffer, 2012, pp. 65-66). Gross and Shaffer capture the unique standing of misconduct by police and prosecutors vividly in this quote. From the very start of an investigation, misconduct by police and prosecutors has the potential to contaminate a case in the most profound way.

Police misconduct is usually closely related to false confessions by defendants and codefendants. In the case of the Norfolk Four, four people confessed to the same crime, but it turned out none of them were the perpetrators. All four later said the interrogation was done in such a way that they realized they could not possibly leave the room if they did not conform and confess.12 The array of police misconduct includes torture, threat, deception, perjury and forensic fraud (Bedau, Radelet, & Putnam, 2003; Gross & Shaffer, 2012).

Misconduct by prosecutors is also found in previous research but is comparatively rare and less prominent in the cases studied in my research, so the discussion is omitted.

D. False statements by witnesses

Mistakes in identification have been documented to be one of the major factors in miscarriages of justice. Lies by witnesses also are a factor. These are comparatively rare in

12 The PBS (Public Broadcasting Service in the United States) produced a documentary on the Norfolk Four, which can be viewed at http://www.pbs.org/wgbh/pages/frontline/the-confessions/
the cases reviewed in my research. The main reason, as argued by Gross and Shaffer, is that witness testimony is less common in homicide cases, so law enforcement agencies devote more resources in such cases to producing other types of evidence. It is therefore less likely to find a homicide case that reaches a conviction based solely on misidentification or lies by a witness (Gross & Shaffer, 2012). False statements by witnesses are observed among the cases in my research and are covered in the discussion of police coercion, so the discussion is omitted here.

E. Other factors

Research into U.S. cases has identified plea bargains and inadequate legal defense to be essential factors in miscarriages of justice, but because Taiwan’s criminal procedure and legal practices are different, those are not salient in Taiwan’s judicial system. Plea bargains were only recently introduced in Taiwan and were not available for most of the cases in my research. Whether the defense is strong or weak is not easy to analyze because court transcripts in Taiwan usually are not faithful, word-by-word transcriptions but rather summaries of the hearings, in which the attorney’s defense might be downplayed. So the discussion is omitted.

F. Inadequacies in the research

After reviewing the factors involved in wrongful convictions, an important question is whether this list exhausts all causes. An obvious characteristic of the list is that it implies all mistakes come from external institutions or individuals, rather than the court. This suggests courts do not make any mistakes and have nothing to do with wrongful convictions. In the common law system, the legal decision maker is the jury, and academics perhaps cannot research how jurors weigh evidence. But that is not the case when we are discussing mistakes in Taiwan’s judicial system. In Taiwan, fact establishment is done by professional judges, and they present their arguments in their rulings. For a wrongful conviction produced in such a judicial system, the list provided by the previous literature is useful, inspiring, but not sufficient. As the legal decision maker, does the judge make mistakes in a wrongful conviction? By what process do the mistakes made by outside institutions or individuals enter the procedure and remain unnoticed until they land in the judgment? This is what is missing in the existing literature on miscarriages of justice, and it will be elaborated upon in Chapter Five.

Another void that needs to be addressed is WHY wrongful convictions happen. By studying wrongful convictions, “close calls” and “near misses,” the literature on wrongful
 convictions demonstrates a static description of what they look like. According to Bedau et al., “close calls” refer to “cases in which execution was averted at the last moment, sometimes with only a few days or even hours to spare, and if the death sentence had been carried out, a demonstrably innocent prisoner would have been executed” (Bedau et al., 2003, p. 589). “Near misses” are used as a control group in contrast to wrongful convictions and refer to cases in which the defendant “escapes” conviction: “when an innocent defendant is arrested, indicted, and/or prosecuted, but his case is either dismissed prior to trial or he is acquitted at trial” (Gould et al., 2014, p. 476). Such a picture piques curiosity without providing an explanation. The judicial system is designed and run by legal professionals and social elites, who are well-educated, well-trained, well-paid, well-respected, and often well-intended, without personal interest in the cases or motives to distort results. Why, then, do they make huge mistakes or fail to spot the mistakes of outside institutions, so as to wrongfully condemn an innocent person to death? The causes listed in the previous literature are “legal causes” but not “root causes.” The root causes need to be studied further by criminologists and sociologists (Leo, 2005).

An attempt was made by Gould et al. to fill in the void in the literature by organizing an expert team consisting of prosecutors, attorneys, activists and police to conduct a qualitative analysis of the data. They identified “tunnel vision” as the key to miscarriages of justice and explained it thus:

*Tunnel vision is defined as the social, organizational, and psychological tendencies “that lead actors in the criminal justice system to ‘focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.’” As more resources—money, time, and emotions—are placed into a narrative involving a suspect, criminal justice professionals are less willing or able to process negative feedback that refutes their conclusions. Instead, they want to devote additional resources in order to recoup their original investment. As a result, evidence that points away from a suspect is ignored or devalued, and latent errors are overlooked.* (Gould et al., 2014, p. 504)

In this insightful quote, Gould et al. describe how “tunnel vision” overarches the mistakes coming from external institutions or individuals in the process of a case, contributing to the final error. “Tunnel vision” forms a filter that screens out exculpatory evidence and focuses solely on inculpatory evidence. As a result, a conviction is reached in absence of vital information, which has a decisive influence on the establishment of facts. It is implied that
tunnel vision develops in the course of a process rather than at a specific point, and is an incremental change rather than a rapid, drastic change. Tunnel vision is more of an unconscious, psychological tendency rather than a conscious, rational decision.

By introducing the concept of “tunnel vision,” Gould et al. move wrongful conviction research beyond mere description and toward explanation. Borrowing from their insight, I will argue that “tunnel vision” is not the best analytical tool for studying wrongful convictions. Gould et al. describe “tunnel vision” as a psychological process involving people within the criminal justice system. This downplays the social and organizational aspects of the accumulation of errors. These aspects become a background instead of the target phenomenon to be examined and analyzed. My research positions the dynamics of error accumulation at the center of the study, informed by theories of organizational wrongdoing in criminology literature, which we will turn to in the following section.

III. The theory of organizational wrongdoing

In order to understand the social process by which errors accumulate and interact with one another in the judicial system, I will turn to the study of organizational wrongdoing. Sociologists and criminologists began much later than legal scholars to study wrongful convictions (Leo, 2005). Lofquist was the first scholar to view miscarriages of justice through the lens of organizational wrongdoing and develop a successful wrongful conviction theory (Lofquist, 2001). I will therefore dedicate some space to Lofquist’s point.

Lofquist reviews two explanations of organizational wrongdoing in criminology literature: the agency theory vs. the structure theory. The agency theory is in line with the rational choice theory in criminology, in which it is believed that crime is committed when an actor makes a rational choice in pursuit of a certain purpose. In this school of thought, organizational wrongdoing is considered to be done by an individual driven by greed, ambition, or economic profit. And miscarriages of justice are instances of wrongdoing that start with the police and prosecutors’ ambitions to crack a case and catch the bad guy, with prejudice against people from certain races or social classes, and with public outrage and pressure to find the perpetrator of a crime. These factors accumulate and contribute ultimately to a wrongful conviction.

The structure theory, on the other hand, emphasizes structural factors rather than individual ones, and recognizes that organizational wrongdoing does not necessarily involve bad faith or intent on the part of any individual. This is because an organizational outcome
is usually not reached by a single action, by a single individual. Instead, it is “emergent,” “shaped by the complex interactions of numerous decision makers and their larger environments” (Lofquist, 2001, p. 176). Following this line of thought, miscarriages of justice, like many other types of organizational wrongdoing, need to be understood as a series of interactions among actors inside and outside the organization. All of the individuals involved make decisions under the circumstances with limited time and information.

Lofquist draws on the literature about organizational wrongdoing to elaborate on his notion that organizational outcomes emerge without being calculated and planned. Vaughan argues the explosion of the space shuttle Challenger was not the result of conspiracy or political pressure imposed on professionals, nor any managerial mistakes made on purpose (Vaughan, 1996). Vaughan adopts the concept of “normal science” from Kuhn to describe the organizational culture of engineers, in which scientists repetitively conduct experiments, accumulate knowledge, and develop theories without challenging the paradigm. The routine and repetition boost the confidence of the scientists and further limit their ability to see any faults in the paradigm. Escalating commitment to the routine and repetition of practice eventually develop into an “incremental descent into poor judgment” (Vaughan, 1996).

“Escalating commitment” also features prominently in Ermann’s research into the production of unsafe products by corporations (Ermann, 1996). Both researchers argue that mistakes accumulate in an incremental fashion through the process of decision-making and that the actors involved break no rules. In the case of the Challenger disaster and the production of unsafe products, organizational wrongdoing is neither the result of purposeful choices by the actors, nor greed and ambition. It is not an “accident” per se. Richard Perrow captures the essence of the arguments well by coining the term, “normal accident” (Perrow, 1999).

Perrow researches the Three Mile Island accident and similar occurrences to demonstrate that these incidents are caused by routine functions of the system rather than any exceptional violations of the routine: “If interactive complexity and tight coupling — system characteristics — inevitably will produce an accident, I believe we are justified in calling it a normal accident, or a system accident. The odd term normal accident is meant to signal that, given the system characteristics, multiple and unexpected interactions of failures are
inevitable. This is an expression of an integral characteristic of the system, not a statement of frequency. It is normal for us to die, but we only do it once” (Perrow 1999, p. 5). Perrow also points out that the factor of human error is usually overestimated in after-the-fact analyses of accidents that caused considerable damage. Structural factors are thereby ignored (Perrow, 1999).

This brings us back to the two schools of thought in criminology regarding organizational wrongdoing. The agency perspective in mainstream criminology is perfectly illustrated by the popular Pixar animated film, *Monsters Inc*. The monsters live in a city that relies on the screams of children for its power supply. They scare children at night through closet doors and collect their screams. A blue hairy creature, Sulley, is the No. 1 employee, but the No. 2, a sneaky chameleon, is full of ambition to replace him. The chameleon invents a torture machine to extract screams more efficiently. Their supervisor is aware of the invention but tolerates it because it fits the organization’s goals. As the story develops, the torture machine is stopped and the unethical actors are punished. The whistleblower, Sulley, invents a better way to generate power — making children laugh — and everybody lives happily ever after.

In *Monsters Inc.*, a crime is about to be committed by aggressive individuals who take advantage of their positions in an organization to use it for wrongdoing. But such a picture does not help us understand miscarriages of justice. Though certain individuals might be unethical, greedy or reckless in handling cases, thereby causing wrongful convictions, usually people act in good faith and have good qualifications and good reputations. The perspective of Perrow, Vaughan, Ermann and Lofquist is more relevant to wrongful convictions. A trial outcome emerges through a process in which commitment to convicting the suspect escalates and mistakes accumulate and interact, thus strengthening the bias against the defendant. The cause of a miscarriage of justice should be analyzed both statically and dynamically, both legally and sociologically, because “individual decision making is nested within organizational structures and cultures, which are themselves nested within larger institutional and societal environments. Carefully reconstructing and closely examining these contexts makes it possible to understand the knowledge and policies that guide decisions and meaning assigned to decisions by those making them” (Lofquist, 2001, p. 192).
Continuing the theme, one can think of a judgment as the product of a corporation — Justice Inc. — that claims justice to be its purpose. Considering its irrevocability and the sacrosanct value of life, a death sentence is Justice Inc.’s flagship product.

IV. Summary

Borrowing insights from the previous literature on narrative analysis, miscarriages of justice, and organizational wrongdoing, my research develops a twofold perspective for analyzing capital judgments. It scrutinizes their content and views them as narratives pieced together by legal decision makers into a coherent story based on information and arguments gathered during the criminal justice process. This research therefore seeks to describe what capital judgments look like and to offer a static analysis of these “stories.” It also focuses on the process by which judgments take shape. It views judgments as a product of the judicial system and wrongful convictions as “normal accidents” caused not by unlawful behavior on the part of mean-spirited individuals, but rather by routine operation on the part of actors in the system. Naturally, the goal of the research is to explain why some capital judgments fall prey to various mistakes, and to offer a dynamic analysis of the judicial process in which commitment to conviction escalates and eventually causes an erroneous decision.
Chapter Three
Methodology

The method applied in my research is document analysis, which is only natural since rulings and court transcripts make up the major sources for it. Ryan & Bernard (2003) cite Renata Tesch in identifying two traditions of text analysis. One is the sociological tradition, which “treats text as a window into human experience,” and the other is the linguistic tradition, which views text as the object of analysis (Ryan & Bernard, p. 259). My research aims at examining judgments in the hope of understanding how the judicial system — by its own mandate and to meet society’s expectations — applies the law to carry out “justice” by sentencing certain lawbreakers to death. This research thus grounds itself in the sociological tradition, trying to look “through” the text of the judgments to grasp the cultural meaning demonstrated in the legal stories they tell.

Considering the high volume of these texts, deciphering the narratives and identifying the latent patterns is a challenge. Moreover, legal writing in Chinese is notoriously hostile to readers without a legal background, because of its strong tendency to use jargon and to construct arguments using double, sometimes even triple negations. Laypeople respond to the situation in two extremes. One is to pull out a paragraph or two from a judgment arbitrarily, make a claim regarding its meaning and comment based on this partial reading. The other is to remain silent and refrain from voicing an opinion. The former does not help build a healthy judicial culture, while the latter is nothing but surrender. Therefore, it is important to come up with a methodology to process judgments, transform them to a readable format and make sense of the cultural concepts they subtly convey.

There are many examples of Taiwanese legal research that use judgments as the primary research source. Most of them are concerned with legal concepts rather than cultural ones, such as the incorporation of the United Nation’s ICCPR into rulings, or the interpretation of certain legal concepts. As such, they have not developed a methodology for processing the judgments and have no need to reduce or transform them. For researchers dealing with sentencing issues, the paragraph relevant to their work can easily be found near the end of every judgment, and in most cases the length of that portion does not exceed 200 characters. Thus, their analysis does not require reducing the text.

By comparison, my research includes not only a static analysis that views the ruling as a story written in legal terminology, but also an analysis of it as a product of a series of legal
proceedings. This dynamic analysis incorporates not just the last factual judgment, but also the previous judgments and court files of any given case in order to uncover the process by which a mistake travels through undetected. The amount of text involved is tremendous.

This explains why I have not encountered any literature that provides a methodology for reducing legal material in the study of Taiwanese law, and this is where I must turn to social sciences for an adequate analytical tool. I have developed a three-phase methodology. Phase one involves reducing the text to grasp and identify analytical themes from it. The method used for this is coding. Phase two involves reducing the text to identify the structure of the story, the arguments that pave toward the conviction and sentence, and the evidence introduced and used to build the story. The method used is summary. The above two phases are essential for basic understanding, or static analysis, of the texts. Phase three involves organizing the themes identified in phases one and two, and using them to reconstruct the process by which mistakes occur and survive all the way to the end. In the following section, I will discuss the three phases in order.

I. Phase one: Coding

Coding is used to identify the characteristics of the judgments and document the prevailing pattern in preparation for future analysis. Coding is carried out through a careful, line-by-line reading of the text, because the text itself is the best teacher. My experience fits with the Grounded Theory developed by Barney Glaser and Anselm Strauss. Their theory asserts the researcher will find the appropriate concepts for reducing any given text by immersing herself/himself in the text. For example, the section of any given judgment that lists the physical evidence confiscated during investigation is rich in information and caught my attention when I read the judgments line-by-line. The importance of this section has not been documented in previous literature and only became apparent through careful reading. I will come back to my interesting findings regarding the confiscation section later, while discussing “evidence chains” — that is, the interconnecting key elements required to build a solid murder conviction. Careful reading also revealed certain writing patterns. For example, the courts express disapproval and signal the undesirability of a crime with the sentence structure, “Just because…the defendant went so far as to…” Likewise, the word “unremorseful” is used arbitrarily — and without any supporting information — to bridge
the gap between a defendant’s prior criminal record and the crime in question. The goal is to depict the defendant as a hopeless, recidivist criminal.

However, I am also inspired by previous studies and some of the concepts that emerged in a review of the literature. Thus, schema theory also has a place in my research. For example, Lee Chia-wen analyzes a high-profile homicide in Taiwan in which a battered wife killed her husband in his sleep. Lee points out that the start of the story — whether the domestic violence that occurred before the homicide is presented in detail — has a major impact on the narrative of the judgment (Lee, 2005). This insight led me to incorporate “the start of the story” as one of the themes that should be coded systematically in every judgment to facilitate analysis at a later stage.

In addition to these two sources, I have derived concepts from a third: my former experiences and knowledge acquired as a participant in the movements to abolish the death penalty and reform Taiwan’s judiciary. My correspondence with people on death row and exposure to the professional legal environment have sharpened my senses for detecting irregularities in judicial cases. For example, I have learned from prior miscarriage of justice cases that inconclusive forensic test results are sometimes misinterpreted as inculpatory and used to support wrongful convictions. Special attention is therefore paid to inconclusive test results. More salient examples are the procedural errors identified in the research. The procedural errors are not straight-forward, and it takes a profound understanding of the judicial system to spot them. This is because they are normalized in Taiwan’s judicial routines and training of legal practitioners, and are therefore not considered errors. For example, discontinuous hearings and the double role of the judge — concepts that I will explain later — are built into the legal process or legal culture and are well-accepted by the legal community. I did not find any literature that tackles them as factors contributing to the accumulation of errors. Later in this chapter I will turn back to this topic and offer further explanation.

Coding, as a way of processing data and reducing text, was the first step of analysis. In qualitative research, the analytical tool is neither statistics nor computer software, but rather the researcher herself/himself. Analysis was inherent in every step of processing the text. Coding encouraged me to engage in reading it line-by-line in a systematic manner. Hence, this strengthened my understanding of the text for further analysis. Creating a summary was the second step of reducing the text. I developed it while coding and becoming aware of the limitations of coding and realizing another method was needed.
II. Phase two: Summarizing

Summarizing was used to identify the characteristics of each judgment’s structure. A ruling usually adopts a tree-like structure within a “Fact Column” and a “Reason Column.” By creating a point-by-point summary, I was able to grasp the structure of each judgment and identify its major evidence and arguments for conviction. This later facilitated discussion of each judgment’s coherence, fidelity and selectivity.

One of the main concerns in my research is fact establishment. That is, based on what evidence do the judges consider it just to convict the defendant and sentence her/him to death? This involves not only the probative value of a piece of evidence, but more importantly, the structure that all the evidence forms in a specific case and whether it supports conviction. We can think of the judgment as a birdcage. A cage is able to contain a bird not with any single bar, but rather with the structure in which the bars are arranged. Examining whether a cage is effective requires looking at both the bars and the structure. This is the rationale for scrutinizing the structure of rulings.

Building on the birdcage analogy, an effective cage (or judgment) needs bars that are each in good shape (the probative value of the evidence), as well as a good structure that leaves no room for the bird to escape. In legal terminology, this refers to fact establishment. Unfortunately, fact establishment has been a weak link in the training of legal professionals, be it in Taiwan or in the U.S. and U.K. Brian Foley writes: “Under the traditional law school model, students rarely needed to grapple with factual indeterminacy and would learn to do so only later, as apprentice attorneys, atomized in different practice settings, without the benefit of an overarching pedagogy” (Foley, 2008, p. 19). The only exception in U.S. law school education is the New Evidence Scholarship developed by William Twining, but it is relatively small and does not exist in Taiwan. Law school curriculum includes learning the elements of an offense, yet does not discuss “what kind of evidence is sufficient to convince the legal decision maker that the elements of an offense are met.” What is included in legal education is the question of whether evidence is admissible, rather than the probative value of evidence or how evidence should be incorporated to reach a conviction or acquittal.

In Taiwan, the probative value of evidence is left to the judge to decide, under the principle of discretionary evaluation of evidence. It is similar in the U.S. and U.K., where
the probative value of evidence is left for legal practitioners to grapple with in a trial-and-error fashion. For example, trainee solicitors have the chance to observe the way senior attorneys handle a case, and in the apprentice-mentor-like relationship, the trainees accumulate experience in the evaluation of evidence that could influence their future practice. The learning process is not via verbal teaching, however, let alone systematic discussion.

Individual judges have discretion in a specific case to evaluate evidence freely, but this does not mean that the probative value of evidence should be left undisussed in professional training and academic research. On the contrary, it is of vital importance to engage in detailed discussion about the probative value of various types of evidence, including people-based evidence (witness testimony, expert witness testimony, defendant testimony and codefendant testimony) and object-based evidence (inspection and documents). How the probative value is determined and synthesized in a specific case is pivotal to the rectitude of judicial decisions. Hence a set of principles or rules of evaluation are required to serve as guidelines for individual judges to exercise discretion. In the Code of Criminal Procedure, Article 155 stipulates: “The probative value of evidence shall be determined at the discretion and based on the firm confidence of the court, provided that it cannot be contrary to the rules of experience and logic.” Certain limitations are applied to the discretion of judges, but the phrase, “rules of experience and logic,” is no less ambiguous than what is transferred through apprentice-mentor relationships among legal practitioners. Such ambiguity does not help clarify how determination of probative value is done or should be done by the court. In this aspect, my research is explorative in tackling the rules of discretionary evaluation of evidence.

In the following section, I will discuss the minimum requirements of a judgment’s structure for it to be an effective birdcage. The source for this research is murder cases. In the past 10 years of legal practice in Taiwan, all finalized death sentences involved murder charges. The crimes differed, but at the core of each was this: “The defendant used some tool to cause the victim’s death on purpose.” In every murder case there is a murder weapon that can be linked to the victim’s death at one end and to the defendant at the other. The “defendant—weapon—victim” chain is omnipresent in every murder case with a solid conviction.

The purpose of creating a point-by-point summary is to isolate this evidence chain within the lengthy judgment and locate other essential evidence used as the ruling’s foundation.
This task cannot be achieved through coding — which is the most prevalent way of reducing chunks of text — and hence is the rationale for conducting point-by-point summaries in my research.

The steps for summarizing are as follows:

1. Make a point-by-point summary of the judgment.
2. Identify the murder weapon.
3. List the evidence that can link the weapon to the victim’s death.
4. List the evidence that can link the weapon to the defendant (i.e., that can show the defendant possessed and used the weapon).
5. Consult the court files when necessary.

If this evidence chain is broken in any given conviction, that ruling is considered flawed because it lacks the material elements of murder. Ten of the 62 cases in my research are categorized as flawed. Those cases will be discussed further in Chapter Four.

An interesting finding that emerged while processing judgments concerned the confiscation sections. The confiscation sections list physical evidence collected in the course of investigation. They are given trivial treatment and have no bearing on the judicial decision. There are two places in the judgment that list the physical evidence. The first is the syllabus of the decision, which states what has been confiscated. The second, near the end of the ruling, states what was confiscated and what wasn’t, as well as the reasons. These confiscation lists turn out to be the most straightforward section in any given judgment for understanding what is in the court’s possession and what is not. The “Fact Column” and “Reason Column” lay out how the crime was supposedly committed, but when investigators weren’t able to recover an object that is essential to the case, it is not unheard of for judges to avoid mentioning that fact. Instead, they sometimes squeeze it into another paragraph as an insignificant footnote that is easy to ignore.

For example, a truthful account should go like this: “The defendant pulled out a gun (which was never found) and fired at the victim.” Obviously, such an account raises doubts concerning the facts of the murder. So instead, the judgment often reads something like this: “For trivial reasons, the defendant went so far as to pull out the gun he carried and shoot the victim.” This treats the unfound gun as a confirmed fact. Thousands of characters later, buried somewhere else in the judgment, the judge mentions — still in a reassuring tone — that “the gun used in the crime was discarded in the Taiwan Strait and
could not be retrieved.”13 Through an effective writing trick, the judgment plays up what is “believed to be true” as what is “known to be true.” However, the confiscation section provides a way to detect these writing tricks. By comparing the list of physical evidence with the “defendant—weapon—victim” chain, one can effectively and efficiently tell whether a murder case is based on lawfully-investigated, rigorously tested evidence or on inferences. If the murder weapon is not on the list of confiscated items and the reason is that it was never recovered, it is highly possible (though not always the case) that the evidence chain of “defendant—weapon—victim” is broken. That is, confiscation serves well as a checklist for the chain.

The way discretionary evaluation of evidence, determining the probative value of evidence, and rigorous testing of evidence function is central to trials. It is surprising that legal education and professional training have long ignored these questions. Although my research focuses on murder cases, the methods developed here can be applied to other types of cases. Every offense has a unique evidence chain that is essential to the conviction. The chain is closely linked to the elements of the crime as defined by law. Researchers can identify the chain of a given offense and read the judgment line-by-line to find a way to reduce the text and eventually reach an analysis.

III. Phase Three: Organizing themes

After phases one and two, themes that deserve further analysis start to surface from the chunks of text. Phase three is the process of organizing the themes in a way that builds toward an effective description of the phenomena observed in the research, and an explanation of why the phenomena appear as they do. Traditionally the organization of themes is part of the coding process, in which codes are arranged in a meaningful order. In my research, it is categorized as an independent, follow-up phase so that the themes discovered through coding and summary can both be incorporated into analyzing capital judgments.

In terms of static analysis, the themes identified through coding and summary are organized mainly according to the structure of the judgment. Special attention is paid to the start of the story and the moral of the story. Since rulings are written in a highly

13 See Case No. 24.
standardized format, it is easy to see whether the themes are organized in accordance to the standard structure.

In terms of dynamic analysis, my research arranges the themes according to the timeline of the criminal justice process to analyze how errors accumulate over time, from pretrial to trial, until the final judgment is made. In each phase of the criminal justice process, the themes are presented against the background of understanding the organizational culture within the judicial system. Actual examples are provided. However, it is worth devoting some words to clarifying what kind of themes are considered “errors.”

Two different types of “errors” are mentioned in the discussion of the dynamic process of legal decision-making. Mismatches are one, and these are straight-forward. The other type is less intuitive and subject to varying interpretations. Mismatches are easy to understand: When a statement is inconsistent with the facts, it is an outright error. Consider, for example, a confession that describes the crime differently from what was found by investigators, or a test result that proves to be wrong when it is double-checked. In my research, this type of error is found in expert examinations, statements by witnesses, codefendants and defendants. There is a second type of error, though, that may deviate from the typical definition of error. Examples include the order in which evidence is investigated, discontinuous hearings, and the double role of the judge. From the perspective of most people in the legal arena, these are not “errors” but simply the way legal proceedings work. This is exactly what this research intends to challenge. The theory of organizational wrongdoing tells us that organizational wrongdoing often results from seemingly harmless protocols. Often it occurs without malice on the part of the actors and without awareness of the protocol’s serious consequences, as explained in Chapter Two. In my research, I argue that the order in which evidence is investigated, discontinuous hearings, and the double role of the judge are structural factors that systematically facilitate bias against the defendant throughout the process. In that sense, they are “errors.”

IV. Difficulties and limitations regarding wrongful conviction

Ten of the 62 cases included here are categorized as flawed convictions. This should come as no surprise, since no judicial system can boast that it never makes mistakes, and all types of cases (including death penalty cases) are susceptible to miscarriages of justice. That said, wrongful convictions are an integral part of the institution of capital punishment. In any
jurisdiction, if you scrutinize the cases of people on death row, you will find innocent people. It is just not always clear who belongs to that category.

Encountering wrongful convictions in the course of researching the death penalty is inevitable. Therefore, the difficulties and limitations of the study of wrongful convictions also cast a shadow on the study of the death penalty. Here I will explain what difficulties and limitations this research shares with the study of wrongful convictions, and how I try to deal with them.

Richard Leo lists three difficulties in the study of wrongful convictions. Firstly, governments rarely keep a record of miscarriages of justice, meaning verified miscarriage of justice cases are difficult to find. Secondly, gathering primary sources on wrongful convictions is time-consuming and money-consuming — if they are accessible at all. Very often they are inaccessible to researchers. Thirdly, a person’s “innocence” is a negative fact that is inherently difficult to prove, and especially so when relevant information is usually incomplete. Without a considerable number of wrongful convictions, producing a meaningful account of miscarriages of justice is scientifically impossible (Leo, 2005).

Considering the situation in Taiwan, I would add a fourth difficulty to the list: the resistance and reluctance of the judicial system to admit mistakes. Taiwan’s retrial ratio between 1992 and 2011 was 0.575%, according to statistics provided by Judge Huang Ruihua of the High Court. As a reference point, the retrial ratio in Norway is 16%, nearly 30 times that of Taiwan (Lee, Lou, Huang, & Wang, 2013). Moreover, public opinion in Taiwan favors punitive actions (Jou & Hebenton, 2011; Lee, 2014). This discourages the judicial system from admitting mistakes in convictions, because society pressures the courts to produce more convictions, not fewer. Up to this moment, only four death row inmates have been exonerated. Three are alive and one had already been executed.14 It is impossible to conduct research and develop an analysis using such a tiny sample.

In short, my research suffers from two confinements. One is that few capital cases have been acknowledged by authorities to be wrongful convictions. The other is that it takes tremendous effort on the part of the researcher to determine a conviction to be wrongful, not to mention that it is fundamentally difficult to confirm a negative fact. As Gross and Shaffer put it: “We do not claim to be able to determine the guilt or innocence of convicted defendants. In difficult cases, nobody can do that reliably. That’s the central problem of the

14 The three living exonerees are Su Jianhe, Liu Binglang, and Zhuang Linxun, also known as the Hsichih trio. The dead exoneree is Jiang Guoqing.
criminal justice system and the underlying cause of all mistaken convictions: In many cases we just don’t know whether a defendant is guilty or innocent, before trial or after” (Gross & Shaffer, 2012, p. 6). For the same reason, I reveal essential problems (such as breaks in the evidence chain of specific judgments) in my analysis of flawed convictions, but refrain from making substantial judgments about the innocence of the defendants. More thorough research on the causes of wrongful conviction must be postponed until the difficulties mentioned above are tackled — for example, once a considerable number of exonerations have been documented.

V. Multiple sources of input

In order to expose myself to multiple perspectives, I organized several occasions for an exchange of ideas and feedback while conducting research. I have a mailing list consisting of law professors, judges, attorneys, academics and activists that comment on my work from time to time as an informal consultation. They are my first readers and offer an insider perspective for me to consider. I also worked with the Taiwan Alliance to End the Death Penalty to organize a workshop on reading judgments. This brought together 38 participants, ranging from young attorneys and law students to people from all walks of life, including an editor, a government official and a documentary director. The workshop was titled “Convictions with Hard Evidence,” because a widely shared myth about the death penalty is that all capital cases are convicted with hard evidence. I taught the methods used in my research and led exercises involving true capital cases. After two days, 13 panels were formed, each with three participants, just like the judges in a trial. The participants then tried to reach a consensus with the panelists and handed in their evaluations of the assigned cases. The workshop had three benefits. The first was to test my methods and make sure they could be taught and utilized by other researchers. The second was to produce summaries of capital cases for my reference. The third was to expose more people to capital judgments, so they acquire firsthand knowledge of the death penalty that debunks the myth that death sentences are based on hard evidence. My research benefitted from the contributions of the heterogeneous group of workshop participants.

After describing these three phases of research, I would like to add one point regarding methodology. As many methodology books note, any codebook will evolve over time during the process of research. Very often a researcher starts coding with a set of codes in
mind, but the need for additional codes pops up part-way through the process, forcing the researcher to go back and apply the new codes to texts that have already been processed. Other times a researcher comes to the realization that a code should be split into two codes. Hence, coding completed early in the course of research is done with only partial understanding. This is what I experienced in my research. To ensure consistency of text coding and processing, I therefore suggest the coding process should be re-conducted or double-checked after the analysis is done but before the research is complete. This will help make the research more coherent.
Chapter Four

The “How” of Death Sentences: A static picture

A capital judgment, like any other judgment, is a standardized product manufactured on the production line at Justice Inc. There is a clear and distinct format and uniform wording in every ruling. All too often, the final judgment amounts to a collaboration among all the judges who have handled the case along the production line — with or without contributions from the prosecutor and defense attorney.

Producing legal documents in a standardized format constitutes a major part of the training that judges undergo. Individualistic writing style is discouraged, if not repressed. A close look at the materials used in the training of judges and prosecutors will reveal how the format is set up and what is required of the trainees to follow the writing pattern. *Practical Basics of Writing a Criminal Judgment*, the material used during the 2013-2014 academic year for aspiring judges and prosecutors consists of 105 pages, plus one guilty and one not-guilty judgment as examples. The rules in it are incredibly trivial, such as specifying that the title of the judgment should be centered; that there should be no space before the defendant’s name and two spaces after it; that the defendant’s ID number should be listed as the number plus “No.” Many regulations are purely arbitrary, such as requiring that trial remands should be called the “second remand,” “third remand,” etc., except that the first remand shall only be called “the remand.” When a date is mentioned for the first time in a judgment, it should be noted as “the Republic Era” (民國, the Taiwanese year-numbering system) without adding the phrase, “the same applies to the following section.” Yet when money is mentioned for the first time, it should be noted as “NTD” (Taiwan’s currency), together with the phrase “the same applies to the following section.”

A judgment starts with the case number, the date and the names of the defendant and the attorney, which gives the judgment a serious and sedate touch. The syllabus of the ruling is brief, stating whether the first judgment has been affirmed or reversed, the primary and ancillary punishment, and related actions (such as whether property should remain in confiscation or be returned to the owner). For the rulings included in my research, the primary punishment is the death penalty, the ancillary punishment is civil death (the deprivation of civil rights for life), and the related actions include confiscation of items related to the crime.
The major part of a ruling comes after the syllabus: the “Fact Column” and the “Reason Column.” The Fact Column contains the court’s assertions about the crime. It states who did what to whom, with what result. According to Practical Basics of Writing a Criminal Judgment, the Fact Column should be precise and succinct (Academy for the Judiciary, Ministry of Justice, 2013, p. 42). The Reason Column explains the grounds and reasons for finding the defendant guilty. The Reason Column is the core of a judgment in terms of length and nature. In the last section of the Reason Column, the High Court points out any errors in the first judgment and in what ways it agrees or disagrees with the prosecutor and the defendant. It also announces the sentence. Sometimes there are explanations of technicalities, such as why a case was dismissed rather than tried by the court, or why the court rejected certain investigation requests from the defendant. Practical Basics of Writing a Criminal Judgment suggests that the Reason Column be organized into 6 sections: I. The admissibility of evidence, II. The evidence and reasons used to establish the facts, III. Reasons not to adopt the exculpatory evidence and the defendant’s defense, IV. The application of law and the sentence, V. Any acquittals on other charges related to the conviction at hand VI. The combined issue (Academy for the Judiciary, Ministry of Justice, 2013, p. 57). At the very end, all law articles relevant to the case are listed, as well as the names of the judges, the name of the prosecutor, and the date. The judgment begins with specific information and ends with specific information.

The ruling is a judicial action as well as a story. It has an immediate and direct impact on people’s lives, and it cultivates its legitimacy by telling an appealing story to convince the public that the parties involved got what they deserved and justice was achieved. Analyzing the text of a ruling, therefore, means analyzing how the judicial system exercises its power to carry out justice — the product that Justice Inc. manufactures and sells to the public.

In this chapter I will divide the judgment into three parts and provide an analysis of each: the start of the story, the main body and the moral of the story. In discussing the start of the story, I use the criterion of selectiveness to examine the judgment. In discussing the main body, the criteria of coherence, fidelity and selectiveness are used. And in discussing the moral of the story, the key question is whether the judgment succeeds at self-justification.

In this chapter, I will draw on many judgments from among the 62 death sentences. It is worth noting that the translated quotes are faithful to the original texts. Inconsistencies, weak arguments and confusingly long sentences in the quotes are true to the Chinese
wording and reflect the characteristics and quality of the products of Justice Inc.

I. The start of the story and social background

The start of a story has bearing on one's moral stance and judgment. For example, in recent years, people in Hong Kong have demanded a general election, but China has only allowed an election with candidates pre-approved by the Beijing government. People in Hong Kong rallied and occupied the streets starting in September 2014, and a few physical conflicts erupted. If this story is recounted starting with the public's demand for democracy and their frustration, it is a story of struggle akin to what happened in Tunisia, Egypt and Ukraine in recent years. But if it is told beginning with the occupation of the streets and disruptions caused by crowds, then the government's actions might be perceived as an effort to restore normalcy to everyday life. In the latter version, the story no longer echoes other democratic campaigns. Borrowing Roberto Franzosi's insights into narrative analysis, the events prior to the start of the story will be pushed to the background and become insignificant, making it easy to neglect or downplay them. What happens after the start takes the foreground, the center stage spotlight (Franzosi, 1998).

Of the 62 rulings I examined, 29 start with the defendants' criminal records. This defines them as bad people and implies the murder they are accused of is just one episode among their evil acts. Yet in capital cases, a defendant's criminal record has no bearing on applying the law. Although Taiwanese law does increase penalties in cases of recidivism, this provision doesn't apply to life sentences or the death penalty. Additionally, a defendant's criminal record has nothing to do with conviction: The fact that he/she committed past crimes is not evidence of the crime in question. However, the criminal record can be taken into consideration during sentencing if the court believes it is an indication of the defendant's character. It would seem, therefore, that any information regarding prior criminal record would belong at the end of the judgment rather than the beginning.

Past criminal actions are presented in judgments as the start of the story — regardless of their relevance to the crime at hand. For example, Case No. 5 starts with two prior crimes by the defendant, a violation of the Personal Property Secured Transactions Act and an instance of forgery.¹⁵ Neither of these is a violent crime, yet the defendant is introduced to

¹⁵ There is in fact a third record of theft, which is mentioned later in the Reason Column and leaves an inconsistency in the judgment.
readers as a repeat criminal rather than someone who broke the law under specific circumstances.

If a criminal record reveals a person's character, is the lack of one equally indicative? The answer is no. None of the rulings start by noting that the defendant has no prior record, nor do they describe the defendant using any identities other than “criminal.” Not, for example, the defendant’s occupation. The 33 cases that do not launch their narratives with the defendant’s criminal record fit into four categories: (1) Stories that start by describing a feeling of resentment between the defendant and the victim, resulting for example from a sour relationship or unpaid debts. These stories begin by introducing the defendant’s grudge to help build the assertion that the defendant intended to commit murder. (2) Stories that start by describing a need that drove the defendant to crime, usually an urgent need for money to pay serious debts. This type of beginning also sets up the assertion of a motive. (3) Stories that start by describing opportunity to commit the crime. This could mean, for example, describing how the codefendants met each other or met the victim and intended to commit a crime. Usually the crime is against the victim’s property or sexual autonomy. Again, this bolsters the assertion that the defendant had a motive. It sometimes helps establish the assertion that the defendant conspired with the codefendants. (4) Stories that start with the crime itself, for example by describing the acquisition of tools and other preparations for the crime, or the location and participants. These are cases in which the defendant did not know the victim before the act.

Beginning a story with a criminal record instead of the defendant’s occupation is a deliberate choice and not reflective of limited access to information. In cases Nos. 8 and 9, the rulings start with the need for money and the preparations for the crime: “Wu Qinglu owed money to black-market banks and was short of money. He knew the couple Huang Ting and Yang Bixia were wealthy and tended not to be on their guard. He [referring to Wu] thought he had a chance and went so far as to plan to commit robbery on the couple…So he used a mobile phone to contact Lu Wensheng to come and plan it.” Thousands of words later, the judgment includes a passage of testimony given during police interrogation that reveals the fact that Wu used to work as a house cleaner and delivery guy, and Lu used to work as a technician. News reports indicate that at the time of the robbery, Wu was selling goose and Lu selling chicken at the market. Their story could have started as two entrepreneurs who had tried to support themselves with several jobs but failed to make ends meet and resorted to an unlawful solution. They had no criminal records — a fact
known to the court from the very beginning of the trial, according to the chronologically assembled court files. Instead of stating their vocation and that they lacked criminal records, the judges started their story with the motive and criminal intent. The defendants’ other identities are downplayed and their clean record is never mentioned.

Similarly, Case No. 29 begins thus: “Tang Linyi indulged in sports gambling and owed a bookie NT$260,000 [roughly €6,500]…The bookie threatened Tang (a matter that is being pursued by police and prosecutors as an independent case) over the phone, saying he would take Tang’s life and get revenge on Tang’s family if the debt was not paid. Tang was terrified. Surprisingly Tang Linyi did not look for legitimate ways to settle the gambling debt, but went so far as to come up with a vicious idea. Tang intended to commit robbery to pay back the debt, so he chose an old classmate from primary school, Zhang Zhiyu, who lived in the same village, as the target of crime.” The judges do not mention until the end of the ruling that Tang was a technician at a glassware company at Taichung Science Park, with a stable income.

In Case No. 28, the judgment launches directly into the defendant plotting the crime, with no mention of the defendant’s identity. The Fact Column mentions the defendant had trouble wrestling with the victim due to an occupational injury on the wrist. This is the only hint of the defendant’s occupational identity.

Just two rulings mention the defendant’s vocation at the start. In both cases, the occupation is an inseparable part of the crime. Case No. 1 begins thus: “Zeng Siru worked as a teacher at Jinshan High School in Taipei County, Jinshan Township, from August 1999 to August 2002, and rented a room at [the address]. He moved out in August 2002 because he was reassigned to teach at Ziqiang High School in Taipei County, Zhong-He City, yet he did not return the key of the above-mentioned apartment to the owner. He Jiayan…rented a room in the above-mentioned apartment and shared it with Li Zhongping and Xu Shanghui, teachers at Jinshan High School. In October 2002, Zeng Siru’s finances were ill-managed. He spent nearly NT$900,000 [roughly €24,000] on buying a car to commute and applied for credit cards. As a result he was on a tight budget, failed to make ends meet and went so far as planning to use the unreturned key when He Jiayan, Li Zhongping, and Xu Shanghui were not present at the above-mentioned address on holidays to sneak in and commit theft with intent to exercise unlawful control over other’s property.” Zeng’s occupation is closely related to his chosen victims and acquisition of the tool to commit the
crime. His vocation appears at the very start of the judgment because there is no way to
describe what happened without mentioning that he was a high school teacher.

The other exception is Case No. 38. It starts its story by mentioning that Ouyang Rong
was vice director of the manufacturing department at Yuen Foong Yu Company. He ran
into financial difficulties after leaving his position and started to plot a crime after
becoming acquainted with his wealthy victim. In this case, having a decent job is not
interpreted as an indication of good character, but rather a reason that Ouyang deserves
the death penalty: “Considering that the defendant is a comparatively well-educated person
with the experience of possessing an important position (vice director of the
manufacturing department) at a reputable company (Yuen Foong Yu), he should be a pillar
of society in his prime, yet he went so far as to attempt to obtain property by illegal means,
and intended to procure gains without effort. Coveting the victim’s property, he went so far
as to plan meticulously a kidnapping and murder.”

The 29 cases that start with the defendants’ criminal records can also be categorized. After
the criminal record, these rulings launch into a description of a sour relationship with the
victim, a motive, an opportunity, or preparations for the crime. They widely make use of
the bridge phrase “does not know remorse” (不知悔改), meaning “without remorse.” This
is strongly suggested in Practical Basics of Writing a Criminal Judgment, which offers guidance
on writing the Fact Column that includes five examples regarding recidivism or criminal
records. All five use the following format: “So-and-so was sentenced to A years in prison by
court B for crime C in year D. He was released in year E, but so-and-so did not know
remorse and went so far as to…” (Academy for the Judiciary, Ministry of Justice, 2013, pp.
43-44).

Case No. 18 starts with Zhang Junhong’s criminal record and then adds: “Zhang Junhong
was an adult and did not know remorse. He and his partner, Long Baowen, became
acquainted with Pan Juzhi because their shops were close by and they had been in contact.”
Thousands of words later, it is casually revealed through the inclusion of Pan Juzhi’s
testimony that “Zhang Junhong’s noodle stall is next to my shop.” This shows Zhang
started a noodle stall to make a living after leaving jail, yet the judgment describes him as
“unremorseful.” “Unremorseful” here is a uniform expression that provides an overarching
scheme to link the defendant’s prior record to the crime at hand. It is used even when the
facts show an effort on the part of the defendant to make a living as a law-abiding citizen.
The word “unremorseful” sets the tone for the ruling: The judgment will tell a story not about a one-time offense, but rather about repeat offenses by a person who indulges in a pattern of unlawful activities. The crime in question is not a peripheral, occasional happening, but one episode in a long history of recidivism, and Justice Inc. is dealing with a criminal who shows no potential for correction.

As seen in Case No. 18, this depiction of lack of remorse is applied to cases where no evidence is presented to support such an assertion, or where evidence suggests otherwise. It is found in many capital cases. In Case No. 11, the judgment begins with Wang Zhihuang’s prior record: “[He] did not know remorse, left jail and went to his friend Lin Mingzhao, nicknamed ‘A-zhao,’ and lived together at [the address], and got to know Lin Mingzhao’s friend Qiu Jinzhu, nicknamed ‘Iron Pipe Zhu.’” Wang is described as “unremorseful” only because he left jail and lived with his friends. In Case No. 13, Shi Zhiyuan was released from jail on parole in 1999, and later bought a gun for the crime in question in 2002. The judgment deems him “unremorseful” despite a three-year gap between his release and the purchase. Those three years may well be an indication of remorse and an attempt to abide by the law, but the ruling skips over these years and concludes he was “unremorseful.” This choice of narrative leap serves as an effective way to create a continuation of criminal acts by neglecting the three-year gap (Franzosi, 1998). In Case No. 30, the ruling begins with defendant Ke Shiming’s criminal record: “Surprisingly Ke Shiming and codefendants do not know regret, and committed the following crimes: (1) Ke Shiming worked at his girlfriend Zhang Shujuan’s pub at [address] together with the codefendants in July 2007. While working at that pub, the trio made acquaintance with one of the customers, Chen Jinzhong.” In this case, “do not know remorse” is replaced with a similar condemnation, “do not know regret,” and working in a pub is taken as part of the condemnable lifestyle that the defendants led.

I will review two cases at length to further illustrate how capital judgments use available information to construct a story that could have looked quite different.

Case No. 5 is a murder in which a man was convicted of killing his wife and son. The judgment sketches the story thus: “Considering that the defendant [Zheng Wentong] has prior criminal violations of the Personal Property Secured Transactions Act, theft and forgery, as documented in the defendant’s criminal record in the court files, it is evident that the defendant’s character is bad; The victims, Zhuang Ruimei and Zheng Zhihao, were wife
and son to the defendant; victim Zhuang did not get along well with the defendant, but there was no deep hatred; just because the defendant was not happy with Zhuang’s bad temper and the fact that she often scolded the defendant without reason and kicked him out of the house, forcing him to spend the night on the streets, the defendant went so far as to use a pillow to attempt to suffocate victim Zhuang in her sleep, but failed; he then used a sharp knife to stab Zhuang Ruimei and Zheng Zhihao in the chest and abdomen repeatedly; each stab was deep enough to reach their internal organs; the cruelty and the ferocity of the means are indeed unforgivable, especially since the young child, Zheng Zhihao, was only five years old and knew nothing of the world; how innocent he was. Yet the defendant went so far as to abandon the father-son affiliation and kill with strong will; it is evident he has no humanity; his sin is inescapable — we have given it much thought; the defendant’s vice is really serious and we consider whether to spare his life, but in vain; he is unforgivable and needs to be separated from society forever; the prosecutor’s request for the death penalty is not unreasonable; the Court takes everything mentioned above into consideration and announces the penalty of death as stated in the syllabus, Section 2, in order to demonstrate the natural order of things."

“Just because… the defendant went so far as to…” is one of the standard expressions used in rulings to express the court’s disapproval and condemnation of the crime. It emphasizes that the offense was groundless and shows moral outrage at such a brutal offense. The judgment against Zheng portrays him as a malicious criminal who killed his family in cold blood. Yet information in the court files shows he was the sole caretaker of his wife, who went to a medical clinic every two or three days in search of painkillers, and that he lost his previous job as an ironworker because of a workplace accident that cost him two fingers and the opportunity for future work. Zheng received no compensation from his employer and no help from social services. He suffered from unemployment after

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16 In Chinese, this quote is a single, extremely lengthy sentence. The original text is: “爰審酌被告前逾違反動產擔保交易法、竊盜、僞造文書等犯罪紀錄，此有本院被告前案紀錄表一份在卷憑參，足徵被告素行不佳，被害人莊瑞美、鄭智豪與被告係夫妻、父子之親關係，被害人莊瑞美平日雖與被告相處不睦，惟並無何深仇大恨，被告僅因不滿被害人莊瑞美性情乖張，經常無故辱罵，驅趕離家以致離宿街頭，竟能趁被害人熟睡時，先持枕頭欲將被害人莊瑞美悶死未遂，復使用利刃猛刺莊瑞美、鄭智豪胸腹部等處，刀刀深及內臟，其下手之冷酷無情，手段之凶殘，實無可寬恕，尤其稚子鄭智豪年僅 5 歲，未曉世事，何其無辜，被告竟仍罔顧父子情誼，痛下殺手，足見其泯滅人性，罪無可逃，縱酌再三，被告惡性實屬重大，求其生而不可得，並無可憫恕之處，有與社會永久隔離之必要，檢察官主體求處極刑，並非無因，本院斟酌上情，宣告如判決主文第 2 項所示之死刑，以昭天理。”
that, while having to pay rent, medical bills and household expenses. His past crimes were petty crimes committed in a state of poverty: He could not afford to pay installment fees for the television he bought, hence the violation of the Personal Property Secured Transactions Act; he stole diapers for his son from a supermarket, hence the theft; he signed a false name at the police station when he was interrogated for the theft, hence the forgery.

The court files reveal at least six identities for Zheng. In chronological order, he was an ironworker, the victim of a workplace accident, a caretaker, a thief, a forger and a killer. Zheng supported his family and had a relationship colored with bitterness and grudges against his wife and son. The story told in the ruling is constructed by making a series of selections from the available information: Only the latter three identities are presented in the judgment. They are used to indicate the defendant's poor character. Only the sourness in his marital relationship is included as reason for the killing. His career as an ironworker and his injury prior to the killing are treated as irrelevant, while his past petty crimes are considered relevant and woven in to establish the defendant’s recidivism. They are deemed as aggravating factors in the sentencing.

Case No. 24 also illustrates that the beginning of a story has a vital impact on it and on attributing accountability. The defendant, Chen Wenkui, was a gangster running a gambling business. A police officer, Huang Huazong, lent him NT$2 million (roughly €50,000), which Chen later had trouble repaying. The borough chief, Huang Tengyi, intervened on behalf of the police officer and pressured Chen to repay the money by threatening his girlfriend at her residence and her business. Feeling bullied by the alliance of the police officer and borough chief, Chen and an accomplice went to a gathering with Huang Huazong and Huang Tengyi in attendance and shot the place up. Two men were killed and three injured. Chen admitted to the shooting but defended his actions by arguing the police officer was charging a sky-high interest rate on the loan, plus a mandatory contribution for police “protection.” Chen said the shooting was revenge.

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17 The Personal Property Secured Transactions Act, Article 28 stipulates: “If, before the transfer of ownership of the subject’s property to the buyer, the buyer has any of the following doings, to the detriment of the rights and interests of the seller, the seller may retrieve and take possession of the subject’s property: 1. Fails to pay the price of the property as stipulated. 2. Fails to fulfill the specific conditions as stipulated. 3. Sells, pledges, or otherwise disposes of the subject’s property. If, when the seller retrieves and takes possession of the subject’s property of the preceding paragraph, there is significant depreciation in the value of the subject’s property, the seller may claim damages from the buyer.”
The local court subpoenaed two witnesses to verify the claim of usury. One, surnamed Guo, testified he had delivered the loan from Huang Huazong to Chen and collected the daily interest of NT$30,000 (€750) from Chen to give to Huang. The police officer confirmed there was a loan, but claimed there was no agreement on the interest rate. He admitted, however, that he had received interest payments via Guo twice. When the case reached the High Court, a similar investigation was conducted with the same results.

The district court subpoenaed Chen’s girlfriend, surnamed Yao, regarding the debt-collecting activities. Yao’s testimony confirmed the borough chief had threatened her. The High Court subpoenaed one of Yao’s employees, surnamed Hsu, who testified that Yao’s karaoke bar was destroyed as a warning. In both trials, the police officer denied having threatened Yao.

The first and second trials both recognize the relevance of whether there was a loan, and whether usury and intimidation took place. The results confirm the defendant’s story that the loan constituted usury. Yet all the judgments written about this case start the story in the Fact Column by describing the loan and the defendant’s inability to repay it — with no mention of the sky-high interest rate, the threats and the bullying. In the last factual judgment, the relevance of usury is denied: “The defendant admitted to running a gambling business and making inappropriate payments to a police officer. All of these are illegal activities, regardless of the facts. They are not an excuse for revenge against bullying. He [the defendant] killed innocent people at random over a personal dispute. This is by no means a motive to be pitied and the defendant’s argument has no merit.”

This text is a tug of war between the defendant and the court over the start of the story. The defense’s story starts with a victim of usury by a police officer, followed by intimidation tactics, triggering a revenge shooting. The court rejects this story not because it doubts the authenticity, but because regardless of whether usury and bullying took place, the defendant is accountable. Previous trials of the same case suggested otherwise when they conducted multiple investigations into those circumstances. The last factual judgment

18 Court transcript on July 7, 2003, pp.2-6, in the court files of Difang Fayuan [Tainan Local Ct.], 91 Zhong Su No. 31, Volume 2.
20 Court transcript on Jan. 7, 2003, pp.3-9, in the court files of Difang Fayuan [Tainan Local Ct.], 91 Zhong Su No. 31, Volume 1.
pushes the loan into the background and excludes the interest rate from the narrative, deeming it irrelevant. Likewise, the intimidation tactics are not mentioned in the final factual judgment.

My analysis here is not about whose story is more convincing or more “true.” Instead, I am trying to point out the power of background and foreground: Simply by choosing a different start to the story, judges push certain information to the background and neglect it, as if it never happened. Other information, meanwhile, is pulled to the foreground and becomes the core of the story, as if that is all that happened.

When selecting information to include in capital judgments, judges usually, if not always, ignore societal context. One of the common motives for committing a crime is a shortage of money resulting from problems like gambling, unemployment, debt from black-market banks and debt from credit cards. Among these, gambling is largely attributable to an individual’s bad habits or greed, but the rest are phenomena shaped partly by other social forces. Let’s start with unemployment. Taiwan’s jobless rate used to be around 2%. Unemployment mainly affected first-time job-seekers. But starting in 1988, statistics show the causes of unemployment changed, and involuntary joblessness increased due to the liquidation of manufacturers. 2002 and 2010 were peaks in unemployment; many people aged 25-44 lost their jobs. Research shows the first peak resulted from manufacturers closing their operations in Taiwan and moving to Vietnam, Cambodia and China for cheaper labor. The second peak was the aftermath of the global financial tsunami in 2008 (Li, & Xue, 2003). The labor force was not to blame in either case, but the most disadvantaged, low-skilled, low-level workers suffered the consequences. During the same time frame, the price index kept climbing. The unemployed were doomed to sink into poverty. Among the 62 cases, Nos. 5, 55, 56 and 61 were crimes closely associated with financial problems resulting from unemployment. However, none of the rulings in these cases saw unemployment as a social phenomenon; they considered it the defendant’s individualistic situation instead.

People who are short of money have two easy ways to get loans. One is from black-market banks run by gangs. An important part of the underground economy, these banks are not regulated by the government, so their interest rates can go so high that a loan borrowed over two months ends up costing double the amount. Gang members collect on debts using the shadow of violent threats, so many debtors end up committing crimes to
get money, or else being hunted down and killed, or committing suicide. Case No. 29 was a crime committed by a threatened debtor. The other way to get an easy loan is with credit cards. People spend money that they do not have and take money from one credit card to pay for another, then apply for a third to pay for the second, and so on in a vicious circle. This became a social problem when banks issued as many credit cards as they could to whomever applied for one. At some point, the financial bubble created by this credit card system exploded, and the term “credit card slave” was coined to describe the 700,000 people with financial difficulties linked to this malfunction of the credit card system (Tsai, 2007). Case No. 1 was a crime committed by a “credit card slave” in 2002, six years before Taiwan’s Legislature passed the Statute for Consumer Debt Clearance to partly correct flawed financial policies.22

Societal context — the tumbling economy, the increasing gap between the rich and the poor, unregulated underground financial activities, capital drain, the lack of social responsibility on the part of companies, flawed financial policies — is completely wiped out in death penalty cases. All the harm done is attributed to the defendants for their mismanagement of finances or their ill-mannered lifestyle.

Like any other narrative, writing a capital judgment involves making a series of selections from available information. The story told in the ruling is simple and easy: The defendant needs money, so he kills to get it. The diversity and complexity of crimes are screened out and structural problems are pushed to the blurred background. This deprives the reader of the possibility to understand crimes contextually.

Judgments that do not start with the criminal record of the defendants begin by introducing them as criminals or jumping right into the motive and means for committing the crime. With or without prior records, most rulings do not document the occupations, nor any other identities, of the defendants. This omission guarantees that the readers know the defendants solely as criminals — no more and nothing else. “Criminal” is the first identity given to a defendant, and in most cases the only identity.

It is natural that the defendants in death penalty cases are described as criminals, since we are looking at convictions. What is worth noting, however, is that the defendants are presented as criminals who committed crimes in a social vacuum. No other identities are mentioned and no structural, societal forces are considered when evaluating the harm done,

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even when relevant information is available in the court files, as seen above. As a result, the
capital judgments tell stories that hold the defendant fully accountable for the crime.

Publications such as Just Mercy: a story of justice and redemption (Stevenson, 2014) or The
Autobiography of an Execution (Dow, 2010) provide a contrasting paradigm of storytelling that
encompasses rich details of personal history and social/economic background of the
person committing a crime, hence opens a possibility to a contextual understanding of
wrongdoing. Simone de Beauvoir’s famous quote “one is not born, but rather becomes, a
woman” is perfect to be used here to characterize the two contrasting paradigms of
storytelling: the judgments in my research believe that “one is born a criminal”, while
Stevenson and Dow see it as “one becomes a criminal”. And that difference lies in the
choice of the start of the story: in the judgments, the crime is the start of the story, the
cause of blood and death; in Stevenson and Dow, the crime is the outcome of a social
mechanism in malfunction, an expression of pain in itself.

II. The main body of the story
A. The criminal intent

One distinct characteristic of the narratives found in judgments is that they are
meticulously tailored to meet legal requirements. All the elements of a crime as defined by
statute are included. When there is more than one offender, the judgment makes it explicit
that they all shared the intent and contributed to the activity, even if through unspoken
consent. In robbery cases, for example, rulings describe the offenders as “shouting and
commanding” the victims to surrender their belongings, thereby fulfilling the statutory
definition that a robbery involves “rendering resistance impossible.” If there was a principal
offender and others who were accessories to the crime, this “shout and command” scene is
also used to clarify the hierarchy among the offenders. If the case involved multiple crimes,
such as sexual assault and killing or robbery and killing, the judgment specifies at which
stage the criminals intended to carry out sexual assault and at which point their intentions
pivoted to killing. The judgments have a definite destination to reach — a death
sentence — and the only way to reach it is by demonstrating that all elements of the
charges have been met. Therefore, the rulings embed the elements into their stories like a
marathon runner running a pre-set course and collecting stamps from posts along the way.

Yet the concern is whether evidence and arguments support these depictions, and whether
they fulfill the criteria of coherence and fidelity. We will discuss the elements of murder below and assess the judgments accordingly.

The elements of a crime include subjective and objective requirements. The subjective requirement is criminal intent, which is typically broken into two elements, “knowledge” and “desire.” Knowledge means the defendant knows her/his action may cause the victim’s death. Desire means the defendant either actively wishes to cause death or has no objection to it. Germany saw a long debate over these two elements and their roles in determining criminal intent (Hsu, 1997; Huang, 2000), but the Taiwanese legal system chose to adopt both elements from its very inception. Article 13 of the Criminal Code of Taiwan clearly defines criminal intent as knowledge and desire: “An action is committed intentionally if the actor knowingly and intentionally causes the accomplishment of the elements of an offense.”23 In practice, the courts determine criminal intent by “the synthesis observational method,” which takes a number of factors into consideration in order to reach a conclusion. Those factors include “the criminal motive and the reason, fatal or non-fatal injuries, the number of wounds, the seriousness of wounds, the weapon, the observable behavior during the crime and all relevant circumstances”.24

In general, criminal intent is treated as a given in death penalty cases and is simply declared in the Fact Column without evidence or arguments. As Hsu Yu-An points out, “the criminal intent cannot be ‘found’ like a knife used in a murder; it is a normative judgment, made after factual investigation, which finds the defendant highly reproachable (Hsu, 2012, p. 117).” Hsu argues criminal intent is not a psychological fact hidden in the defendant’s mind, but a legal concept; therefore, a judgment must explain in the Reason Column how and why the court has established the defendant’s criminal intent.

Establishing intent to kill is problematic when non-fatal methods were used in a crime, such as strangulation or arson. Take Case No. 18. The judgment in this case contends that defendant Zhang Junhong “knew clearly that Zou Yijing was a young girl, and that the neck is a vital organ with the trachea inside for breathing, and that strangling someone’s neck and covering his or her mouth and nose will block blood circulation to the brain and cause a reflective shock to the carotid sinus that leads to death or difficulties in breathing and suffocation that lead to death.” The medical terms used in the judgment are far above common knowledge. It is not a factual statement reflecting the knowledge of the defendant,

but an assertion made arbitrarily to meet the elements of murder. Strangulation might lead to death, but it is equally well known that it may cause no permanent harm in many cases. Therefore, the judgment fails to establish intent to kill simply by saying strangulation was used. The same critique can be applied to Cases Nos. 26 and 37, in which strangulation is believed to be the means of murder and no argument is provided establishing intent to kill.

In many death penalty cases related to arson, the judgments describe a sour relationship between the defendant and the victim, but fail to establish intent to kill. Cases Nos. 3, 21, 48, 50 and 62 are examples. As Hsu points out, hatred can be considered proof of intent to harm but not necessarily to kill: “The motive serves as a directional indicator only, because be it resentment or jealousy, the motive indicates the background and reason for attack, yet it is not conclusive on whether the defendant aims at causing harm or death” (Hsu, 2012, p. 141). The same applies to Case No. 52, in which the defendant committed arson on a restaurant as revenge for his friend, but the defendant and his friend held no hatred toward people in the restaurant.

Case No. 2 stands out for its peculiar interpretation of the defendant’s behavior. The defendant, Hong Mingcong, had a combative relationship with his wife and planned to set fire to her residence. Hong asked for a ride from a friend who had no knowledge of his plan. According to testimony by Hong and his friend, Hong had second thoughts and changed his mind upon arrival, then left without doing anything. Eventually overcome with resentment again, he requested a second ride and committed arson. Hong’s behavior that night was akin to Hamlet’s indecisiveness; “To be, or not to be” makes Hamlet an iconic figure of weak will. Contrary to common sense, the judgment interprets Hong’s hesitation as proof of strong will to kill: “It is revealing that the defendant hesitated before he set the fire. Obviously he knew it would be irreversible and serious once he did it, and after an internal struggle he still set the fire in a rage. It is thus evident that his hatred was deep and the desire to kill was strong, and it was not merely a threat to his wife. What he said about not intending to kill was false — meant to shirk responsibility and punishment — and will not be accepted.”

When a fatal weapon is used in a crime, it is almost self-evident that the perpetrator intended to kill, but not always. In Case No. 13, the defendant fired a gun without premeditation and as a reflex, and interpreting his action as intent to kill instead of a reflex is farfetched. In Cases Nos. 39 and 40, the defendants armed themselves before
negotiations with members of another gang. Intent to kill is not established to any satisfying degree, because the judgment asserts the defendants’ motive was to “act pre-emptively” rather than to kill: “Ji Junyi and Li Jiaxuan both knew shooting people in the head, chest and abdomen at close range with the guns they possessed would be fatal, but in order to act pre-emptively, they still [committed the following crimes] and shared the intent…” Acting “pre-emptively” does not necessarily mean intending to kill, and could be meant for self-defense or to injure someone. The judgment later asserts the defendants fired their guns “without heed to the consequences,” which again casts doubt over the judgment’s claim about intent to kill, because the potential “consequences” included that the victims might not be struck, might be injured, or might be killed. This is insufficient to establish intent is to kill rather than injure.

In addition to the 13 cases mentioned above, Case No. 30 leaves doubt regarding intent to kill. The victims were drowned — but there was no hatred as a motive. Intent to kill can be established if a definitively fatal method or strong and definite desire to eliminate the victim are present, but neither of those is present in Case No. 30. The assertion regarding intent to kill is not supported by any evidence or arguments.

In cases where the victim knew the offender, it is common for judgments to claim that the perpetrator’s intent was “to kill to eliminate the witness” (殺人滅口). Twenty-eight of the 62 cases in my research fit this description: Nos. 1, 6, 10, 14, 15, 16, 18, 19, 25, 29, 30, 32, 33, 34, 36, 37, 38, 41, 42, 43, 44, 47, 49, 53, 54, 55, 56 and 61. Among these, many do not offer any evidence to support this claim, but rather use the expression as a convenient solution to establish intent to kill.

Overall, intent to kill is one of the elements of murder that does not receive adequate attention in capital judgments. The assertion that a defendant intended to kill a victim is sometimes made with insufficient evidence or arguments (this constitutes a weakness in fidelity) or established with feeble arguments (this constitutes a weakness in coherence).

B. The evidence chain in murder cases

As mentioned in Chapter Three, the evidence chain in murder cases consists of “defendant—murder weapon—victim.” This chain is one of the fundamental claims of the murder story, and if it is broken in any given judgment, I characterize that conviction in my research as flawed. In this section, I will summarize 10 flawed convictions, focusing on
broken links in this chain and critiquing the judgments based on their fidelity, coherence and selectivity.

(1) Case No. 3

The narrative

It should have been a clear case. In the middle of the night on January 5, 2002, someone with a gun reportedly fired a few shots in a karaoke room. The police arrived promptly and took control of the room. Six men and one woman were arrested, one of whom was shot twice and died in the hospital. Two men were shot in the legs, and the remaining three men and one woman were detained and questioned at the police station, because someone had shot one of the police officers.

Reporters rushed to the scene of the crime, which was blocked off with yellow tape. Fengyuan Police Station deputy police chief Hong Jidian spoke to the media on camera: “The deceased used two guns and kept shooting at us.” Hong gestured during this statement, using his hands to mimic a gun at each of his sides (see Figure 1).

By “the deceased,” Hong was referring to Luo Wuxiong, whose actions had instigated the incident. Luo, who was drunk at the time, had fired three bullets into the ceiling and a fourth bullet at a wine bottle on the table. The staff of the karaoke bar had then called the police. What happened next is well documented in the media coverage and criminal investigation.

The next morning, it became clear that police officer Su Xianpi had passed away in the hospital. His colleagues shed tears there, turning their faces away from the news cameras. The police officers completed a report on January 6 about what had happened in the karaoke room: “Investigators Su Xianpi, Wang Zhihuai and Gao Yuhui responded immediately to the scene and Investigator Su Xianpi entered Room A10 first. Suspect Luo took two authentic Glocks from his waist and shot at his victim, Investigator Su Xianpi, causing Su to take a bullet to the chest and fall to the ground. Then Suspect Zheng Xingze, possessing a gun (or guns), walked up to

Figure 1
Su and shot him twice in the head.”

Figure 2
Source: Video file: 我無罪，我是鄭性澤！I am innocent, I am CHENG Hsing Tse (TAEDP, 2013, October 15). The 3D animation is reconstructed by an animator based on the measurements documented in the court files. The red figure lying on the ground is Su. The red figure sitting across from Su is Luo. The blue figure on the right is Zheng.

During an interrogation carried out by a prosecutor on January 10, police officer Wang Zhihuan testified: “Su Xianpi went in first, and I followed. As soon as Su entered, he said to Luo Wuxiong, ‘Don’t move.’ Luo Wuxiong fired his weapon without pause. I fired one or two bullets in a standing position at that time, then hid beside the couch near the entrance and fired five or six more bullets at Luo Wuxiong. I had a feeling I was running out of bullets, so I backed off and saw Su Xianpi lying on the floor. I shouted that Su Xianpi might be shot. Su Xianpi had fallen at the time under the corner of the table.”

In these depictions — the deputy’s statement to the media, the official report and the testimony of the police officer who was at the scene — Luo had two guns and fired at the police. There were supposedly two shooters: Luo hit Su with one bullet and Zheng hit him with more. The police controlled the key evidence in the case, since they sealed off the
karaoke room crime scene and found and confiscated the alleged murder weapons (four guns) right on the spot. The bullet heads, bullet shells and bullet holes in the room were also under police control or else in the victim’s body. The suspects and witnesses were located: Luo (suspected shooter who was dead), Zheng (suspected shooter who was still alive) and seven witnesses (five people who had been in the room singing karaoke and two police officers who participated in the shooting).

On January 11, results were released from forensic tests conducted on the three bullets in Su’s body. All three came from the authentic (i.e. non-counterfeit) Glock 17. There was only one such gun among the four weapons recovered in the karaoke room, allowing investigators to identify the murder weapon and potentially the shooter.

On January 21, another test result was released. It confirmed Luo had been in possession of the murder weapon. When Luo fired at the wine bottle, the bullet went through the room and became lodged in the wall to the next room. That bullet was shown to have come from the authentic Glock 17.

As soon as the test results came out, the police changed their story. Originally they had said Luo possessed two guns and fired at the police, triggering the gunfight. But now they said Luo did not have a chance to do so. The two police officers claimed they had fired their guns when they saw Luo pull back the slide on his Glock. Two witnesses who had been seated in the karaoke room, Liang Hanzhang and Wu Mingtan, were called to the police station, where they gave statements saying they saw Luo hand something to Zheng before the shooting broke out.

The ultimate conviction against Zheng relied on this new version told by police, in which Luo was shot at the very beginning of the gunfight and therefore did not fire at the police, while Zheng used the authentic Glock 17, which Luo supposedly handed to him before the gunfight, to fire a bullet at Su from his seat. This caused Su to fall to the ground, at which point Zheng walked over to Luo’s seat and fired two more bullets from that angle. Zheng then disposed of the murder weapon in the trash can near Luo.

The judgment against Zheng depends on four major establishments of fact: (1) that the authentic Glock 17, the murder weapon, was handed to him before the shooting; (2) that Luo was shot and killed immediately; (3) that Zheng changed positions while firing the weapon, such that he shot once from his own seat and again from Luo’s seat; (4) that Su was not shot by three bullets fired in rapid succession, but rather by one bullet that caused
him to fall to the ground and then two bullets while he was laying down.

The evidence chain

The murder weapon was found and confiscated at the crime scene right after the shooting. Three bullets were recovered from Su’s body and four bullet shells were collected at the scene.

Test results show the three bullets were fired from the authentic Glock 17 and the four shells collected at the crime scene were also from the Glock 17. The Glock 17 was therefore the murder weapon.

The link between the weapon and the defendant is established through the testimony of witnesses Liang and Wu, both of whom said they saw Luo hand “a black gun” to Zheng.

The break in the chain

The link between the weapon and the defendant is far from satisfying. Firstly, as is evident in Figure 3, the four guns present at the scene were all black. Secondly, both Liang and Wu testified that Luo handed “a black gun” to Zheng before shooting at the wine bottle on the table. Since forensic tests showed that Luo used the authentic Glock 17 to shoot at the bottle, this means whatever he handed to Zheng was not the murder weapon. The testimony of Liang and Wu are thus exculpatory rather than inculpatory. Thirdly, the murder weapon tested negative for Zheng’s fingerprints, so the link is not supported by physical evidence. Fourthly, all parties involved acknowledged that Luo and Zheng each had two guns. If Luo had handed one to Zheng, he would have been left with just one, yet all statements by police — the deputy’s announcement to the media, the official report, the testimony of the police officers present at the scene, and the officer who processed the crime scene while Luo’s body was still there — described Luo as having two guns in the gunfight.

The corroborating evidence for conviction

Among the four major assertions, (1) is involved in the evidence chain as discussed above;
(2), (3) and (4) are pieced together with corroborating evidence to produce a conviction. In the following section, these assertions will be discussed one by one to examine the judgment.

In (2), the judgment adopts the narrative that Luo was shot and killed immediately, based on the revised testimonies of the police officers, alleging that Su fired first and Luo never had a chance to fire. An examination of Su's gun showed Su fired five bullets. The judgment cites testimony from crime scene investigator Wei Xizheng: “([Judge:] If Su Xianpi and Luo Wuxiong were facing each other, is it possible the gunshot on Su Xianpi’s face came from Luo Wuxiong?) [Wei:] Based on police training, when Su saw the criminal pulling back the gun slide, he would have opened fire to strike back, so it is impossible that the shot was fired from Luo Wuxiong’s seat.” “Assuming Su Xianpi was shot by Luo Wuxiong, there is only one possibility: Luo and Su opened fire at each other. Su Xianpi fired five bullets, all of which missed Luo, and Luo Wuxiong fired three bullets (there were four bullet shells near Luo Wuxiong, one of which was from the bullet shot at the wine bottle), all of which hit Su Xianpi. Then Luo Wuxiong was shot dead by Wang Zhihuai and Gao Yuhui. But Officer Su had a gun equipped with a red laser sight and he was near Luo Wuxiong. Also, it is impossible that officers Wang and Gao took such a long time to react, so the probability is extremely low.” “Based on the traces at the crime scene, after Su Xianpi fired five shots — being a trained police officer and originally from the Thunder Squad — five bullets consecutively, at such close range and aimed at Luo Wuxiong, he would presumably have already struck Luo Wuxiong.”

Assertion (2) has at least three weaknesses. For one, it relies heavily on the police officers’ revised testimonies, which contradicted their prior accounts in the most crucial ways regarding whether Luo fired his weapon or not. Secondly, even if the revised testimonies are to be trusted, this establishes that Su and other police officers fired immediately, but does not establish that they hit Luo immediately. Even if Person A draws his weapon faster than Person B, it is perfectly possible for A to miss his target and be killed by B. The three paragraphs of Wei’s testimony cited in the judgment are nothing but sheer speculation that police officers always win in shooting matches. In fact, the facts of this very case prove this speculation to be wrong. The police shot 19 bullets in total, all aimed at Luo Wuxiong because they did not know Luo was not the only person in the room with a gun. Luo

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25 The Thunder Squad is a specially trained law-enforcement team.
sustained two bullet wounds. The other 17 bullets missed. Meanwhile, the offender, be it Luo or someone else, fired three bullets, all of which hit Su’s vital parts — 100% precision. Furthermore, it has been demonstrated that when someone takes a bullet to the heart, he or she can still do something like pulling a trigger while dying (DiMaio, 1999).26 This again introduces reasonable doubt regarding assertion (2). Even if Luo was hit in the heart at the beginning of the shooting, the possibility that he opened fire and hit Su cannot be ruled out.

As a side argument to assertion (2), the judgment contents that bullet shell No. 3 must have been fired by Zheng rather than Luo, because it was found to the left of Luo and a shell always lands to the right of the shooter. This contention comes once again from Wei and is wrong. Professor Li Junyi of National Taiwan University’s Department of Forensic Medicine provided a video clip in his essay on this case that shows shells sometimes fall to the left (Shih, 2016/1/25).27 That said, bullet shell No. 3 is insufficient to rule out the possibility that Luo was the shooter.

In assertion (3), the judgment contends Zheng fired one bullet from his seat, then walked over to fire two more shots at Su. The supporting evidence is Wei’s testimony, which the judgment cites: “My speculation is that the defendant may not necessarily have fired the two shots into the head [of Su Xianpi] from his seat. It’s possible that he walked to the side of Luo Wuxiong and fired the gun. And at the crime scene there was blood on the table and floor, so it is also possible that Su Xianpi was shot, fell prostrate on the table and was shot (again).” “([Judge:] Using common sense, assuming the space between the seats and the table was narrow, walking during the shooting would have made oneself an easy target, and since the defendant had a gunshot wound in his leg, what is the probability that the defendant left his seat and shot the victim?) [Wei:] Basically, spatially speaking, as long as one stands up, takes two steps and turns around, shooting the second and third bullets

26 “An individual may sustain a fatal gunshot wound and yet engage in physical activity. Experienced forensic pathologists, not uncommonly, encounter cases in which an individual, after incurring a fatal gunshot wound of the heart, is able to walk or run hundreds of yards and engage in strenuous physical activity prior to collapse and death. In one case seen by the author, a young man was shot in the left chest at a range of 3 to 4 ft with a 12-gauge shotgun firing #7 1/2 shot. The pellets literally shredded the heart, yet, this individual was able to run 65 feet prior to collapsing. Such activity is not surprising if one realizes that an individual can function without a heart for a short time. The limiting factor for consciousness is the oxygen supply to the brain. When the oxygen in the brain is consumed, unconsciousness occurs. Experiments have shown that an individual can remain conscious for at least 10 to 15 sec. after complete occlusion of the carotid arteries. Thus, if no blood is pumped to the brain because of a massive gunshot wound of the heart, an individual can remain conscious and function, e.g., run, for at least 10 sec before collapsing (p. 254).”

27 The clip is at 4:50 of the video.
could be done in this manner.”

In the first quote above, Wei offers his speculation without any supporting evidence, and can only suggest that things “possibly” happened this way. The second quote is a dialogue between the judge and Wei. The judge raised three questions: The space between the table and seats was narrow, so could Zheng have walked over? And since the shooting was going on, could he have walked over without further exposing himself to being shot? Finally, since Zheng had been shot in the leg, could he walk over at all? Wei only replied to the first question with an affirmative, and again without supporting evidence; he did not reply to the other two questions. Reasonable doubt remains: The shooting was going on, could he have walked over without further exposing himself to being shot? Zheng was shot in the leg, could he walk over at all?

The judgment draws on Wei’s opinion: “This court believes that [Wei’s] testimony does not contradict common sense, and is able to explain: (1) why the authentic gun was disposed of in the trash can in front of Luo Wuxiong after it jammed; (2) the position of bullet shells Nos. 3, 25 and 29, which are compatible with a situation in which the defendant fired the shots and the shells ejected from the gun.” The court believes Wei’s speculation that the position of the murder weapon and the bullet shells supports the theory that Zheng walked over to shoot. Unfortunately, it is an ineffective argument. The position of the murder weapon and bullet shells indicates the bullets were shot from Luo’s seat, but tells us nothing about Zheng or anyone else walking around to fire the weapon. The position of the murder weapon and bullet shells can also be used to support the assertion that Luo fired the gun and disposed of it in the trash can, and that is why the bullet shells were scattered all around Luo.

Assertion (3) is weak not only because it relies solely on Wei’s testimony, but also because the evidence tends to negate Wei’s account rather than sustain it. First of all, the space between the seats and table was as narrow as 38cm, and there were three people sitting between Zheng’s seat and the shooting spot, according to the floor plan in the court file. Common sense has it that it would have been difficult to cross, contrary to Wei’s testimony. Moreover, Zheng sustained a gunshot wound that caused an open fracture, which would have caused a lot of pain had he tried to walk. And had he walked across to the shooting spot with a wound like that, he would have left a trail of blood, yet the photos of the crime scene show no bloodstains in the space between Zheng’s seat and the shooting spot. The
person sitting next to Zheng during the shooting, Liang Hanzhang, testified that he and Zheng were leaning into each other during the gunfight and didn’t move. The judgment rejects Liang’s testimony: “But Witness Liang Hanzhang stated at the second trial that he did not open his eyes during the gunfight. In other words, whether Zheng Xingze left his seat or did anything was not witnessed by Liang’s own eyes. Liang acknowledged (that his belief) that Zheng Xingze did not leave his seat was only based on the physical sensation of leaning against Zheng’s shoulder. It is not impossible that Liang’s sensation was flawed.” The argument laid out in the judgment defies common sense.

Finally, assertion (4) asserts Su was not shot in rapid succession with three bullets. Instead, he was shot with one bullet, fell to the ground, then took another two bullets in a lying position. Assertions (4) and (3) are closely intertwined, and negating theme (4) will refute theme (3), too. If three bullets hit Su in quick succession, Zheng could not have had enough time to walk from his seat to Luo’s. The judgment establishes assertion (4) based on testimony from Wei and coroner Xu Zhuoxian. Both speculated that Su was first struck by a bullet to the face, which came from Zheng’s seat to the side. Su collapsed on the ground in a side-lying position, and Zheng walked over to Luo’s seat to fire two more shots, which struck the top of Su’s head and his chest. Xu testified that the three bullets must have been fired from different spots: “([Judge:] If Su Xianpi took the first bullet and collapsed belly-down and unconscious, and he took two more bullets in the process of falling, is this possible?) [Xu:] It is impossible that the shooting came from one spot, because the direction of the first shot differs significantly from that of the second and third. The second and third shots were done from a nearly top-down angle. If they were fired in rapid succession, the direction of the first, the second and the third would not have been so tremendously different, so it is impossible that it was a shooting in rapid succession.”

The evidence refutes assertion (4) for two reasons. One, if Su was shot as described by Xu — i.e. that he took the first bullet to the face and fell onto his side on the ground before taking the second and third bullets, there would be no blood on the coffee table. Photos from the crime scene clearly show that a considerable amount of blood was shed on the coffee table. This invalidates Xu’s description of the shooting. Two, the wound on Su’s chest shows he was not shot while laying on his side. As shown in Figure 4, the wound has two parts: The longer part is a burn caused by the bullet flying and grazing the skin, and the round wound is where the bullet entered the body. The wound resembles an exclamation mark. The space between the burn and the entry indicates Su was not lying on
his side when he was shot, because bullets do not stray up and down in a curve. It is most likely that Su was shot while standing and leaning forward, such that the skin on his torso was squeezed to form multiple folds. The space in the exclamation mark was the part of skin that was folded inward. If, as Xu speculates, Su was shot while lying on his side, his skin would not have formed folds, meaning there would be no explanation for how the bullet could have grazed the skin, lifted away from the skin briefly, and then plunged back into it.

Lastly, the most powerful corroborating evidence is the confession of the defendant, Zheng. Zheng was taken to the hospital because of the gunshot wound in his leg, and there he confessed during the police interrogation. Zheng admitted he had had two counterfeit guns and had shot at a police officer from his seat two times. One hour later, a prosecutor interrogated Zheng. He confessed again, but requested that the prosecutor “examine the two guns.” Then Zheng was transported to the karaoke room to show how he had
committed the crime. Once there, he retracted his confession in front of the prosecutor and said he had not fired his guns at all, which was why he had asked the prosecutor to “examine the two guns.” Asked why he had lied earlier, Zheng timidly told the prosecutor: “Because I was afraid.” A video recording of this conversation shows police officers starting to pace behind Zheng when they hear him retract his confession (TAEDP, 2013/10/15). Zheng accuses the police of torturing him to extract his confession. Apart from the gunshot wound in his leg, Zheng had no wounds when arrested at the crime scene, according to a medical examination carried out when he was admitted to hospital. After he was interrogated and taken to a detention center, a physical examination report there indicates he had bruises at that point on his left eye.

Nevertheless, the ruling treats Zheng’s confession to the prosecutor as inculpatory evidence. It dismisses his original confession to police. Yet the confession contains major inconsistencies with the established facts. It has been confirmed that the murder weapon was the authentic Glock 17, but in Zheng’s confession, he fired with his counterfeit guns. It has been confirmed that the bullets were fired from the area of Luo’s seat, but in Zheng’s confession, he shot from his own seat. It has been confirmed that the victim was shot three times, but Zheng confessed that he fired two bullets. The judgment interprets these inconsistencies as a cunning trick by Zheng to deliberately provide misinformation to investigators to get away with the crime. That doesn’t explain, though, why he would confess in the first place if he wanted to evade responsibility.

The broken chain

As discussed above, the corroborating evidence fails to support the evidence chain of the murder laid out in the judgment. The four assertions contained in the judgment cannot sustain a conviction.

Overall assessment

Case No. 3 relies heavily on a confession extracted through torture and on speculation by expert witnesses. In terms of the evidence chain, the judgment fails to provide convincing evidence linking the defendant to the murder weapon. The evidence, common sense and scientific research contradict the four themes that are supposed to sustain the conviction.

28 The clip is at 5:03 of the video.
As a result, the narrative is seriously flawed in terms of fidelity and coherence.

I spotted the irregularities of Case No. 3 in 2009 and worked on a campaign to save Zheng from death row. A defense team was formed in 2011. I conducted dozens of lectures around Taiwan to raise public awareness about this miscarriage of justice, and published a book in 2013 to further illustrate the weaknesses of the conviction. After several unsuccessful attempts by the defense team to secure a retrial or a special appeal, the flaws in the judgment attracted the attention of the Control Yuan, which released a report urging the Prosecutor General of the Supreme Prosecutors Office to file a special appeal (鄭性澤殺警案偵辦過程重大違法瑕疵, 2014). Scholars of Taiwan’s criminal code and criminal procedural code have taken notice of the flaws in this case, and it has been incorporated into a textbook as an example of lack of due process and the violation of human rights. Hsu Yu-shiu, a former Constitutional Court justice, organized a conference to discuss the case at length in 2015, which caught the attention of the Taichung District Prosecutors Office. After months of research and investigation, the office reached an unprecedented decision to seek a retrial for Zheng. The Taichung Branch of the High Court granted the request and released Zheng on May 4, 2016, so that he could be free during the retrial. The case is ongoing.

(2) Case No. 9

The narrative

Lu Wensheng (No. 9) and Wu Qinglu (No. 8) purportedly went to rob an old couple and ended up murdering them. Lu used a watermelon knife to slash the man’s neck, and, finding that the man wasn’t dead yet, Wu delivered a final stab in the chest with a pair of V-shaped scissors. The woman was killed by Wu, who used the scissors and a pair of designer’s scissors to stab her in the head, neck and back.

The evidence chain

The murder weapons are the watermelon knife, a V-shaped pair of scissors and a pair of designer’s scissors. Only the designer’s scissors were found in one of the victims’ bodies.

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30 For example, Professor Lin Yu-hsiung’s Criminal Procedural Code.
The watermelon knife and V-shaped scissors were missing.

In the case of the male victim, the weapons were suggested in the forensic report to perhaps be a pair of scissors and a non-scissors type of weapon: “[The male] had multiple stabbing and cutting wounds. If the stabbing wounds were made by a weapon like scissors, then the other cutting wounds were made by weapons that were not scissors. The cutting wounds did not display injuries made by the other end of a V-shaped pair of scissors when used wide open with great strength.”

In the case of the female, the forensic report concluded that the weapons were the pair of designer’s scissors found in her neck and a non-scissors type of knife: “Other than the murder weapon left in the left ear and penetrating deep into the neck, the victim also suffered multiple cutting wounds made by a sharp tool. These wounds were not made by the V-shaped opening of the scissors, but by a sharper knife, so it appears there was more than one murder weapon.”

Both of these passages come from a written report produced by the Institute of Forensic Medicine on the cause of death. Both are hypothetical, speculative and disorienting. The defense was not given an opportunity to cross-examine the expert on the cause of death. Since the forensic reports fail to link Lu to the murder weapon, Lu’s guilt is established by the testimony of codefendant Wu.

The break in the chain

Because no watermelon knife was found, the link between the weapon and the victims is mere speculation on the part of the forensic expert. This speculation cannot prove that the victims were killed with a watermelon knife. For the same reason, there is no physical evidence linking the weapon and defendant Lu.

Furthermore, the judgment is ambiguous on the question of whether Lu committed the murder or not. The Fact Column describes the crime thus: Lu slashed the male victim but did not succeed in killing him. Wu made the last stab and also stabbed the female victim to

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31 The original text: “有多處穿刺及切割傷, 其穿刺傷若為剪刀類型凶器, 則另一類切割傷造成之凶器則非剪刀類型, 且在切割傷未觀察到剪刀張開時使勁切割時, 「V」型口之另一端形成之傷口。” The English translation here is faithful to the original text.

32 The original text: “由留置左耳深頸部之剪刀之凶器外, 死者尚有多處銳器切割傷, 其切割型態非為剪刀「V」型開口所致, 且刀刃較銳利, 故疑凶器應至少有兩種。”

33 The robbery and double murder is believed to be committed by two defendants, both of whom were sentenced to death. The conviction of Wu is not considered problematic, and only the conviction of Lu is discussed here.
death. In other words, Lu did not commit murder. However, later in the Reason Column, the ruling cites court testimony and autopsy reports to conclude: “Based on the above evidence (1) to (5), it is clear that the victims, Huang Ting and Yang Bixia, were both stabbed with more than two weapons and that the offense must have been committed by two people. The situation must be close to Wu Qinglu’s above-mentioned confession.”

The speculation concerning “two weapons — one scissors and one non-scissors — and two killers” is point No. 5 in the judgment. It suggests that Lu participated in murdering the man and woman. Yet Wu Qinglu’s “above-mentioned confession” stated that Lu did not stab the female victim. The judgment goes on to reject Lu’s claim that he did not stab either of the victims. This leaves two possible scenarios: One is that Lu stabbed the man, as Wu stated, and the other is that Lu stabbed both victims, as the report suggested. The judgment doesn’t decide between these two scenarios.

In terms of the male victim, there is a break in the evidence chain: It is unclear whether the watermelon knife was used to hurt the man, let alone to cause his death. In terms of the female, it is not even clear whether there was a chain at all: The judgment does not explicitly assert that Lu stabbed the female victim, let alone that he killed her.

The corroborating evidence for conviction

Lu’s DNA was found on a wall at the crime scene.

The break in the chain remains

The corroborating evidence places Lu at the crime scene, but his participation in the activity is not explicitly addressed in the judgment, nor supported by any physical evidence, only Wu’s statement.

Overall assessment

It is exceptional that in the Case No. 9 judgment, even the charges against Lu remain ambiguous. Two scenarios coexist in the story recounted in the judgment and the judges don’t specify which they believe to be true. The criticism here is not that one of the two scenarios was clearly true and the other false, but rather that the judgment failed in its fundamental task of establishing the facts based on evidence and telling a coherent story. If the court believes Lu stabbed the woman, it is a flaw in coherence not to mention this in
the Fact Column, and a flaw in fidelity not to provide evidence in the Reason Column. If
the court believes Lu did not stab the woman, it would be a flaw in fidelity to convict him
of murder without providing evidence that he caused the death of the man, and it would
be arbitrary to give the two defendants the same sentence if their contributions to the
murders varied significantly.

(3) Case No. 25

The narrative

Shen Honglin is believed to have initiated a criminal plan with two friends, Huang Xiren
and Huang Qixiong, after learning that two female workers were living alone in the
dormitory of the company where Shen had been hired. The women were raped and beaten
to death. The judgment says Shen participated in the rape but not the killing.

The evidence chain

The murder weapons were a wooden rod and an ashtray. They were found at the crime
scene in 1989 but had been lost by the time Shen Honglin was put on trial in 2003.
The wooden rod tested positive for Type A blood. One of the victims, surnamed Chen,
had Type A blood. The link between the weapon and the victim is weak by today's
standards.

None of the murder weapons can be linked to Shen, but that is not relevant anyway, since
the charge was collaborating to commit murder. The evidence used against Shen was
testimony by Huang Xiren and Huang Qixiong, who accused Shen of planning to kill the
witnesses to eliminate them.

Shen was also convicted of rape. The autopsy report states: “There is no obvious sperm
in the vagina, but protein-like (semen) crystals are observable (under a microscope).” No
trace of Shen was found in the victims' vaginas. The judgment relies on Huang Xiren and
Huang Qixiong's testimonies to convict Shen of rape, too.

The break in the chain

Huang Xiren and Huang Qixiong were never cross-examined because they had both been
executed by the time Shen stood trial. According to a ruling by the Constitutional Court of
Taiwan (Judicial Yuan Interpretation No. 582, 2004), testimony by a codefendant is
admissible only if it is made under oath and the witness is subjected to cross-examination.

This calls into question the admissibility of the testimony by Huang Xiren and Huang Qixiong.

Moreover, the judgment inserted unverifiable inferences in the codefendants’ testimony. For example, the judgment cites a statement Huang Xiren made to police: “When the three of us were about to depart, Huang Qixiong invited us to meet halfway between Lunqiao Village and Xinbow Village at 22:00 to go to the dormitory together to rape the two girls (referring to Wang Cuilian and Chen Renlan), and said if there were any consequences, his friend (referring to the defendant) would take care of it.” The addition in parentheses, “referring to the defendant,” was not part of Huang Xiren’s statement but rather added by the judge. In other words, Huang Xiren did not testify against Shen here and this statement is therefore not inculpatory evidence. Nevertheless, the judgment confuses the inferences of a judge with testimony by a codefendant, thereby producing a flaw in fidelity.

The judgment also cites two parts of Huang Qixiong’s testimony as inculpatory evidence to support conviction. The first part is about the preparation of the crime: “When the codefendant, Huang Qixiong, was arrested and interrogated for the first time by a judge at the district court, he stated clearly that he had gone to Yi-Xin Company on the evening of September 15, 1989, to help the defendant move cargo together with Huang Xiren, and that the defendant had proposed going to the dormitory. The three of them climbed over a fence to enter.” The second part is about the aftermath: “Afterwards, Shen told him to escape. The two women lay on the ground, face-up, heads bleeding. The two female workers were killed in the same room; the room was the crime scene.” The judgment does not mention that Huang Qixiong denied being present during the crime and therefore had no knowledge and offered no account of either the rape or the murder. With care and skill, the judgment draws selectively from Huang Qixiong’s statement and claims both codefendants confirmed Shen’s crime. This is not true. It is a flaw in terms of both fidelity and selectivity.

In terms of the evidence chain regarding the murder, Shen was convicted on a charge of collaborating to kill, but the attempt to establish the facts in the case rested weakly upon statements that should not have been admissible in court and that do not identify Shen as

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34 The statement is first cited in the judgment of Remand 4 as it is, followed by Remand 5. The inference is added in the judgment of Remand 6, inherited by Remand 7, and then finalized.
the perpetrator. The judgment also distorts statements with embellishments (such as the inference about the identity of the accused) and by omitting essential information (such as the description of the crime). The judgment clearly strengthens the codefendants’ accounts in this manner.

In terms of the evidence chain regarding the rape, no link to Shen is established. The judgment uses Huang Xiren’s testimony as the only evidence Shen committed rape. The uteruses and vaginas of the victims were cut out and soaked in formalin, which makes it impossible to test for DNA or other biological traces. The coroner documented protein-like crystals on both victims and the judgment uses this result as inculpatory evidence despite its inconclusiveness and imprecision.

The corroborating evidence for conviction

A cigarette butt with saliva on it was found at the crime scene and tested positive for Type B blood. Huang Xiren had Type B blood. A fingerprint on the third floor matched Shen.

The break in the chain remains

The test result is consistent with Huang Xiren’s testimony but does nothing to corroborate his identification of Shen as an accomplice. The third floor was a social space for company employees, and many male employees went there to watch TV and play cards. The judgment does not specify where exactly on the third floor Shen’s fingerprint was found. Again, the physical evidence has since been lost. As a result, the break in the evidence chain regarding the murder remains.

Overall assessment

Case No. 25 is weak in evidence, partly because it happened in 1989 and partly because of reckless storage of evidence. The judgment relies heavily on the codefendants’ testimony, which was neither given under oath nor subjected to cross-examination and therefore should not have been admissible under due process. The judgment also inserts text into Huang Xiren’s statement to make it an accusation against Shen, and omits text from Huang Qixiong’s statement for the same purpose. The ruling therefore fails to meet the criteria of fidelity and selectivity.

(4) Case No. 26
The narrative
Chen Xiqing and Lu Jinkai were friends and roommates. Chen and Lu purportedly lured a young woman via a tutoring agency for a job interview, with the intent to rape her. Lu gripped her neck tightly to hold her in place so Chen could rape her, but the strangulation killed her. The judgment holds both Chen and Lu accountable for collaborating with direct intent to rape and indirect intent to kill, and as accomplices. Chen was sentenced to death and Lu received 20 years in prison.

The evidence chain
The murder weapon was Lu’s hands. The conspiracy by Chen was established by statements made by Chen and Lu.

The break in the chain
There is no evidence other than Chen and Lu’s testimony, which do not meet the challenge of fidelity and coherence.
Both Chen and Lu claimed to have been tortured by the police, and their claims are supported by records from when they were booked into the detention center. The booking records indicate Chen had a cut on his lips and Lu had a bruised ear and swollen face. The ruling nevertheless cites interrogations conducted by a prosecutor on the same day that the defendants were tortured. It dismisses the possibility that this police torture had a continuing influence on their statements to the prosecutor. When defendants give statements to prosecutors, they are usually still in police custody.
Chen and Lu’s confessions are highly contradictory, which also suggests coercion and a lack of free will. Chen offered varying accounts of what happened, including that he raped the woman and Lu killed her; that he raped and killed her alone; that he and Lu both raped and killed her; that he had intended to hire an English tutor but had argued with her and unintentionally killed her; that he didn’t commit the crime, but was misled by police into thinking Lu had framed him and therefore framed Lu in retaliation; that he committed the crime after heavy drinking and so his memories were blurry; that he had taken heroin that day and so his memories were blurry; that his other friends had visited him that day and committed the crime without him; or that he raped the woman but didn’t intend to kill her.
and should not be responsible for Lu strangling her. Lu offered differing accounts, too, including that Chen raped her and Lu accidentally strangled her to death; or that Lu did not participate at all and had no knowledge of the crime.

Some of the arguments in the judgment are pure speculation. For example, the judgment concludes Chen and Lu must have committed the crime together: “[Chen and Lu] knew each other when they were both behind bars in Taipei Prison. If they did not establish a deep friendship, why would they have exchanged contact information for future contact? Once Chen was granted parole, he sought help from Lu and Lu offered the place that he rented from the owner of a bakery. The two stayed in the same room. The two endured hard times in prison. Defendant Chen had needs and got Lu’s consent to find a woman for fun, since Chen lured the victim on the pretense of a job interview and forced the victim to have sex, how could it be possible that Lu did not participate and help?”  

It is groundless to assume that because Lu offered Chen a place to stay, the two must have committed this crime together. Based entirely on speculation, the judgment rejects Chen’s account that Lu did not participate in the crime: “It must be that Chen knew he himself could not escape the law, and that he therefore wanted to take the blame alone in return for Lu having done him the favor of providing him shelter. Or else he intended to mystify the crime and prepare a cause for appeal to the Supreme Court to buy himself more time before execution, so he deliberately withheld the account of the crime in which Lu did not participate in the rape. Hence, this alternative account that Chen provided later was unacceptable.”

The judgment concludes Chen committed rape based on the following argument: “According to defendant Chen, the victim happened to have her period and was using a sanitary pad, so there was blood at the crime scene. So defendant Chen must have committed sexual assault on the victim — otherwise how could he have known that the

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35 This is a faithful translation of the original text: “既係曾被在臺灣臺北監獄執行時之獄友，若非已經建立深厚情感，焉有可能互相留下聯絡方法，以便日後聯繫。被告陳錫卿獲得假釋出獄，旋即前往投靠呂金鎧，呂金鎧並將之收留同住於麵包店租賃公寓（見原審卷第 95 頁背面陳錫卿供述），住同一房間（見原審卷第 95 頁背面陳錫卿供述）。二人共同監獄服刑的煎熬忍受，被告陳錫卿因需求並獲得同案被告呂金鎧之同意，要找女人前來玩樂，被告陳錫卿既以請家教之名騙得被害人范 00 前來，被告陳錫卿對於被害人范 00 為強制性交，呂金鎧豈能不參與幫忙之理?”

36 This is a faithful translation of the original text: “應係自知法網難逃，一人承擔犯行即可，為報答偕住宿處之呂金鎧，或擬混視聽，預埋最高法院再度發回更審之事由，蔣以苟延殘喘不願伏法，而故為隱瞞呂金鎧未參與共犯強姦罪之犯罪過程，故其事後翻異之供述，委無可採。”
victim was having her period and using a sanitary pad?"  

It is surprising to read the “arguments” listed above in a capital judgment. They are speculation at best, and as such are not persuasive. The arguments do not establish guilt beyond a reasonable doubt.

The corroborating evidence for conviction

The tutoring agency records show the victim went to Chen and Lu’s place for a job interview. Chen’s DNA was found in the victim’s vagina.

The break in the chain remains

The corroborating evidence helps establish the facts of the rape, but does not help establish the facts of the murder. The assertion that Chen committed murder is still based on Chen and Lu’s dubious confessions extracted by torture or the continuing effects of torture.

Overall assessment

Case No. 26 perfectly illustrates that a case with weak prosecution is difficult to reverse, because there is not much evidence left to be challenged through re-examination or re-investigation. From Chen’s point of view, the only hope of reversing his murder conviction was for Lu to offer a different statement. Lu did that — he pleaded not guilty after being removed from the custody of police and placed into a detention center, at which point he argued he knew nothing about the crime. Yet the ruling rejects Lu’s claim of innocence based on the fact that Chen contacted Lu after release from prison, and that Lu gave him a place to stay. From Lu’s point of view, meanwhile, the only hope of reversing his murder conviction was for Chen to alter his account, which Chen did. At some point in the trial, Chen argued he committed the crime alone and Lu knew nothing about it. Yet the ruling dismisses this claim based on speculation that Chen only said so to protect Lu or plan his own appeal. The narrative in the Case No. 26 judgment is flawed in terms of fidelity because it lacks supporting evidence, and flawed in terms of coherence because it is replete

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37 This is a faithful translation of the original text: “且斟諸被告陳錫卿所言，被害人范00當時剛好經過，且在使用衛生棉見偵查卷第78頁背面、第79頁）及現場仍留存血跡（見偵查卷第40頁）等情，則被告陳錫卿必有對被害人范00為強制性交之行為，否則渠焉知被害人范00當時剛好經過，且正使用衛生棉？”

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with assumptions and speculation.

(5) Case No. 27

The narrative

It is believed that a group of bandits planned to commit an armed robbery in a family-run gambling place. A thin robber named Liu Yanguo rushed in and ordered people to lay down and put their belongings on the table. A fat robber named Wu Liren went upstairs to keep the rest of the people under control. Unfortunately, one of the gamblers got a glimpse at Liu, who became upset and lifted up a chair to hit him. The gambler snatched the chair away and was about to strike Liu when Liu opened fire.

In the meantime, the female owner of the house emerged from the restroom and the fat robber tried to snatch her purse. She resisted and got shot too. In the chaos, someone said, “How dare you shoot police!” The two robbers realized they were in trouble and fled.

The male victim was Chen Zhiyuan, an off-duty police officer. The female victim was Chong Huimei, and the witnesses were mainly her relatives, including her husband, daughter and nephews. One of her nephews, Su Fengzheng was shot in the hand.

The evidence chain

Chen and Chong were both killed by bullets. Chen had seven wounds. The fatal shot entered his chest and exited from the back, hitting his heart and liver. When he was moved, a bullet fell from his back. His elbow bore two bullet wounds — an entry wound on the inside and an exit wound on the outside. His abdomen also had two wounds, an entry wound on the right and an exit wound on the left. Finally, there was a wound on his right hand wrist where a bullet remained lodged. Chong was struck with one bullet that entered her abdomen and went through. The judgment suggests the bullet that killed her became lodged in the door frame.

Three bullets and three shells were recovered. Test results show the bullets were all fired from the same 9mm gun. The shells also came from that gun.

Liu had a potentially lethal, Brazilian-made 9mm gun, but the court files do not indicate whether it matched the bullets and shells.

The break in the chain
The first break is that the murder weapon, bullets and shells were all in the court’s possession, yet the court relied on speculation instead of ordering a simple and feasible forensic test to achieve certainty. As a result, it is clear the victims were killed with a gun, but whether the murder weapon can be linked to Liu remains unverified.

The judgment assumes the bullet in the door frame is the one that hit Chong based on the assumption that three bullets were fired, two hit Chen and one hit Chong, all of which were collected in the investigation. That is the second break in the chain: More than three bullets were fired, and the investigators didn’t collect all the bullets and shells.

The judgment cites the crime scene investigation report to establish that Chen was shot twice: “Offender No. 1 shot Chen Zhiyuan twice — once from the right side of the chest through to the right side of the back, and once from the left hand joint through to the left side of the abdomen and out the right side of the waist, before becoming lodged in the right wrist.” This description assumes the bullet flew left to right, penetrating the left elbow, then abdomen, and stopping at the right hand, in that order. But the police failed to correctly identify the entry and exit wounds for lack of forensic knowledge. The autopsy indicates the wounds on the abdomen were created right to left and the wounds on the left elbow occurred inside to outside. This is the opposite direction. A bullet flying right to left and penetrating the abdomen and left elbow would never land in the right wrist.

Chen’s wounds show he was shot at least three times. The wound in his chest and the one in his abdomen were definitely two separate shots, because they were both on his torso. The wound in his left elbow may have been caused by the shot to the abdomen. This fits if he had his hand to his side in a natural standing position. The wound in his right hand could not have been caused by the shot to the abdomen, as explained earlier. The shot to the chest couldn’t have caused it either, because both are bullet wounds.

A third person was shot, too — Chong’s nephew, Su. A bullet struck his right hand. That is all there is to know about that; it was not investigated at any of the trials.

Judging from the fact that Chen was shot at least three times, Chong was shot once and Su once, and that Chong was shot after Chen (so there’s no possibility that one bullet hit both), it is clear the judgment is wrong in asserting that only three bullets were fired and all were collected.

That leads to the third break in the chain: It is not clear whether the bullet that killed Chong was found. The bullet stuck in the door frame had blood on it but was never tested
to determine whose blood it was. The court engaged in speculation instead of ordering a test that would have provided certainty.

This in turn leads to the fourth break: It is not known who killed Chong. The murder weapon was not unverified and as a result, the shooter was not verified.

The corroborating evidence for conviction

The witnesses provided contradictory testimony: Half of them said they saw the fat robber shoot Chong, while the other half insisted they saw the thin robber do it.

The judgment concludes Liu killed Chong from a distance. When a bullet is fired at short range, the gunpowder penetrates the skin, leaving a mark like a tattoo. Chong’s wound showed no such mark. Since Wu was closer to Chong and Liu stood farther away, the ruling says Liu was the shooter.

The break remains

As a principle, gunpowder markings can help determine the shooting distance, but if the wound is covered by clothes, then the skin won’t exhibit such markings. In this case, Chong was shot in the abdomen — which was covered by clothes. Hence, the lack of gunpowder does not mean the bullet was shot from a farther distance.

The expert opinion cited in the judgment emphasizes that the only way to determine the shooting distance is to use the specific gun and bullets to experiment: “Most importantly, to judge the shooting distance, one needs to take the gun and bullets involved in the crime and shoot at different distances to get different wound patterns and use them as the standard to compare with the wound patterns on the person who was shot in the crime. One cannot speculate [the shooting distance] based only on the patterns of the gunshot wound and past experience.” Without such experiments, the speculation in the judgment is groundless and does not fix the evidence chain.

Overall assessment

Case No. 27 fails at coherence because its arguments contradict the evidence, as seen with the gunpowder issue. The judgment fails at fidelity because it relies on evidence known to be false (such as the crime scene investigation report), and because it arbitrarily speculates on matters that need to be verified with evidence, even though the court possessed the evidence (such as the bloodstain on the bullet or Su’s wound) and could examine it.
The narrative

Guo Junwei and Xie Zhihong were hanging out at night on their motorbikes. Guo picked up a girl named Chen Baozhu, an 18-year-old student in vocational school majoring in hairdressing. Guo took Chen on his motorbike, but the two soon got into an argument. He stopped his bike beside a deserted brick factory, slapped her in the face, and took away her cellphone to prevent her from contacting anyone.

After this unpleasant episode, Guo had a thought. The three went back to his place, where he asked Xie to go to his room and fetch a “butterfly knife” (named so because it can flip open and fold back). Guo stayed with Chen to prevent her from leaving. In the middle of the night, the three went to a cemetery on motorbikes. Xie was nervous, so he waited at the entrance. Guo took Chen to a pavilion, where he showed her his knife. She cried and begged: “Do whatever you want as long as you take me home.” Guo was pleased and the three went back to his place, where he proudly announced to Xie: “I'll take her home to screw her.”

Before dawn, around 4 am, when Guo was supposed to take Chen home, he stabbed her in a frenzy with the butterfly knife beneath a wooden shed in a rice field. Her blood stained the wall of the shed and more blood soaked into the straw and stained the soil. On a routine check of his rice field water supply, an old farmer, Zhang Qingmu, passed by and Guo stabbed him, too, on a killing spree.

Thirty minutes later, two farmers in their 60s came on their bicycles to check the water supply. One found a young woman lying in his field, and the other found his cousin lying on the road. Zhang had never had any quarrels with anybody, according to his cousin. Chen was identified based on the belongings in her purse. The police then learned she had last been seen in the company of a man with blond hair the night before, and that there was a third person with them.

It is not difficult to identify a young man who has died his hair blond. The police found Guo on June 25 and questioned him about his whereabouts on June 23 and 24. He was well prepared for this questioning. Guo said he worked for his brother-in-law’s transportation business and that it was not unusual for him to set out for work late at night. On June 23,
they drove all night to Taichung, and the trip took longer than ever because one of the tires exploded and they had to put on a spare. They had lunch in Taichung and loaded goods to transport back to Tainan. Guo’s account was detailed and vivid, and his brother-in-law gave an account that matched his.

However, Chen’s other friends were ruled out as suspects, one by one. At 10 pm on June 27, the police showed up at Guo’s place and confiscated a cellphone and a butterfly knife with bloodstains on it. From Guo, the police learned the identity of Xie. They confiscated a white T-shirt, blue jeans, a pair of slippers and a motorbike, all belongings that Xie wore or used that night. The district attorney, Gao Fengqi, issued a search and arrest warrant only after these deeds were done. He did not seem to mind that the police had overstepped their authority.

The lab results came out days later. The semen stain on Chen’s body matched Guo’s DNA. The confiscated cellphone belonged to Chen. More importantly, the stains on the butterfly knife were Chen’s blood. Zhang and Chen’s bodies were found close to each other, with similar wounds that matched the mark of the butterfly knife.

But Guo claimed Xie had participated in the killing, too. What weapon did Xie use? There was no other weapon aside from the butterfly knife. Between 2000 and 2011, this case was remanded seven times. The final judgment says Guo and Xie took turns stabbing Chen and Zhang with the knife. Guo and Xie each received two death sentences.

The evidence chain

The murder weapon used to kill the victims was a butterfly knife. Chen’s blood was found on it, which establishes that the knife was a murder weapon. Zhang lay nearby with similar wounds, so the judgment concludes the murderers used the same knife to kill Zhang after killing Chen.

The butterfly knife was found in Guo’s house, so this establishes a link between the murder weapon and defendant. The knife is not linked to Xie by anything other than Guo’s statement accusing Xie of participating.

Xie’s guilt was determined based on (1) Guo’s statement, (2) Guo’s polygraph test, (3) the opinions of forensic experts, and (4) Xie’s confession. Guo insisted Xie had taken part in the killing. His polygraph test indicated two people committed the killing. The forensic experts believe there were two killers, and Xie admitted committing the crime during police interrogation.
The break in the chain
(i) Guo’s statement

The judgment convicts Xie based largely on Guo’s statement, despite the fact that Guo’s account kept changing and shifting responsibility to Xie bit by bit. Guo denied everything until the knife was found in his house, and came up with an alibi backed by his brother-in-law. During police interrogation, Guo admitted stabbing Chen, though at the pretrial detention hearing, he emphasized that “Xie stabbed more than I did.”

During the investigation, Guo claimed he had used full force on the first stab only: “For the rest of the stabs, I refrained from using full force.” According to Guo, Xie was the one who stabbed her in a frenzy. At the Tainan District Court trial, Guo’s testimony added this about Xie’s intention to kill: “I stabbed Chen Baozhu in the abdomen with the butterfly knife. I meant to send her to the hospital, but Xie Zhihong said he wanted her to die, and stabbed her in the chest, abdomen and back.”

In the beginning, Guo admitted to stabbing Zhang. Until Aug. 9, he said he had taken the knife from Xie and stabbed Zhang. Then his story changed: He said Xie had handed him the knife and egged him on with the words, “Go, go,” so he obeyed what Xie told him to do. On Sept. 14, his story changed again, and Guo claimed Xie went to kill Zhang. From then on Guo insisted he did not kill Zhang and had been ordered by Xie to take the blame. Guo also alleged Xie had urged him to finish off the killing by saying, “How can you kill if you do it like that!”

Similarly, Guo offered no account of Xie’s motive during police interrogation, but later offered one to the prosecutor. He claimed Xie had made advances toward Chen while Guo had stepped away for 5 minutes, and that Chen had rejected Xie, angering him.

Parallel to his efforts to criminalize Xie, Guo also tried to decriminalize himself. One year after the crime, he started claiming he had been carrying the knife out of self-defense because he feared Chen’s friends might hurt him.

Some of Guo’s accounts have proven to be lies. For one, his vivid alibi proved to be false and his brother-in-law admitted to lying to protect him. Secondly, he denied killing Zhang, yet settled with Zhang’s family for compensation of NT$1.1 million (€30,000). Thirdly,

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38 See the court files of Difang Fayuan, [Tainan Admin. Local Ct.], 89 Sheng Ji Ze No.194 (2000).
39 See the court files of Prosecutor’s Office, Tainan Local Court, 89 Zhen Ze No. 7578, p. 170 (back) (2000).
Guo told a psychiatrist he had stopped using drugs in 1997, when he last used amphetamines. But the fact is, he was found on drugs on May 16, 2000, 40 days before the double murder.40

Despite evidence debunking a long list of his lies, Guo’s testimony was popular with the judges. That a ruling would rely so heavily on the testimony of someone with dubious credibility and personal interest in the matter is a dangerous sign.

(ii) Guo’s polygraph test

Eager to win the trust of the judges, all too often defendants offer to take a polygraph test. This is the modern version of the ancient ritual of making a blood oath. The Taiwan Supreme Court has, in several rulings, cautioned against polygraph tests as falling short of scientific standards. Zuigao Fayuan [Sup. Ct.], 92 Tai-Shang No. 2282 (2003), 98 Tai-Shang No. 2991 (2009) and 99 Tai-Shang No. 2273 (2010) assert that polygraph tests cannot be taken as the sole evidence in a conviction. 94 Tai-Shang No. 1725 (2005) goes even further, arguing that polygraph tests cannot be taken as evidence in convictions at all: “Polygraph test results might be taken as a technique in investigation to rule something out or point in the right direction, but it is not sufficient to be considered valid at trial and to be taken as the basis of fact-finding for the crime.”

The Supreme Court sets both procedural and substantive standards for polygraph tests to be admissible in court. The procedural requirements include a well-informed subject who is in good condition, a well-trained polygrapher, well-maintained equipment and a proper environment. The substantive requirements include the process of inspection and the result. A polygraph that meets both standards is admissible, and its strength in fact-establishment is up to the court to decide.

Guo’s polygraph test results do not meet these standards. In terms of the procedural standards, the polygrapher’s credentials were not submitted to the court and are therefore unknown. In terms of the substantive standards, the questions asked during the test and the chart of physiological reactions also are missing. As a result, adopting Guo’s polygraph test as evidence is inconsistent with the Supreme Court’s rulings.

The use of polygraph tests as court evidence has generated worldwide concern. Polygraphs operate on the assumption that people show subtle physiological reactions

40 The case of drug abuse was investigated and resulted in rehabilitation.
when lying, such as an accelerated heartbeat or perspiration. The major flaw is the fact that deception is not the sole cause of these reactions, so they cannot be taken as evidence of deception. When all roads lead to Rome and someone shows up in Rome, that doesn’t tell you which road he took.

Xie and Guo both took polygraph tests. Xie’s was inconclusive. The video of the test shows he wept for 40 minutes beforehand. This fluctuation in emotion may have interfered with the results. Guo, however, passed the test. The polygrapher asked him if he had framed Xie, and Guo replied, “No.” The polygrapher then used a technique called “peak of tension,” and asked Guo how many people killed Chen, at which point he reacted to the number “two.” The judgment utilizes Guo’s test results to convict Xie of killing Chen.

In *Polygraph and Lie Detection*, the National Academy of Sciences (a United States research institution) proposes questions that must be answered before establishing polygraphs as a scientific method of lie-detection. For example, “How might the test results be affected by the examinee’s personality or frame of mind? For example, can recent stress change the likelihood that an examinee will be judged deceptive?” “Does the type of lie (rehearsed, spontaneous) affect the nature of the physiological changes (National Academy of Sciences, 2003, pp. 67-68)?”

Both questions have a bearing on this case. Guo’s psychiatric evaluation describes him as having “very low empathy toward the victim, a strong tendency to consume alcohol and drugs, a tendency toward anti-social behavior…a lack of guilt for his own criminal act.” People with anti-social personalities tend to rationalize their offenses and believe their victims deserved it. When asked “Did you frame Xie,” someone who is anti-social, like Guo, might well deny this in all honesty, thinking internally, “Xie had it coming and deserves it.” Also, the choice of the word “frame” is inappropriate for a polygraph test because it is not neutral.

The court transcript doesn’t reveal until Remand 5 that Guo actually took two polygraph tests. Xie signed a consent form on Feb. 6, 2011, but Guo signed two forms, one on Feb. 6 and another on Feb. 7. Is that why Guo passed the polygraph — because he got a second chance, and lies that have been rehearsed generate less physiological change? What was the result of the first test and why was a second test ordered? The court does not answer any of the above questions and simply ignores the matter. Considering the international concerns about polygraphs, Guo’s test results suffer from weaknesses in interpretation: His
personality disorder and his second chance to pass the test are not taken into consideration. The polygraph was conducted in 2001 using Zone Comparison Test (ZCT), a method of Comparison Question Test (CQT). In 1988, the German Supreme Court ruled polygraph tests inadmissible in criminal proceedings (December 1998, BGH 1 StR 156/98 and 1 StR 258/98). This was based on an expert opinion provided by Klaus Fiedler. Fiedler, Jeannette Schmid and Teresa Stahl apply scientific criteria to examine the validity of polygraphs and conclude: “According to these commonly accepted standards, the current CQT practice is simply not the kind of procedure that should be sold in the name of scientific psychology” (Fiedler, Schmid, & Stahl, 2002). Fiedler et al. demonstrate that most polygraph research suffers from selectivity bias, which results in an unrealistically high accuracy of nearly 100% (Fiedler et al., 2002). Interpretation of polygraph results is arbitrary: “Practitioners and proponents of the CQT would downplay this problem, saying that polygraphers use their ‘experience’ to select appropriate control questions for each individual case, taking the biographical and criminal background into account. A more accurate way of describing this would be to admit that this crucial aspect of the test relies on intuition” (Fiedler et al., 2002, p. 316). A well-documented case is Wen Ho Lee, a scientist accused of being a spy, whose polygraph charts received conflicting interpretations from the Department of Energy and FBI (McCarthy, 2000).

Fiedler et al consider the CQT “pretentious.” “The problem with the CQT is that it purports to measure truth directly, or even guilt, and does not restrict itself to what electrodes really can do, namely, measuring circumscribed physiological reactions with a great variance in meaning” (Fiedler et al., 2002, p. 322). Fiedler’s critique is applicable and relevant to this case because Guo and Xie’s tests were conducted in the same period of time when Fiedler et al did his research, and the method used was ZCT, a form of CQT. After the German Supreme Court adopted Fiedler’s opinion and made polygraph results inadmissible, the U.S. Supreme Court reached a similar conclusion. It, too, decided polygraph tests are inadmissible, and cited the opinion of psychologist Leonard Saxes (United States v. Scheffer, 523 U.S. 303).

To sum up, Guo’s test results do not meet the requirements set by the Taiwan Supreme Court. Important factors are ignored in the interpretation, as is the fact that polygraph tests in general are the subject of criticism.

(iii) The expert’s opinion
The ruling against Xie and Guo frequently cites expert examination reports. There are three such reports in this case. The first was on the cause of Chen's death and was authored by Wang Yuehan and Xiao Kaiping, coroners at the Ministry of Justice's Institute of Forensic Medicine. The second was on the cause of Zhang's death, authored by Mao Junzhong, an examining official at the Tainan District Prosecutors Office. Both were completed at the very beginning of the investigation when the bodies were found. The third report was a review by Pan Zhixin, a coroner at the Institute of Forensic Medicine. It was conducted during Remand 6 and entered the proceedings at a later stage. The three reports were submitted to the court with signed affidavits, hence unquestionably admissible.

Meanwhile, there were letters written back and forth between the court and the Institute of Forensic Medicine during the trial. These letters concerned the number of murderers. The court wanted the Institute to determine how many people had participated in the killing. The Institute replied in letters without affidavits or details concerning forensic methodology. It is unclear who exactly was giving their opinion: “Opinions offered by the original expert,” the letters say. Naturally, the experts were not cross-examined by the defendants. Hence it is important to distinguish between clearly admissible expert reports and coroner letters of dubious admissibility.

According to the first report, Chen died of cardiogenic shock caused by stabbing her heart. She sustained 48 wounds, which the coroner believed to be “made by one knife or knives of the same kind.” The following three letters all opine that the number of killers cannot be inferred. Remand 1 cites one of the letters, but the wording is biased. By stating “it cannot be ruled out that the wounds were made by more than one offender,” the letter favored the possibility of multiple offenders over a single offender. An impartial way to phrase this would have been: “Whether there was one or more offenders cannot be inferred from the wounds.”

According to the second report, Zhang died of hemorrhagic shock caused by stabs to his chest and back. There is no other inference in the report. But in Remand 1, a coroner's letter from the Institute of Forensic Medicine determined that “based on the above analysis and testimony, it should be concluded that the wounds on the deceased were stabbed from three different directions and done by two people.”41 In Remand 3, a coroner's letter explained it is impossible to infer the number of offenders based on the amount and depth

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of the wounds. That is why it is not possible to infer how many people killed Chen: “But having other information in hand, such as the original confession or testimony of the suspect or witness, it is then possible to infer or rule out the number of offenders, and Zhang Qingmu’s death is such a case.”

The two coroner’s letters in Remands 1 and 3 both suggest there were two offenders and acknowledge such an inference is not based on the pattern of wounds, but rather on testimony. The court sent out yet another request for clarification on the same issue in Remand 6. The Institute replied with a review report — the third expert report mentioned above. This third report was a peer review of the coroner’s letter in Remand 1 (No. 0920002457). It concluded: “In theory, it is impossible to infer the number of offenders by the amount, depth, direction and pattern of stabbing wounds. This is because the hands of the offender and body of the victim could be in motion in all directions, and the direction of stabbing would change according to the relative position of the offender and the victim. Thus, it is impossible to judge how many people did it by the direction of stabbing.”

The coroner’s letters in Remands 1 and 3 exhibit major flaws by allowing testimony to guide them. If Zhang was stabbed from three directions, why do the letters conclude there were two perpetrators instead of three? It is because Guo said there were two. The letters are based on arbitrary selections from the defendants’ accounts: Why rely on Guo’s account but not Xie’s?

An expert examination is the professional interpretation of traces found at a crime scene. It is used at trial to help the judge verify or negate testimony, or evaluate its probative value. Testimony is like a climbing vine that cannot stand by itself, and expert examination is the trellis, with science as its foundation. The coroner’s letters cited in Remands 1 and 3 are not based on science but testimony. In other words, the letters are not a trellis, but rather another vine. When one vine climbs on another, both creep on the ground and none can stand tall. This results in a tautology in the judgment: Guo’s testimony against Xie is considered true because it is corroborated by the coroner’s letters, yet the letters reach their conclusion based on Guo’s testimony. This is not corroboration but a game of ping pong.

The coroner’s opinions are biased in wording and rely on Guo’s testimony, but the court makes the mistake even worse. The coroner’s opinion regarding Chen’s death was inconclusive, yet the judgment interprets it as conclusive. For example, in the Fact Column,

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Point Two (4), the judges write that according to Xie’s confession and Guo’s testimony, Xie stabbed Chen, “which is consistent with the examination opinion of the Institute of Forensic Medicine, Ministry of Justice (see the court files, Remand 1, Volume 2, p. 24-26), hence acceptable.” The coroner’s opinion in question said it was not possible to determine the number of killers. Point Two (4) also says that “according to the results of the examination, the victim Chen suffered 48 wounds, and Guo felt tired after stabbing 20-some times, so it is clear that Xie Zhihong stabbed victim Chen more than once.” In actuality, the forensic results did not indicate how many stabs were made by Guo. Hence, “Xie stabbed victim Chen more than once” is a conjecture presented as a conclusion drawn from the report.

In the case of Zhang’s death, two coroner’s letters concluded he was killed by “two offenders” (Remands 1 and 3). The third examination report dismisses these letters. The judgment incorporates the two letters as evidence that two people killed Zhang, and cites Guo’s testimony to negate the expert report: “Yet according to the defendants’ testimony mentioned above, plus the fact that the deceased, Zhang Qingmu, was passing by when he witnessed Xie Zhihong stabbing Chen Baozhu and was shocked (according to Guo Junwei’s account), it is more likely that the two defendants intended to kill Zhang Qingmu out of fear that he would expose their murder of Chen. It was just that Xie was stabbing Chen, who had fallen in the rice field and was farther away from the victim, so defendant Guo Junwei, who had finished stabbing Chen and was taking a rest, took the butterfly knife from Xie and chased Zhang Qingmu and stabbed Zhang when Zhang tried to run away. It is more likely that Zhang fell to the ground, Xie rushed to Zhang and took the butterfly knife and continued stabbing Zhang, because it is consistent with the defendants’ testimony that they killed Zhang Qingmu together.” The judgment asserts the testimony by the defendants is “more likely” to be true than the expert examination report. This is like expecting a trellis to climb a vine, instead of the other way around.

In addition to the previously mentioned examination reports and coroner’s opinions, the judges convicted Xie based on two major arguments. One is: “The butterfly knife used in this case by defendants Guo Junwei and Xie Zhihong is a knife without a fuller, which, when inserted into the human body, must meet with intense pressure from the [victim’s] muscles. It takes considerable strength to pull it out. There were as many as 11 deep wounds in Chen’s body, which would take a lot of strength, so there must have been more
offenders other than defendant Guo Junwei.” In short, the judgment believes that it takes at least two offenders to use a knife without a fuller to create 11 deep wounds. This paragraph is repeated three times in the last factual judgment, which shows the judge did not even read the whole thing through in the remand process.

There is a somewhat technical term in this argument: “fuller.” A fuller is a carved indentation on a knife. Myth has it that a knife with a fuller is easier to pull out than one without. Research shows, however, that a fuller does not affect the amount of pressure on the blade from the victim’s muscles. Those who have a lot of experience with knives (such as surgeons) testify that the power needed to pull a knife out does not vary based on the presence of a fuller (Blood-groove or fuller? [Year unknown]). The premise of this argument is false.

It certainly takes a lot of strength to stab someone to death. Is Guo endowed with such strength? He was 18 years old at the time and 177cm tall. He specialized in physical education in junior high school and he worked in the transportation business when the crime was committed. The judgment argues Guo stabbed Chen dozens of times and became exhausted, so Xie must have done the rest of the stabbing. But when Zhang appeared on scene, Guo went to stab Zhang. This is a contradiction: If Guo was capable of stabbing Zhang, why was he not capable of stabbing Chen?

Is Xie Zhihong endowed with enormous strength? According to the court transcript, Xie was 158cm tall and weighed 43kg. He was as thin as a piece of paper. Figure 5 shows Taiwanese singer Zhang Shaohan, who has the same measurements as Xie. Look at her arm. It is incoherent to argue that the murders required a lot of strength, and therefore someone with a weak figure committed the act.

The other major argument concerns Chen’s wounds: “The stab wounds on her chest, abdomen and back can easily be categorized into a 1.5cm-deep wound on the belly, other 4 or 5cm-deep wounds, shallow wounds that are uniformly 0.8cm. Based on the observation that many of the stabs penetrated the abdominal cavity and reached the organs, it is obvious the offender intended to kill. Based on the fact that there are significant differences
between the strength of stabbing, it can also be inferred that the stabbing was done by two different people.’ In short, the judgment argues there were deep and shallow wounds, so there were two offenders.

No forensic science indicates that the depth of wounds can be used to infer the number of attackers. If you have ever peeled a potato, you know how to use a knife to remove the skin, then cut the potato into pieces. It would be preposterous to conclude it takes two people to deal with a potato. What about Chen’s 1.5cm belly wound? This was neither deep nor shallow — was it done by a third killer? There were shallower wounds on her hands and legs, too — were those done by a fourth killer? Zhang sustained four wounds of different depths — can it be inferred there were four killers?

These two major arguments continue all through the case’s various trials. That is, the two paragraphs are copied and pasted into all nine factual judgments — from the Tainan District Court to Remand 7. It turns out this was not an opinion provided by a forensic expert, but rather a legal professional, namely, the prosecutor. The two paragraphs first appeared in the indictment and there is no record of consultation with forensic experts during investigation. The assertions do not make sense and are not even professional, yet the nine trials failed to detect this absurdity. In theory, Taiwan’s remand system provides trials de novo, meaning each factual trial is conducted anew as if nothing has taken place before. Yet in practice, the system functions through copy-and-paste. It is a train with no inspector, so all you have to do is jump the turnstile.

(iv) Xie’s confession

Not surprisingly, a dubious case starts with a confession by the defendant. Xie was arrested in the wee hours of June 28, and the clothes, slippers and motorbike that he used that night were confiscated as evidence. His first statement to the police was completed at 6am, meaning he was kept awake all night. He admitted to raping Chen on Guo’s couch and killing Chen and Zhang.

Xie retracted his confession when the prosecutor arrived to interrogate him, and likewise denied the rape and murder at the pretrial detention hearing.

Xie’s father hired an attorney, Li Kunnan, to defend him. Rushing to the police station after being notified by the prosecutor, Li was furious to learn that Xie had been held in police custody for almost nine hours. Xie gave a second statement of confession, and the
police told Li this was done with Xie’s consent. Xie became emotional and accused the police of starting the interrogation against his will, even though he had asked to wait for his lawyer. Li then demanded Xie be allowed to make a third statement, in which he maintained his innocence.

Unsurprisingly, the judgment relies heavily on the first and second statements to convict Xie. Li asked the court to inspect audiotapes of the interrogation to explore the possibility that the police extracted the confessions through physical violence. Unsurprisingly, the audiotapes were not available. Also unsurprisingly, the court does not put the burden of proof on the prosecutor as stipulated by law. Instead, it confirms the admissibility of the two confessions by stating: “Although there was a minor flaw in conducting the statements, the state had no unlawful intentions when handling the investigation and trial of this case with two dead victims, so failure to record the whole process of interrogation is not an essential violation of the law and does not infringe on Xie Zhihong’s rights directly. It does not, therefore, pose a disadvantage to Xie Zhihong in terms of defense in litigation.” He was sentenced to death based on his false confessions, yet the judgment does not consider this a “direct infringement of rights.”

Xie’s confessions were not only coerced but also proved to be false. The investigation later showed Chen was not raped by Xie and there was no couch at Guo’s place. Xie was pressed by the police to admit he had committed a nonexistent rape on a fictional couch, yet the court trusted in the good will of the police and built a story based on false confessions.

The corroborating evidence for conviction

Chen’s cellphone was in Guo’s possession and the semen stains on her body contained his DNA. These facts reinforce the assertion that Guo raped and murdered Chen.

On the other hand, no circumstantial evidence supports the involvement of Xie in either rape or murder. His clothes, slippers and motorcycle tested negative for blood, which contradicts Guo’s statement. A test on distance and sound was done to check Xie’s claim of innocence, and the results confirmed his account that he waited at an intersection 30 to 40 meters away and overheard Guo and Chen talking.

The break in the chain remains

The corroborating evidence helps to establish the link between Guo and Chen’s murder, which leads to Zhang’s murder. None of the corroborating evidence connects Xie to the
crime, so the break in the evidence chain remains. The judgment omits all the exculpatory evidence as if irrelevant, even though the tests were ordered by the court in the first place.

Overall assessment

The ruling in Case No. 41 suffers tremendously in terms of coherence and fidelity. Guo’s statements were not coherent and kept changing to dodge culpability. Guo was a witness of dubious credibility whose statements were found to be deceitful. His polygraph results were submitted to the court without the list of questions or the results chart. This is a void in coherence, and the validity of polygraph tests in general has been challenged by academics and rejected by courts in Germany and the U.S. — i.e. in both inquisitorial and adversarial systems. The expert opinions were inconclusive on the question of how many people stabbed Chen, but the judgment twists this into inculpatory evidence. The expert opinions concluded two people had stabbed Zhang based not on forensic science but rather Guo’s statements. This creates a tautology that undermines coherence and fidelity. Xie’s confessions during police interrogation were inconsistent with facts and show signs of coercion, which also are reasons to question the fidelity of the confession.

(7) Case No. 45

The narrative

Wang Xinfu and Li Guanglin were friends and business partners. Chen Rongjie was a junior member of Li’s gang. One night, the three of them went to a karaoke bar to hang out with friends. Li went out to fetch a 0.38 Colt handgun and gave it to Wang. It is believed Wang was upset that the owner of the bar was not serving them well and was spending time on two other customers, who were off-duty police officers. Wang handed the gun to Chen and whispered, then pointed at the officers. Chen fired two shots, one at each, and killed them. Chen was arrested, tried, sentenced to death and executed. Wang escaped overseas and remained at large for 16 years, until he tried to re-enter the country with a fake passport.

The evidence chain

The murder weapon was the 0.38 Colt handgun. Two bullets were found in the victims,
and the bullets matched the Colt.

The gun was discovered with the help of Chen's statement, thus linking it to Chen. Many witnesses in the karaoke bar testified that they saw Chen fire the gun at the officers.

The judgment says Wang instigated the crime instead of physically participating in it. Chen testified that Wang had ordered him to kill the officers. The owner of the bar and a witness to the event, Hong Qingyi, testified that he saw Wang hand the gun to Chen. Another witness, Wu Junhan, testified that he saw Wang and Chen whispering and Wang handing something over. Yet another, Li Qingquan, testified that he saw the handover, too. Three more witnesses testified Wang and Chen were standing close to each other, and one witness reported hearing Wang have a quarrel with the owner and police officers.

The break in the evidence chain

Chen was executed long before Wang was put on trial, so Wang’s lawyer never cross-examined his testimony.

Hong’s first statement during police interrogation shows he heard Wang curse but saw nothing else — no handover of the gun and no whispering. Wu argued he was tortured by police into giving a statement against Wang, and that Wang had nothing to do with the shootings. Wu said he had submitted to another court a physical examination report documenting this torture, because he was a witness to a separate dispute that happened at the karaoke bar that night, too, and which was being tried separately. Unfortunately, the physical examination report is no longer available because those court files were destroyed after the statutory requirement for preserving them expired in 2005. Li Qingquan later retracted his testimony, too, saying he had never seen the handover of the gun.

The evidence chain in this case is very thin to start with. Instigation is not something tangible, with physical evidence or biological traces. As a result, the conviction was built on testimony. What is worse, the testimony in this case was unstable and unreliable. For example, Chen claimed Wang held his elbow when he fired the bullets, but none of the witnesses could confirm this description. The judgment did not buy this account, but still uses Chen’s testimony as the major source of evidence. Testimony provided by other people flipped between “Yes I saw it” and “No I did not see it,” as mentioned above.

The corroborating evidence for conviction

There is no evidence other than testimony.
The break in the chain remains
The judgment is not supported by any evidence other than testimony.

Overall assessment
Case No. 45 is another classic example of a point that seems to defy logic: A case with a weak prosecution is a case that is impossible to reverse. Wang was convicted based solely on testimony, the admissibility of which was dubious because of the lapse of time between the arrests of Chen and Wang. The testimony was also fragile in probative value (witnesses’ accounts do not match each other and even accounts provided by a single witness are unstable). Yet there was not much for the defense to challenge, and there was not much to establish Wang’s innocence. The defense pointed out the inconsistencies between the various statements, but the court exercised its discretion by selecting the testimony that fit with conviction and rejecting any testimony that did not fit.

This conviction is weak in terms of coherence. In addition to the inconsistencies mentioned earlier, the motive remains a mystery — a trivial quarrel at a karaoke bar led to a double murder? The defense provided an alternate story. Wang argued that Chen, being a disciple of Li Guanglin, had orders from Li to kill the two officers because they had charged Li’s brother with gambling two years earlier. In other words, the shooting was not a random killing, but rather revenge. Unfortunately, this claim could neither be verified nor proved false — the court found that the files related to the gambling case had already been destroyed due to the time limit on record-keeping requirements.

The conviction is equally weak in terms of fidelity, since the statements used as inculpatory evidence are unverified and do not support the conviction.

(8) Case No. 46

Qiu Heshun and 10 other people were accused of two murders in 1987, and after a lengthy trial, Qiu was sentenced to death in 2011. I will discuss Case No. 46 as two separate cases: the murder of Ke Hong Yulan and the murder of Lu Zheng.

The Murder of Ke Hong Yulan
The narrative

The kidnapping and murder of Ke is believed to be a job carried out by 10 people. Ke was an insurance agent and gambling dealer, presumably rich. Qiu rented two cars to accommodate the 10 men, lured Ke to Qiu’s place and asked for NT$500,000 (€13,000). Ke refused, so they took her to Huihuang Ranch, which they knew was desolate. Strangely, the judgment suggests Qiu brought three sharp knives and three plastic bags with the intent to carry out robbery.

Five men waited outside the forest as lookouts, and the other five beat Ke up to scare her into paying up. Qiu lost patience and strangled her to death with a rope. But they did not know she was dead, so one of the codefendants, Lin Kunmin, stabbed her in the head. Strangely, the judgment argues the murder weapon was a rope, which was not included in the list of tools collected during preparations. It is mentioned out of nowhere.

The five lookouts left, and the other five put the body in the trunk of one car and drove to another hill, dismantled it and put the arms, hands and legs in one plastic bag, the torso and thighs in another, and Ke’s clothing in a third. They took all three bags back to Qiu’s residence.

That was when Qiu and four other men thought of dumping the body. Two of them took the first bag, wedged it between them on a motorbike, transported it back to Huihuang Ranch and dropped it there. The judgment did not find this plot too bizarre to believe. The other three men took the second and third bags by car and dumped them in a ditch that leads to the town center. Qiu dumped Ke’s license plate at the same place in the ditch the next day.

Map 1
Source: Google map. Spot A, B, C, D, and E are marked on the map based on the confessions documented in the court files.
Map 1 shows the route of the killing, mutilation and dumping. They started from Spot A, Qiu’s residence, went to Spot B, Huihuang Ranch, and killed Ke there. They carried the body to Spot C to dismantle it, then headed back to Spot A. Then they split into two teams and dumped the body parts in Spot B and Spot D. Among the four spots, B and C are remote places theoretically suitable for dismemberment or body dumping, and Spot D is the most populated area. The judgment does not question why they would have bothered to make this circuitous trip with the dead body, only to end up dumping part of it in Spot D, the worst choice to discard something they wanted to vanish. It does not ask why Qiu dumped the license plate where the body had been dumped, which would enhance the risk that it would be identified.

Bags two and three were found in Spot E, two kilometers away from Spot D. Qiu and his friends were arrested and confessed during police interrogation, but the police could not find any traces of evidence in Spots A, B, C, or D.

The evidence chain

The alleged murder weapon was a rope that was never recovered. The cause of the victim’s death, according to the last factual judgment, was “throttling, pressure, strangulation and twist by rope,” despite the fact that throttling, pressure and strangulation or twist by rope are different ways of killing.

Since the rope was not found, no link is established between Qiu and a murder weapon other than by testimony from Qiu and his codefendants.

The break in the chain

Since the rope was not recovered, the evidence chain is fragile. It is in fact not clear whether a rope caused the victim’s death, because the body was not fully recovered and forensic expert Yang Risong gave contradictory opinions at trial. In Remands 5 and 7, he testified that the cause of death was throttling or strangulation by hand, which would mean the rope was not a murder weapon. At Remand 11, he said the act was strangulation by rope, not by hand. The first break in the chain is the uncertainty regarding cause of death.

The second break is that the testimony was extracted through coercion. In Remand 10, the defense requested to inspect the audiotapes of the police interrogation. To everyone’s surprise, the physical violence was vivid, with sounds of cursing by police officers, sounds
of slapping and moans from one of the codefendants, Yu Zhixiang. After the beating, Yu identified Qiu as the mastermind of the crime (TAEDP, 2011a). In another episode, it was clear Yu changed his statement because of police coercion: When asked the color of the car used in the crime, Yu replied “red.” This is followed by the sound of hitting and police officers cursing, after which Yu said “gray or silver-gray.” Upset with Yu’s “dishonesty,” the police threatened to bring in “the chili water” and Yu begged them not to (TAEDP, 2011b). Chili water is a method of torture used by police that involves forcing water with hot chili into the suspect’s nose and mouth. Since Yu did not ask the police what the chili water was for, chances are he had already experienced it at that point. These audio clips show the confessions were not made voluntarily and the codefendants knew nothing about the crime. Qiu was brutally tortured, too. A videotape in the court files caught a dialogue between two investigators who celebrated their success in forcing him to confess: “He had no choice but to admit… I pressured him to the extent that it was impossible for him to deny. You beat him…” They also confirmed that Qiu confessed in the morning while in police custody, then retracted his confession after being returned to the detention center (TAEDP, 2011c). The Control Yuan (a Taiwanese branch of government similar to an ombudsman) impeached the police officers and later prosecuted them for malfeasance. They admitted at trial to torturing Qiu and his codefendants, but argued “torture is a well-established and necessary method of investigation.”

However, the ruling in Case No. 46 insists on using these statements as evidence and denies or downplays the influence of torture. Among 288 statements made by the defendants, the judgment only eliminated one by Yu Zhixiang, which was the one in which evidence of torture was caught on tape. The judgment concludes that all the other statements were voluntary and therefore admissible. It argues that although one recording shows the police spoke at a high volume, “if defendants Wu Xuchen and Deng Yunchen had felt intimidated, their voices would have trembled. Yet that was not observable.” Therefore, their statements are admissible. As for the dialogue between the investigators, the judgment says: “The reason they had this conversation could be that evidence of Qiu’s crime was emerging, the facts of the case were beginning to unravel, and the opportunity to crack the case was imminent. They were just so happy that they forgot themselves and spoke vulgarly. It cannot be inferred that Qiu was tortured by the police, so Qiu’s defense is

43 Difang Fayuan [Taipei Admin. Ct.], 84 Su Ze No. 1262.
not acceptable.”

The physical violence used to extract the confessions and the lack of evidence in Spots A, B, C and D leads to the third break in the evidence chain: Spots A, B, C and D may not be the places where the crime happened, and the real crime scene remains uncertain.

The judgment relies solely on statements by Qiu and his co-defendants to establish the facts. The cause of death, the murder weapon and the crime scene are all uncertain, and no physical evidence was found verifying the statements. Unfortunately, the fidelity of the statements is unknown because of the lack of evidence. The coherence of the statements is far from satisfying. The judgment is full of inconsistencies. For example, the description of the preparation of tools does not match up with the criminal intent; the murder weapon is not mentioned in the description of preparations; the choice of dumping location and the bizarre story of transporting the body parts defy common sense; the torso was found two kilometers away from the dumping location.

The fatal error is that the description in the Fact Column does not match the Reason Column. The judgment asserts in the Fact Column that Qiu and others dismantled Ke’s body and dumped three plastic bags in total — two with body parts and one with clothes. But in the Reason Column, the judgment says the third bag had nothing to do with the case, and the knives, shoes, a syringe and man’s underwear that were found in the bag are ignored as evidence.

The corroborating evidence for conviction

There was originally another suspect named Zheng Xinfu, who knew Ke Hong Yulan very well. Zheng’s neighbors testified that he often visited when his wife was away, and the two spent a lot of time alone. Many of the items in the third bag may have been linked to Zheng: Zheng was a butcher and his parents sold pork at the market. The knives found in the bag bore a blacksmith’s name, and the blacksmith testified that he only made 200 copies of that model and that Zheng’s parents were his customers, though he was not certain which model they had bought. There was also a syringe for animals, and Zheng’s parents used to run a pig farm. The underwear found in Zheng’s house is the same brand and size as the one in the bag.

Shortly after Ke was reported missing, Zheng was admitted to a hospital with stab wounds.
When he left the hospital, he immediately moved out of a house he had rented for a year but inhabited for just five months — without collecting the deposit. The police went to investigate Ke’s disappearance and found campfire residue in front of the house. Ke’s daughter identified a steel folder and insurance company documents that belonged to Ke.

Though described by his relatives as “lazy” and “filthy,” Zheng left the house spotless. It had been washed from top to bottom. Investigators nevertheless found blood in the living room, bathroom and kitchen, but due to the technology of the time, it could not be verified to be human.

Ke’s daughter was working at a club where every female employee used a pseudonym. One day she received a call from someone who knew her real name. The message was brief: “There is a dismantled body close to Qingcao beach, and that could be your mother.”

Three days later, Ke was found, dead and dismantled. The person who made that call possessed special knowledge of the crime, because at that time it was not known that Ke was dead or dismantled. The caller may well have been the real killer, which would mean Ke was killed by someone who knew her well enough to know her daughter’s name and place of work. Qiu and his codefendants did not have that information.

When Ke’s torso and thighs were found, the head, arms and legs had been removed from it with straight cuts — professionally. Thus, the knife, the motive, the unusual behavior and the cutting method all point to Zheng, not Qiu and his codefendants.

Nevertheless, the judgment rules out Zheng based on a test result. In Remand 6, a hair test was run and did not match Zheng. “Such a result is sufficient to serve as exculpatory,” says the final factual judgment. Unfortunately, the test itself and the argument around it reveal the court’s recklessness.

If it is suspected that Zheng murdered Ke, and the hair was collected from the house he abandoned after she went missing, it needs to be tested for a match with Ke — not Zheng. It would be meaningless if it matched Zheng, because it is natural to find one’s hair in one’s dwelling. The hair was tested for the wrong thing, so the results do not rule him out as a suspect. What needs to be asked is, did the hair match Ke?

From Remands 6, 7, 8, 9 and 10, to the final factual judgment in Remand 11, none of the courts spotted the invalidity of the test. Instead, they misused the results. Other than the hair, there was no corroborating evidence related to the conviction of Qiu.

The break in the chain remains
The hair test does not rule out Zheng, nor connect Qiu to Ke’s murder. The assertions in the case remain grounded in contradictory, unstable, incoherent testimony by codefendants who were coerced by the police.

The murder of Lu Zheng

The narrative
Lu’s murder is believed to have been committed by nine people. Lu was a 10-year-old boy from a wealthy family. Qiu and his codefendants kidnapped Lu one day after the boy left his tutoring school, and Qiu strangled him till he fainted. They drove to Qingcao Lake, where Qiu stabbed him to death. Deng Yunzhen and Yu Zhixiang then went to dump the body.

They demanded NT$1 million as ransom and wanted Lu’s mother to come and pay. They left instructions on paper, leading Lu’s mother to a spot underneath a highway overpass. Qiu and his codefendants tied a basket to a rope, eased it down from the overpass and told the mother to put the money in the basket so she would not be able to identify them.

The Lu family paid the ransom, but their son was not returned. Lu’s father offered NT$1 million to anyone with pertinent information. A 15-year old boy, Lou Zhixun, turned himself in and claimed that Qiu, himself and seven other people had committed the kidnapping. Eight of the nine people were arrested and all confessed during police interrogation, then retracted their confessions when the case reached court.

The evidence chain
Lu’s body was never found. The court believed the murder weapon was a Rambo knife later broken in half by Qiu’s girlfriend. Without the body and the murder weapon, the chain is based only on statements from the defendants.

The break in the chain
The missing body is the fatal weakness of this case, not only because it was not found, but because the statements by the defendants were ridiculously inconsistent in terms of the dumping grounds. The inconsistencies are shown in Table 1 and Map 2.
<table>
<thead>
<tr>
<th>Location number</th>
<th>The date of the statement</th>
<th>Who made the statement</th>
<th>The dumping location</th>
</tr>
</thead>
<tbody>
<tr>
<td>Location 1</td>
<td>1998/9/30</td>
<td>Deng Yunzhen</td>
<td>The body was left in Toqien Creek, and the clothes were left on a hill in Baoshan.</td>
</tr>
<tr>
<td>Location 2</td>
<td>1988/9/30</td>
<td>Yu Zhixiang and Chen Renhong</td>
<td>The body was dumped into the creek from a hill in Baoshan.</td>
</tr>
<tr>
<td>Location 3</td>
<td>1988/10/1</td>
<td>Chen Renhong</td>
<td>The body was dumped into a river about 10 to 20 minutes from Xinzhu Train Station.</td>
</tr>
<tr>
<td>Location 4</td>
<td>1988/10/6, 10/8</td>
<td>Chen Renhong</td>
<td>The body was left under a bridge on a beach in Xinzhu City.</td>
</tr>
<tr>
<td>Location 5</td>
<td>1988/10/8</td>
<td>Deng Yunzhen</td>
<td>The body was dumped into a river under a bridge of the old harbor.</td>
</tr>
<tr>
<td>Location 6</td>
<td>1988/10/9</td>
<td>Deng Yunzhen</td>
<td>The body was dumped into the water from the embankment of Nanliao.</td>
</tr>
<tr>
<td>Location 7</td>
<td>1988/10/9, 10/10</td>
<td>Deng Yunzhen</td>
<td>The body was left at Qiding Beach.</td>
</tr>
<tr>
<td>Location 8</td>
<td>1988/10/9</td>
<td>Yu Zhixiang</td>
<td>The body was buried on a hill in Baoshan.</td>
</tr>
</tbody>
</table>

Table 1
Source: Table made by the author
The codefendants provided eight different locations scattered all over the map, yet the police did not find the body at any of these. The alleged murder weapon, the Rambo knife, was never found, so no further tests were done to establish a link between the murder weapon and Qiu.

The statements of the codefendants differ on other important points, too. They named different locations around Qingcao Lake where the killing happened. Yu said they kept Lu at Qiu’s place for four days and killed him there; Deng said he himself killed Lu. The testimony shows signs of coercion and instability, casting its authenticity into doubt.

The corroborating evidence for conviction

The judgment concludes Lu’s body was dumped at Qiding Beach (Location 7 on Map 2) because this would explain why the body never turned up. According to data provided by the Central Weather Bureau, high tide that night came at 11pm, so the judgment says: “According to codefendant Deng Yunzhen, ‘around 9pm, Qiu Heshun ordered him to take
care of the dead body,’ so [they] left Qiu Heshun’s residence in Zhunan and arrived in Qiding Beach around 11pm. It happened to be high tide, and the tide was about to change from the highest to the lowest of the following day, so when the dead body was dumped in the sea, because the tide was falling rather than rising (water receding from a shore causes an ebb), the body drifted out to sea and could not come back to shore. The statements of the two defendants [Deng Yunzhen and Yu Zhixiang] regarding the tide of the day they dumped the body, that it was receding from the highest point, match the fact that Lu Zheng’s body was not discovered.”

The weather report is treated as evidence that corroborates the statements of the defendants: The tide was receding from 11pm, and they dumped the body around 11pm, so no wonder the body washed away. But on what grounds does the judgment determine the dumping time to be 11pm? Nothing.

Map 3 below will help illustrate the flaw in the judgment. The defendants confessed they dumped the body around 9pm. Qiu’s residence (marked as Spot A) was about 12 minutes away from Qiding Beach (marked as Spot B). If the defendants left Qiu’s place at 9pm, when they dumped the body at Qiding Beach, the tide would have been rising and it would have pushed the body to the shore instead of pulling it away. The weather information is not corroborative evidence, but the contrary.

Map 3
Source: Google map; Qiu’s residence and the dumping location are marked on the map based on the address documented in the court files and confessions of the defendants.

44 Road No. 61 is a highway that didn’t exist at the time; the purple route would be the way they could use back in 1988.
Lu’s parents received a dozen phone calls from the kidnappers, which the police recorded. All the recordings turned out to be inconclusive because of noise, with one exception. A voice recognition study conducted on that recording in 1988 concluded the voice belonged to Yu Zhixiang. According to the Control Yuan report on the case, the Ministry of Justice’s Investigation Bureau says voice recognition only works on high-quality recordings. At least 40 Chinese characters (i.e. 40 syllables of speech) are required to draw conclusions about a match. However, the recording in this case was filled with static and only 19 syllables long. The test results said the recording was “similar” to Yu’s voice. The Control Yuan report thus heavily criticizes the judges’ ruling for treating voice recognition as evidence (Li, 2013).

Another piece of corroborative evidence was the rope used to collect the ransom from the highway underpass. The police record shows a rope was confiscated from Qiu’s residence. The prosecution’s record shows three ropes were confiscated. Remand 4 says four ropes were collected — two that were 1cm in diameter and two that were 0.8cm in diameter. Qiu claimed his father used them for fishing, but the investigators believed some of the rope had been used to collect the ransom. Lu’s mother, who paid the ransom, testified that the rope was 2.5cm in diameter, which does not match the confiscated ropes. The ruling explains this fact by saying Lu’s mother was nervous at the time, but that she also testified the rope “smelled like oil,” and that this matches the claim that the ropes in Qiu’s place were for fishing. The judgment does not clarify why a fishing rope would smell like oil. Fishing ropes should smell like fish. Oil doesn’t smell like fish — even fish oil doesn’t.

The break remains

None of the corroborative evidence proves anything. The weather information invalidates the codefendants’ statements rather than supporting them. Voice recognition, as a science test, is not reliable enough to establish a match beyond reasonable doubt, and in this case, the test did not meet the Investigation Bureau’s standards. The ropes were linked to the case only by testimony from Lu’s mother, which did not match the description of the ropes in either diameter or smell, and the court files suggest the ropes may not pertain to this case. Therefore, the break in the evidence chain remains.

Overall assessment
The Control Yuan has expressed concerns over Case No. 46 on several occasions over the years. The first time, the agency impeached 10 police officers for torture and two prosecutors for failing to preserve relevant evidence (Control Yuan, 1994). The second time, the agency released two reports concluding the conviction had been based hastily upon unreliable testimony extracted through torture. The agency said the handling of the case violated the United Nation’s ICCPR as well as Taiwan’s Code of Criminal Procedure. Furthermore, the Control Yuan recommended the Attorney General petition for a special appeal (Li, 2013; Li, 2014).

A human rights report on the Qiu case consisting of essays by three law professors has been compiled by the Judicial Reform Foundation and published in the *Taiwan Law Journal* (Lee, 2010; Lin, 2010; Yang, 2010). Amnesty International is also campaigning for a fair trial for Qiu (also spelled “Chiou Ho-hsun,” using Taiwan’s Romanization system, Tongyong pinyin) (Rife, 2011). He receives postcards from all over the world.

(9) (10) Cases Nos. 53 & 54

**The narrative**

Taiwanese businessman Yan Mingyi owned a big factory in China. Yan befriended other businessmen and provided help to them, including accommodations, storage for cash, etc. Du Qingxui was one of Yan’s friends, and the judgment contends he and his two sons, Du Minglang and Du Mingxiong, killed two guards to enter the factory, then killed a young woman in Yan’s room, and tied up Yan and another Taiwanese businessman, He Guoli. The three then forced Yan to reveal the combination to a safe, stole 2.47 million yuan (€267,000) in cash and killed Yan and He. Du trusted part of the cash to three friends.

During the trial, he passed away in the detention center, leaving his sons as defendants in the multiple murder.

**The evidence chain**

The murder weapons were not found. The five bodies were examined by Chinese

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45 The torture revealed in the Report relates to both the murder of Ke and the murder of Lu. The failure to perpetuate evidence relates to the murder of Lu, which will be discussed in the following section.

46 "監察院 103年度司調字 0038號調查報告" (Li, 2013) is an investigation about the murder of Ke Hong. "監察院 103年度司調字 0038號調查報告" (Li, 2014) is an investigation about the murder of Ke Hong.
authorities; all of them had been killed with a knife to the throat.

A taxi driver, Fu Guangxuan, testified that Du Minglang and Du Mingxiong took his cab to buy a watermelon knife and tape. A bag was found 50 meters from Du Qingxui’s residence, containing two sheaths made of tape, 40cm and 16.5cm long. From this it was concluded that the murder weapons were a watermelon knife (with a 40cm sheath) and a peeling knife (with a 16.5cm sheath). On the shorter sheath, a fingerprint matching Du Mingxiong was found. This creates the link between the murder weapons and the Du trio: The taxi driver’s testimony links the watermelon knife to the trio and the fingerprint links the peeling knife.

The break in the chain

First of all, conclusions about the murder weapons were based solely on speculation. The knives were not recovered, so it was not possible to verify whether the wounds on the victims matched the knives. Chinese coroners conducted the autopsy, and these experts neither testified nor submitted reports. The speculation was based on the sheaths in the bag, but there was no blood on the sheaths. The judgment explained: “The Chinese police did not document anything in their investigation regarding whether the victims’ blood was found on the sheaths. The suspects must have wiped off the knives after the killing and before inserting them back into the sheaths; this is a method of destroying evidence that everybody knows, so no matter how dumb the defendants are, they would not have inserted knives stained with their victims’ blood into the sheaths without cleaning them first. Thus, there is no evidence to demonstrate there was blood on the sheaths, but it is a fact that Du Mingxiong’s fingerprint was found on the sheath fashioned out of tape for the short knife. This is sufficient to confirm the short knife to be one of the murder weapons the defendants used.” Unfortunately, a fingerprint on a sheath is NOT sufficient to confirm something is a murder weapon. The conclusion regarding the murder weapons is a hypothesis rather than a fact.

Secondly, the dead bodies, fingerprints, sheaths and tape were all absent at trial. The witnesses, including the taxi driver and the forensic experts, were also absent. The evidence and testimony were collected and processed in China by Chinese authorities; the Taiwanese courts failed to obtain any of that.

Thirdly, without access to that, no evaluations were done to check the assertions regarding
the evidence chain in this case. No expert examinations indicate the five victims were killed with a single knife, or what kind of knife, or which knife. No examinations indicate the defendants used any murder weapons. No examinations indicate the sheaths in the bag were used to store the murder weapons. No examinations indicate the defendants can be linked to the murder weapons.

Fourthly, the testimony the judgment relied on to link the defendants to the watermelon knife was unstable and questionable. The judgment cites Fu Guangxuan's testimony that the Du brothers took his taxi to purchase a watermelon knife a day before the crime. Yet Fu's earlier testimony indicated the Du brothers had bought “watermelon cream.” Only during his second interrogation by Chinese police did Fu change his account and offer a description in line with the assumptions of the Chinese police. This calls the credibility of Fu's testimony into question. Plus, Fu could not be located even though the courts made several attempts to subpoena him.

Fifthly, the Chinese investigation appears to have been reckless. During the first trial, in Tainan District Court, the judges sent a Taiwanese investigator, Weng Jinhui, to China to interview the Chinese investigators. The conclusions were as follows:
- The Chinese investigators claimed there was blood on the shoes found in the bag, but the DNA was unknown.
- The Chinese investigators claimed there was blood on the sheaths, but the DNA was unknown.
- The Chinese investigators claimed the fingernails of the five victims had been cut and collected to check for traces of the murderers, but no forensic examination was done on them.
- The sizes of the clothes found in the bag were not documented, so it is unknown whether they fit the Du trio.

The above information came from informal conversations between Weng and the Chinese investigators. No test results or reports were available. It is therefore reasonable to doubt whether the Chinese investigation was suitable to serve as the grounds for a conviction, when no evidence was transferred to Taiwan for examination.

Considering the flaws discussed above, the chain of murder is not established in this case.

The corroborating evidence for conviction

According to the Chinese police, the tape found on the victim’s mouths matched the tape
found in the bag. And a roll of tape was found near the window of the crime scene, on which Du Mingxiong’s fingerprint was found.

The most suspicious sign was that the Du trio all of a sudden had a lot of cash — 1.64 million yuan — after 2.47 million yuan was taken from Yan’s safe.

The break in the chain remains

The corroborating evidence raises suspicions regarding the Du trio, but does not establish the degree of certainty needed for a conviction. Reasonable doubts remain, as the Tainan District Court argued in the first judgment, which acquitted the Du trio. The judgment said the tape could have been taken from one place to another easily, and that Yan’s bookkeeper’s fingerprints weren’t found on the cash confiscated from Du’s friends, meaning it was not possible to verify it came from the safe. The judgment argues: “[Since defendant Du Qingxui] failed to explain where he had obtained such a huge amount of money, it is obvious he provided his statement untruthfully. However, the defendant is not obligated to prove his innocence, and the results of the investigation are insufficient to conclude that the money defendant Du Qingxui trusted to witnesses [Du’s three friends] was indeed the cash robbed from [Yan’s factory].”

Overall assessment

The weakness of Cases Nos. 53 & 54 stems from violating the principle of direct trial. The Taiwanese court failed to obtain the evidence, both testimonial and non-testimonial. The judgment turned to speculation for lack of basic facts. Here is an example of how the judgment pins blame on the Du trio: “There were five victims killed in two sets: The first were the guards near the gate, Tian Xuewu and Wu Yuanzhai, and the second were people on the second floor, Yan Mingyi, He Guoli and Xiong Yuchen. It takes more than one person to control and kill two guards and control and kill three people in two different rooms at nearly the same time.” The judgment goes on to say the two guards were killed at different locations in the factory, judging from blood marks that indicate the bodies were dragged, and assumes there must have been more than two perpetrators — three at least — to carry out the job: “If there were only two murderers, and one was killing Wu Yuanzhai, then Tian Xuewu should have had a chance to escape or scream for help, since Tian was controlled by only one person.” This speculation is far from satisfying, because the
murderer(s) obviously took the guards down one by one at different locations. This means the murderers — if there were more than one — did not need to split up and engage in one-on-one attacks. Moreover, even if Tian had a chance to escape or scream, this does not guarantee he would have succeeded in that. The judgment goes on: “The participants were able to control Yan Mingyi, Xiong Yuchen and He Guoli, who slept in two different rooms at the same time, so it is obvious there were at least three participants, which matches the number of the defendants, Du Qingxui, Du Minglang and Du Mingxiong.” He Guoli’s son was sleeping in the room next to the crime scene and was not disturbed or made aware of the killing. Once again, it is therefore possible that the murderer(s) invaded one room at a time without drawing the attention of people in other rooms. The speculation that there were three murderers is groundless, and adopting such speculation creates incoherence in the judgment.

C. Other issues

There are some factors that have an influence on the application of the law in capital cases. If, in some cases, the chain of events is successfully established with evidence and the intent to kill is confirmed, but the defendant committed the crime out of self-defense or delusions resulting from serious mental illness, or the defendant turned himself in before 2006 revisions to Taiwanese law, the death penalty is not applicable. These factors rule out the death penalty. Yet in some capital judgments, these factors are simply downplayed, causing incoherence in the arguments.

Case No. 13 is a good example. Shi Zhiyuan was hired to kill Xu Xinsheng for NT$1 million (€250,000). In the wee hours of Nov. 24, 2003, Shi watched Xu having drinks with friends and waited till they finished. Shi followed Xu as he returned home at 7 am with his wife and a friend, Huang Yufeng. Xu was pretty much drunk. Shi greeted him and said, “Somebody wants to ‘discuss the table’ with you.” “Discussing the table” is jargon among gamblers that means “opening a new venue for gambling.” Xu’s wife and friend looked for a pen and paper to jot down Shi’s phone number, at which point Shi fired a gun three times at Xu’s head, neck and abdomen. Huang Yufeng turned toward Shi, who fired two more bullets at Huang, one of which went through Huang’s body and hit Xu’s wife.

47 Prior to 2006, Taiwanese law stipulated that when an offender turned herself or himself in, she or he must receive leniency in sentencing. This meant the death penalty could not be used. Since 2006 this leniency is optional, not mandatory. We will turn to this issue in the following section.
Shi left the scene without trouble and disposed of the gun. Ten days later he was arrested, and the trial sentenced him to life imprisonment for the premeditated murder of Xu and sentenced him to death for killing Huang on the spur of the moment.

In the last factual judgment, the shooting of Huang is described in five passages. The first mention is in the Fact Column: “Shi Zhiyuan saw Huang Yufeng turn around and from his perspective believed Huang would snatch the gun and bullets, so he went so far as to formulate another intent to kill, and shot two bullets at the left side of Huang Yufeng’s head and his neck.” This is a neutral description: Shi thought the victim was going to snatch the gun, so he fired. The judgment does not reveal what the court thinks happened.

The second mention is in the Reason Column. It is a repetition of the first mention, plus emphasis: “In the time and place mentioned above, Shi shot Xu Xinsheng, then used the gun to shoot Huang Yufeng because Huang Yufeng had attempted to turn around.”

The third mention is also in the Reason Column, citing the confession Shi made to the prosecutor: “[Shi] used the gun to shoot Xu Xinsheng two or three times at close range, and saw he was shot and collapsed on the couch…and shot Huang Yufeng two or three times.” The original confession was: “[Shi] used the gun to shoot Xu Xinsheng two or three times at close range, and saw him shot and collapsed on the couch and meant to leave, then saw Huang Yufeng in the position of leaning forward, seemingly attempting to snatch the gun from me, so I got nervous and shot Huang Yufeng two or three times.” The boldface indicates his intention to leave was omitted from the judgment.

The fourth mention is in Point 7 in the Reason column. The judgment lists the statements by Shi at different stages of the trial, all of which involved Shi confessing he killed Huang because Huang was attempting to snatch the gun. The judgment continues: “Judging from the defendant’s confession and the statement of witness A [Xu’s wife] about the circumstances of the crime, it is obvious defendant Shi Zhiyuan shot victim Xu Xinsheng, then saw victim Huang Yufeng seemingly leaning forward and attempting to snatch the gun from him, and formulated the intent to shoot Huang. Thus, Shi committed the act of shooting Huang Yufeng based on a separate intent.” “Moreover, judging from general experience, after a shooter finishes the act of killing the victim, he will always leave the crime scene as soon as possible to reduce the risk of being caught or arrested on the spot. Yet, surprisingly, defendant Shi Zhiyuan did not leave the scene right away after he shot victim Xu Xinsheng, but used the gun to shoot Huang Yufeng. Based on common sense, it
would seem victim Huang Yufeng did lean forward to snatch the gun, so the defendant formulated a separate intent to commit the act of shooting Huang Yufeng. This conclusion should be reached to correspond to the rules of experience.”

In this passage, Huang Yufeng’s attempt to snatch Shi’s gun is a fact asserted explicitly by the court. It is not just a perception or false assumption by Shi. The assertion is made to charge Shi with two murders, each with its own intention. But by doing this, the judgment creates a contradiction.

The assertion includes three key claims: (1) Shi did not intend to kill the two witnesses at the scene after killing Xu Xinsheng, (2) Huang tried to grab the gun from Shi, and (3) Shi killed Huang for that reason.

Huang’s attempt was NOT intended to prevent Shi from killing Xu, because according to the judgment, that deed had already been done. Huang’s attempt was NOT an attempt at self-defense either, because Shi was about to leave and had no intention of killing Huang, the ruling indicates.

Two possibilities remain. One is that Huang wanted to kill Shi as revenge for Xu. Shi committed a reprehensible crime, homicide, but that does not mean anyone was entitled to kill him. Punishment should be carried out through due process. So Huang’s attempt in this scenario would be unlawful, and Shi would be killing Huang in self-defense, even if one might argue it was overdone. The other possibility is that Huang intended to arrest Shi and deliver him to police after grabbing his gun. But Shi was a gangster, the person who commissioned Xu’s murder was a gangster, victim Xu was a gangster. Wouldn’t it be naïve of Shi to think Huang just wanted to arrest him?

Without discussion, the judgment rules out the possibility that Shi shot Huang in self-defense. This casts doubt on Shi’s death sentence for shooting Huang. If it was self-defense, Shi should be exempted from punishment; if it was unpremeditated action, considering that the premeditated, commissioned murder of Xu drew a life sentence, why would an unpremeditated killing receive a more serious penalty? The final factual judgment explains it this way: “When defendant Shi Zhiyuan was done murdering Xu Xinsheng, his purpose was reached. For the innocent victim Huang Yufeng, who happened to be present, even if it was an intense situation and Huang Yufeng was leaning in to snatch the gun, it would have been enough for Shi, given his excellent shooting skills, to shoot Huang in a non-fatal part of the body. But defendant Shi Zhiyuan still shot Huang Yufeng in fatal areas, and each shot could cost Huang his life. It was very cruel.” This is the fifth mention in the
judgment, and yet here the ruling appears unsure and reserved on the question of whether Huang attempted to grab the gun. The wording “even if” is used.

While the last factual judgment suggests Shi should have shot Huang in non-fatal parts of the body, the final judgment suggests he should have fired warning shots in the air, and that would have been enough to scare Huang away. None of the suggestions make sense for a coherent narrative. When someone fires a gun on the spur of the moment, it is about reflexes, training and chance, and not so much about intent. The fact that Shi shot Huang does not prove he intended to kill Huang, nor the cruelty of the means. Moreover, Shi’s skills could hardly qualify as “excellent” in this case: At a range of three meters, Shi shot Huang twice, yet Huang survived for five days. As for firing warning shots in the air, the Supreme Court seems to ignore the fact that Shi shot Xu in the presence of Huang, yet Huang was not scared away and still tried to grab the gun. So how would firing into the air do anything?

The murder weapon was not recovered. Forensic tests showed the bullets that killed both victims were shot from the same gun, and concluded that “it is not impossible that the bullets were fired from a 9mm handgun.” It is customary for forensic reports to use the wording “it is not impossible” when results are inconclusive. Without the murder weapon, no tests could be conducted to match the gun and bullets. In the Reason Column (1), Point 5, the judgment can be broken down thus: A. The two victims were shot with the same gun; B. The gun may have been a 9mm; C. A and B are shown in the test results; D. The bullets did cause the deaths of the victims; E. So it is proven that Shi possessed an authentic gun and bullets that were lethal. The evidence chain proving that Shi killed Xu and Huang was established with testimony from Shi and Xu’s wife — not with test results. Yet the judgment makes an effort to present it as though scientific evidence supports the assertion.

Xu’s wife was shot in the waist and entitled to press charges against Shi, but did not. Her testimony was to Shi’s advantage: “Huang Yufeng was shot. He and I were facing away from defendant Shi. Huang was shot from the front — he turned around and was shot by a bullet. I had already turned away then. Huang Yufeng fell to the ground soon after the shot. The whole process, the sound of the gunshot, was fast. He fell to the ground fast. I do not know why Shi Zhiyuan killed Huang Yufeng, Shi Zhiyuan was about 3 meters away from Huang Yufeng. Judging from his skills, if he intended to eliminate the witnesses I should have been dead [boldface by the author].” The boldfaced portion of the
testimony was omitted from the final judgment, which judged Shi as “lacking humanity.” Thus, careful selectivity is used to support the death sentence.

The judgment in Case No. 13 is incoherent in that it describes what happened between Shi and Huang as self-defense, yet refuses to apply the law accordingly. In the same vein, Cases Nos. 39 & 40 demonstrate a similar incoherence in the interpretation of self-defense.

Li Jiaxuan and Ji Junyi belonged to a gang led by Lin Minghua. One of their colleagues, Huang Boting, was beaten up in a fight with members of another gang, led by Li Wenzhong. Lin and Li set a meeting for negotiations. Lin brought eight people to participate in the negotiations and Li brought five. Most were armed with guns. The negotiations did not go well, and according to the judgment: “Lin Jiahui [a gangster in Li’s gang] immediately pulled out his gun and aimed one by one at the foreheads of Chen Rongchang, Li Binshuo, Gao Wenchai, Huang Boting, Victim X, who was about to walk out, and Li Jiaxuan, using the ultra-red laser on the gun. Then he aimed at Li Jiaxuan. Li Jiaxuan then pulled out a CZ-75 gun and pointed it at Lin Jiahui.” Shooting broke out, resulting in Lin Jiahui and Li Wenzhong dying at the scene. Another person died at the hospital and two more were injured. All casualties were members of Li Wenzhong’s gang.

The judgment states clearly that Li Wenzhong’s gang member initiated the situation of pointing guns at each other, and that the defendants were under serious threat as targets. However, the court denies Li Jiaxuan and Ji Junyi’s argument of self-defense: “Self-defense is conditioned in fighting against an immediate unlawful infringement. Assuming the defendants’ claim is true that they shot because they were afraid of being hurt, whether the victim was going to inflict injury was just a potential, and not a defense to present unlawful infringement… The victims, Lin Jiahui, Li Wenzhong and Hong Shenhong, did not fire at defendant Li Jiaxuan and defendant Ji Junyi, as explained earlier. And defendant Ji Junyi also testified at the district court: ‘([Judge:] During the negotiations and shooting, did any of the other gang’s five guys initiate physical contact, pull and drag, or combat?) [Ji:] Absolutely not’ (See Court File 3 of the district court, p.111). This is thus sufficient to conclude there was no present unlawful infringement when defendants Ji Junyi and Li Jiaxuan shot the victims, and it was not self-defense.” An “immediate” danger is usually defined as “the last possible opportunity to defend oneself,” but surprisingly, the judgment suggests the defendants could have defended themselves without shooting when someone

48 Victim X’s name is not revealed in the judgment. He was wounded but survived the shot.
was aiming a gun with a red laser at them, and that as long as the other gang had not yet initiated physical combat, there was no present danger.

The judgment denies the defendants’ claim of self-defense: “Victim Lin Jiahui, Li Wenzhong and Hong Shenhong did not fire at defendants Ji Junyi and Li Jiaxuan, as argued previously; and defendant Ji Junyi testified at the district court: ‘[Court:] During the negotiation and the shooting, was there any physical contact, conflict, or combat between the other party of five and your party of three? [Ji Junyi] Zero.’ (See the third file of the District Court, p.111), it is sufficient to judge that when defendants Ji Junyi and Li Jiaxuan shot the victims, there was no present and unlawful danger; naturally, the defendants’ action is not self-defense.”

The judgment also denies the defendants’ claim of potential self-defense: “Although Victim Lin Jiahui was pointing the ultra-red laser of a gun at Li Jiaxuan at the moment, the defendant Ji Junyi testified in district court that he saw Li Jiaxuan pull out a gun to point at Lin Jiahui and vice versa, and in about 6 or 7 seconds, he himself pulled out a gun and fired in Lin Jiahui’s direction (See Court File 3 of the district court, p.108). When defendants Ji Junyi and Li Jiaxuan fired their guns, victim Lin Jiahui had been pointing at Li Jiaxuan for more than 6 or 7 seconds, so it is difficult to say victim Lin Jiahui was going to fire the gun for sure, and the average person would not mistakenly think victim Lin Jiahui was going to use the gun to kill just because he had pulled out the gun and taken aim.”

Moreover, defendants Ji Junyi and Li Jiaxuan did not ask victim Lin Jiahui to put the gun down, nor asked victims Li Wenzhong, Hong Shenhong and X to raise their arms… so Defendant Ji Junyi and Li Jiaxuan opened fire with intent to kill, not out of self-defense, and it was not

49 The original text: “查被害人林佳輝、李文宗、洪勝宏並未對被告甲○○、乙○○開槍，已詳前述，而被告甲○○於原審審理時亦承稱：「（在談判及槍擊過程中，對方五個人有沒有任何人與你或乙○○及癸○○等同方的人有肢體的接觸、拉扯或是衝突鬥毆？）完全沒有。」（見原審卷(三)第 111 頁）足認被告甲○○、乙○○開槍射擊被害人時，並無現在不法之侵害存在，則渠等自無正當防衛之情形。”

50 The original text: “雖然被害人林佳輝於案發時持槍以紅外線瞄準被告人乙○○，惟被告甲○○於原審審理時供稱：伊是先看到乙○○先拔出槍與林佳輝互指，中間大約隔了 6、7 秒左右，伊再拔槍出來，掏槍後就馬上拉扳機朝林佳輝的方向開槍等語（見原審卷(三)第 108 頁），是被告甲○○、乙○○開槍時，被害人林佳輝既已與被告人乙○○互相持槍對毆達 6、7 秒，尚難認被害人林佳輝必定會開槍，且一般人亦無被害人林佳輝持槍互毆即將持以殺人之誤認。”
potential self-defense from which intent can be excluded.”

The situation described in the judgment is surely one of self-defense — only Keanu Reeves in *The Matrix* could avoid a bullet after it has been fired, and then only by making a 90 degree backward bend, which of course was only a computerized special effect! As in Case No. 13, the judges tend to suggest alternatives to argue that firing a weapon was not necessary in the situation, but their farfetched arguments create incoherence in the narrative.

My research shows that other mitigating factors also are downplayed in some of the cases. In Case No. 50, defendant Lin Wangren’s family testified that Lin had begun acting strangely after having brain surgery following an accident. Lin’s brother reported that if Lin did not take medicine regularly, he would pick up a lighter and burn ants, but the ants were a hallucination. Lin has an IQ of 63 on the Wechsler Adult Intelligence Scale (WAIS). According to WAIS, an IQ of 50 to 70 is classified as mild mental retardation. It is estimated that in Taiwan, 80 percent of retardation cases fall in this category. Many of them are unidentifiable and can lead their lives unnoticed. However, the court refused to reduce the sentence and argued that Lin Wangren had the ability to plan and commit the crime, so he must have full capacity to take responsibility for his deed.

In Case No. 57, the defendant pretended to be a potential tenant, randomly picked a home owner and killed him. Then he went into the victim’s residence and stabbed his wife and son, injuring them. The defendant confessed he had gotten an idea from a Japanese comic book, that by hurting people he could transfer his pain to them. The defendant had been diagnosed with latent schizophrenia before committing the crime, but the court concluded his ability to tell right from wrong was not “significantly influenced” at the moment of committing the crime. Thus, the judges ignore the role of mental illness when determining the sentence.

Similarly in Case No. 59, defendant Chen Yuan had a history of schizophrenia and had been suffering from agitation, persecution delusions, auditory hallucinations etc. since the age of 13. Chen’s father couldn’t stand him anymore and decided to throw him out, and Chen responded to this by stabbing him violently, which caused the father’s death. When the prosecutor interrogated Chen and asked: “Who was the person you stabbed with the cutting knife on the surveillance camera?” Chen Yuan replied: “My dear Daddy.”

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51 The original text: “再者，被告甲○○、乙○○並未要求被害人林佳輝停止持槍之動作，或要求被害人李文宗、洪勝宏、庚○○舉起雙手……則被告甲○○、乙○○係基於殺人之故意而開槍，實與出於防衛意思者為尚屬有間，並非誤想防衛而得阻卻故意。”
judgment uses a similar tactic to downplay the mental illness and sentence Chen Yuan to death.

In Case No. 60, the defendant is believed to have killed her own mother, mother-in-law, and husband to collect on insurance. She was sentenced to life for the first two crimes and death for the third, even though she had an IQ of 57. In addition to low IQ, an expert evaluation conducted for the trial confirmed that the defendant suffered serious depression, which the prosecutor acknowledged in the final oral debate by addressing the defendant as “a patient of major depressive disorder.”

Nevertheless, the sentence was death: “Whether the defendant is retarded or not cannot be determined only by the previously mentioned psychological test results. The defendant has a diploma from a vocational school, runs a business producing and trading tofu, is a 27-year-old adult, committed the crime for the sake of insurance, and was calm when she killed Liu Yuhang… and she gambles on a regular basis… Judging from all this, it cannot be concluded that her IQ is significantly lower than the average person. Naturally, it is difficult to spare her from the death penalty for a disability.” Thus, the judgment overrides the IQ test and psychological diagnosis and sentences a defendant with mental retardation and depression to death. The defendant in Case No. 23 has an IQ of 75, which is borderline mild retardation. This person also received a death sentence without the court making any arguments about why such a sentence does not violate the ICCPR.

Mitigating factors are perceived as obstacles in capital cases that the judgment has to overcome to reach the desired destination. Whether someone turns himself in is irrelevant in the determining the facts of a crime, but it is crucial in determining the sentence if the case occurred before the relevant statute changed. Article 62 of the Criminal Code mandated that courts reduce the sentence of a defendant who turns himself in before the crime is discovered. According to the Supreme Court, “discover” does not necessarily mean that the investigators are certain the defendant committed the crime, but rather, that the investigators have reasonable suspicion toward the defendant based on solid grounds; it is sufficient if the investigators discover the essential elements of the crime without all

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53 The old Article 62 stipulated: “If a person voluntarily turns himself in for an offense not yet discovered, the punishment shall be reduced provided that there are special provisions. In such a case, these special provisions shall apply.” The old stipulation still applies to crimes committed before 1st, July, 2006.
54 See Zuigao Fayuan [Sup. Ct.], 89 Tai-Shang No. 110 (2000).
In several cases, the defendant allegedly turned himself in, but the court declined to commute death to a lighter sentence, insisting that the investigators had already developed reasonable suspicion toward the defendants before they confessed. Examples of this are Cases Nos. 1, 6, 23, 38, 51, 55, 57, 61 and 62. In Case No. 1, Zeng Siru did not confess to the crime in the first police interrogation but confessed in the second. The court rejected the argument that his confession was equivalent to turning himself in, because DNA test results had shown Zeng could not be eliminated from the suspect list. Zeng’s lawyer argued (1) that the DNA test was inconclusive and had not confirmed Zeng’s involvement in the crime, and (2) that there were 16 other suspects on the list when he confessed, and they had not been cleared either. In other words, the investigators did not at the time have information establishing Zeng’s guilt. However, the court rejected these arguments and sentenced him to death.

Case No. 10 is an interesting exception in which the court acknowledged the defendant, Guan Zhongyan, turned himself in, yet still concluded a death sentence would be lawful. Guan was convicted of murdering two homeowners in a crime committed with three other people in February 1988. He remained at large after the accomplices were caught, tried and executed or jailed. Guan was captured in 1993, and during the interrogation he told the police he had actually committed other crimes, including a triple murder that happened in November 1989. The court found itself in a difficult position: On the one hand, there was no evidence linking Guan to the 1988 double murder other than the testimony of his codefendants, who were either dead by that point or unstable in their statements. The murder weapon that Guan allegedly used was never recovered, so no tests could be done to establish his involvement. The victims’ bodies were not examined, and the judgment assumed, based on speculation, that there were multiple weapons used in the crime. On the other hand, there was solid evidence related to the 1989 triple murder. The bullets were in the victims’ bodies and matched a gun in Guan’s possession when he was arrested. But since Guan turned himself in, he could not be sentenced to death for it.

The district court interpreted the two murders as a “successive offense” (a concept in Taiwanese law at the time) and charged Guan for them. The court ruling says: “Defendant Guan Zhongyan turned himself in for the part that involved robbery and murder of Yang Quetian, but did not turn himself in for the successive offense. Hence, it is difficult to

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55 See Zuigao Fayuan [Sup. Ct.], 85 Tai-Shang No. 3788 (1996).
reduce his sentence for surrendering.” Yet the two crimes were committed 21 months apart, with different accomplices. The reason for the district court to categorize them as a successive offense was to make the death penalty applicable to Guan.

Case No. 10 was on trial from 1994 to 2006. When the Criminal Code was revised in 2006, the concept of successive offenses was abandoned. Guan’s trial faced the same difficulty again: If the court failed to tie the crimes together, Guan might not be convicted for the 1988 case and would receive a life sentence at most for the 1989 case. Starting from Remand 5, the court therefore adopted another legal concept, the “occupational criminal” (常業犯), to link the crimes. Using this, the court continued to argue Guan was not eligible for a mandatory sentence reduction, because he had only confessed a portion of the complete (i.e. linked) crime.

My research indicates some rulings achieve death sentences through applications of the law (whether skillfully like Case No. 10 or not so skillfully like Cases Nos. 1, 13, 39, 40 and 60) that create a twist in the judgments themselves and hamper the coherence of the narratives.

III. The moral of the story

After asserting the facts of the case and providing a legal opinion about how to treat the defendant, a judgment is not complete until it offers a moral of the story. What is the death penalty for? Why is it being applied to this specific person? What impact is expected for society? Before continuing with technicalities such as the confiscation list, the names of the judges and prosecutors, the date of the trial and relevant articles of law, there is a paragraph or two dedicated to communicating for the general public why this conviction is necessary and what good it accomplishes for society. It is, in short, the judgment’s self-justification.

In my research, I found self-justifications consisted of two elements. The first is a specific justification of the death penalty, focusing on explaining the sentence. The accounts offered are usually along the lines that the defendant was violent and vicious, the crime was violent and vicious, the victim and victim’s family suffered, social order was harmed and the public peace was disturbed. The second element is a general justification of the death penalty argued in an assertive fashion (that the death penalty carries a certain function that serves the public good) or a defensive fashion (that neither the Constitution nor the ICCPR prohibit the state from using death as a form of punishment). I will elaborate in the
A. The specific justification of the death penalty

It is standard to place the explanation of the sentence nearly at the end of the judgment, after the establishment of facts and application of law. A standard feature of rulings, the sentencing is typically brief and hollow. Brief in that the full text of a capital judgment can easily reach 30,000 words, but the section regarding sentencing is usually no more than 1,000. Hollow in that this section often draws upon Chinese “chengyu” (proverbs that usually consist of four characters). Examples are: “He cannot escape his guilt” (罪無逭), “He enraged both humans and gods” (人神共憤), “A great sin and an extreme evil” (罪大惡極), “He is devoid of humanity” (人性已泯), and “He was born violent” (生性兇殘). All of these are ready-made expressions with strong moral condemnation but no substantially clear definition. These “chengyu” are subjective and ambiguous: What kind of crime enrages both humans and gods? How do we verify whether a defendant has humanity or not? On what grounds does a court find that a defendant was born violent? A judge with years of experience in criminal court, Gou Yuzhen has acknowledged that “the sentencing decision is documented in the judgment, but the grounds and thought process are hidden deeply in the judge’s mind” (Guo, 2008, p. 10).

This brevity and hollowness results from the fact that the Taiwanese judicial system does not put much effort into sentencing, be it in practice or in theory (Lee, 2013). The Code of Criminal Procedure does not require the court to hold debates over sentencing. According to Article 288, the court shall handle a case in this order: (1) investigating the evidence, (2) interrogating the defendant, and (3) investigating the information regarding sentencing. Article 289 stipulates: “After the investigation of evidence has been completed, arguments on law and facts shall be made in the following sequence: the public prosecutor; the accused; the defense attorney. After an argument, additional argument may be made; the presiding judge may also order further argument. After the conclusion of the argument pursuant to the preceding two sections, the presiding judge shall provide the parties with opportunities to state opinions regarding sentencing.” That said, it takes both investigation and debate to fulfill the requirements of due process for establishing a defendant’s guilt; but it only takes investigation and “opportunities to state opinions” for the sentencing. Since the law does not attach much importance to sentencing, the court in practice reduces it to a
ritual. The judge asks, “What’s your opinion regarding the sentence?” The prosecutor normally answers, “Please show severity.” And the defendant either answers, “I am not guilty” or, “Please show leniency.” And that marks the closure of the oral debate.

As a result, the sentencing portion of the capital judgments included in my research can be described as follows. Firstly, the basic facts of the crime are repeated in the format of “just because… the defendant went so far as to [commit the crime and hurt the victim].” This is meant to show the severity and undesirability of the defendant’s deed and the disapproval of the court. Secondly, ready-made expressions are used to emphasize the wariness of the court and the viciousness of the defendant, such that there is no room for mercy. Just to name a few of the many examples: “We consider the fact that just because their marriage went sour, the defendant went so far as to transfer his anger to the family of his wife, …[summary of the crime]… The method was brutal, caused a lot of casualties and serious harm. The defendant still indulged in sophistry after committing the crime, alleging with no regret that he didn’t intend to murder. The court has considered over and over again and concludes that he is indeed devoid of conscience, his vice is extreme, his guilt is inescapable, and it is better to isolate him from society forever, to comfort the feelings of the victims, and set a bright example for society. Thus, the death penalty is ordered.”

“We consider the fact that the defendant and Miss X were a couple… Just because Miss X expressed her will to break up and refused to back down, and Mrs. X [mother of Miss X] also objected to the defendant moving in with them again, the defendant developed a grudge and determined to kill Miss X… [the defendant] went so far as to slash Mrs. X’s nape with a knife with the intent to murder and with great strength… The way the defendant killed is devoid of humanity, and he had no trace of feelings toward the parents of his ex-girlfriend who had taken care of him. Every slash he did was in cold blood. His vice is deep and hard to change. If [the defendant] is not isolated from society, it is highly possible the defendant will use radical and violent means to infringe on other people’s right to life in the same way when he develops a grudge. This is known by the fact that the defendant did not regret his bloody offense and was still thinking of ways to kill Miss X as revenge to release his rage. The cruelty of the defendant, from the perspective of public safety, makes it necessary to isolate him from society forever. Carefully considering over and over again, the judges find the defendant’s motive and method horrifying, that he

56 See Case No. 3.
did not regret the offense afterward and that it is inescapable, and sentence him to death for killing.” 57 “The original trial finds it evident that the defendant committed murder and attempted murder. It is considered that the defendant… just because he had a quarrel with the victims on gambling issues… he intended to kill them respectively… It is believed that the two murders were committed out of the defendant's mentality that human life has no value. His vice is great and he did not settle with the family of the victims. The guilt is inescapable and it is obvious it cannot be corrected by educational punishment other than the death penalty. It would not be sufficient payback for the victims in terms of justice if he were only sentenced to life, and it would not be sufficient to comfort the family of the victims for the loss of their dearest love. Therefore, in order to find a balance between the ideals of equity and justice, to respond to the call for social justice, and to maintain the nation’s security, public order and good customs, and to enhance the public good, the original court believes the defendant's guilt is not to be forgiven. It is impossible to seek to spare his life, and it is necessary to isolate him from society… The original court sentences him to death for the two murders… This is not unreasonable. The defendant provided several awards and letters of apology during this trial (see Court Files, Remand 1, p118-122) to prove that during detention, he had read Buddhist scripture and directed his prayers to the victims. Yet he denies the killings even today. He obviously lacks regret and naturally is not granted mercy.” 58

The vital argument missing from most capital judgments is to demonstrate that the crime committed was the most serious of crimes. This would be accomplished by presenting facts rather than ready-made proverbs. It is doubtful that some of the cases would meet the standard:

- In Case No. 5, the defendant was caring for his sick wife and their son when he fell unemployed for a long time due to a workplace injury. He was convicted of taking their lives and sentenced to death. 59

- In Case No. 13, the defendant is sentenced to death for being “devoid of humanity” even though a survivor testified that the defendant would have killed her too if he had wanted to. 60

- In Case No. 27, the judgment argued: “Although the defendant confessed the robberies

57 See Case No. 17.
58 See Case No. 32.
59 More details of the case are discussed earlier in this chapter.
60 More details of the case are discussed earlier in this chapter.
after the assaults with honesty, the pattern of his behavior is not stoppable through institutional treatment. It is deemed necessary to seclude him from society for good. Considering that life imprisonment under the Criminal Code does not serve to seclude a convict from society for good (under certain circumstances the convict is eligible for parole) and all other situations, the charge against the defendant is changed to successive robbery and murder and recidivism, and the sentence is death.” The death penalty is delivered not because the court believes it is what the defendant deserves, but because the state fails to provide an adequate punishment for such a crime. In other words, the defendant is punished for something unaccountable to his deeds.

- In Case No. 28, defendant Liao Mingui planned with his current girlfriend, Yang Kexuan, to kill her former father-in-law, mother-in-law and ex-husband to get her daughter back and sell their house. Liao learned the floor plan of the house from Yang, went to kill Yang’s former father-in-law and mother-in-law while Yang waited outside, and took the little girl. The court found Liao and Yang joint principal offenders of murder and robbery, but sentenced Liao to death and Yang to life. The judgment argued Yang had no criminal record, so she did not deserve death. Yet Liao had no prior record either. Liao testified he had committed the crime because Yang lied to him and said the little girl was being sexually abused by her ex-husband and former father-in-law. The court failed to investigate Liao’s claim even though it is highly relevant to the facts of the case and the appropriateness of Liao’s death sentence.

- In Case No. 31, the sentence reads thus: “[The defendant is] college educated and did not get the ransom for the crime. He confessed his crime with sincerity. While in prison to serve incomplete time for a previous offense, he received religious guidance and responded well to the teachings.” The judgment then takes a turn, saying his crime was violent and he failed to settle with the victim’s family, and is thus sentenced to death. When compared with a life prison sentence from the same year, it is clear that the death sentence is unpredictable: “[The defendant’s] deed was brutal. He despised the value of other people’s lives and caused great pain for the family of the victim. He is a danger to public safety, a man of great evil, and has no remorse after the offense.”61 Moreover, the last factual judgment of Case No. 31 suggests the defendant needs to be “isolated from society for a long time.” This wording demonstrates that the death penalty is not necessary, and is

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61 Zuigao Fayuan [Sup. Ct.], 98 Tai-Shang No. 2579 (2009).
therefore excessive in this case.
- In Case No. 48, the defendant was 75 years old and sentenced to death even though a life sentence would have been enough to confine him behind bars for a minimum of 25 years.
- In Case No. 61, the defendant, Qiu Hecheng, was sentenced to death and his codefendant Chen sentenced to life. The conviction was firmly based on facts, but the judges reached this sentence by defying logic. For example, the judgment denies Chen was remorseful: “Considering the fact that Chen seemed at ease the day after the murder when he was called in for questioning at the Taoyuan District Prosecutors Office regarding a sexual assault charge, it is clear the defendant had no remorse for the serious crime he had committed.” It is hard to understand why this attendance proves lack of remorse. And the ruling goes on: “Moreover, over the past three years since the discovery of the crime, whenever there was a public hearing at trial, the two defendants always had a few hypocritical words expressing repentance and a desire to compensate the victim’s family. Yet judging from their external behavior versus their internal motives, it is obvious they only did so to cover their intentions and avoid responsibility. It is so evident that theirs is not sincere repentance, and they did not settle with the victim’s family or offer any actual compensation. From the time the crime was discovered till the end of the trial, the two defendants have not taken action regarding compensation or condolences toward the victim’s family.”

Earlier in the judgment, the court confirms the two defendants have no money: The ransom was used to pay their debts and the cars they had were not worth a dime. It is incoherent to confirm the inability to provide monetary compensation on the one hand, yet attribute the lack of compensation to lack of remorse on the other hand.

Signs of Qiu’s remorse were dismissed by the court in various ways. Qiu wanted to donate his organs after being executed, and to transfer the subsidies to the victim’s family as compensation. The court declined to take this into consideration because it would only happen in the future. Qiu expressed his apologies in written letters to the victim’s family, and through statements in court when he was given the chance, but the court judged these statements to be hypocritical. The judgment complains the defendants offered no substantial compensation or condolences, but what could they possibly do aside from

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62 The original text: 「再參以兩人案發迄今三年來，每逢審判庭訊均有矯情言詞一衆句，略以表達對被害家屬懺悔賠償之意，惟衡酌其外在行為以探究其內心動機，顯然亟欲藉此方式掩飾其薦卸罪責之意圖，昭然若揭，實非真誠悔悟之舉與被害人家屬成立和解，實際賠償被害人家屬任何損害。」
offering future payment, writing letters and making statements in court?

Qiu and Chen collected NT$180,000 in ransom (roughly €4,500). The judgment takes this as a reason for giving Qiu the most severe sentence: “They recklessly destroyed a happy family for just NT$180,000. The evil is extreme.” This is yet another ineffective argument to justify the death sentence. The amount of ransom has nothing to do with malice, but rather opportunity. Qiu and Chen would have asked for more had the hostage been able to pay more. Normally a crime involving less money is considered less serious than one involving more money. The low ransom amount in Case No. 61 is considered an aggravating circumstance when it should be a mitigating one.

Among the 62 cases analyzed in this research, the sentencing arguments in general demonstrate that the crimes are undesirable — a fact that is not even contested by the defense. What is needed is a reason why the crime at hand is more malicious than other murders, why it is the most malicious among possible crimes. Yet this is the point that most judgments included in my research failed to establish.

B. The general justification of the death penalty

After announcing the sentence, some judgments offer a more general vindication of the death penalty as a legitimate form of punishment. This vindication can be categorized into two approaches. The affirmative approach argues the death penalty has a certain merit or function, and usually makes this argument with a bunch of ready-made “chengyu,” such as “in order to illustrate the natural order of things” (以昭天理), or “in order to warn those who would imitate” the crime (以儆效尤). The same paragraph may appear in more than one judgment, and like sentencing, the judges sometimes simply pile on these proverbs, creating a hollow declaration rather than an argument. For example, in Case No. 1, the judges write: “The robbery and murder in this case, the personality of the defendant and the method to commit the crime all qualify as serious. If the lighter punishment of ‘life in prison’ is applied, doesn’t this mean the defendant’s crime was not serious? This is so incompatible with public opinion and runs counter to legal justice.”

Or in Case No. 32,
the judges hand down the death penalty because “we are balancing the ideals of fairness and justice, responding to the need for social justice, and maintaining the nation’s security, public order and good customs, and it is necessary to enhance the public good.” These paragraphs can be summarized as “the death penalty is needed because anything less serious is not serious enough.” Here, the death penalty is used as a synonym for “justice” without explanation. It is a tautology that leaves the core question unanswered: Why is a life sentence or another alternative “not enough”?

The defensive approach argues the death penalty is not prohibited. Several judgments mention that Taiwan’s Constitutional Court has not struck down the death penalty, and that though Taiwan has signed and adopted the ICCPR as domestic law, this document does not stipulate that the death penalty must be abolished.

In Rulings No. 194 (Judicial Yuan Interpretation No. 194, 1985, March 22), No. 263 (Judicial Yuan Interpretation No. 263, 1990, July 19), and No. 476 (Judicial Yuan Interpretation No. 476, 1999, January 29), the Constitutional Court concluded the death penalty is not unconstitutional. Nos. 194 (1985) and 263 (1990) deal with mandatory death sentences for certain crimes. They are no longer relevant because Taiwan has abandoned the law in question. No. 476 (1999) deals with the law allowing the death penalty for drug trafficking crimes. These three Constitutional Court rulings all took place in the last millennium. Since then, Taiwan has experienced major changes in politics. The longtime ruling party, the Kuomintang (generally called the KMT), lost presidential power in a 2000 election, marking Taiwan’s first peaceful transition of power. The KMT won the presidency back after two terms held by the Democratic Progressive Party. However, neither political party carried out transitional justice to address the massive human rights violations that took place during the previous several decades of authoritarian rule. In 2009, Taiwan adopted the ICCPR to lift the standard of human rights. Constitutional Court ruling No. 476 from 1999 maintains it is constitutional to sentence someone to death for trafficking drugs, yet the most recent instance of the courts finalizing a death sentence for drug trafficking was in 2002. It has become an unwritten rule that only murder cases receive the death penalty in their final rulings. Adopting the ICCPR has brought a new standard and new law and order to Taiwan, which further shows that the three previous rulings by the Constitutional Court are outdated and irrelevant, and the constitutionality of the death

64 The original text: 「故權衡公平正義之理念，回應社會公義之需求，並為維護國家治安、公序良俗及增進公共利益所必要」.
penalty should be reconsidered.

Among capital cases, some judgments argue that the death penalty does not necessarily violate the ICCPR. Take Case No. 51. It cites ICCPR Article 6, Section 2 — “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime” — to argue that “for the retentionist countries, if a person commits a serious crime, and it is tried according to the law which is in action as the crime was committed and does not contradict with the present Covenant and the Convention on the Prevention and Punishment of the Crime of Genocide, it is then not necessarily forbidden for the state to deliver the death sentence.” This reveals a visible flaw in the courts’ application of the ICCPR. It means the courts are perhaps applying the death penalty for cases that are not the most serious crimes, thereby violating the ICCPR. As argued earlier, most capital judgments analyzed in my research fail to argue that the crime at hand constitutes “the most serious” crime. Another flaw is that the judgments cite Article 6 as a passive justification for the death penalty, yet completely ignore Section 6 of Article 6: “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.” Although it does not guarantee abolition, the ICCPR takes a firm and clear stance toward the end of the death penalty to the extent that it confines its interpretation. The incorporation of Article 6, Section 2 in capital judgments actually violates the ICCPR, according to Article 6, Section 6.

Article 6, Section 1 of the ICCPR says: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” To fulfill this would require a sentencing grid and list of aggravating circumstances that defines what “the most serious crime” means. Without this type of comparison, it is hard to establish whether a crime is “the most serious” one, and impossible to compare one murder case with all other murder cases. Only a consistently applied guideline would eliminate the arbitrariness of specific convictions and help determine that a crime constituted “the most serious” offense. In this sense, every death sentence handed down in the absence of a generally applied guideline is prey to arbitrariness and therefore violates the ICCPR.

The constitutionality of the death penalty is under debate. In the following section, I will

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65 The original text: “凡未廢除死刑之國家，如犯情節重大之罪，且依照犯罪時有效並與該公約規定及防止及懲治殘害人權公約不抵觸之法律，尚非不得科處死刑。”
provide my viewpoints and argue that the capital judgments included in my research do not provide a successful justification of the death penalty. I will discuss the concept of “human dignity” in Germany and the United States, and the relationship between the right to human dignity and the right to life, to argue that since the protection of human dignity is unconditional, the protection of the right to life — the basis of human dignity — is also unconditional. A law that violates human dignity must be judged unconstitutional, and a law that violates the right to life must be judged unconstitutional too, for the deprivation of life invariably deprives one of human dignity.

Human dignity is the key concept in arguments that capital punishment is unconstitutional. “Human dignity” was first introduced in constitutionalism and incorporated into the Basic Law for the Federal Republic of Germany in 1949. Many European countries adopted the concept in the 1970s, including Greece, Sweden, Portugal and Spain (Dupré, 2003). Hungary incorporated the concept of “human dignity” into its constitution and later utilized it as the basis for a series of court rulings on constitutionality as part of efforts to achieve transitional justice: “In the Republic of Hungary, everyone has the inherent right to life and to human dignity, and no one shall be arbitrarily deprived of these rights.” It sees “human dignity” and “human life” as twin rights, which influenced the Constitutional Court of South Africa to abolish the death penalty in 1995.

Li Zhenshan, a former justice of the Constitutional Court of Taiwan, argues human dignity consists of the following points: (1) A human being is an end in itself, instead of a means, so torture, death, or concentration camps are prohibited in modern states. (2) Self-determination means internal spiritual freedom, such as the right to privacy and freedom of thought. The Constitutional Court of Germany chooses not to define “human dignity” as what it is, but as “it is a violation of human dignity if certain measures taken by the state reduce a human being to an object”. (3) Everybody has human dignity, including criminals or the mentally or physically challenged. Human dignity is not based on contributions to society. (4) Human dignity is the primary principle of the Constitution (Li, 2012, pp. 10-19). The Supreme Court of the United States has tackled the death penalty several times, and “human dignity” also lies at the center of these arguments. William Brennan argued the death penalty is cruel and inhuman because it deprives people of human dignity. However, Justice Anthony Kennedy, seen as a spiritual disciple of Brennan, deviates from Brennan on

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66 Hungary Constitution, Section 54, 1989.
the death penalty. Kennedy believes the state is responsible for “respecting” everybody’s human dignity (Roper v. Simmons). Helen J Knowles has pointed out that his use of the word “respect” implies that the protection of human dignity is not unconditional and the state can terminate the life of a criminal when necessary (Knowles, 2011).

Brennan and Kennedy agree on one point and disagree on another. They both embrace the definition proposed by Alan Gewirth that dignity is “a kind of intrinsic worth that belongs equally to all human beings” (Knowles, 2011). “Equally” means human dignity is a neutral concept that has nothing to do with one’s morality and qualities. Yet Brennan believes human dignity should be protected unconditionally and Kennedy believes it should be protected conditionally. But even Kennedy would accept the notion that the right to life is a prerequisite of human dignity; he acknowledges that depriving someone of his life is depriving that person of human dignity.

Taiwan’s Constitutional Court also has introduced and incorporated the concept of “human dignity” into its rulings. Ruling No. 567 argues freedom of thought should be protected on the grounds of human dignity: “While the state may impose more restrictions on individual rights during extraordinary periods and due to necessity under extraordinary circumstances, such restrictions must nevertheless not exceed the boundaries of minimum human rights protection. Freedom of thought must be upheld to safeguard the spiritual activities of the people, the root of human civilization and the foundation of freedom of expression, and the most fundamental human dignity the Constitution intends to protect. Given its particularly crucial meaning to freedom, democracy and the continuance of the constitutional rule of law, no government agencies may encroach upon [this fundamental right] in the name of emergencies. Even in times of extraordinary nature, and regardless of whether in the form of a statute, invasion of the scope of minimum human rights is prohibited, be it with the means to compel revelation or rehabilitation” (Judicial Yuan Interpretation No. 567, 2003, October 24). Here, the justices assert that human dignity is core to the Constitution and therefore enjoys unconditional protection.

To sum up, human dignity is the utmost core value of constitutionality in all contemporary republics, and everybody’s human dignity is protected, be it a bandit or a saint, good or evil. Human dignity is easily misunderstood because of the word “dignity,” which can be misconstrued to mean the fine qualities of people, i.e. that only good people deserve protection because they have dignity, but that evil criminals lack dignity and do not
deserve protection. As argued previously, in Germany, the United States or Taiwan, it is clear that human dignity in the context of these countries’ constitutions does not refer to characteristics that certain people possess, but rather something that belongs equally to all people. Human dignity is descriptive rather than normative, it is a synonym to “humanness,” referring to the quality, state, or condition of being human.67

The right to life is the precondition to all other rights, including human dignity. In 1974, the Federal Constitutional Court of Germany declared Article 218-a of the Criminal Code (concerning abortion) to be unconstitutional because it violated human dignity. It clearly stated: “In the order of the Fundamental Law, human life has the utmost value, which does not require further explanation. Human life is the essential foundation of human dignity, and is the precondition of all other fundamental rights.”68 Article 218-a did not set limitations on abortion, and the court found this unconstitutional because the state was not providing sufficient protection of human dignity for the fetus. This echoes previous arguments that human dignity is equivalent to humanness and belongs equally to all people, regardless of social contributions. An unborn fetus has made no contributions to society, and whether it will do good or harm to society is unknown, but it is considered a subject whose humanness must be protected by the state.

The 1974 judgment also echoes previous arguments that protecting human dignity is equivalent to protecting the right to life, because there is no way to take away someone’s life and leave his human dignity intact. Since it receives unconditional protection under the Constitution of Taiwan, the precondition of human dignity — the right to life — naturally must also enjoy the same unconditional protection.

Although some of the capital judgments I have reviewed in this research mention the Constitutional Court rulings that validate the death penalty’s constitutionality, they fail to take the concept of human dignity into consideration and ignore the more recent Ruling No. 567, which reasserts the state’s obligation to protect human dignity unconditionally.

The “moral of the story” offered in capital judgments aims to establish a self-justification that is effective both specifically and generally, in an affirmative and defensive fashion. Over all, the flaws in the sentencing compromise the specific justifications, while the general justifications fail to provide convincing arguments, given that human dignity is a core value, according to the Constitutional Court. When the state executes someone, it fails to perform

67 See the definition in Cambridge English Dictionary.
68 BVerGE 39 (1975), 1, 41 f.
its duty to protect human dignity unconditionally because life is the foundation of all fundamental rights.

IV. Summary

A capital judgment can be described in three sections. In “the start of the story”, the key concept is foregrounding/backgrounding: by skillfully deploying the information, the judge can successfully pull certain information — in these cases, the crime committed and the “evil” nature of the defendant — to the foreground, and push certain information — a lawful way to make a living, the lack of prior record, or the disadvantaged social status — to the background so that it is ignored in the story. The selectiveness of the judgments is under challenge.

In “the main body of the story”, the key concept is the evidence chain of “defendant—weapon—victim”. I find that at least 10 out of 62 cases are seriously flawed in the conviction, and the fidelity and coherence of the judgments is under challenge.

In “the moral of the story”, the key concept is human dignity. Although several international covenants of human rights and constitutions in contemporary democratic polities unexceptionally strive to provide unconditional protection over human dignity, I find that the judgments fail to acknowledge the utmost value of it and consequently fail to justify the death sentence.

In the next chapter, I will turn to the dynamic process of Justice Inc. and analyze how the flaws in a capital judgment manage to escape quality control and survive all the way to the final judgment.
Chapter Five

The “Why” of Death Sentences: A dynamic process

In this chapter I will analyze the dynamic process of decision-making by the courts. First, in Section I, I will discuss the affinity between judges and prosecutors in Taiwan as a cultural background; then, in Section II, I will demonstrate how, through the dynamic court process, errors make their way through trials and eventually land in the final judgment.

I. The affinity between the judge and the prosecutor

The affinity between judges and prosecutors is fundamental in Taiwan’s judicial culture, to the extent that it penetrates every stage of trial and radiates influence over every aspect of the judicial establishment. I will review the history of this affinity to show its longitudinal section, followed by a description of its contemporary features to show its cross-section.

A. The historical perspective

The role of judge can be traced back to the Middle Ages, but the role of prosecutor is a much later invention in both the civil law tradition and the U.K. and U.S. In time, public prosecution developed and in the mid-16th century, a system of public prosecution in the modern sense took shape in many parts of the European continent. Germany employed the role of prosecutor with the goal of dividing the power of the state in two — in which the prosecutor is accuser and the judge is decision maker — to prevent the violation of people’s rights (Yue Ma, 2008).

The role of prosecutor was first introduced to Taiwan in 1896 under Japanese colonial rule. A description of court seating dating to 1928 shows the judge and prosecutor sat together at the bench, while the attorney and defendant sat facing the bench (Wang, 2008).69 The unity between the judge and prosecutor was demonstrated visibly through spatial arrangement and the triangle of judge-prosecutor-defendant was not yet in place.

Meanwhile, China was struggling with the separation of powers in a time of war. The role of prosecutor was introduced in China in 1906, but the judicial and executive powers were entangled for decades (Wang, 2007). The Constitution was not created until 1935, and the blank paper used for litigation bore a printed image of the headquarters of the Kuomintang

(the ruling party), instead of the courthouse. The “Department of Judicial Administration” was put under the executive branch in 1932, then put back under the judicial branch in 1934, and back under the executive branch in 1943. Each time it was placed under the executive branch, the motivation was “to make the judiciary cooperate with the administration better” (United Daily News, 1960, August 17).  

With the end of World War II in 1945, borders shifted and territories changed. Japanese colonial rule over Taiwan ended and was replaced with a Chinese one. In the 1950s, the entanglement between the judicial and executive powers became a political issue. The fact that the High Court and district courts were put under the Department of Judicial Administration, under the executive branch, drew much attention. A major part of the judiciary was being supervised by the executive power, which was considered a violation of the separation of powers. In an attempt to remedy this, 51 members of the Control Yuan — Taiwan’s watchdog branch of government — petitioned the Constitutional Court for a ruling on the matter. 

The most influential magazine at the time, Free China, was a strong and effective critic of the judicial system. Lei Zhen, an important intellectual and the founder of Free China, commented that the judiciary had become worse under Chinese reign than it was during the Japanese era (Lei, 1957). In a high-profile corruption case in 1958, a district court acquitted the commissioner of Nantou County. The chief prosecutor rejected the prosecutor’s appeal, allegedly on orders from the minister of the Department of Judicial Administration. Free China published four consecutive editorials urging that the minister be held accountable, which eventually resulted in the chief prosecutor being dismissed (Huang, 2005). 

The vision of Lei and Free China was to have judges and prosecutors function independently of the administrative intervention that came, without exception, from the ruling KMT party. Separating judge and prosecutor was not on the agenda. In Lei’s opinion, the Constitution held that the judge and prosecutor belonged together; what was important was saving them from inappropriate meddling by the KMT (Lei, 1959). 

Aided by progressive public intellectuals, the Constitutional Court delivered ruling No. 86, determining that the High Court and district courts should fall under the judicial branch (Judicial Yuan Interpretation No. 86., 1960, August 15). But half a month later, Lei was
arrested and put on trial in military court for making preparations to organize a new political party. *Free China* was forced to shut down. Dictator Chiang Kai-shek ordered that Lei’s sentence should not be shorter than 10 years, which happened to be the sentence Lei later received (Huang, 1960, p. 201-202). Lei’s criticisms of the judicial system proved to be accurate at his own trial: There was overreach by the military court, inappropriate intervention by the KMT and a lack of judicial independence.

With the dissidents in jail and a chilling effect on progressive public intellectuals, the high and district courts remained part of the executive branch and suffered from continued meddling by the KMT until 1979, when the United States established diplomatic relations with the People’s Republic of China (i.e. Beijing). This was a political crisis, and President Chiang Ching-kuo, Chiang Kai-shek’s son, launched a series of political reforms that included shifting the high and district courts to the judicial branch. The official history of the judiciary interprets the 1979 political reform as the start of an independent judicial system. It intentionally omits the fact that the KMT government long ignored criticism of the previous system and claims the 1979 shift was done out of respect for the Constitutional Court’s Ruling No. 86. Yet that ruling dated to nearly 20 years earlier.

The shift was mainly a political response to the new situation in international relations, and it did not clear up the role confusion between judge and prosecutor. Judges and prosecutors had developed a sense of unity, like a life-long couple, and breaking up demanded them to grow a new sense of individuality. Prosecutors had more difficulties in this adaptation than did judges, because judges inherited the glory of justice, the power to make legal decisions and the cultural heritage of Justice Bao. As compensation, a policy was adopted allowing prosecutors to become judges, although not without controversy (Li, 1982, January 14). It is still in place today.

Another unresolved issue was courtroom seating. The prosecutor sat at the bench together with the judge from 1928 until 1989. Even after the 1979 shift, it took several more years because of resistance from prosecutors. Members of the Judicial Yuan then

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71 For example, it is not mentioned in “Chronicle of Events of the Prosecution of R.O.C.” by Taiwan High Prosecutors Office, in *Taiwan Prosecutor Review*, No. 1, pp. 300-313.
73 Justice Bao is a historical figure fictionalized over time who serves as a symbol of justice in Chinese-speaking culture.
74 The transfer policy started in 1960 when some senior prosecutors expressed their strong will to “fulfill their dreams” of becoming judges. See *The Oral History of Senior Law Professionals in Taiwan*, Volume 2, pp. 159-160. It is available at [http://www.judicial.gov.tw/publish/ebook/2_04.pdf](http://www.judicial.gov.tw/publish/ebook/2_04.pdf).
intended to change the seating after they visited Europe, where the seat of the prosecutor had been separated from that of the judge, but prosecutors again resisted the idea and it fell through (Ron, 1983, May 30). It took 10 years before prosecutors finally sat opposite from the defense attorneys.

One thing that remains untouched is the extra door behind the bench, which is only for judges and prosecutors. The prosecutors appear and vanish through that door together with the judges, and the other party, the defendant, is left wondering if this court will really treat him fairly, as an equal to the prosecutor.

The unity of the judge and the prosecutor is a long-established phenomenon, therefore, separating them is bound to be a long and winding road. The major resistance comes from prosecutors, whose stance is that they themselves also exercise some form of judicial power, and that it is not adequate to characterize the prosecution as part of the executive power. Prosecutors insist judges and prosecutors should both fall under the joint title “judicial officials.” What prosecutors seek is the protection offered in the Constitution, the salary and benefits (Wang, 2008) and the legacy of Justice Bao. Judges have inherited this legacy effortlessly, but prosecutors have never given up their right to succession. Prosecutors have nicknamed the article of law that allows them to hire assistants “the Wang Chao Ma Han Clause” (Taiwan High Prosecutors Office, 2007). Wang Chao and Ma Han are to Justice Bao as Robin is to Batman. If someone nicknames his assistant Robin, he sees himself as Batman; likewise, when prosecutors nickname their assistants Wang Chao and Ma Han, it means they see themselves as Justice Bao. The difficulty of separating judge and prosecutor is a tug of war that demonstrates how deeply rooted their unity is in judicial culture.

B. Contemporary appearance

Most judges and prosecutors acquire their qualifications by passing the Special Examination for Judicial Officials, which only the top 1% pass. Statistics shows that in the past ten years, 88% of the people who pass the exam hold a university degree with an average age of 26 (see Table 2).

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75 Quote of Wang (2008): “There are 391 (more than 95%) prosecutors of the local office that have joined the Prosecution Reform Association in two weeks. We should not be misled by the number; many joined the association for their own benefit. If the draft of the Judge’s Law is to be passed, the prosecutors will stop being seen as judicial officials, and they will lose the special compensation package that is for the judicial officials only, which constitutes 1/3 of the salary (interviewee 101).”
<table>
<thead>
<tr>
<th>Year</th>
<th>Number of people who pass the exam</th>
<th>University degree</th>
<th>Master degree</th>
<th>PhD degree</th>
<th>University degree ratio</th>
<th>Average age</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>85</td>
<td>78</td>
<td>7</td>
<td>0</td>
<td>92%</td>
<td>26</td>
</tr>
<tr>
<td>2014</td>
<td>54</td>
<td>52</td>
<td>2</td>
<td>0</td>
<td>96%</td>
<td>26</td>
</tr>
<tr>
<td>2013</td>
<td>75</td>
<td>64</td>
<td>11</td>
<td>0</td>
<td>85%</td>
<td>26</td>
</tr>
<tr>
<td>2012</td>
<td>75</td>
<td>67</td>
<td>8</td>
<td>0</td>
<td>89%</td>
<td>27</td>
</tr>
<tr>
<td>2011</td>
<td>71</td>
<td>64</td>
<td>7</td>
<td>0</td>
<td>90%</td>
<td>26</td>
</tr>
<tr>
<td>2010</td>
<td>146</td>
<td>130</td>
<td>16</td>
<td>0</td>
<td>89%</td>
<td>26</td>
</tr>
<tr>
<td>2009</td>
<td>121</td>
<td>96</td>
<td>25</td>
<td>0</td>
<td>79%</td>
<td>28</td>
</tr>
<tr>
<td>2008*</td>
<td>190</td>
<td>170</td>
<td>17</td>
<td>0</td>
<td>89%</td>
<td>26</td>
</tr>
<tr>
<td>2007</td>
<td>141</td>
<td>121</td>
<td>20</td>
<td>0</td>
<td>86%</td>
<td>26</td>
</tr>
<tr>
<td>2006</td>
<td>155</td>
<td>136</td>
<td>19</td>
<td>0</td>
<td>88%</td>
<td>26</td>
</tr>
<tr>
<td>Average</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>88%</td>
<td>26.3</td>
</tr>
</tbody>
</table>

*in 2008, 3 hold a “half” degree (such as a college graduate instead of a university graduate)

Table 2 The education and age of judges/prosecutors in the start of their career
Source: Ministry of Examination, Taiwan; table made by author

Before being assigned to practice law, those who pass the test are subjected to training at the College for Judicial Officials, where they acquire one of the most important indications of their position in the judicial system — their cohort. It is compulsory to live at the College for Judicial Officials, where all trainees are subjected to a fixed schedule and rigid regulations that designate what time to get up, when to eat each of the three daily meals, and what time to turn off the lights and sleep. They are not allowed to leave campus without permission and they are asked to keep a journal which will be reviewed and marked by their mentors (Yo, 2012).

Near the end of training, the grades are calculated based 80% on coursework and 20% on “conduct” as determined by the mentors. All trainees are ranked and then divided into groups of three, with the first two being assigned to be judges and the third to be a prosecutor, unless one of the first two agrees to trade positions. Then the judges-to-be and prosecutors-to-be take their respective courses, which generally amount to between 1.6% and 6.1% of all the courses taught (Liu, 2002). The judicial system functions on the
assumption of unity between judges and prosecutors in terms of the acquisition of qualifications, training and interchangeability of the two positions. Moreover, the full name of each prosecutors office is subject to the name of the court; for example, the prosecutors office that deals with crimes in Taipei City is the “Taiwan Taipei District Court Prosecutors Office.” As confusing as this is, prosecutors have no intention of changing it; in fact, they have fiercely objected to changing this convention (Chen, 2012 January 12).

An important issue that has long been ignored in judicial reform efforts is the pairing of judges with specific prosecutors. For example, judges A, B and C comprise the panel handling a case, and they are paired with prosecutors D and E. Whenever a case is assigned to judges A, B and C, prosecutors D and E will be assigned to it, too. As a result, A, B, C, D and E handle all cases together and, naturally, develop a bond. The five of them form a team, in which three play the role of judge and two play the role of prosecutor. Like all co-workers, these five people become acquainted with each other’s personal lives as well as professional experiences, opinions, preferences and prejudices. Discussions of ongoing cases easily slip into the daily conversations among A, B, C, D and E.

The Taiwan Alliance to End the Death Penalty published in its newsletter the experience of one attorney who finished a hearing, left the building and realized he had forgotten his umbrella. He returned to the courtroom to get it, and found the judges and prosecutors discussing the testimony of the witness and the cross-examination. The attorney wrote about it on his Facebook page and a commenter responded: “It sounds like they were having an affair and you caught them (Chiu Hsien-Chih, 2012)”

Whatever happens between judges and prosecutors is, indeed, not an affair. Historically and institutionally, they belong together as a unit. The defendant has zero entitlement. The prosecutor adopts the name of the judge, but what does the defendant have?

This pairing of judges with specific prosecutors is presumably meant to facilitate scheduling hearings. If A, B, C, D and E handle all cases together, it is impossible for A, B and C’s schedule to conflict with D and E’s. Some judges are aware of this problematic arrangement and put restrictions on any discussion with prosecutors of ongoing cases in the absence of the defendant. Nevertheless, the pairing of judge and prosecutor hampers the fairness of the court by perpetuating a situation in which judges and prosecutors are close-knit while the defendant is a constant outsider. Former High Court judge Lin Desheng went to a defendant’s mansion while handling his corruption case, and this was
deemed to “severely obstruct a judge’s public image and the judicial system’s reputation.” It cost Lin his job (Control Yuan, 2010). If it is unacceptable for a judge to meet the defendant in private, how can it be acceptable for a judge to meet prosecutors in private, regularly and routinely?

The unity of the judge and prosecutor are characterized by qualifications (they pass the same exam, receive the same training and can switch between the two jobs) and organizational affiliation (the two organizations are usually in the same building, with similar names, and judges and prosecutors are assigned to fixed pairings). Moreover, the close relationship between the judge and prosecutor is infrastructure with public recognition and acceptance. In an opinion poll, 72% of respondents mistakenly thought prosecutors belong to the judicial branch (Lin, 2015). The shift of courts from the executive branch to the judicial branch in 1980 was either a ritualistic move or a reform with limited success. It did not put an end to the conflation of judges and prosecutors and gave rise to a transfer policy that is now entrenched. The separation and independence of judges and prosecutors has not been accomplished. The unity of judges and prosecutors remains the backbone of judicial culture. The unity of the judge and prosecutor sheds light on legal decision-making and the way errors accumulate over the course of the judicial process.

II. The accumulation of errors in the judicial process

In this section I will try to illustrate how erroneous legal decisions are the collective product of the many people who participate in the process, and how the courts dig themselves into a pit too deep to escape by becoming increasingly invested in any given conviction. I will divide the trial process into three phases — pre-trial, trial and remand — and discuss the errors at each stage. I will further divide the trial phase into procedural and substantive matters for convenience of discussion. To show how errors take shape from external sources and survive all the way to the judgment, I will discuss for each phase (1) mistakes originating from outside the court, (2) organizational culture and (3) mistakes made by the court.

It is worth noting that by “organizational culture,” I mean the routines and guidelines that serve as instructions to the actors in the judicial system, be they explicit, like the rules or procedures stipulated by law, or implicit, like the atmosphere and traditions of the judicial
system surrounding the actors. Organizational culture includes phenomena created by the judicial system itself, such as the order of investigation of evidence and the close relationship with the prosecution, which encourages bias. In also includes factors initiated by other social forces, for which the judicial system is not fully accountable, such as the fact that the law does not permit expert examinations from privately hired experts, or that the existing forensic labs are affiliated with police departments or prosecutors offices, and therefore easily biased. In this research, my concern is focused on the process by which judges fail to detect errors originating from outside the court. My research findings, echoing literature on organizational wrongdoing, show that it is a process of accumulation of errors from multiple sources in an incremental fashion, which encourages an escalating commitment to conviction. What matters here is the factors that have an impact on the decision-making. I coin the term “organizational culture” to capture these factors and facilitate a dynamic analysis. The origins of the factors and accountability of the judicial system are not relevant under this framework. For this reason, I do not distinguish between factors coming from various sources, but instead treat them altogether as part of “organizational culture.” Such an analysis does not indicate the judicial system is the sole entity responsible for producing judgments, but rather, that multiple social forces converge on the judicial process and formulate an organizational culture that nurtures the accumulation and inheritance of mistakes.

It is equally important to stress again that the “errors” in this chapter are discussed with the understanding that organizational wrongdoing often arises from a set of routinely performed procedures that look harmless. When viewed individually, these arrangements may not always appear to be “wrong,” but when put together as part of the legal decision-making process, they stop being harmless. With dynamic analysis, I try to point out that some arrangements facilitate the accumulation of errors that lead to flaws in capital judgments.

Needless to say, I do not claim these errors exist in every capital judgment analyzed in my research. No implication of frequency is made here. As Charles Perrow cleverly explains, organizational wrongdoing is a “normal accident,” in which “normal” does not imply frequency but rather inevitability: “It is normal for us to die, but we do it only once (Perrow, 1999, p.5).”
A. The pretrial

(1) The bias toward inculpatory and testimonial evidence

Mistakes from outside  | Organizational culture  | Mistakes by the court
---|---|---
• the preference for testimonial evidence  | • Time lag for the defense  | • bias toward inculpatory evidence
• false testimony  | • unity of judge and prosecutor  | • bias toward testimonial evidence
• undue methods

The pretrial phase includes the discovery of the crime, investigation and prosecution. The police and prosecutors are in charge. The very beginning of a case, understandably, is full of trial and error. The police may focus on the wrong suspect and the prosecutors may charge innocent people. These errors are not the focus of the discussion here, because they are a “necessary evil” for public safety. These errors cannot be eliminated prior to trial, and many of them can only be discovered at a later stage when other evidence is collected. We can only expect that the wrongly accused be exonerated by the court at a later point in the procedure. What interests me here is the errors that could and should be detected and rejected by the court, but are not. The bias toward the defendant reaches the court in the dossier, and due to the organizational culture of the judicial system, the court allows this bias to radiate influence throughout the trial, thus facilitating the cementation of bias.

Mistakes from outside

• The preference for testimonial evidence

At the pretrial stage, police and prosecutors are in charge. The police and prosecutors usually emphasize testimonial evidence over nontestimonial, and all too often, their efforts to collect evidence dwindle once the defendant confesses. It is a worldwide phenomenon that confessions are very powerful in misleading the investigation — especially when they offer a coherent story with motives, emotions and details. A defendant’s confession makes investigators weigh all other evidence accordingly (Leo & Davis, 2010). Taiwan is no exception and capital cases are no exception. It is evident that the prosecution ceased its efforts after the suspects confessed in Cases Nos. 11 and 27. Both involved shootings, both
involved guns recovered and bullets found at the scene and inside the victims’ bodies, both
involved confessions, and in both cases, the prosecution stopped before forensic results
even became available. It is more than obvious that the prosecutors did not consider the
results to be important or relevant as long as a confession had been obtained.

- False testimony

False statements may come from defendants, their codefendants or witnesses. My research
turned up four types of false testimony.

The first type is testimony incompatible with the facts, such as in Case No. 3, in which the
defendant confessed to using a counterfeit Glock to fire two shots from his seat, but the
victim was shot three times with an authentic Glock from a different direction. In No. 41,
the defendant confessed to raping the victim on a couch in his codefendant’s living room
while being left alone with the victim for no more than five minutes. Yet there was no
couch.

The second type is testimony in which codefendants contradict each other. In No. 46, for
example, the codefendants offered eight different locations of the dead body, but no body
was found in any of those places.

The third type is quite the opposite: testimony that is so compatible with the facts that it
generates reasonable doubts. In No. 4, the eyewitnesses’ statements match each other with
word-by-word precision. It can be inferred that the statements were not documented
faithfully but rather copied-and-pasted to avoid inconsistencies.

The fourth type is testimony that contains information beyond the knowledge of the
interrogated person. In case No. 25, codefendant Huang Xiren was able to provide perfect
information regarding defendant Shen Honglin, including Shen’s birthday, ID number and
registered address. It can be inferred that the police used their knowledge to contaminate
the codefendant’s statement, thus hampering the authenticity of the testimony.

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76 See Case No. 11, court file of Prosecutors Office [Taizhong Admin.], 94 Zhen Ze No. 14227 (2005); Case
No. 27, court file of Prosecutors Office [Taizhong Admin.], 87 Zhen Ze No. 15563 (1998).
77 See Chapter Four for more details.
78 See Case No. 41, court file of Tainan County Guiren Branch, 89, Gui Jin Xin Ze No. 5616 (2000). More
details of Case No. 41 are discussed in Chapter Four.
79 More details of Case No. 46 were discussed in Chapter Four.
80 See Case No. 4, court file of Prosecutors Office [Gaoxiong Admin.], 93 Xiang Ze No. 1709 (2004). In this
case, the testimony of the eyewitnesses was typed instead of handwritten, which supports the assumption that
they were done by copying and pasting.
81 See Case No. 25, court file of Prosecutors Office [Zhanghua Admin.], 78 Xiang Ze No. 768 (1989).
These four types of mistakes all lead to one question: How are statements obtained? Are they given of free will and with due process?

- Undue methods

Plenty of examples have been documented in Taiwan in which police conducted interrogations using undue methods, including deceit, torture, threats and fatigue, to extract desired testimony (Chang, 2013; Lee, 2014); my research also turned up such cases. Many defendants accuse the police of torture, including those in No. 3, No. 26 (as well as the codefendant)\(^{82}\), and No. 37\(^{83}\), and their bruises are documented in the physical examination records at the detention centers. In No. 46, the judgment does not acknowledge that torture took place, yet the Control Yuan took punitive measures against the police officers, who were later prosecuted and found guilty.\(^{84}\) The defendants in Cases Nos. 41\(^{85}\) and 60\(^{86}\) accuse the police of coercion by pressure or deceitful methods. Witnesses in No. 3 also accused the police of torture and of misleading them to extract statements against their will.

As a rule, statements made to the police are considered hearsay and inadmissible since the Code of Criminal Procedure was revised in 2003.\(^{87}\) Statements made to prosecutors, however, are admissible: “Statements made at the investigation stage by a person other than the accused to the public prosecutor shall be admitted as evidence unless it appears to be obviously unreliable.”\(^{88}\) So in many cases, prosecutors pursue ways to include the testimony obtained by the police in the trial.

The first way to incorporate the testimony obtained by police is for the prosecutor to ask the defendant during interrogation: “Is what you said to the police all true?” When the defendant says yes, this is considered to certify the truthfulness of the statement obtained by the police. For example, in case No. 26, two defendants claimed to be tortured by the police, and a physical examination supported their claim. Yet their confession to police was still used as inculpatory evidence because they both told the prosecutor their statements to police were true.\(^{89}\)

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83 See Case No. 37, Difang Fayuan [Taipei Admin. Local Ct.], 86, Zong Su Ze No. 16 (1997).
84 More details of Case No. 46 are discussed in Chapter Four.
85 See Case No. 41, court file of Difang Fayuan [Tainan Admin. Local Ct.], 89, Zong Su Ze No. 30 (2000).
86 See Case No. 60, court file of Difang Fayuan [Nantou Admin. Local Ct.], 99, Zong Su Ze No. 3 (2010).
87 Article 159, Section 1, Code of Criminal Procedure: “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.”
88 Article 159-1, Section 2, Code of Criminal Procedure.
The second way is facilitated by the residual effects of undue methods. When a prosecutor conducts his interrogation, the defendant is typically still in the custody of police, which puts him under police influence, especially if the police used undue methods during their own interrogation. Some defendants do not dare retract the false statements they made earlier to the police, and some feel they cannot afford to tell the prosecutor the truth. Case No. 3 asked the prosecutor to test the guns he was carrying during the shooting, and this was as close as he could get to claiming his innocence. Once he was taken to the shooting scene and the prosecutor asked him why had he lied about firing the gun, he worked up the courage to say “because I was afraid,” without specifying he was afraid of the police. Some defendants say they did not understand what the prosecutor was for, and mistakenly took the prosecutor to be some sort of superior to the police officers interrogating them. This prevented the defendants from realizing they should have seized the opportunity to assert their innocence. The continued presence of police during the prosecutor’s interrogation ensures the defendant speaks under the same conditions as during the police interrogation. Yet the testimony appears to be testimony obtained by the prosecutor and therefore admissible in court.

Organizational culture

- The time lag for the defense

Unlike in the Anglo-American system, in Taiwan, the dossier collected in the course of investigating a case and deciding whether to bring charges is transferred to the judge. Since the prosecutor has decided to indict the defendant, it goes without saying that the dossier overwhelmingly contains inculpatory evidence, or else the prosecutor would have dropped the case. Therefore, at the start of every murder case, the judge learns about the dead body, the bloody crime scene, the testimony of the defendant, codefendants and witnesses. The indictment pieces these together into a coherent story in which the defendant has committed a terrible crime. Unlike in the Anglo-American system, judges in Taiwan’s modified adversarial system are exposed to the prosecution and the prosecution only — and this can last for up to three months.

The suspect has the right to hire an attorney during the investigation, but this does not guarantee the suspect equal standing for two reasons. One is that some defendants — such

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90 More details of Case No. 3 are discussed in Chapter Four, including footage of the conversation in which the fear of the defendant was demonstrated by his trembling voice.
as those in No. 3 — are prohibited from corresponding with family, friends and their attorney.\textsuperscript{91} The other reason is the attorney has no access to the information gathered by the prosecutor during the investigation.\textsuperscript{92} Deprived of the chance to consult with clients or access the inculpatory evidence, the “defense” during the investigation period is a blind defense.

Such an arrangement creates a significant time lag between when a case arrives at the district court and when the defense gets to present its side of the story. If the defendant gave his confession to police because of torture, the judge is made aware of the confession but not the coercion. If the defendant has a prior criminal record, the judge is made aware of it regardless of whether it is relevant, but if the defendant has won a literary award or has volunteered to care for street dogs, that is not documented and has zero effect on the judge’s perception of the defendant. The defendant’s merits, if there are any, might be brought to the court’s attention if she/he has an effective attorney, but this will only happen after the time lag is over, once the first hearing is scheduled. This deviates significantly from the Anglo-American adversarial system, in which the deposition is conducted in a way that guarantees information is brought to a jury in a balanced way.

Recently the Constitutional Court has acknowledged that this delay hampers the right to defense. In ruling No. 737, the Constitutional Court asserts that Article 8 (regarding personal freedom) and Article 16 (regarding the right to petition, lodge complaints or institute legal proceedings) of the Constitution make clear that the right to defense is protected even during the investigation, and thus the current law fails to protect this right because access to evidence is not granted to the defendant or her/his attorney during the investigation. Therefore, the Constitutional Court struck down Article 33, Section 1, and Article 101, Section 3, of the Code of Criminal Procedure and demanded the Legislature revise them within a year (Judicial Yuan Interpretation No. 737, 2016 April 29).

- The unity of the judge and prosecutor

A statement obtained by the prosecutor is viewed differently by the court than one obtained by police. Judges consider evidence presented by prosecutors to be highly credible

\textsuperscript{91} See the court file of Prosecutors Office, [Taizhong Admin.], 91, Zhen Ze No. 1433 (2002), the letter signed 2002/1/14.

\textsuperscript{92} The Criminal Procedure Code stipulates in Article 33, “A defense attorney may examine the case file and exhibits during trial and make copies or photographs thereof.” And in Article 101, Section 3: “The accused and his defense attorney shall be informed of the facts based to support the detention of an accused as specified in section I of this article. The same shall be stated in the record.”
because of the unity between judges and prosecutors, as explained in the first part of this chapter. In other words, the very same statement gains credibility simply by shifting from police to prosecutor as source. This is evident in the judgment of Case No. 46:

“Interrogation by prosecutors aims at finding out the truth, and judging from the work of prosecutors, prosecutors have no need to torture defendants, so this is sufficient to determine the statement obtained during interrogation by the prosecutor was out of free will.”

Similarly, in Case No. 30, it turned out that the written version of one of the codefendants’ statements was not faithful to what he said during the interrogation by the prosecutor. Nevertheless, the judge’s trust in the prosecutor remained unaffected and all other statements obtained by the prosecutor were viewed as reliable: “In practice, prosecutors obtain statements from people other than the defendants during the investigation generally in a law-abiding fashion. They do not violate the law to extract statements, and the statements are made under oath as required by due process. So the statements obtained by the prosecutor are highly credible, and the defendants have failed to point out why the statements should not be believed.”

Mistakes by the court

- The bias toward inculpatory evidence and testimonial evidence

A High Court judge, Chen Xianyu, once made this comment on the trial process: “It’s like something is drawn on the board, then the defense tries to wipe it off of the board (Lee, N. T., Chen, X. Y., & W. prosecutor, 2012).” From when the judges receive the case to when they hold the first hearing, they are exposed solely to the prosecution, which offers mainly inculpatory rather than exculpatory evidence (otherwise the charges would have been dropped), and mainly testimonial rather than scientific evidence (due to common practices among police and prosecutors for handling cases). At this stage, the judge’s understanding of the case is mainly based on testimony unfavorable to the defendant. This is what I call “the bias toward testimonial evidence” and “the bias toward inculpatory evidence.” Some judges are, no doubt, able to remain open-minded and restrain themselves from developing

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93 See Gaodeng Fayuan, 98, Zhu Shang Zong Geng 11 Ze No. 7 (2009). This is a faithful translation of the original text: “又檢查官訊問乃在發現真實，以其職務誠慎尚無求取供之必要，是檢查官偵訊筆錄具有任意性，即足認定。”

94 See Gaodeng Fayuan [Tainan Admin. High Ct.], 98, Shang Zong Geng 2 Ze No. 141 (2009). This is a faithful translation of the original text: “實務運作時，檢察官於偵查中向被告以外之人所取得之陳述，原則上均能遵守法律規定，不致違法取供，且經法定具結程序以擔保其證言之可信性，其可信度極高，被告並未提出有何顯不可信之情形。”
a bias. Individuals might have the capacity to resist the influence of organizational culture. But this does not mean the time lag before the defense can present its case has no bearing on the fairness of the trial. Constitutional Court ruling No. 737 clearly demonstrates the imbalance of information is a violation of the defendant’s fundamental right to a fair trial (Judicial Yuan Interpretation No. 737, 2016, April 29). It is hard to imagine the prosecution would tolerate it if the arrangement was flipped, such that the judge would immerse herself/himself for months solely in the defense.

During that time lag, a wrongly prosecuted case looks exactly the same as other capital cases — the defendant confessed. The police and prosecutor slack off after obtaining the confession, and so does the judge. Compare the defendants in Cases Nos. 3 and 11. They both “confessed” during the time lag, but later on, the former was taken by the Control Yuan, the chief prosecutor and the Prosecutors Office of Taichung to be wrongly convicted, while the latter was considered guilty beyond reasonable doubt.

Both the time delay that holds back the defense and the unity of judges and prosecutors hamper the judges’ ability to detect erroneous testimony. Mistakes — such as confessions coerced through torture, false statements given by codefendants out of conflict of interest, or misleading statements by the witnesses out of undue influence by investigators — have time to root in the judges’ minds. The exculpatory evidence has yet to surface due to the defense’s absence at this stage, so no information is available to reveal the mistakes. Therefore, chances are that the mistakes will not be spotted, but rather continue to the next stage.

B. Procedural errors at trial

The mistakes listed here regarding procedure are typically taken for granted as “protocol,” and considered neutral toward the prosecution and the defense. It may seem odd to characterize, say, “the order of investigation” as a “mistake,” but I argue what emerges from this research is that these seemingly innocent arrangements serve to strengthen the bias toward inculpatory evidence developed in the pretrial phase and to contribute to the accumulation of errors.
(1) Immoderate reliance on testimony

Mistakes from outside   Organizational culture   Mistakes by the court

• the order of evidence investigation
• unchanged habits
• immoderate reliance on testimony

Mistakes from outside

• The order of evidence investigation

There were no restrictions on the order in which evidence should be investigated until the Code of Criminal Procedure was revised in 2003. This revision stipulated that confessions by defendants should be looked at only after all the other evidence has been investigated. The reason for this revision was: “In order to prevent the judge from relying on the defendant's confession and forming prejudices, restrictions are imposed on the order of investigation of confessions deemed admissible as evidence. This revision is added in reference to Japanese Code of Criminal Procedure, Article 301.”

Organizational culture

• Unchanged habits

Despite this revision, many judges believe questioning the defendant is the fastest way to grasp the whole picture of the case. As soon as the defendant arrives at court, a pretrial detention hearing is held. In many cases, the judge questions the defendant about the details of the case during this session. In some cases, transcripts show the judge questioned

95 Article 161-3, “The court shall not investigate the confession of the accused that is admissible as evidence prior to investigating other evidence concerning the facts of the crime, unless otherwise specifically provided by law.”
96 The rationale for this revision can be searched in the database of the Legislative Branch at http://lis.ly.gov.tw/lglawc/lglawkm.
the defendants using the indictment paragraph by paragraph and asking the defendants to respond to the accusations.  

Old habits die hard. The court transcripts in this research show most judges interrogated the defendant in the first hearing — prior to the witnesses. The organizational culture has not changed in accordance with change to law. In practice, the order of evidence investigation is defendant—witness—physical evidence (the expert), be it before or after 2003. For example, Case No. 17, Difang Fayuan [Gaoxiong Admin, Local Ct.] 96, Zhong Su Ze No. 12 (2007), Case No. 43, Difang Fayuan [Jilong Admin, Local Ct.] 93, Zhong Su Ze No. 12 (2004) and Case No. 45, Difang Fayuan [Jiayi Admin, Local Ct.] 95, Zhong Su Qi Ze No. 2 (2006), just to name a few. All these occurred after the Code of Criminal Procedure was revised.

The order of investigation is shown in the court transcripts but not in the judgment. The court of the higher instance seldom goes into such detail, so this has never been a cause for a judgment to be reversed.

Mistakes of the court

- Immoderate reliance on testimony

Imposing restrictions on the order of investigation is meant to prevent the judge from relying heavily on the defendant’s confession. Ignoring those restrictions, naturally, causes the judge to rely heavily on the defendant’s confession. Defendants who were not coerced into confessing will repeat their confessions in front of the judge, which forms the judge’s first impression and cements a presumption of guilt. Other evidence is easily ignored even when relevant and present. Case No. 11 is mentioned earlier as an example of prosecutors relying immoderately on a defendant’s confession. The prosecutors could not be bothered to wait for the test results before proceeding with the indictment. The same attitude is shared by judges. The forensic test results matching the guns and bullets are in the court files at Taichung District Court, but the judges did not bother to incorporate the results into the judgment.

For those who were coerced into confessing, it may seem like discussing the confession early on offers an opportunity to assert their innocence in front of the judge and provide the first exculpatory evidence the judge lays hands on. Yet when the defendant’s claim of

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97 See Nos. 8 & 9, Difang Fayuan [Taizhong Admin, Local Ct.] 93, Zhong Su Ze No. 1042 (2004).
98 See court files of Case No. 11, Difang Fayuan [Taizhong Admin., Local Ct.] 94, Zhong Su Ze No. 3415 (2005).
innocence arrives at the court in isolation — i.e. without supporting evidence — its probative value is frequently underestimated. In Case No. 3, the defendant’s claim of torture was considered “a false one made simply with the intention of denying his prior confession.” The court not only dismissed it as deceiving, but used it as a reason for a severe sentence: “[The defendant] continued to indulge in sophistry after committing the crime and denied the offenses… Cheng does not have the slightest modicum of remorse and has great malice, so there is no room for sympathy or forgiveness.”

Judges have plenty of experience hearing defendants make false claims of innocence, so when a defendant claims innocence at his first hearing, truth and lie are indistinguishable: The liars and the truth-tellers all wrestle against the prosecution with words alone.

The order in which evidence is investigated appears trivial, just like all errors do at the beginning of organizational wrongdoing. Questioning the defendant prior to considering other evidence enhances the judge’s bias toward conviction when the defendant admits the crime, but not vice versa. The judge’s bias toward conviction does not dissipate when a defendant denies a crime. The defendant’s statement is taken into consideration only when it is inculpatory, while exculpatory statements will be dismissed or downplayed. Starting the trial by questioning the defendant helps reinforce the inculpatory evidence bias.

After questioning the defendant, the court will question the witnesses. This is partly out of custom, partly out of the fact that it takes time to obtain results from forensic tests on physical evidence. As with defendants’ statements, judges may dismiss witness accounts that are exculpatory as isolated evidence. A witness in Case No. 3, Hsiao Ruwen, gave an unfavorable statement in pretrial proceedings, but retracted it when questioned at the district court. Hsiao said the police had coerced her by blindfolding her, then hitting her head and kicking her backside. The judge asked her for medical proof of her wounds, instead of instructing the prosecutor to prove the admissibility of the account obtained by the police.

Eventually the judgment went: “Why is it that other people, like Wu Mingtang and Chen Jianqing, who were also seen as suspects and interrogated by the police at the time, did not report torture of any sort, and only Zhang Banglong and Hsiao Ruwen made such claims? Witnesses Zhang and Hsiao changed their accounts perhaps because they had

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100 Gaodeng Fayuan [Taizhong Admin., High Ct.,] 93, Shang Zhong Geng 2 Ze No. 33 (2004).
other concerns, as an attempt to protect the defendant. So the statements made on Jan 6, 2002 in front of the police are deemed credible.”

Hsiao’s claim is dismissed as isolated evidence.

After questioning the witnesses, the physical evidence comes next. In murder cases, physical evidence such as guns, bullets and bullet shells, knives, or DNA samples on objects like a rope, can rarely be linked to the case by inspection alone. Usually it takes an expert’s analysis to establish the relevance. Even in killings with eyewitnesses, such as Case No. 4, it takes an expert’s opinion to clarify whether the wound was done by pressing or swiping the knife to determine whether the action was murder or manslaughter.

The expert’s testimony is the interpretation of physical evidence using expertise. Although in the format of testimonial evidence, the expert’s opinion is supposed to be based firmly on physical evidence and forensic knowledge. This testimony is in essence different from the testimony of the defendants, codefendants and witnesses in the sense that it is scientifically verifiable and therefore enjoys a higher probative value than other testimony. The Taichung Branch of the High Court wrote in a judgment: “Non-testimonial evidence, such as documents, physical evidence and inspections, exist objectively and invariantly, while the authenticity of testimonial evidence is often influenced by uncertainties in both objective and subjective circumstances, such as the [testifiers’] memory, unique point of view, changing intentions, ability to express oneself, and omission of written testimony. So in terms of the establishment of facts, the probative value of non-testimonial evidence is usually higher than that of testimonial evidence…” The expert’s testimony is the oral presentation of the results of expert examination, and for that reason possesses the qualities and strength of the expert examination that the establishment of facts relies heavily on in today’s criminal justice.

An expert examination is to testimony what a trellis is to ivy: Without it, the testimony cannot stand alone. However, in practice, the judges hear testimony first and the expert examination later (be it a written test result or testimony by the expert who conducted the

103 See Gaodeng Fayuan [Taizhong Admin. High Ct.] 97, Shang Zhong Geng 7 Ze No. 13 (2008). The original text: “書證、物證、勘驗等非供述證據，具有客觀、不變易之特性，供述證據則常受供述者之記憶力、觀察認知角度、自由意志變化、表達能力程度及筆錄記載之簡略等主、客觀不確定因素，影響其真實性，是就認定事實所憑之證據以言，非供述證據之價值判斷，通常高於供述證據，倘經合法調查之供述及非供述證據，均存於訴訟案卷而可考見時，自不能僅重視採納供述證據，卻輕忽或完全疏略非供述證據，否則其證明力判斷是否正確即不無可慮之處。”
test). The judges’ understanding of a case is founded on testimony rather than expert examination. Take Case No. 41. In Remand 6, a report from an expert was submitted to the court as exculpatory evidence, but the judge decided the testimony of the codefendant was more credible and dismissed the expert’s assessment.\textsuperscript{104}

The order in which evidence is investigated is, in practice, testimonial evidence first, and non-testimonial later. Among the testimonial evidence, the judges hear the defendant’s first. Such an arrangement helps perpetuate the bias toward conviction by leaving the defendant to fight the prosecution with words alone. It reinforces the bias toward testimonial evidence that starts in the pretrial phase, and as a result, helps create a story based first and foremost on testimony instead of on scientific evidence.

(2) The fragmented presentation of exculpatory evidence

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\begin{tabular}{|c|c|c|}
\hline
Mistakes from outside & Organizational culture & Mistakes by the court \\
\hline
\textbullet discontinuous hearings & \textbullet heavy workloads & \textbullet the fragmented presentation of exculpatory evidence \\
\hline
\end{tabular}
\caption{Mistakes in the legal system}
\end{table}

Mistakes from outside

\textbullet Discontinuous hearings

Unlike the Anglo-American system, hearings for trials are conducted in a discontinuous, rather than concentrated, fashion. Before 2012, a case could be on trial forever, without any time limit. Case No. 46 has been on trial for more than two decades, with hearings spanning over 23 years. Since the Speedy Trial Act was adopted in 2012, stipulating that courts cannot detain defendants more than eight years, courts have been pressured to come to final judgments within that period of time.

Organizational culture

\textsuperscript{104} Gaideng Fayuan [Tainan Admin. High Ct.] 99, Shang Zhong Geng 7 Ze No186 (2010).
Heavy workloads

Judges in Taiwan’s criminal courts suffer heavy workloads. Statistics from 2005 to 2014 show that a district court judge handling criminal matters completes 56 to 80 cases per month\(^{105}\). At the high court, 17 to 37 cases\(^{106}\), and 14 to 21 cases at the Supreme court\(^{107}\). Delaying cases leads to worse evaluations, which affects a judge’s salary, benefits and promotion possibilities.

According to regulations, when a criminal case has been at the district court level for a year and the trial is still going on, the judge will receive an official notice from the head of the court to remind her/him that if the case is not complete in the following four months, it will be registered as a “delayed” case and information will be sent to the judicial branch’s administrative headquarters. A court with a high volume of delayed cases is considered inefficient, and the headquarters pressure the head of the court, who pressures the judges. For a complicated case it is possible to request a three-month extension. Most judges conform to the management and evaluation system, so among the 62 capital cases in my research, only Cases Nos. 6 and 45 exceeded the time limit at the court of first instance. It is worth noting that Cases Nos. 5 and 11 only took two months to hand down death sentences. The widespread “wisdom” among judges is that “every case can be completed within the time limit” (Chien, 2011).

Mistakes by the court

The fragmented presentation of exculpatory evidence

Since the hearings of any given trial are held in a discontinuous fashion, when a judge is dealing with a murder case, she/he handles dozens of other cases at the same time. Detention orders are good for two months at a time, so the interval between two hearings is usually two months. While the inculpatory evidence collected by the prosecution is pieced together into a crime story and presented to the judge in one go, the exculpatory evidence revealed at trial is dispersed, presented to the judges at two-month-or-longer intervals (because the defendant may not be able to produce exculpatory evidence at every hearing). This must compete with the dozens of other cases occupying the judge’s mind. The discontinuous hearings are, again, a seemingly innocent arrangement taken for granted by legal practitioners. But when viewed as part of a dynamic that also includes a time lag for


\(^{107}\) See [http://www.judicial.gov.tw/juds/year103/03/08.pdf](http://www.judicial.gov.tw/juds/year103/03/08.pdf).
the defense team, it is clear that trials are designed unfairly in the sense that inculpatory
evidence is presented as a story, but exculpatory evidence is presented in fragments.

The fragmented presentation of evidence weakens it and its power to the extent that
exculpatory evidence can be taken as inculpatory if not situated in the right context. In Case
No. 3, the defendant asked the prosecutor at the very end of the interrogation to examine
the counterfeit guns he had possessed. At the time, the prosecutor did not understand how
to read between the lines, and so the confession was woven into the indictment as
inculpatory evidence. Only later did the defendant have a chance to argue he had been
under threat of police violence, and that he had figured examining the guns would clear him
of suspicion. The “confession” to the prosecutor is in fact exculpatory evidence rather than
inculpatory. The defendant denied the crime rather than admitting it, and the fact that he
expressed himself in euphemisms is a strong indication that the “confession” was not
voluntary. This example shows that evidence is evaluated and interpreted in the context in
which it is presented. Ripped out of context, a carefully worded exculpatory statement can
be mistaken as an outright confession, inculpatory evidence.

(3) Unfair instructions from the judge

Mistakes from outside  Organizational culture  Mistakes by the court

- the prosecutor’s passiveness
- the judge’s dual role
- unfair instructions from the judge

Mistakes from outside

- The prosecutor’s passiveness

The prosecutor is active in the investigation, but after the indictment, the case is usually
assigned to other prosecutors, and from then on, these prosecutors play a passive role at
trial.
Before 2003, when Taiwan’s system was still inquisitorial, the prosecutors generally did not bother to attend trial hearings. The court transcripts simply bore stamps with text such as: “May the prosecutor please stand up and make a statement. The prosecutor stood up and said as documented in the indictment.” Another stamp read: “The judge announced the completion of the investigation. May the prosecutor please prosecute. The prosecutor stood up and said the crime is evident, please make a judgment according to the law.” Just like that, the absent prosecutor’s role at trial was fulfilled with two ready-made stamps.

Under the modified adversarial system, the prosecutor’s role has not changed much. The 62 cases in my research involve more than 400 trials (excluding the Supreme Court ones where no hearings were held). I found two exceptions in which the prosecution engaged in the trial process actively. Other than that, the prosecution submits zero documents to the court during the trial and remains passive in cross-examination. In many cases, different prosecutors were assigned to attend the hearings and do nothing more than occupy the prosecution’s seats.

Case No. 16 is an example of how passive prosecutors are at a court. In Case No. 16, two victims were tied up and pushed into a river. One of them, who had been raped, drowned. The survivor testified against the defendant, and the defendant’s attorney questioned the witness, “You said the defendant intended to harm you. Is that your speculation?”

The prosecutor remained silent and did not object to the use of the word “speculation.” The witness answered, “No.” The attorney went on: “You said the other victim was raped by the defendant. Is that your speculation?”

“No, she told me.”

“Do you hate the defendant for what he did?”

“Yes, I still hate him.”

“Are you exaggerating in your statement because you hate the defendant?”

The prosecutor remained silent, and the witness had to defend herself and denied it.

During the cross-examination, the prosecutor asked, “Having experienced the harm done to you by the defendant, is it possible that you speculated you might become a victim [of murder] too?” The defendant’s attorney had tried to discredit the witness by using the word

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108 They are Cases Nos. 8 and 9 (as one case), and Case No. 28.
“speculate,” but to our surprise, the prosecutor joined in the effort to paint the witness as speculative. The witness had no choice but to say: “It was not speculation.”

At the end of the debate, the defense lawyer submits a written document summing up the defense and piecing the information into a story in the defendant’s best interest. Meanwhile, the prosecutor usually simply repeats a standardized statement orally and submits nothing. Among the cases I studied, only a few prosecutors submitted written documents, but these papers bore strong resemblance to the indictments. Prosecutors barely exist at trial, and the trial barely exists in the closing documents she/he submits at the end of the trial.

One reason prosecutors are passive at trial is that they believe judges and prosecutors share the responsibility of collecting inculpatory evidence. In 2012, the Supreme Court announced that the court’s duty to investigate evidence applies to exculpatory evidence only. In response, Prosecutor Wu Xunlong launched a one-man protest against the Supreme Court’s decision, publishing a statement arguing his point: “Continental European countries believe that in order to explore the authenticity of a charge, the court is obligated to investigate ex officio as a supplement if the court is aware of the existence of evidence that may influence the establishment of facts, be it exculpatory or inculpatory.” Wu favors the European continental system over the adversarial system, because “both the prosecutor and the judge have the obligation to investigate the exculpatory and inculpatory evidence, so more evidence will be collected, which increases the opportunity to discover the truth (Wu, 2012 May 14).”

It is common for prosecutors to file appeals arguing the court has “failed to investigate what needed to be investigated.” When inculpatory evidence is insufficient, prosecutors consider it negligence on the part of the judge, not themselves. The ideal trial for the prosecutors is not adversarial — in which the prosecutor and the defendant are equal rivals — but rather one in which the judge and prosecutor team up to find enough evidence to convict the defendant.

Organizational culture

- The judge’s dual role

The affinity between judges and prosecutors underlies Taiwan’s judicial culture, as explained in detail in Section I of this chapter. Prosecutors actively embrace this and judges

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passively accept it and become accustomed to it. When prosecutors are passive in court, it is almost intuitive for the judge to step forward to fill in the void. As a result, the judge performs a dual role at trial — she/he is both the accuser and the decision maker. She/he is an accuser in the process and a decision maker at the end of the trial.

In addition to the long tradition of unity between judges and prosecutors, there are also cultural and practical reasons why the judge plays a dual role. The cultural reason relates to the legacy of Justice Bao, a semi-fictional character in Chinese-speaking culture. Justice Bao’s superpower of detecting criminals is one of the most popular themes in the contemporary TV and film industry, which makes him an essential figure in today’s legal culture (Liu, 1999; Chiang, 2006). Justice Bao is exceptional because of his ability to discover truth and carry out justice by delivering instant punishment, which dominates the image of an ideal judge even today. Judges have an obligation to be miraculous factfinders; it is their duty, the source of their glory, and a public expectation that they have to meet. Judges are to blame when judgments are found to be flawed. Burdened by the public’s expectations that they be like Justice Bao, contemporary judges may well set goals for themselves of “cracking the case.” Passiveness by prosecutors pushes judges to take up this responsibility on their own.

The practical reason is that the judge has to write the judgment, and a judgment in which the facts of the case remain unclear will be reversed by the court of higher instance, resulting in poor evaluations for the judge. Among the three parties at trial, the judge alone suffers the pressure of fact-finding due to her/his duty to write the judgment, in which her/his personal interest is involved. The prosecutor and attorney have personal interests in the case too, but their interest is to win, rather than coming up with a coherent narrative. Unlike their counterparts in the Anglo-American system, judges in the modified adversarial system may find the cross-examination insufficient for them to complete the judgment, and this drives judges to step into the investigation.

Mistakes by the court

- Unfair instructions from the judge

When the judge plays a dual role in the trial — as accuser and decision-maker — it hampers fairness because the judge may give biased instructions. For example, at the first trial in Case No. 3, the judge organized an inspection of the crime scene and summoned three police officers, two witnesses and the prosecutor. The defendant, as an important potential participant, was not included. Defendant Zheng Xingze requested to be present to
explain what happened that night, but the judge denied his request, saying it could be difficult to keep the defendant securely in custody. The defendant’s attorney was allowed to attend on his behalf. But without Zheng’s presence and his account of the situation of that night, it was impossible for the attorney to argue against the other participants. It was bound to be an ineffective defense.

Moreover, during the inspection, the judge instructed the prosecution’s witnesses to give statements on how the shooting lasted, and used these accounts as inculpatory evidence, despite the fact that the witnesses were not under oath and were not cross-examined.\footnote{See court files of Difang Fayuan [Taizhong Admin., Local Ct.] 91, Zhong Su Ze No. 549 (2002).}

Then, in Remand 2 of the same case, the court designated Central Police University to examine the bullets. When the results came out, the report was sent only to the prosecution and not to the defense.\footnote{See court files of Gaodeng Fayuan [Taizhong Admin., High Ct.] 93, Shang Zhong Geng 2 Ze No. 33 (2004).} This discrimination against the defendant clearly shows that the judge does not treat the defense and prosecution as equals. Unfair instructions at trial may have an influence on the results of the trial.

Case No. 37 is another example of a judge evidently taking up the role of public prosecutor and hampering the defendant’s right to a fair trial. In Remand 5, since defendant Xu Weizhan claimed his confession had been extracted by torture, the judge instructed the prosecutor to “show how to prove whether or not the defendant was tortured.” According to court transcripts, the “method” provided by the prosecutor was simply to ask the defendant to prove he had been tortured. When the defendant said the police had forced water up his nose, the prosecutor asked him to elaborate on how exactly they did it. Xu offered a detailed description, then the prosecutor asked him if it happened at every interrogation. During the hearing, the prosecutor and judge took turns questioning the defendant.\footnote{See court files of Gaideng Fayuan [Taiwan High Ct.] 94, Zhong Shang Geng 5 No. 27 (2005).} It is impossible to distinguish who’s who if one reads the conversation in the court transcripts; the judge and the prosecutor both played the role of accuser. In other words, the judge instructed the prosecutor to bear the burden of proof, but all that happened was the judge invited the prosecutor to question the defendant together on the issue of torture.

In Remand 10, the defendant’s attorney could not make it to one of the hearings because of a pre-scheduled meeting in the Philippines. Even though the attorney provided a flight
ticket, the judge refused to reschedule and assigned a public defender with no knowledge of the case to “represent” the defendant.

Also in Remand 10, defendant Xu requested to inspect the recording of one of the open hearings from Remand 5. According to the transcript, when defendant Xu cross-examined witness Zhang, the judge did not allow Xu to read Zhang’s testimony and blamed Xu for not preparing well for the cross-examination. At the insistence of Xu, the judge reluctantly agreed to read Zhang’s testimony, but Xu had to ask the judge several times: “Please read the sentence prior to what you just read.” Unnecessary obstacles were laid in front of Xu and he had no choice but to risk irritating the judge.113

In the 62 cases included in this research, it was common for the court to ignore or reject requests from defendants to investigate specific evidence. During Remand 1 of Case No. 3, the defendant requested that the court investigate the ballistics of the victim’s wounds. The judge simply ignored the request, announced the end to the investigation and ordered closing arguments. Then the court was adjourned.114 In Remand 2, the defendant’s attorney asked again, and the prosecutor said the crime scene had been remodeled, “but if the attorney believes that the defendant is innocent, please elaborate on the reasons, then request further examination.” She sounded like a judge making a ruling, while the real judge remained silent.115

Nevertheless, no investigation was conducted. In the judgment, the judge contends there is not enough information left to reconstruct the crime scene. This is flawed procedurally: The defendant was not given any opportunity to argue against such an assertion, and the court did not consult any experts on this issue. The defendant was ambushed. It is wrong in terms of substance, too: The information contained in the floor map and photos in the court files were indeed sufficient for reconstruction of the crime scene. This was later proven feasible by an architecture professor who built a 3D model of the scene at the request of the defense team.

113 See court files of Gaodeng Fayuan [High Ct.] 99, Zhong Shang Geng 10, No. 184 (2010). The conversation that happened in Remand 5 is absent from the court transcripts of Remand 5, because the court, as a rule, does not document hearings in a word-by-word fashion, but in a concise fashion. The court transcript therefore is an imprecise document of what really happened, and it is difficult to spot unfair instructions from judges. Case No. 37 is a rare exception in that the inspection of the recording was granted in Remand 10.
When the judge actively plays the role of accuser at trial, it is to be expected that she/he would tend to deny a defendant’s requests for investigation and deem them nothing but sly strategies. It is worth noting that, as argued earlier, the order in which evidence is investigated also contributes to unfair instructions from the judge. When inculpatory evidence and testimonial evidence reach the judge’s desk before exculpatory and nontestimonial evidence do, chances are high that the judge will develop preconceptions and feel more investigation is not necessary, because there is plenty of inculpatory evidence.

In Case No. 41, defendant Xie requested a second polygraph test and was rejected by the court, even though requesting a second chance is legitimate according to the American Polygraph Association’s protocols. Xie then requested to summon an expert witness, Dr. Shi, but was rejected again for the same reason: The court was satisfied with the inculpatory evidence and found further investigation unnecessary. Dr. Shi submitted a written opinion as exculpatory evidence, but this was ruled inadmissible by the court. Unlike the United States adversarial system, in which the two parties have equal access to evidence and the right to initiate examinations, defendants in Taiwan do not have either access to the evidence or the right to assign an expert. Therefore the order in which evidence is investigated — inculpatory first, exculpatory later — has a fatal impact on the fairness of trial. Procedurally speaking, it results in unfair instructions from the judge when the judge refuses to conduct an investigation requested by the defendant, such as the second polygraph test sought by defendant Xie. Substantively speaking, it results in the tragedy that exculpatory evidence, such as Dr. Shi’s statement, is deprived of an opportunity to be presented.

(4) Summary: Bias enhanced and handed down

The errors that happen in the course of the trial interact with each other and accumulate as the trial goes on. Imagine the trial as a basketball game with two teams competing against each other and a referee that enforces the regulations, and it will be comprehensible. Testimonial evidence enters the court first, and non-testimonial later. This is like having substitute players as starters, while the top players enter the game after the die is cast. Consequently, the judgment relies immoderately on testimony. Secondly, the inculpatory evidence is presented all at once, while the exculpatory evidence is presented in fragments.

\[116^{116}\] “Examinee’s Remedies: If a polygraph examinee believes that an error has been made, there are several actions that may be taken including the following: request a second examination”. It can be found at http://www.polygraph.org/polygraph-frequently-asked-questions.
This is like allowing one team to have five players on the court at the same time, while the other team is confined to sending in one player at a time. At any given moment, it is a game of five against one, even if each team technically has five players. Consequently, the probative value of exculpatory evidence is systematically underrated. Thirdly, the judge plays the role of both accuser and decision maker. This is like having a referee who cannot resist also coaching one of the teams. Consequently, the judge fails to conduct the trial in an impartial manner, and hampers the defendant’s rights. The bias nurtured in the pretrial phase toward inculpatory and testimonial evidence is likely to carry on at trial and solidify.

C. Substantive errors at trial

Unlike procedural errors that require explanation to be considered “errors” at all, substantive errors fit the bill of “error” perfectly. Substantive errors involve mismatches or inconsistencies in some form, and as observed in this research, they include errors in expert examination, errors in testimony and failure to collect evidence.

(1) Errors in expert examination

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Mistakes from outside

Mistakes in expert examination include the following: First, using imprecise or unscientific methods, such as DNA tests in the earlier days, polygraph tests, voice recognition and handwriting analyses. Second, experts are sometimes biased toward conviction, seeking conclusions that align with testimonial evidence or using misleading statements in their reports. Third, experts sometimes compromise the evidence.
Imprecise or unscientific methods

It is not unusual for DNA test results in old cases to be considered imprecise by modern standards. In the United States, 419 cases have been overturned with DNA evidence, including 26 cases in 2015 alone, according to *The Exonerations in 2015* report by the National Registry (National Registry, 2015, p. 5). In the 1980s, bloodstains could only be tested for blood type, such as in Case No. 25, in which a blood type match is no longer considered evidence beyond a reasonable doubt. In the 1990s, cases suffered from imprecision for similar reasons. Case No. 58, for example, relied on a DNA test using 15 pairs of chromosomes and No. 26 relied on a DNA test using 16 pairs of chromosomes.

Polygraphs are another heavily challenged method in forensic science. One of the strong opponents of the polygraph, Klaus Fiedler, has examined the validity of the prevailing Comparison Question Tests used with polygraphs and found that the arbitrariness of the polygrapher influences the interpretation of the results. Fiedler concludes polygraphs are a sham and not up to the standards of scientific psychology. Fiedler’s research led the Federal Constitutional Court of Germany to declare polygraph results inadmissible in criminal court (December 1998, BGH 1 StR 156/98 and 1 StR 258/98). Similarly, the U.S. Supreme Court adopted Leonard Saxes’ analysis to deny polygraph results as evidence (United States v. Scheffer, 523 U.S. 303).

In addition to polygraphs, voice recognition, handwriting analyses, fingerprints and certain tool mark interpretations have also become the targets of scientific scrutiny for lack of precision and objectivity.

The expert is biased toward conviction

As a rule, courts hand over the entire case file when they assign a case to forensic experts. This creates the possibility that the expert’s opinion will be contaminated by testimonial evidence, especially when the test methods are not strictly defined in a scientific way, thus allowing human prejudice to slip in. There are several examples among the capital cases in my research of knife analyses that violate the rules of forensic science:

- Cases Nos. 8 and 9: The expert states that the male victim “had many stab wounds and incision wounds. If the stab wounds were made with scissors as a weapon, then the incision wounds were not made with scissors as a weapon… So it is inferred that there are two murder weapons or more.” The expert did not explain why he believed one of the murder

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117 For more discussion, see Chapter Four, Case No. 41.
weapons was scissors, nor did he make such an assertion — the report puts it hypothetically. He leaves unexplained why the stab wounds and incisions cannot be made with a single weapon being wielded in more than one manner. As for the female victim, the expert believes that “in addition to the pair of scissors that was left in her ear/neck, the victim had many incision wounds caused by sharp weapons. Judging from the pattern, they were not caused by the V-shaped blades of scissors, but were caused by sharper weapons, so it is suspected that there are at least two murder weapons.” This inference is based on the fact that the wounds do not exhibit a V pattern, but it does not address the fact that a killer could easily hold a pair of scissors wide open so that only one of the blades actually hurts the victim. The expert reaches the conclusion of “two murder weapons” not because the patterns of the wounds suggest so, but because the defendants confessed as much.

- Case No. 41: In Remand 1, the experts believe there were two murderers, based on the direction of the stab wounds: “Summing up the analysis of the wounds and the testimony, the wounds of the victim came from three different directions, so there should be two murderers.” In Remand 3, the experts made it clear it was impossible to determine the number of killers only by the depth and quantity of the wounds: “But with other supporting information, such as the suspects or witnesses’ original statements, the number of killers can be inferred or excluded. That is the case for victim Zhang.”118 The experts admit their judgment came from testimonial evidence rather than forensic science.

- Case No. 16: The victim’s vagina did not show any sign of rape, but the report by the Institute of Forensic Medicine asserts that it is “very possible [the victim was] subjected to sexual violation before her death” based on the fact that her clothes were not intact after drifting in the river for hours before her body was discovered.119 The assertion is not based on forensic traces but on the witness’ claim that the victim was raped in a car while the witness was kept outside.

- Case No. 26: The expert even determined the number of killers based on the quantity of semen. The forensic doctor cited the defendants’ confessions in front of the police and concluded there were at least two killers because there was 20cc of semen left in the victim’s body.120 During cross-examination, the doctor reluctantly admitted that he had

118 Fa Yi Li Ze No.0950000409, 2006/02/09.
119 Gaodeng Fayuan [Gaoxiong Admin., High Ct.], 96, Zhong Shang Geng 6 Ze No. 64 (2007). The judgment does not take this report to be convincing.
120 See the court files of Difang Fayuan Prosecutors Office [Banqiao Admin] 83 Zhen Ze No. 1003 (1994).
come up with “20cc” only by eyeballing the fluid, and that the sample may have been a mixture of semen and other bodily fluid.

The examples above show that sometimes expert testimony is not based on scientific tests or experiments, but rather inference based on testimonial evidence. If in Cases Nos. 8 and 9, the defendants had confessed to using another kind of knife, the forensic report would have put forth a different assertion. In Case No. 41, if the codefendant had confessed to committing the crime alone, the forensic report would have concluded the victim was killed by one person. In Case No. 16, if the witness had offered a different statement, the forensic report would not have claimed the victim was raped; in Case No. 26, if the defendant had said he committed the rape alone, the report would have dropped its scenario regarding “two perpetrators.”

Sometimes the bias of experts is conveyed in the wording in the report and misleads the court toward a flawed legal decision. Take Case No. 41: The expert opinions in the second trial, Remand 1 and Remand 6 all insist it is not possible to determine how many people participated in the killing of the victim. But the report in Remand 1 phrased it thus: “It is not possible to rule out that the victim was killed by more than one person.” This implied “it is very possible that she was killed by more than one person.” A neutral expression would be “the number of participants in the killing can not be determined.” All judgments issued in Case No. 41 favor the expression used in Remand 1 rather than neutral ones because the biased expression better facilitates an impression of Xie’s guilt.

● The expert compromises the evidence

In Case No. 25, the coroner cut off the reproductive organs of the two victims and “preserved” them in formalin, which destroys biometric traces.

Organizational culture

● Unequal access to experts

As mentioned in the discussion of procedural errors, the current system for conducting forensic examinations does not put the prosecution and defense on equal footing. Most of the evidence is sent to labs during the investigation by the prosecution and/or the police. The designated labs all have strong affiliations with the prosecution and the police. The bullets, DNA, fingerprints, hair and blood samples are usually assigned to the Criminal Investigation Bureau, which is part of the Ministry of Internal Affairs. The Institute of Forensic Medicine — part of the Ministry of Justice — is usually asked to determine the
cause of death and interpret wounds on the body. Another assignee is the Investigation Bureau, also part of the Ministry of Justice. The defendant, meanwhile, has no access to evidence and examinations. When the defendant manages to obtain an alternative expert’s opinion on the evidence, it is nothing but hearsay — such as the aforementioned situation in Case No. 41 — unless the court agrees to subpoena the expert. This unfair battle between the prosecutor and the defense means inculpatory forensic results are admissible, and exculpatory results are not.

- Lack of forensic studies in legal education

The judge has complete discretion to determine the probative value of an expert examination. However, forensic knowledge is not part of the curriculum at law school and in pre-occupational training. Courses regarding interpretation and application of law are essential in the schooling and training, yet courses on evidence and fact-finding are not. As Foley points out, legal professionals learn about factual determination on their own, “without the benefit of an overarching pedagogy,” once they are apprentices to lawyers (Foley 2008, p.19). A good example is Case No. 41. The ruling in Remand 3 describes Xie as “abnormal in personality.” This description remained all the way until Remand 6, just because his polygraph test was “inconclusive.”

Together, the above-mentioned phenomena — an unfair battle between the prosecution and the defense and the lack of forensic studies in legal education — make judges vulnerable when receiving results from unscientific tests.

Mistakes by the court

In terms of the examination of evidence, errors made by the court include errors in law, errors in selection, errors in interpretation, errors in evaluation and errors in profession.

- Errors in law

As common practice, the court accepts written reports from forensic experts as an exception to hearsay and does not subpoena the expert to be cross-examined in court. Article 206 of the Code of Criminal Procedure stipulates that the expert will report the process and results of the examination either in written or spoken form. The experts are usually reluctant to take the stand. As a result, the court acknowledges the admissibility of

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121 Code of Criminal Procedure, Article 155, Section 1: “The probative value of evidence shall be determined at the discretion and based on the firm confidence of the court, provided that it cannot be contrary to the rules of experience and logic. Evidence inadmissible, having not been lawfully investigated, shall not form the basis of a decision.”

122 “An expert witness shall be ordered to make a report of his findings and results verbally or in writing.”
written reports and corresponds with the experts in writing if there are things that need to be clarified. There are at least two problems with this practice. For one, the correspondence may not clear things up effectively. In Case No. 27, the simple question of whether the bullets matched the confiscated gun remained vague after three rounds of correspondence. For two, the defendant’s right of cross-examination is obstructed or hampered. In Case No. 41, the defendant was directed by the court to write to the Institute of Forensic Medicine seeking clarification on a point, but the Institute refused to answer his question by letter. The defendant requested to subpoena the Institute’s expert, but the institute again refused. The expert’s report thus became a flaw in procedure — testimony that was not cross-examined. As stated in Difang Fayuan [Taoyuan Admin., Local Ct.] 94 Su Ze No. 1321 (2005), failing to have the expert take the stand “bypasses the principle of strict proof, the hearsay rule and the principle of direct trial in one go, and engages in immense violations of the right to defense.” Lin Yuxiong also argues it fulfills the principle of strict proof only when the expert takes the stand to report to the court orally (Lin, 2013, p. 564).

A procedural flaw like this may result in substantive errors. In Case No. 24, the court sought clarification in writing from the Criminal Investigation Bureau, but the agency wrote back letters containing statements different from the written report. Another example is case No. 41. The Institute of Forensic Medicine stated in both Remand 1 and 3 that victim Zhang was killed by two killers, according to “the original examiner.” But Zhang’s body was examined by Mao Junzhong, an examiner at the Tainan Prosecutors Office, not the Institute of Forensic Medicine. The Institute signed the letter without specifying whose opinion it was. Whoever it is, that person was not the assigned expert and his/her opinion is inadmissible and low in probative value because it is speculative. A flawed procedure results in substantive errors.

In the following sections, most of the errors arose when the experts did not take the stand.

- Errors in selection

The error in selection refers either to accepting unscientific evidence or rejecting scientific evidence. Examples of accepting unscientific evidence include Case No. 7, in which the

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125 See Tainan Municipal Police, 89, Jin 1 Xin Zhen Ze No. 635 (2000).
court accepted the length of the defendant’s feet as inculpatory evidence because the shoe prints at the crime scene did not match. In case No. 41, the court accepted polygraph results from a codefendant as inculpatory evidence. In case No. 46, voice recognition analysis was admitted as inculpatory evidence.

Case No. 41 is an example of rejecting scientific evidence. A forensic examination conducted for Remand 6 overturned the forensic opinion from Remand 1, but was rejected by the court. The coroner, Wang Yuehan, who performed the autopsy on victim Zhang, testified that one killer was capable of making 40-some wounds. The court rejected the validity of his opinion. The defendant’s clothes and motorcycle did not show any traces of blood, and a sound experiment was consistent with the defendant’s claims of innocence, but the court chose to ignore these facts.

Drawing comparisons between different cases, it seems courts decide the probative value of evidence based on whether it supports conviction or not. For example, in Case No. 38, the defendant claimed to be innocent, but failed a polygraph test. This was considered inculpatory evidence. Yet in Case No. 60, the defendant passed a polygraph test, in which she stated that the poison she had used came from her husband. The district court rejected the probative value of the polygraph for its lack of reliability despite the fact that the test was initiated by the district court.

- Errors in interpretation

Some judgments interpret test results in a twisted way. In case No. 26, Central Police University provided an expert opinion on gunpowder markings, saying it would take the original gun and bullet to determine the distance from which the victim had been shot. The judgment cites nearly the whole letter — then goes on to do exactly what the expert’s opinion suggested it not do: Speculate without any experiments using the original gun and bullets.

In Case No. 60, the defendant was accused of killing her mother-in-law, but the cause of death certificate issued by the hospital said she had had a heart attack. An expert from the Institute of Forensic Medicine testified he could not determine the cause of death based only on the victim’s medical records. When asked if he could exclude the possibility of sickness, he replied: “It’s improbable that her death was caused by illness.” The judgment uses this testimony as inculpatory to rule out the possibility of a heart attack.

- Errors in evaluation
Some judgments that exhibit bias toward conviction interpret inconclusive results as inculpatory and offer speculation on why the test would fail to reveal traces of evidence. This is a prevailing phenomenon worth a thorough analysis. There are many examples:

- Case No. 3: The defendant’s fingerprint was not found on the murder weapon, so the judgment assumes the gun was not processed immediately, the sampling was not done properly, and this is why the defendant’s fingerprint was not found. By doing so, the judgment rules out the possibility that the defendant neither touched the murder weapon nor committed the crime.

- Case No. 25: The victims’ vaginas bore no traces that could be linked to the defendant. The judgment assumes this is because the specimens were preserved in formalin, not because the defendant was innocent and did nothing to the victims.

- Case No. 37: The judgment asserts that the defendant attacked the victim with a taser and killed her. The autopsy showed no signs of electric shock, but the judgment assumes that it is because the body has decayed and so the signs have worn off, not because a false confession has been obtained by coercion.

- Case No. 41: The forensic opinion in Remand 1 states that “the possibility of more than one killer is not excluded.” That is, it is possible there was one killer or more. This forensic opinion is inconclusive, but the judgment repeatedly uses it as inculpatory evidence.

- Case No. 46: None of the defendants’ fingerprints were found on the ransom note, but the court refuses to take it as exculpatory, and even goes so far as to speculate that the defendants must have planned very well beforehand so as to avoid leaving any fingerprints.

- Cases Nos. 53 and 54: There was no blood on the knife sheath, so the judgment assumes the defendants must have cleaned the knife after the killing and before putting it back into the sheath.

With a handful of examples, it is obvious the courts commonly interpret inconclusive evidence as inculpatory, or refuse to consider it exculpatory. The court points to causes for doubt, suggesting there is perhaps some reason that no traces of evidence can be found. In other words, the court contends that inconclusive results do not meet the standard of strict proof, and therefore cannot qualify as exculpatory evidence. The following argument will show that this violates the presumption of innocence.

In each case, there is inculpatory and exculpatory evidence. If the court makes its judgment effectively by weighing inculpatory and exculpatory evidence on a scale, the
defendant must produce exculpatory evidence or might lose at trial even to a weak prosecution. The inculpatory evidence could weigh almost nothing and the prosecution would still win if the defendant has zero exculpatory evidence. This “scale” model compels the defendant to prove her/his innocence or else lose. It violates the presumption of innocence.

A court that practices presumption of innocence will instead examine whether the inculpatory evidence is strong enough for conviction. If the answer is no, the defendant is acquitted, even if there is no exculpatory evidence. The criteria for inculpatory evidence is an absolute instead of a comparative standard. That said, all exculpatory evidence impeaches by nature. Exculpatory evidence is not used to establish the defendant's innocence or the truthfulness of his defense, but rather to challenge the prosecution’s claims of guilt. Therefore, inculpatory evidence requires a standard of strict proof, while exculpatory evidence only requires a free proof standard.\(^{127}\) As long as the inculpatory evidence is challenged to the extent that reasonable doubt remains, the defendant should be acquitted.

When a test result is inconclusive, it means it can be interpreted as either inculpatory or exculpatory. An inconclusive result usually leads to a reasonable doubt one way or another: Why aren’t the defendant’s fingerprints on the gun? Reasonable doubt has it that the defendant never touched the gun. Why doesn’t the knife case have the victim’s blood on it? Reasonable doubt has it that the knife case has nothing to do with the victim’s death. The prosecution for sure will try to frame the inconclusive results as inculpatory, but such an attempt cannot withstand the scrutiny of a strict proof standard. For instance, if the results of a DNA test fail to rule out the defendant, this means it may or may not be the defendant’s DNA. This cannot be construed as inculpatory because there is a reasonable doubt. It can, however, be used as exculpatory, because the principle of free proof allows it.

**Hence, inconclusive results are exculpatory and can only be considered as such; any attempt to construe them as inculpatory or corroborating other inculpatory evidence violates the presumption of innocence.**

The “scale” model is inappropriate because it utilizes the same criteria to evaluate inculpatory and exculpatory evidence. The appropriate approach would be to examine

\(^{127}\) Regarding the idea that free proof is sufficient to impeach other evidence, see Zuigao Fayuan [Supreme Ct.] 96, Taishang Ze No. 7337 (2007), in Collection of Judgments of Supreme Court as Precedents, No. 55, pp. 510-515.
inculpatory evidence against a standard of strict proof and see if it remains beyond reasonable doubt even when challenged with contradictory evidence. Exculpatory evidence is a valid challenge if it stands the free proof standard.

Problematic capital cases are often even worse than the “scale” model, because they set a strict proof standard for exculpatory evidence and a free proof standard for inculpatory evidence. These cases not only require the defendant to prove his innocence, but also demand they do so beyond a reasonable doubt.

In Case No. 3, the defendant had gunfire residue on his right hand, but the Criminal Investigation Bureau explains that this residue could come from shooting a gun, holding a gun after someone else shot it, or even just being near the gun when someone else shot it. The test results are therefore inconclusive. Yet the judgment concludes: “The test results that found gunpowder residue are sufficient to support the fact that the defendant did shoot at the victim.” It explicitly uses the standard of free proof to evaluate inculpatory evidence.

However, a witness at the scene, Mr. Liang, says he and the defendant were sitting together and leaning against each other during the shooting. Liang’s testimony is exculpatory because it indicates the defendant did not walk over to the site of the shooting to fire the gun. The judgment says: “But the witness testified at trial that he did not open his eyes during the shooting. In other words, he did not see with his own eyes whether the defendant got up to do anything or not. The witness said so only based on the sensation of leaning against the defendant. Whether his senses are right is dubious… it is obvious subjective ‘sensations’ are not sufficient as exculpatory nor to impeach the above-mentioned inculpatory evidence.” The court explicitly uses a strict proof standard — a hilarious one — to evaluate exculpatory evidence.

Similarly, inconclusive results are taken to be inculpatory again and again in Case No. 41, and evaluated with a free proof standard. The defense provides three pieces of evidence that impeach the prosecution’s claims: (1) the codefendant was well-built and physically capable of killing two people in a row, (2) the coroner testified it would be possible for a single killer to stab 40-odd times, and (3) an expert in forensics offered examples of over-killing, in which a single killer commits multiple stabbings. But the judgment says: “It is difficult to conclude that Xie did not participate in killing victim Chen only because it is possible that Guo killed victim Chen.” It continues: “The questions proposed by Xie’s
attorney cannot rule out the possibility that victims Chen and Zhang were killed by more than one killer.” It is obvious that the court evaluated exculpatory evidence against the standard of strict proof.

In Case No. 46, on the one hand, voice recognition is used as inculpatory evidence even though the analysis was done on a 19-character sample (failing to meet the 40-character standard) and voice recognition is not considered scientifically precise. This shows the court evaluated inculpatory evidence using the free proof standard. On the other hand, the defendant provided a car rental receipt as his alibi. Though it showed the precise rental time, the judges seized upon testimony from the car rental owner, who had said in the previous trial that a rental slip might sometimes be signed when a car was returned, so the time indicated on the slip might not be the exact rental time. The court concluded the rental owner’s statement was “not impossible, so the signature cannot be used as exculpatory evidence.” It is evident the court evaluated this exculpatory evidence using a strict proof standard.

- Professional errors

Some judgments invent arguments when scientific tests are needed but unfortunately not possible. In Case No. 3, as mentioned in the procedural errors section, the defendant requested a crime scene reconstruction and ballistic comparison, but was rejected by the court. Here I will try to make clear that this procedural flaw led to substantive errors. When the attorney sent material to a 3D animator to reconstruct the scenario described in the judgment, the animator was deeply puzzled and murmured, “It couldn’t be done… with Luo Wuxiong sitting there, Zheng Xingze couldn’t possibly have squeezed himself in (Chang, 2013, p. 10).” This reconstruction would have been exculpatory evidence had the court allowed it, and it would have led the judges to correct professional errors.

A fallacy that repeatedly appears in court is the idea that many wounds must indicate multiple killers. In Cases Nos. 8 and 9, one of the defendants, Lu denied the killing. The judges wrote: “There are about 30 injuries — abrasions, wounds by sharp weapons, stab marks and cuts — how could it be possible that defendant Wu did it alone? Defendant Lu’s defense is obviously incompatible with the facts, therefore it is hard to believe.”

In Case No. 10, the judgment speculates there must have been more than two kinds of murder weapons because “the wounds are of different lengths, widths and depths, and some of them are identical.” It continues: “The victims were stabbed nine and 18 times respectively; the wounds are of more than two lengths, widths and depths.”
In Case No. 41, the prosecutor invented several arguments out of nowhere: “The butterfly knife used in this case by defendants Guo Junwei and Xie Zhihong is a knife without a fuller, which, when inserted into a human body, would meet with intense resistance from muscles. It would take considerable strength to pull it out. There were as many as 11 deep wounds in Chen’s body, which would take a lot of strength, so there should be more offenders than the defendant Guo Junwei.” It continues: “The wounds on the chest, abdomen and the back can be categorized as one in the abdomen, 1.5cm deep, others 4 or 5cm deep, and shallow cuts 0.8cm deep.… Judging from the fact that the strength used to create these wounds obviously varied, it is construed that the wounds were done by different people.” And more: “If all the wounds on victim Chen were done by Guo alone, it is obvious that in such a short time, exerting so much strength, Guo would not have understood or remembered Chen’s reactions. Yet Guo remembered Chen’s words clearly and was able to recite them.” It’s unheard of in forensic science to conclude the number of killers based on the number and depth of wounds or the ability of a killer to remember a killing. The judgments engage in speculation because a professional report is not available. This is often because of an external failure to collect evidence, which I will discuss later.

The errors in expert reports, like other errors mentioned before, accumulate on the trial production line. These mistakes occur outside the court — including the use of flawed methods and bias or negligence on the part of the expert. In an organizational culture where forensic knowledge is not included as part of legal training, and where labs often are affiliated with the prosecution, the judge is unlikely to resist and detect errors made by experts.

What is worth noting is that a variety of legal practices in the judicial tradition — such as not subpoenaing the experts and interpreting inconclusive results as inculpatory — contribute to the accumulation of errors. Common practices in the judicial system are part of the fallacy that results from prior mistakes and in turn produces more mistakes at later stages.

(2) Errors in testimony

As mentioned earlier, testimonial evidence comes from defendants, codefendants, witnesses and experts. The testimony of experts was discussed in the previous section. Here
is a discussion of testimony from the other three sources, and why the errors are not spotted and corrected at trial.

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Mistakes from outside

- False testimony

Testimony has inherent weaknesses. The authenticity of any given testimony depends heavily on the speaker’s willingness and ability to tell the truth. A codefendant might give misinformation either to dodge or to take full responsibility. A defendant might give misinformation to avoid punishment or to seek it. A witness might give misinformation out of self-interest. A speaker’s memories might not serve her/him well. Just as a prematurely born baby is susceptible to minor infections, testimony is vulnerable to manipulation because of its weaknesses. Misconduct by officials most often involves obtaining testimony through torture, threats, intimidation, blackmail, deceit, or by misleading the speaker or interrogating them in a state of fatigue.

In the literature on miscarriages of justice, false testimony tops the list of causes of wrongful conviction. What is worse, it is a mistake that cannot be eliminated. Reforms to pretrial investigation procedures could do the most to reduce misconduct by officials, but even this could not rule out the possibility of people lying intentionally in their statements or unintentionally remembering details incorrectly. Hence, one of the court’s duties is to identify false testimony. If the defendant was coerced into giving a false confession during the investigation, he or she will provide the true story at court. But the thing is, it is hard to
tell which version is truthful if the defendant has changed his story. So it is not exceptional for false testimony to pass all the court’s quality checks and end up in the final judgment.

Organizational culture

The power of storytelling

As mentioned earlier, legal education and training in Taiwan do not include learning about forensic science. Non-testimonial evidence, such as a gun, bullets, the crime scene itself and autopsy results, are difficult for judges to comprehend. Meanwhile, testimony is easy to understand and stories have a powerful influence on people’s perception. Previous literature on legal storytelling demonstrates that it has a decisive impact on judicial decisions, especially when the story contains vivid details (Chestek, 2012; Rideout, 2008). Hence, although in theory non-testimonial evidence should occupy a more important role in legal decisions, in practice judges often use testimony to construct the whole story of the crime, form understandings about the “facts,” and pick compatible non-testimonial evidence to fill out the story.

As mentioned earlier, testimony enters the procedure in the pretrial phase and forms the core of the judge’s understanding. Along the way, the court becomes increasingly invested in the story of conviction, which creates a huge challenge for the judge if the speaker changes his or her statement. The tendency to rely on testimony is manifest in this common expression: “The first statement outweighs everything else” (案重初供). There are thousands of judgments in Taiwan’s judicial databases that cite this principle explicitly. Yet if a defendant’s first statement was to deny the crime, but later he confesses — as was the case in Nos. 1, 23, 26, 27 and 44 — the court does not conclude that “the first statement outweighs everything else.” Legislator Gu Lixiong sums up the court’s use of defendants’ testimony: “When the defendant’s confession is compatible with the evidence, it is exactly correct; when it is incompatible with the evidence, it is meant to cause deliberate mystery; when the defendant denies first, then confesses, it is out of remorse; when the defendant confesses first, then denies, it shows the first statement was done out of free will. Various combinations, one conclusion: The defendant is guilty” (Gu, 2015 October 5).

Mistakes by the court

“Ivy judgments”
How to detect a faulty statement? Verify it with facts, of course. “Facts” refer to results of scientific tests, not other testimonial evidence. Testimony has inherent weaknesses and must rely on support from scientific tests like ivy climbs on a trellis. Without a trellis, an ivy plant can only creep along the ground. Two ivy vines creeping on each other do not allow either to climb tall. Mistakes made by the courts regarding testimony include: Type (1), using testimony to corroborate other testimony, which is like making ivy crawl on other ivy and hoping they will climb high; type (2), when testimony is incompatible with test results, giving it more weight than the results, which is like making the trellis lean on the ivy instead of the other way around; type (3), when testimony is incompatible with test results, interpreting it as a mistake in the speaker’s memory or perception and still using it as inculpatory evidence to convict the defendant.

Every miscarriage of justice is filled with such mistakes. In Case No. 3, the ruling relies on a coerced confession plus elicited testimony from a witness to establish a plot in which the murder weapon was handed over to the defendant. This is the type (1) mistake: Make ivy climb on ivy. This mistake is often intertwined with the type (3) mistake: The witnesses’ statements indicate the defendant got the gun at a time when he could not possibly have used it to shoot the police. The judgment concludes the witnesses must be wrong about the timing, yet uses their statements as evidence that the defendant had the gun during the shooting. Another example of a type (3) mistake is that the defendant confessed to using a counterfeit gun, yet the test results showed otherwise, and the judgment indicates the confession included lies, but it still cites it as inculpatory evidence.

In Case No. 41, the defendant had no motive, and his clothes, motorbike and slippers bore no bloodstains, but the judges used his coerced confession and a statement from his codefendant to convict him. This is a type (3) mistake. In Remand 6, an expert analysis demonstrated that determining the number of killers based on the direction of stab wounds runs counter to forensic science. But the judgment cites the codefendant’s statement as reason to reject that particular report. This is a type (2) mistake — valuing testimony over test results and using the former to negate the latter. When the codefendant’s statement did not match the test results, the judges attributed this to mistaken memory and still used it as inculpatory evidence. This, too, is a type (3) mistake. The defendant was coerced by police into confessing rape, and the confession was later revealed to be false, yet the judgment still uses it as inculpatory evidence. Again, a type (3) mistake.
In Case No. 46, there is no physical evidence related either to the murder of Ke or the murder of Lu. Both convictions were based solely by sewing together a patchwork scenario from the testimony of codefendants. This is a type (1) mistake. When the testimony of those codefendants heavily contradicted each other, the judgment simply ignored the inconsistencies regarding the locations where the murder occurred or the body was dumped. This is a type (3) mistake.

It is very common for the courts to adopt testimony unverified by any test results. In Case No. 10, the ruling relies on the defendant’s confession and codefendant’s testimony to make a bold speculation: “There were more than two different murder weapons, judging from the fact that the wounds were of different lengths, widths and depths.” Case No. 25 relies solely on the codefendants’ testimony, though none of it is verified, because the defendant was arrested long after his codefendants had been executed and all evidence lost. Case No. 44 convicts the defendant based on his codefendant’s testimony and the fact that he failed a polygraph test. In Remand 8, the defendant pleaded guilty in order to seek clemency under the Speedy Trial Act, only to be convicted and handed a death sentence. Case No. 45 solely relies on the testimony of the codefendant and witnesses, without even a shred of non-testimonial evidence. In Case No. 46, the dead bodies, murder weapon and crime scene were never found and thus there was no physical evidence to process. A story was nevertheless constructed based on codefendants’ testimony. In Cases Nos. 53 and 54, all physical evidence allegedly remains in China, where the crime occurred, so it was not investigated by the court and the witnesses in China were never cross-examined.

All the examples above can be considered “ivy judgments” — judgments that rely heavily or solely on testimonial evidence without the support of non-testimonial evidence. In ivy judgments, a testimony’s probative value is not based on its coherence or consistency, or the credibility of the speaker, but rather on its adequacy as inculpatory evidence.

As strange as it sounds, ivy judgments are hard to challenge. The defendants find themselves helpless. A dead codefendant cannot be cross-examined; a murder weapon that has never been found or has been lost cannot be re-examined. The defendants soon learn all they can do is say: “I didn’t do it,” or “the codefendant was lying.” Unfortunately, this sounds to judges like nothing but clichés. Gould et. al. researched 420 criminal cases in the U.S. and found that weak prosecution was difficult to overturn (Gould et. al., 2014). Imagine, for example, that a rape victim identifies a man as the rapist based on a glance in
the dark, and hair is found, but forensic tests cannot determine whether it belongs to the suspect. The identification and the test are imprecise, but do provide a probable base for conviction. If this is all the prosecution provides, the suspect has no way to defend himself other than his statement. On the other hand, if a case involves a strong witness identification or a DNA sample, then a truly innocent defendant has a chance to prove the witness is lying or request re-examination of the DNA (Gould et. al., 2014, p. 501). My study of death sentences in Taiwan echoes Leo’s research in the sense that cases with ambiguous evidence are more difficult to challenge than those with clear-cut evidence. For example, in case No. 46, a witness testified that the rope used by the kidnappers was 2.5cm in diameter, but the rope confiscated from one of the defendants’ houses was only 1cm in diameter. The judgment brushes off this inconsistency and cites the testimony as inculpatory evidence by simply assuming the witness misjudged the diameter when she glanced the rope hurriedly in the dark.

Case No. 45 exemplifies why it is extremely difficult to detect and correct mistakes in ivy judgments. The defendant, Wang Xinfu, is believed to have incited his codefendant, Chen Rongjie, to kill two people. The gun and bullets were recovered but could only be used to establish Chen’s guilt, not Wang’s, because Wang was believed to have committed incitement. Witnesses provided contradictory, unsatisfying testimony — half said Wang and Chen had been sitting far apart, and the other half said they had been sitting together and talking. Even this latter half remained ambiguous on whether Wang had instigated the killing. The evidence for instigation was naturally minimal, and since Chen had been executed long ago, the judges’ decision on Wang’s guilt depended solely on gut feeling.

I discuss procedural and substantive errors separately, but they are often intertwined with each other. For example, ivy judgments are flawed because they rely on substantively weak evidence. But parallel to that, they usually also include hearsay as inculpatory evidence, which violates due process. The reason is simple: Since non-testimonial evidence is not available, the judge is left no choice but to incorporate all available testimony as inculpatory evidence, regardless of whether it is admissible by law. So in Cases Nos. 26, 37 and 46, it was confirmed that the defendant had been coerced by police, but his confessions were nonetheless accepted as inculpatory evidence. In case No. 3, the ruling admits there is good reason to question whether the defendant freely confessed to police, but it nevertheless construes confessions made under continued threat of torture as inculpatory; in Case No. 41, the problematic interrogation by police was not documented with audio or video
recording. The judges cite it as inculpatory nonetheless, arguing that it does not violate the defendant’s right to defense. The judgments in Cases Nos. 10, 25, 45, 53 and 54 all accept testimony as inculpatory even though the source of the statement was never cross-examined. The criterion here for testimony is not the credibility of the speaker or the compatibility of the testimony with the facts, but rather the testimony’s potential to be inculpatory. If it meets that standard, it is accepted. If it has exculpatory potential, it is denied. In Case No. 41, codefendant Guo was caught fabricating an alibi and he had a documented history of drug abuse. Still, the court takes Guo’s testimony against his codefendant Xie as inculpatory nonetheless.

Very often, ivy judgments are the result of a failure to collect or preserve evidence. I will turn to this in the following section.

(3) Failure to collect evidence

The failure to collect or preserve evidence happens in the pretrial phase, but the mistake cannot be detected at that time, so I will include the discussion here. Unfortunately, even if detected at trial, the mistake cannot then be corrected. When the trial begins, the consequences of such failures are often a headache for judges.

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Mistakes from outside

- Reckless failure to collect evidence

Investigations commonly do not live up to the expected standard of precision. In Case No. 3, a police officer was shot in service, yet the case was handled recklessly. The first cop who entered the scene picked up four guns in the room and placed them on the sofa, meaning
the matter of who had the murder weapon remains unknown. The crime scene was sealed immediately after the shooting, yet dozens of bullet heads were missing and the spot where the bullet fired by the victim was found was not marked. We see the same failures in Cases Nos. 13, 24, 27, 39 and 40, too. These were also shootings and the crime scenes were sealed immediately, yet not all the bullets were recovered. The fact that Case No. 27 has been through so many remands is mainly due to a reckless failure to collect evidence when the crime occurred.

- Reckless failure to preserve evidence

It is also common that evidence is not preserved according to expected standards. The murder weapons in Case No. 25—a rod and an ash tray—are missing. A fingerprint sample is missing and there is no documentation regarding where in the room it was found. The reproductive organs of the victims were spoiled by soaking them in formalin. In Remand 3 of Case No. 26, it was found that the DNA sample did not belong to either of the defendants. It turned out the sample tested in Remand 3 did not belong to this case. How it sneaked into the case remains unknown. In Case No. 31, the crime scene was the defendant’s car, and the police returned it to the defendant’s family without conducting forensic tests. Additionally the audiotape of the call made by the kidnapper asking for ransom is missing. In Case No. 46, the audiotape of the ransom call is missing, too, and the two knives, animal syringe, men’s underwear and women’s shoes that were dumped near the dead body are all lost. All of the above are objects that investigators found but lost due to a reckless failure to preserve evidence.

Audiotapes of police interrogations seem almost destined to go missing. If a defendant claims he was tortured and requests the audio or videotape, the police reply they do not have it. The reasons they give include: The tapes were sent to the prosecution (but the prosecution insists they don’t have them either); the tapes were re-recorded or demagnetized; they went missing when the police station relocated, reconfigured, or flooded during a typhoon; or no recording was ever made. The only exception is Case No. 46. By sheer luck, some audio and videotapes were recovered, and these revealed that the police had yelled at and intimidated the suspects with vulgar and vicious words, and threatened to pour chili water into the suspects’ noses. The suspects begged, moaned and sobbed and the video shows that one of them was only wearing underwear during the interrogation. Meanwhile, two police officers are chatting in a tone of triumph about how they have “squeezed” the defendant to the point that he could not help but confess.
Organizational culture

- The weaknesses interact and reinforce one another

The previous analysis has revealed some of the prevailing weaknesses in the judicial system, and as the dynamic analysis moves downward along the production line, it becomes increasingly clear the weaknesses interact with one another and contribute to flaws in the product.

When the investigator fails to collect evidence, how does the court react? Who is put at a disadvantage, the prosecution or the defense? Theoretically, the failure to collect evidence is not the defendant’s fault, so any disadvantage should go to the prosecution to safeguard the presumption of innocence, which demands that the burden of proof fall on the prosecutor. But the organizational culture of the judicial system makes it a different story.

As discussed earlier, legal education in Taiwan does not address the importance of fact establishment, and leaves it up to legal practitioners to learn in a trial-and-error fashion once they are practicing law. The same applies to the forensic knowledge required to understand non-testimonial evidence about murder weapons, blood splatter patterns, etc, and what to make of expert opinions. Judges lack this knowledge, too. As shown earlier, the criminal justice system relies immoderately on testimony, and that results in a bias toward testimony from the very beginning of the trial.

When the external mistake of failing to collect evidence happens, it triggers a response from the judicial system that involves three weaknesses reinforcing one another. The judge primarily uses testimony to establish the facts of a case, and any lack of physical evidence to verify the testimony does not bother her/him. If the physical evidence has not been collected, no further tests can be done, and speculating on the narrative of the crime does not bother the judge. The observations in my research echo the literature on organizational wrongdoing: System failure is caused by the interaction of normal operations, and very often individual intent, greed or evil are absent from the equation. The following section contains real examples.

Mistakes by the court

- Tolerance of recklessness

The court often tolerates recklessness in the collection and preservation of evidence. The ruling in Case No. 3 explains that the police officer gathered up the possible murder weapons left at the shooting scene — in violation of standard operating procedures —
because he was scared that a person who remained lying on the sofa might try to attack. In Case No. 46, when it was discovered in Remand 11 that the knives, animal syringe and other key items had gone missing, the court simply rejected the notion that they constituted evidence in order to bring the case to a quick close. It is also common for judges to carefully craft the wording in their judgments so that such mistakes are less obvious. In Case No. 25, the judgment meticulously avoids stating that the rod is missing, but says instead that “a photo of the rod is being kept in the dossier as evidence.” Another murder weapon, an ashtray, was missing, too, and not even a photo remained, but the judgment does not mention this.

Recordings of police interrogations are almost without exception doomed to go missing. When a defendant claims to have been tortured, rulings use a number of tactics to insist the confession was voluntary. Firstly, the court subpoenas the police officers, asks them if they did anything illegal during the interrogation, and uses their denials as evidence against the defendant’s assertion. This happened in Cases Nos. 26, 37, 41 and 46. Secondly, if the defendant did not tell the prosecutor about the torture, the judgment uses this as evidence against his assertion. Such was the situation in Cases Nos. 26 and 46. Thirdly, quite magically, when a defendant retracts a confession at a later stage, the court considers this to be evidence that the earlier confession was voluntary. An example is Case No. 3. In the same vein, in Case No. 46, the judges argue three codefendants in the case did not confess while in police custody: “If the police engage in torture to extract confessions, how is it possible the other three were allowed to deny the crime? It’s obvious the defendants’ allegations of being tortured are not true.” Fourthly, the court throws out confessions that were manifestly extracted by force, but then uses other confessions in the same case as inculpatory evidence, ignoring the fact that the defendant remained under the ongoing influence of coercion. Cases Nos. 3, 37, 41 and 46 fit this description. Fifthly, judgments emphasize the good will of the police and prosecutors, as in Case No. 41: “Though the interrogations were not recorded, the investigators had no unlawful intentions, and this violation of law was not major.”

Reversing the burden of proof

Recordings of police interrogations, in this scenario, are inculpatory evidence and therefore should be the prosecutor’s burden of proof. But due to the affinity between the judge and prosecutor, the court does not require the prosecutor to do his job. Instead, it
urges the defendant to prove he was tortured. In Case No. 41, the judge asked the defendant: “How could we investigate it, since you did not tell us who tortured you?”

As argued earlier, inculpatory evidence provided by the prosecutor should be held to a standard of strict proof, while exculpatory evidence provided by the defendant should follow a free proof standard. In practice, however, the court only measures confessions to police against a free proof standard, while demanding any allegations of police coercion fulfill strict proof requirements. This is classic presumption of guilt: The burden of proof is reversed, and so are the principles of proof.

(4) Summary: A vicious circle consists of interconnected errors

The three substantive mistakes in trials are interconnected. The judges are not knowledgeable about forensic science, so they do not spot mistakes in forensic tests. Meanwhile, testimony appears on the judge’s desk from the very beginning, pieced together by the prosecutor into a coherent story with no rival narrative. Naturally, the judge tends to rely on testimony to formulate her/his understanding of the crime at hand. Furthermore, the recklessness in collecting and preserving physical evidence makes forensic tests impossible, which leaves the judge little choice but to rely on testimony even more.

D. The errors in remands

The point of having remands is to correct possible mistakes. But many cases show that the remand process generates errors instead of discovering and correcting them.

(1) The succession of errors

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Mistakes from outside

The remand is purely a process within the judicial system, so there are no new errors of external origin.

Organizational culture

- Trial de novo is not carried out

In a trial de novo, after a case has been remanded by the Supreme Court, it returns to the moment when the district court has made its judgment. The High Court is instructed to conduct its investigation from scratch. Taiwan’s design of three court levels plus a remand system is meant to enhance quality control of legal decisions by intensifying supervision from the courts of higher instance. However, a simple comparison of the rulings of different instances of the same case will demonstrate easily and clearly that each judgment takes most of its text from the previous ruling, with only some minor modifications on the points that have been raised by the Supreme Court. The court files show that remand trials are in fact never carried out as though “starting anew.” Only the points raised by Supreme Court get re-investigated.

- Job evaluations encourage conformity

The remand system does not fulfill its goal of quality control because the judicial system encourages judges to obey the legal opinion of the court of higher instance, and rewards them with benefits and promotion opportunities. Disobedient judges remain in the lower courts, while obedient judges rise to higher ones.

The evaluations that judges receive have an impact on their salaries and other benefits. A grading system of 0-100 is used, in which anything above 80 is an A and 70-79 is a B. A junior judge who receives a B on her/his evaluation will lose an estimated €1,500 a year, and a senior judge who receives a B will lose around €3,500 a year (Lin, 2004, p. 111). By regulation, the number of judges receiving A’s cannot exceed 90 percent of all judges, meaning at least 10 percent must receive B’s or lower. And hierarchy is evident in grading, although subtly: The head of the court may receive a 90, a senior judge with administrative duties typically receives 86-89, the presiding judge of each panel may get 84-85, and other judges 81-83. Among those who receive B’s, a score of 79 effectively means: “Sorry, but you had the bad luck of landing here to fill our 10 percent quota.” A 78 or lower means: “You deserve it and we mean it!” (Wei, 2014, p. 100)

In addition to these grades, several other marks purport to measure the judges’ job performance, including their “affirmed rate” and “subduing rate.” If a judge makes 100
judgments and 40 of them are reversed by the court of higher instance, her/his affirmed rate is 60%. If in 20 of 100 cases the plaintiffs choose not to appeal a judgment, her/his subduing rate is 20%. These marks are published periodically for each court without naming the judges individually, but each judge then receives her/his own mark in private, knowing that her/his superiors are informed, too. At Justice Inc., the higher the affirming and subduing rates, the better. The former means one’s superiors are pleased with one’s work, and the latter means the clients are satisfied with the judge’s work. Another mark is the number of pending cases. If a judge takes longer to handle a case than the duration allotted by the judiciary’s headquarters, the courts count it as “pending.” Needless to say, the lower the number of pending cases, the better. A judge with a high volume of pending cases is considered slow and inefficient.

Just like at any corporation, “what gets measured gets done.” It is not unheard of for judges to manipulate the grading system to achieve the best outcome. Delivering a light sentence for a serious felony is one of the tricks. It is meant to achieve a higher affirmed rate by making the defendant feel like she/he is better off not appealing. Delivering a severe sentence for an obvious but petty crime is another trick. This one is designed to induce an appeal, but the judge knows she/he will likely win it, because the court of higher instance rarely reverses a judgment only because of inappropriate sentencing (Huang, 2006, p. 8). It is difficult to determine whether these tactics are widely used or not, but it is common knowledge among judges that they should not challenge the legal opinions of higher courts, so as to minimize the possibilities their judgments will be reversed.

Work is very competitive at Justice Inc. As mentioned earlier, there are two sets of hierarchies: One is cohort, the other is court level (i.e. Supreme Court, High Court and district court). The peer pressure piles on as one member of a given cohort is elevated to the court of higher instance while another is “stuck” at the lower court. All the insiders know when someone is “left behind.” The Constitution guarantees lifelong employment for judges, yet what is involved here is not just salary and benefits, but also power and honor. This perpetuates the stability of the judicial system: The obedient ones outrun and eventually overpower the disobedient ones.

Mistakes by the court

- Old errors stay, new errors happen
There are errors that survive all the way through trial without being discovered. In addition to the previously discussed errors regarding forensic evidence and testimony, more examples are provided here.

In Case No. 3, 17 bullet shells from the police were found at the crime scene. When the test results came back, the shell numbered 8-1 was not listed. The prosecutor did not notice that only 16 shells had been confirmed as coming from the police’s guns. The district court judge found the error but did not send shell 8-1 to be re-examined. Instead, the judge listed it as coming from one of the police officers’ guns and indicated that the test results suggested so, even though that was not true. It is very likely the judge discovered the error while writing the judgment — that is, after the investigation of evidence and debate were already done. Re-opening the case and re-examining the shell would take time and risk going over the expected deadline. Such a mistake travels from the first to the last trial, because the successive trials mostly copy and paste the whole judgment from the first trial. The system of three instances plus remands is not successful at spotting the error.

Similarly, in case No. 60, the evidence confiscated included IV bags, an IV bag connector, and two syringes. In the Fact Column of the first ruling, the judges assert all these were used as murder weapons, but in the Reason Column, they say the syringes were disposed of and lost after the defendant used them. This contradiction travels from the first to the last judgment and remains unnoticed.

Sometimes the remand does not correct old errors, but creates new ones. As mentioned earlier, the last factual trial of case No. 27 contains an error about ballistics. That error had been corrected in Remand 3 but reappeared in Remand 7 and was finalized as such. Similarly, in Case No. 46, one of the codefendants, Lin Kunming, was put on trial starting with Remand 5 and accused of robbery, murder and disposing of the body. In Remand 7, the court concluded Lin stabbed the victim after she was already dead, so the charges against him should have been changed accordingly. Unfortunately no changes were made in the judgments and the error in this application of law remained undetected to the end.

High affirmed rate as the goal of the judge

Very often in the process of trying cases on remand, the High Court does not reconsider the case but only aims to have its judgment be affirmed. Case No. 2 illustrates this point. It is not clear whether there was direct or indirect intent to commit arson. The first trial says there was direct intent, and the second says indirect intent. The first remand says the intent was “direct” in the Fact Column but “indirect” in the Reason Column. Obviously the
Supreme Court was not content with this inconsistency, so the second remand refrained from being specific and just said “with intent.” The case was finalized after Remand 4, but the whole process was not about fact-finding or debating the application of law, but rather trial-and-error attempts to figure out how to get the Supreme Court to sustain the ruling.

When dealing with a serious case, the Supreme Court’s direct assignment system does not usually apply. Instead, the case is assigned to the same panel of judges if it comes to the Supreme Court more than once. This arrangement is supposed to guarantee the stability of the opinion of the Supreme Court, but several cases show this is not the effect. For example, in Case No. 27, Remand 3 found the police report wrong in stating the victim had been shot twice. The Supreme Court disagreed and reversed the judgment. Remand 4 insisted the victim was shot twice, but the Supreme Court again disagreed and reversed it. The High Court caved in and complied in Remands 5, 6 and 7, which eventually contributed to this fatal mistake appearing in the last factual judgment.

The system guarantees neither the quality nor the stability of Supreme Court judgments. Case No. 41 is an extreme example of errors made by the Supreme Court. When reversing the ruling in Remand 2, the Supreme Court “pointed out” a contradiction in the evidence: Codefendant Guo had said Xie stabbed the victim in the neck, but there were no wounds in the victim’s neck. In fact, this so-called “contradiction” did not exist; the Supreme Court’s ruling shows a misunderstanding resulting from carelessness. In the autopsy, under the section about internal wounds, the coroner recognized the victim’s neck had “no abnormalities,” but in the section on external wounds, he noted a huge cut. If only the Supreme Court judges had skimmed the autopsy report, they would not have missed the whole section on external wounds. And had they glanced at the photos of the crime scene, the huge wound on the victim’s neck would have caught their eyes.

III. Summary

From pretrial, to trial (procedural and substantive) to remand, this chapter has demonstrated the fatal flaws at Justice Inc. The raw material that Justice Inc. receives is riddled with all kinds of errors: fabrications, misinterpretations, biases, imprecisions and outright lies. One of the major missions of Justice Inc. is to detect these errors. Unfortunately, it is not equipped or configured to do so. Justice Inc. is a person with a flawed immune system living in a germ-infested world.
Research on organizational wrongdoing shows fatal errors begin as trivial, harmless episodes, but escalate over a process and interact with other irregularities, accumulating to the point of eventual disaster. Examining the process of decision-making in death penalty cases shows that the routine functions of the judicial system tend to foster the accumulation of errors and discourage their discovery and correction. Holding discontinuous hearings for any given trial, for example, is a seemingly harmless and neutral arrangement, but when we add to the equation the unity between the judge and prosecutor, the time lag for the defense, and the bias toward inculpatory evidence, it puts the defendant at a disadvantage. Furthermore, the mistakes do not occur randomly: The judicial system is biased in favor of the prosecution and against the defendant. This matches with what Perrow calls “normal accidents.” Perrow studies prominent accidents, such as a leak at a nuclear plant. Like miscarriages of justice, these organizations — be it a research center launching a space shuttle, or a nuclear power plant — are run by brilliant, well-trained, well-respected professionals, yet disasters happen in the course of their operations and cause great harm to people. The accidents are “normal” not in the sense that they happen every day, but in the sense that they result from normal functioning. The “normal accident” does not arise from exceptional violations of protocol, nor from criminal intent on the part of vicious employees. A “disastrous” day at the nuclear power plant begins exactly the same as a “non-disastrous” day in terms of the staff and the way they handle things and perform their tasks. It is just that most days things go smoothly, until one day some unexpected, trivial detail gets tangled up in the process and escalates into a disaster.

Similarly, at Justice Inc., a rightful conviction and a wrongful conviction are dealt with in the same manner, passing the same procedures, and being tried and judged with the same mentality. Cases Nos. 3 and 11 make for a good comparison: Both involved shootings, both defendants confessed to the police, both were proven to be present at the crime scene, and both had guns. In the pretrial phase, the prosecution was negligent about physical evidence in both cases. In case No. 3, the murder weapon was not taken to be processed for fingerprints, but the prosecutor indicted the defendant. In Case No. 11, the gun and bullets were not processed for compatibility, but the prosecutor indicted the defendant. Both indictments were based mainly on the defendants’ confessions.

When the cases reached the district court, the judges found in the files the defendants’ confessions, witnesses’ statements, photos of the victims’ bodies and the crime scenes, and test results from the guns and bullets. The only difference between the cases is that
defendant Zheng in Case No. 3 retracted his confession. But at the time, Zheng was forbidden from meeting or corresponding with anyone, including his attorney, so no exculpatory evidence could have surfaced other than his claim of innocence. His claim was isolated testimony without support. The judge could easily think Zheng was lying to avoid responsibility.

Two pieces of exculpatory evidence emerged at district court: The test results showed Zheng’s fingerprints were not on the murder weapon, and the physical examination report documented bruises on his left eye, which supported his claim of police violence. The court made mistakes in evaluating the evidence by applying a strict proof standard to the exculpatory evidence, but a free proof standard to inculpatory evidence. As a result, the court continued to use Zheng’s confession as inculpatory evidence. Zheng asked to participate in the inspection of the crime scene to tell his side of the story, but was rejected. This was an unfair action by the court and blocked exculpatory evidence from surfacing. At this point, his claim of innocence was no longer isolated but supported by the tests on the gun and the physical examination. Additionally, one of the witnesses, Zhang Bang-long, submitted his physical examination to prove the police had tortured him into testifying against Zheng. But the district court was biased toward conviction and Zhang’s allegation was omitted from the judgment.

At the High Court, the police officers testified against Zheng, and the chief inspector speculated Zheng could have taken two or three steps to get to the angle from which the bullets were fired. Their testimony was folded into the judgment as inculpatory evidence, and Zheng’s confession during police interrogation was replaced with a statement he had made to the prosecutor right after the police interrogation and possibly under the continuing threat of torture. The statement Zheng made to the prosecutor was incompatible with the test results regarding the murder weapon (as well as the number of bullets fired and the angle from which they were fired), but the judgment concluded the defendant was “purposely casting mystery over things.” The court easily swallowed a false confession even when it contradicted the facts of the case outright. The defense requested analysis of an unfired bullet found at the scene, but the judges had already developed a bias toward inculpatory and testimonial evidence, so they handed down a conviction without conducting the test.
In Remand 1, only one hearing was held before the case was closed. The defense requested a reconstruction of the ballistics comparison but the court ignored the request completely and wrapped up the oral debates. This shows vividly why the remand system fails to determine the facts or correct errors: The court is “invested” in conviction and as the procedure goes on, the court is less and less likely to conduct investigation, and more and more likely to assume any further investigation will not change the outcome of the case and is simply a waste of time. A similar mentality is visible when stockholders know the price of a stock is dropping but are unwilling to sell and instead dream of the day it will rebound.

In Remand 2, the defense requested testing the unfired bullet and doing a ballistics comparison. The court sent the bullet for testing, and informed the prosecution but not the defense of the test results, which showed that the court did not treat the two parties as equals and violated the principle of fair trial. The court denied the defendant’s request to reconstruct the shooting scene even when the prosecution had not voiced any objections, which showed that the judge was acting as opponent to the defendant. The court based its decision on the presumption that there was not enough information to do the reconstruction, but this proved to be an unprofessional conclusion and once again missed the opportunity to correct the previous errors underlying the conviction.

The Supreme Court finalized the ruling in Remand 2 and afterwards all petitions for a retrial or special appeal failed. A finalized death sentence is the judicial system’s ultimate investment in conviction and is one with no return.

These errors accumulated to contribute to a wrongful conviction in Case No. 3, but the handling of that case was indeed no different from Case No. 11. There lies in the court files of No. 11 a test result that matched the gun and the bullets, but the court was satisfied with the defendant’s confession and thus ignored the result completely. The court’s reasoning is the same in both cases: The defendant confessed, he was there, he had a gun, the victim was shot with a gun, so the defendant did it. Case closed.

It may seem to readers that judges are to blame for the accumulation of errors as well as for the mistakes in the final decision. However, research on organizational wrongdoing shows that all too often, when “normal accidents” occur, human error is overestimated. A disaster usually starts with some trivial irregularity that is common and unavoidable in this imperfect world. But the detail snowballs, and when employees are faced with the irregularity, there is not enough information to take the correct action, even if it seems
obvious in hindsight. Only in hindsight one can conclude with confidence that the employees should have zigged instead of zagged, yet blaming the staff would be scapegoating them.

The magic of organizational wrongdoing is that the irregularities accumulate over a given process incrementally, a little bit at a time. A drastic change would trigger alarms for the judges, making them cautious and suspicious, but when it is all incremental — especially since, as argued above, much of the problems are part of accepted routines and therefore viewed as regularities rather than irregularities — it is predictable that the investment in conviction remains unchallenged and is strengthened over time into a solid belief.

The conviction in Case No. 3 accumulated errors incrementally. In the beginning there was the failure to preserve the crime scene and collect the evidence, plus wrongful confession and testimony. The judge conducted the trial with a bias toward conviction, which ruled out the possibility of collecting exculpatory evidence and led to a wrongful conviction.

The principles used in handling Cases Nos. 3 and 11 are no different, but the former resulted in the most serious violation of human rights — sentencing an innocent person to death — and the latter resulted in a rightful conviction. What makes the results different? In Case No. 3, the police arrested the wrong suspect, and in Case No. 11, the police arrested the right one. Once the police suspect someone, they use coercion to extract a confession, which in turn leads to a confession in the presence of a prosecutor. The confessions constitute the framework that the judge uses to understand the crime. Evidence that facilitates the framework is adopted and accorded high probative value, but if the defendant requests any tests on the evidence that could challenge this framework, the judge refuses because she/he does not believe any evidence could challenge it. The comparison of Cases Nos. 3 and 11 shows that when the mistake of apprehending the wrong suspect happens, the court is not capable of identifying it and correcting it. Case No. 11 was a rightful conviction because the mistake of catching the wrong person did not happen in the first place.

The process of decision-making at Justice Inc. is characterized in this chapter as an incremental investment in conviction, instead of quality control and correction of errors.  

A similar observation is made by Richard Leo and termed “tunnel vision”, but the phenomenon is not presented as systematically in favor of the prosecution, nor clearly presented as a dynamic process in which the incremental change facilitates the escalating investment in conviction.
This chapter presents two arguments regarding this incremental investment in conviction: Firstly, the vision of the judge is biased toward conviction because of the affinity between the judge and prosecutor and routines of the trial in practice. Secondly, the bias grows and evolves into a conviction over a gradual process, and this incremental escalation consolidates the judge’s confidence in her/his vision. The escalating investment prevents Justice Inc. from fulfilling its most important calling — discovering errors and correcting them.
Chapter Six

Mistakes Happen

I. Mistakes happen

Popular belief has it that the death penalty is the ultimate punishment for exceptional evil. People often think about it like this: “If the sentence is death, the defendant obviously must have committed the crime. Judges are meticulous with those cases because it’s a matter of life and death. So if somebody gets that sentence — he must deserve it.” This belief is expressed in the Chinese proverb “鐵證如山” — literally, iron evidence like a mountain. “Iron evidence” means solid and indisputable proof; “like a mountain” means there is so much of it that it piles that high.

By analyzing capital judgments, I have found the reality of the death penalty is very different from popular belief. My research reveals this by analyzing capital judgments both statically (scrutinizing their content) and dynamically (scrutinizing the processes that produce them). In Chapter Four, I argue that death sentences in Taiwan tend to offer a one-sided crime story in which the defendant does not deserve mercy (even if the court files suggest there is cause for it), and that in a considerable number of the cases, it’s unclear whether the stories put forth by the court are true. In Chapter Five, I argue that capital judgments are produced through a process in which bias toward inculpatory evidence and testimonial evidence accumulates incrementally, leading to a one-sided story unfavorable to the defendant. Contrary to popular belief, my research demonstrates that capital cases do not necessarily rely on “iron evidence,” nor proof piled up “like a mountain.” At times, what I have termed “ivy judgments” are observed, relying on shaky testimony.

Mistakes happen and persist in capital cases. Sometimes they cause Justice Inc. to commit the most serious violation of human rights — putting an innocent person to death. In other cases, they lead to anything from minor procedural defects to an unfair trial.

II. Suggestions for Justice Inc.: Technical ones and fundamental ones

Based on research findings in Chapters Four and Five, the bias toward inculpatory and testimonial evidence is central to the errors made by Justice Inc. I propose the following suggestions to improve Justice Inc.’s capability to conduct a fair trial that produces a
convincing judgment to build public trust. The central task here is to counteract the bias toward inculpatory and testimonial evidence.

A. Indictment without dossier

The bias toward inculpatory evidence starts with the dossier the judge receives at the beginning of a case. The first step to prevent the bias, therefore, is to make sure the judge is exposed to both the inculpatory and exculpatory evidence almost at the same time. The prosecution should submit the indictment, instead of the complete dossier, to the court, and the court can schedule a preliminary session where the prosecution and defense each reveal their inculpatory and exculpatory evidence. As criminal procedure in Taiwan transitions from an inquisitorial to an adversarial system, this pretrial arrangement should also follow the Anglo-American model of Disclosure of Evidence.

Taiwan’s judicial reform advocates have been advocating for “indictment without dossier,” and the Legislature acknowledges the merits compared with the current “indictment with dossier” arrangement. When it revised the Code of Criminal Procedure in 2007, the Legislature reached a decision that “in seven years, Taiwan’s courts should shift to ‘indictment without dossier’ (Legislative Yuan, 2012).” But this already-agreed-upon reform has never taken place. Considering the analysis in Chapter Five of its disastrous impact on the fairness of trials, it is necessary to bring this issue to the public’s attention and urge the judicial system to make changes.

B. Continuous hearings

Since revisions to the Code of Criminal Procedure in 2003, preliminary proceedings have been scheduled. It is feasible to conduct trials in a concentrated, continuous manner that helps improve their efficiency. Furthermore, Taiwan’s judicial branch is piloting an advisory jury system that allows laypeople to participate in the trial, sit with the judges and ask questions but have no vote in the decision-making. For this, concentrated trials would be necessary, since laypeople cannot be kept in isolation for a long time to serve in court.

C. Reforms regarding expert examinations

As analyzed in detail in Chapter Five, the use of expert testimony as evidence must be improved to avoid errors. Suggestions include:

(1) Peer review of the expert’s evaluation: The expert’s examination needs to be double-checked to provide a possible second opinion for the judges. Gould et. al. point out that

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expert errors “are often the result of an accidental or subconscious bias that occurs when the scientist is tainted by knowledge of the state’s case against the defendant. To combat such tendencies, increased internal and external review should be more common among forensic labs. In fact, labs should establish a schedule of regular full reviews (Gould et. al., 2014, p. 512).” Ideally, Taiwan should establish labs independent from governmental agencies like prosecutors offices, police departments, and the Investigation Bureau, but this would involve a vast amount of money, equipment and well-trained personnel. Peer review is a cheaper solution and can be carried out as an intermediate goal before independent labs are founded.

(2) Access to the evidence: The defense should be allowed to obtain the evidence whenever this does not hamper the prosecution from conducting its investigation. Then the defendant should be allowed to hire an expert whose conclusion favors him. A fair trial should allow the opposing parties to utilize weaponry in an equal manner.

(3) Basic forensic science as part of law school education: When evaluating the probative value of evidence, the judge needs to be equipped with forensic knowledge to make good judgments. Given that pseudoscience surfaces at court — such as polygraph test results, voice recognition analysis and sheer speculation — incorporating forensic science into the education and training of legal professionals is essential to improve the rectitude of judgments.

(4) Demand oral reports from the experts: Allowing and using experts’ written reports as evidence compromises the principles of direct trial and strict proof, and at times causes confusion and mistakes. A new convention should be established, in which experts assigned by the court to do written reports also take the stand to give oral testimony. This duty would be waived only under exceptional circumstances and would allow the defense to raise questions about test methods, problematic wording, sample details and advancements in science and technology. For example, the defense attorney in Case No. 46 could have cross-examined the expert who submitted the voice recognition analysis about the adequacy and credibility of the work. In Case No. 41, the defense attorney could have addressed the misleading wording in an expert report by getting a neutral, scientific statement during cross-examination. The attorney in Case No. 25 could have asked the expert on the stand where a fingerprint presented as inculpatory evidence had been found at the crime scene.
And in Cases Nos. 26 and 58, the lawyer could have cross-examined the expert about the probability of false DNA results, given that the science used was already outdated.

D. Order of investigation

The court should investigate the case such that non-testimonial proof comes before testimonial evidence; and evidence aside from defendant confessions precedes those confessions. Information that enters the trial at an early stage has a privileged position in the formulation of the story. Since non-testimonial evidence is usually objective rather than subjective, stable rather than unstable, scientific rather than speculative, and verifiable rather than unverifiable, having this type of evidence investigated and presented at court first would help improve the judgments.

E. Format of the judgment-writing

Here I will spend some pages illustrating the points proposed by Professor Hsu Yu-Hsiu, a former justice of the Constitutional Court of Taiwan. Her main argument is that by setting a format for judgment-writing, legal decisions would be required to conform to guidelines that ensure a fair trial based on solid determination of facts (Hsu, 2013).

Hsu’s argument can be summarized as follows. The credibility of the judicial system comes from the judgments it produces. The credibility of the judgments, in turn, come from establishing facts and a sentence that correspond with reality. The content of judgments is stipulated in Article 310 of the Code of Criminal Procedure: “The reasons of a written judgment of ‘Guilty’ shall, depending upon the circumstances, include the following: (1) The evidence on which the facts of the offense are based and the reasons therefor; (2) Where evidence favorable to the accused is not relied upon, the reasons therefor; (3) The circumstances specified in Article 57 or 58 of the Criminal Code which justify the exercise of discretion in imposing a sentence; (4) Reasons for increasing, reducing, or remitting a sentence; (5) Reasons for commuting a sentence to a warning or for suspension of sentence; (6) Reasons for pronouncing a measure for rehabilitation; (7) The applicable law.” This list, in Hsu’s opinion, is too abstract to serve as guidelines and does not exhaust the requirements needed for a judgment to be credible.

Hsu aims to provide a concrete format for judges to follow. Firstly, judgments should include a list of evidence and the judge should clearly state which items are missing, what is the order of importance of evidence, and the percentage of testimonial and non-testimonial evidence.
Secondly, these lists should prioritize non-testimonial evidence because it has higher probative value in most circumstances. More resources should be used to investigate non-testimonial evidence, and the risk that evidence has been lost should be taken into consideration.

Thirdly, the process of investigating evidence needs to be explained in the judgment. This way, if the investigation unfortunately fails to collect some important evidence, or the court fails to preserve some important evidence, the mistake will be discovered earlier. By noting the lack of evidence, the judge will have a better understanding of the case and can make the judgment accordingly.

These three steps can be seen as preparation for writing the judgment. With a list of evidence in order of importance and an awareness of what is absent from the list, the judge then needs to link the establishment of facts explicitly to the evidence. This way the judgment can be reviewed and checked to see whether the evaluation of evidence was coherent or not and whether the arguments were based on evidence or speculation.

Such a suggestion aims at making the process of trials transparent by demanding the judgments be written in a format that reveals which specific evidence is used to establish which specific facts. This transparency will force the judge to follow due process and presumption of innocence, be it in instructing the proceedings, establishing the facts, formulating arguments, or writing the judgment.

This suggestion regarding the format of written judgments is a procedural requirement, but would help enhance the substantive quality of the judgment. As analyzed in Chapters Four and Five, some of the judgments included in my research show an immoderate reliance on testimony and fall into the category of “ivy judgments.” If the judge adopts the format suggested above, it will expose judgments that rely solely on testimony, and the chances are better that it will set off alarms during the quality check process at Justice Inc.

To set up a new format may sound like a mere technicality. Nevertheless, I would like to put stress on the importance of this suggestion considering the unique organizational culture of Justice Inc. As shown in Chapter Five, the judges-to-be are trained to write the judgments in a highly standardized way, and the instructions given are detailed and easy-to-follow in Practical Basics of Writing a Criminal Judgment. The traditional writing style has been internalized by the judges as an essential part of their everyday practice; therefore, only an alternative standard operation protocol that serves to replace the existing one can push the
judges out of their comfort zone and effectively change the mentality of, say, the immoderate reliance on testimonial evidence.

To summarize the above suggestions, if the courts adopt recommendations A and B, the time lag for the defense will be eliminated, and the injustice of fragmented presentation of exculpatory evidence will be corrected. The procedures of the trial will not foster bias toward inculpatory evidence and will not give privilege to either of the two parties. And by adopting C, D and E, the courts can tackle procedural and substantive errors: Non-testimonial evidence will be weighted to balance immoderate reliance on testimonial evidence. This will not eliminate errors in expert examination and testimony, but measures C, D, and E can increase the chances of detecting the errors.

Several violations of ICCPR involved in the death penalty in Taiwan which should be corrected before the final abolition of the death penalty. Necessary measures include: an independent procedure for the sentencing after the guilty verdict; clear guidelines for sentencing specifying aggravating factors and mitigating factors, in order to eliminate arbitrariness; aggravating factors require strict proof; and an oral session with the presence of the defendant; to say the least. The Amnesty Law fails to safeguard the defendant’s right to appeal, which is also a violation to ICCPR Article 6, section 4: “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.”

More profoundly, based on my research findings, I would like to point out the direction Justice Inc. should take. As argued in Chapter Five, the unity of the judge and prosecutor penetrates the organizational culture at Justice Inc. and enjoys an intense impact on every aspect of Justice Inc. Since organizational wrongdoing often goes beyond individual agency, arising instead from the unique setting of organizational culture, the larger picture has to change if Justice Inc. intends to reduce the risk of organizational wrongdoing. Judge and prosecutor should be viewed as two separate roles, and the qualifications and pre-occupational training for judge and prosecutor should be different. That said, the recruitment path of the judge and the prosecutor should be separated as two different exams. Otherwise, the flow of personnel between these two roles just seems natural because they have the same qualifications and training. Furthermore, I strongly suggest abandoning the practice of pairing teams of judges and prosecutors to guarantee the judge’s neutrality toward the prosecution and defense.

Among 62 cases, 10 of them contained serious flaws at the core of their narratives. Well-cited statistics show a similar ratio: In the United States, for every seven executions since
1976, one death sentence has been reversed (Vago, 2016, pp. 210-211). The finding in my research is that nearly one out of six of death sentences is seriously flawed. And it is worth noting here that it is no guarantee the other 52 cases are flawless. As documented earlier, in addition to those 10 problematic ones, many other cases contain procedural or substantive errors. Moreover, it is likely I could not detect some wrongful convictions because of the lack of information. Not all the court files were available for the cases, and so far no one has found a 100% accurate method for detecting miscarriages of justice. It is safe to say at least 10 of the 62 cases were problematic, and that we will never gain the confidence to claim there were only 10. When the abolition movement holds up a wrongful conviction as an example, it often challenged with the assumption that the case in question was just an unfortunate exception, and that an exception should not be generalized. Research into miscarriages of justice demonstrates the percentage of wrongful convictions is high enough to generate serious concerns about the death penalty, and my research shows errors do not just appear in problematic cases, but in many others, too. Errors exist in death sentences as well as in other legal decisions made by Justice Inc.; they exist not as exceptions, but as part of the routine. Errors are normal rather than abnormal.

My research findings suggest the death penalty should be abolished, if not for the sake of human dignity, then because humans have not been able to develop a mechanism that can guarantee accuracy in imposing an irreversible punishment. Considering that life sentences are effective at preventing incurable, violent perpetrators from committing more crimes, the death penalty poses an unnecessary risk of taking innocent lives and should be considered excessive.

III. The contributions and challenges

Both the death penalty and miscarriages of justice are heavily researched topics in the academic world. My research attempts to use cases from Taiwan — a democracy where information is transparent enough to offer great opportunity for observation, at the same time that many imperfections remain in the judicial system following the country’s 40 years under martial law. It is like St. Martin’s fistula, both sick enough and healthy enough to be observed, to extend our knowledge and to explore for new perspectives. Being fully aware

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131 Regarding the argument that the death penalty violates human dignity, see Chapter Four, Section III, The moral of the story.
that the academic community is a huge talent pool, I would like to mention what this research may contribute to academia and what limitations it bears.

Firstly, the methods developed in my research may be applied to other legal or social research and bridge the gap between these two disciplines. As mentioned in Chapter Two, very little literature regarding the judicial system in Taiwan deals with the judgment itself. It seems the legal scholars are not familiar with the methods of social sciences, and social scientists are alien to legal texts and terminology. The chunks of text in the judgment appear intimidating to researchers from both sides of the academic arena for different reasons, and this results in a dearth of research. In my research, I came up with the idea of reducing the judgment into a summary for further analysis and identifying the evidence chain in murder cases. The goal was to spot the judgments that have serious flaws at the core of their narratives. Considering that fact establishment is poorly taught at law schools in Taiwan and many other countries, the methods used in this research may serve to counter this neglect and spur more discussion and research on fact establishment.

Secondly, in addition to describing the problems with death sentences in Taiwan, my research explores the reasons for these and situates the judgment within a dynamic process rather than just scrutinizing a static document. While giving a talk about the errors in Case No. 3, I often found the audiences were in shock: They were surprised to learn the death penalty was not what they thought it to be and were torn apart by this cognitive dissonance. On one hand, they believe courts to be the ultimate hope for social justice, but on the other, they were learning about an example to the contrary. These chaotic feelings generate confusion: “How can this happen?”

In most instances of organizational wrongdoing, people tend to attribute the disastrous results to human error and fail to see the structural problems (Perrow, 1984). The popular belief in Taiwan about miscarriages of justice also falls prey to this fallacy: Errors of the court are interpreted as mistakes by lousy judges. The term “dinosaur judge” is widely used by the media, referring to judges who fail to produce judgments compatible with public opinion.

The dynamic analysis in my research is an attempt to formulate an explanation that, on the one hand, does not oversimplify organizational wrongdoing as human error, and on the other, eases the public’s cognitive dissonance when learning about miscarriages of justice. It is an eternal debate in sociology between “the agency approach” and “the structural approach”: When a flawed conviction is spotted, who is to blame? The judges, or Justice
Inc.? It reminds me of the famous ruling in which the Berlin Regional court finds Ingo Heinrich, the former border guard who was ordered to shoot the transgressor of the Berlin Wall, guilty of murder. The judge, Theodor Seidel, commented, “At the end of the 20th century, no one has the right to ignore his conscience when it comes to killing people on behalf of the power structure”, although Ingo Heinrich was “at the end of a long chain of responsibility (Kinzer, 1992)”. My research echoes with Judge Seidel in the understanding that the structural approach does not eliminate individual responsibility altogether.

More importantly, only once we identify the structural factors responsible for the failures at Justice Inc. can we further improve the system. Many of the procedural errors identified in my research are rarely (if ever) considered “errors,” but rather viewed as “the way things are.” Examples of this are indictment with dossier, discontinuous hearings, and the order in which evidence is investigated. It is the regularities, rather than just the irregularities, that contribute to the failures at Justice Inc.

It is essential to know not only the “how” of death sentences, but also the “why” — why they are the way they are. By viewing capital judgments both statically and dynamically, this research adds a new perspective to the existing literature.

Thirdly, my research examines all the death sentences over the past 10 years in Taiwan without sampling. This avoids the criticism commonly leveled at the abolition movement: “You focused only on the miscarriages of justice, which is the exception among death sentences rather than the rule.” By doing a blanket review, my research helps show that errors are not confined to wrongful convictions or a few exceptions. As shown in Appendix 3, procedural mistakes prevail in all cases and substantive mistakes are visible in problematic convictions as well as many others. Mistakes are not exceptional in death penalty cases, which echoes my argument that organizational wrongdoing is not an accident, but a normal accident.

The challenges of the research come partly from the inaccessibility of information and partly from the difficulty of detecting errors. Not all judgments are published for the general public — for example, judgments involving sexual assault or offenses against children are not published to protect the victim. Such judgments are accessible only via the judicial branch’s internal database, so I have overcome this difficulty in my research with the help of some judges. Additionally, court files cannot be obtained without the defendant’s consent. With help of the Taiwan Alliance to End the Death Penalty, I was able
to get the court files for 46 of the 62 cases. Others are not accessible because the defendant has not responded to requests, has rejected legal or social support of any form, is reluctant to have his files read and studied, or was executed before we had the chance to request consent.

The incomplete access to information defines what can and cannot be accomplished. What I can do is examine all the judgments with criteria inspired by previous literature on narrative analysis: coherence, fidelity and selectiveness. Next, I can spot problematic cases by checking the evidence chain of “victim—murder weapon—defendant”, to see if the core narrative is broken. What I cannot do is sort out all 62 cases and put them in the categories of “wrongful conviction” and “rightful conviction” and make comparisons between the two. This is because (1) a method of detecting miscarriages of justice with 100% precision has yet to be invented, as mentioned earlier, and (2) the court files of some of the cases are inaccessible, making assessments more difficult. This limitation determines that this research, therefore, cannot be a comparative study between wrongful and rightful convictions. This research demonstrates instead that a variety of errors exist in the procedures and outcomes of capital cases. Some cases contain the fatal mistake of condemning the wrong person to death. Others contain serious flaws in the establishment of facts and leave considerable doubts about the narrative in the judgment. Still others have visible procedural errors, even if their outcomes have not been revealed to be erroneous.

Another limitation is the small number of “near misses.” As mentioned in Chapter Two, methodologically speaking, the factors that play a role in miscarriages of justice can be found only by comparing wrongful convictions and “near misses.” From 2006 to 2015, there were 62 death sentences, but only five “near misses” or cases where the recipient of a death sentence was later exonerated. Among these, Wu Liren was the codefendant in Case No. 27, Jiang Guoqing was exonerated after his execution, and the other three, Su Jianhe, Liu Binglang and Zhuang Linxun (also known as “the Hsichih Trio”) were accused of the same crime (Chang, 2013 [2004]). Wu Liren was sentenced to death in Remands 5 and 6, then found not guilty (of murder) in Remand 7, after which the case was finalized. Wu Liren never confessed to murder.

The other four “near misses” have several characteristics in common: They were all finalized between 1995 and 1997; they were all tortured or coerced into confessing; they

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132 Wu Liren was sentenced to 20 years for robbery and other offenses.
have all attracted increasing attention over the years to the point that their retrials have made headlines; and they were all finalized with acquittals in 2011 and 2012. The exonerations of these four “near misses” were not the result of quality checks at Justice Inc., but rather of media and public attention. For example, in the first open session of the Jiang’s posthumous retrial, Jiang’s attorney said to the judges of the Martial Court: “Please make a substantive judgment instead of a procedural ruling, because the latter will result in the ineligibility of the family of Jiang for the compensation she deserves.” The judge answered, “No problem.” Before the end of the first open hearing, the judge asked Jiang’s attorney: “To which address should we send the acquittal judgment?” He said “acquittal judgment” before any investigation was conducted at retrial.\(^{133}\) The Hsichih Trio case is a milestone in Taiwan’s campaign for the wrongfully convicted and considered an indicator of the rising power of civil society (Lin, 2004). It is also the most well-known case from Taiwan among international non-governmental organizations, such as Amnesty International, the World Coalition Against the Death Penalty and the Anti Death Penalty Asia Network. It is safe to say both the Jiang and Hsichih Trio cases were exonerated by public opinion first, and Justice Inc. later conformed to this external pressure.

Wu Liren is the only “near miss” that Justice Inc. was able to correct without pressure from society, and he is the only defendant who never confessed to the crime. If we trace back a few years beyond the scope of my research, there was another “near miss” death sentence in 2004. The defendant, Huang Zhicheng, was accused of murder and sentenced to death eight times, but exonerated after 10 years of trial.\(^{134}\) Like Wu Liren, Huang Zhicheng’s case was reversed despite very little media attention, and Huang never confessed either. Huang says the police wrote up a written confession during the interrogation and asked him to sign it, but that he refused and replied, “Go ahead and beat me up — beat me to death” (Chen, 2005). It would be an interesting hypothesis to consider that a defendant’s confession is a determining factor in wrongful convictions (or that the lack of one is a factor in near misses). This can only be tested in the future when a certain amount of examples have been collected.

\(^{133}\) This hearing was not open to the public, but I attended with the permission of the judges at the request of Jiang’s attorneys.

\(^{134}\) Huang Zhicheng was found guilty and sentenced to death from the first trial to Remand 6, then was found not guilty in Remands 7 and 8, then finalized as not guilty.
Lofquist’s quote on organizational wrongdoing is worth a revisit here: “individual decision making is nested within organizational structures and cultures, which are themselves nested within larger institutional and societal environments (Lofquist, 2001, p. 192).” Lofquist points out two interrelated themes for research on organizational wrongdoing. I take up the first challenge in my thesis (how the “individual decision making is nested within organizational structures and cultures”), and I think the second challenge—to study the legal culture—also deserves equivalent academic concerns, if not more. I would like to share my thoughts on how to take on the second challenge in the future.

Justice Bao is the icon for justice in Taiwan, as well as in many countries in Asia such as China, Singapore, Malaysia, and even Thailand. There is an interesting contrast between Justice Bao and the western icon of justice, Justitia. Justitia wears a blindfold, and the blindness is a choice instead of a physical condition—it will be redundant if a blind woman wears a blindfold. The choice of not to see symbolizes equality, and it assures that whoever brought in front of the law will be treated equally. The blindfold serves very much as “the vail of ignorance” to prevent prejudice. Justice Bao, as a contrast, features the extraordinary ability in observation. He is usually described as “明察秋毫”: “to see the hair growing in the autumn very clearly”. Many mammals start to grow a fine layer of thin hair close to the skin to prepare themselves for the freezing winter, so “the hair growing in the autumn” is a metaphor for the tiniest thing. For Justice Bao and the legal culture he represents, “the truth”—a substantive value instead of a procedural value—is given the highest importance. An exploration on Justice Bao as a historical/social construct in contrast with his western counterpart Justitia, I believe, will lead to a rich understanding of the legal culture in Taiwan and its influence on the judicial system.

IV. Challenging the death penalty

One of the ways to challenge the death penalty is to focus on wrongful convictions. It is appalling to the general public to know that an innocent person’s life was destroyed because of mistakes made by the court. However, there is a counter argument to that, which is: How about those who did commit the crime? Why do you only focus on the wrongful convictions?

My research is conducted partly as a response to that counter argument. It does not target select cases, but rather reviews all capital cases in the past 10 years in Taiwan. What I found
was — allow me to repeat again — mistakes happen. The confidence expressed in the phrase “iron evidence like a mountain” is nothing but a myth when it comes to capital punishment. On Taiwan’s death row, there are at least 10 cases with broken evidence chains and seriously flawed convictions; seven cases with arbitrary sentencing; and 37 cases that violate the ICCPR. Procedural flaws prevail in most or all of the 62 cases.

After reading the past decade’s capital judgments in-depth, I have found the overall quality of Justice Inc.’s flagship product far from satisfying. When including quotes from the rulings in my thesis, I repeatedly felt the need to stress that they were faithful to the original Chinese texts, for fear that my readers would interpret the gibberish as lousy translations. In an email exchange, my proofreader could not help commenting: “Half the time it seems probably even the judges don’t know what they mean and they don’t particularly care! Reading the examples in your thesis is totally shocking.” Very often I found myself explain to my proofreader what the judges meant, knowing that their writing does not make sense at all.

Mistakes happen in death sentences — the punishment that deprives people of the right to life and all other rights altogether, and the only sentence that is irreversible. This simple fact should not be overlooked in any discussion of the death penalty.
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Appendix 1

The criminal provisions of Taiwan permitting the imposition of death penalty

Gray boxes with bold font indicate offenses that do not involve intent to kill, or that may or may not result in the loss of life.

<table>
<thead>
<tr>
<th>Criminal Law</th>
<th>Death or imprisonment for life</th>
<th>Article 101(1)</th>
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<td>Death or imprisonment for life</td>
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<td>Malfeasance in Office</td>
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<td>Article 120</td>
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<td>ten years</td>
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<td>Offenses against Public Safety</td>
<td>Death, imprisonment for life, or</td>
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<td></td>
<td>Death or imprisonment for life</td>
<td>Article 185-1(2)</td>
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<td></td>
<td>Death or imprisonment for life</td>
<td>Article 272</td>
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<td>Abrupt Taking, Robbery and Piracy</td>
<td>Death, imprisonment for life or</td>
<td>Article 328(3)</td>
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<td>Article 333(3)</td>
<td>Death, imprisonment for life or imprisonment for not less than 12 years</td>
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<td>Article 334(2)</td>
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<tr>
<td>Article 348(2)</td>
<td>Death, imprisonment for life or imprisonment for not less than 12 years</td>
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**Criminal Code of the Armed Forces**

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|                                             | Death, imprisonment for life or imprisonment for not less than 10 years | Article 47  
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|                                             |                              | Article 49  
| Commandeering a Military Vessel or Aircraft or Navigation Thereof | Death, imprisonment for life or imprisonment for not less than 10 years | Article 50  
| Destroying Military Facilities and Materials for Military Use or Rendering them Useless in Wartime | Death or imprisonment for life | Article 53  
| Manufacturing, Selling, or Transporting Military Arms or Ammunition without Authorization | Death, imprisonment for life or imprisonment for not less than 10 years | Article 58(3)  
| Knowingly Making False Military Orders, Documents, or Other Statements in Wartime | Death or imprisonment for life | Article 65(1)  
| Civil Aviation Act                           |                              | Article 66(2)  
| Hijacking an Aircraft by Force or Threat    | Death, imprisonment for life or no less than seven or 10 years | Article 100  
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<td>Death or imprisonment for life; if sentenced to imprisonment, a fine of no more than NT$20 million may be imposed</td>
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<tr>
<td>Compelling Others to Use Category 1 Narcotics by means of Violence, Menace, Fraud or Other Illegal Means</td>
<td>Death, life imprisonment or no less than 10 years of imprisonment; if sentenced to life imprisonment or no less than 10 years of imprisonment, a fine of not more than NT$10 million may be imposed</td>
<td>Article 6</td>
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<tr>
<td>Civil Servants committing offenses described in Article 4 Paragraph 2 or Article 6 Paragraph 1 under the pretexts of their authority, opportunities, or means given to the position (drug crimes)</td>
<td>Death or imprisonment for life; if sentenced to imprisonment, a fine of not more than NT$10 million may be imposed</td>
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<td>Punishment Act for Violation to Military Service System</td>
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<td>Carrying of Weapons by a Group and Obstructing Military Service and Causing death</td>
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<td>Child and Youth Sexual Transaction Prevention Act</td>
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<td>Coercing a Person Under the Age of 18 to Engage in Sexual Transactions by Violence, Menace, Medicament, Control, Hypnosis or other means Against the Will of the Victim and Purposely Killing the Victim</td>
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<td><strong>Genocide Penal Code</strong></td>
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<td><strong>Genocide crimes</strong></td>
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<td>Article 2</td>
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<td><strong>Controlling Guns, Ammunition and Knives Act</strong></td>
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<td><strong>Manufacturing, Selling, Transporting, Transferring, Leasing or Lending Guns, Shoulder-fired Weapons, Machine Guns, Submachine Guns or Carbines without Authorization and with Intent to Commit or Help Others Commit a Crime</strong></td>
<td>Death or imprisonment for life; if sentenced to imprisonment, a fine of not more than NT$50 million must be imposed</td>
<td>Article 7</td>
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<tr>
<td><strong>Punishment of Smuggling Act</strong></td>
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<td><strong>Smuggling and refusing inspection or arrest by force and causing death</strong></td>
<td>Death, life imprisonment or no less than 10 years of imprisonment, and, in addition thereto, a fine of not more than NT$10 million may be imposed</td>
<td>Article 4</td>
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## List of capital cases in Taiwan, 2006-2015

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| 60 | 林于如  
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Appendix 3
The distribution of errors among the cases

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<td>林于如 Lin Yuru</td>
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1 Defendant did not have an attorney for her/his appeal at the Supreme Court
2 The Supreme Court did not hold oral debates
3 Defendant not allowed to attend her/his Supreme Court hearings
4 Prosecution’s case dossier provided to the judge well in advance of access to the defense’s story
5 Evidence investigated in the wrong order
6 Hearings held discontinuously
7 Unfair instructions from the judge
8 Failure to establish direct intent to murder (including judgments that only found indirect intent and judgments that contain inconsistencies regarding the intent or were unable to determine whether the crime involved direct or indirect intent)
9 Failure to establish premeditation
10 Expert errors (including imprecise methods, biased experts, experts compromising the evidence, errors in law, errors in selection, errors in interpretation, professional errors, errors in evaluation)
11 Testimony errors (including testimony incompatible with facts, testimony without cross-examination, “ivy judgments,” and testimony unverified by test results)
12 Failure to collect or preserve the evidence
13 Errors inherited or created in remands
14 Broken evidence chain
15 Sentencing problems
16 Errors in application of the law (including turning oneself in, self-defense and mitigating factors such as mental illness and retardation)
Appendix 4
Summary (English)

If the judicial system is seen as a corporation, its main product is undoubtedly judgments, with justice as their selling point. When a dispute happens, the parties involved seek justice in court, delivered in the form of a judgment. Analogically, the judicial system is a monopoly backed by state force aimed at achieving justice. “Justice Inc.”, to be short. My research aims at examining whether Justice Inc. fulfills its mission and manufactures satisfying products that achieve justice. Focusing on the flagship product of Justice Inc. — capital judgments — I explore the “how” and “why” of death sentences.

Regarding the “how”: How do the judgments look, from a sociological point of view? What are the characteristics of the narrative that Justice Inc. uses to take lives? What are the cultural implications of capital judgments? Is rectitude achieved by Justice Inc. in these cases?

Regarding the “why”: Why does the production line allow or encourage employees to produce such rulings? What dynamics lead Justice Inc. to fail at detecting mistakes and what kind of organizational culture facilitates this?

My research develops a twofold perspective for analyzing capital judgments. It scrutinizes their content and views them as narratives pieced together by legal decision makers into a coherent story based on information and arguments gathered during the criminal justice process. This research therefore seeks to describe what capital judgments look like and to offer a static analysis of these “stories.” It also focuses on the process by which judgments take shape. It views judgments as a product of the judicial system and wrongful convictions as “normal accidents” caused not by unlawful behavior on the part of mean-spirited individuals, but rather by routine operation on the part of actors in the system.

In order to understand the capital judgments over the past 10 years (2006-2015) in Taiwan, my research utilizes document analysis, trying to look “through” the text of the judgments to grasp the cultural meaning demonstrated in the legal stories they tell.

I develop a three-phase methodology in this research. In phase one, coding is used to reduce the text to grasp and identify analytical themes. In phase two, summarizing is used to reduce the text to identify the structure of the story, the arguments that pave toward the conviction and sentence, and the evidence introduced and used to build the story. The above two phases are essential for basic understanding, or static analysis, of the texts. In
phase three, themes are organized to reconstruct the process by which mistakes occur and survive all the way to the end.

Regarding the static picture of Justice Inc., my research finds that the stories told in capital judgments are stripped of societal context and the defendant is often presented as an offender committing a crime in a vacuum without any trace of social structures. Among the 62 capital cases included in my research, I found that 10 were seriously flawed in terms of their core narrative, which I term the “evidence chain.” The judgments are not very successful at arguing the constitutionality of the death penalty, either.

Regarding the dynamic process of Justice Inc., my research finds that the raw material Justice Inc. receives is riddled with all kinds of errors: fabrications, misinterpretations, biases, imprecisions and outright lies. Unfortunately, although one of the major missions of Justice Inc. is detecting these errors, it is not equipped or configured to do so.

Research on organizational wrongdoing shows fatal errors begin as trivial, harmless episodes, but escalate over a process and interact with other irregularities, accumulating to the point of eventual disaster. Examining the process of decision-making in death penalty cases shows that the routine functions of the judicial system tend to foster the accumulation of errors and discourage their discovery and correction. In this dissertation I explain, for example, the practice of holding “discontinuous hearings” for any given trial — a seemingly harmless and neutral arrangement. Yet when other factors are added to the equation, such as the unity between judges and prosecutors, time lapses suffered by the defense, and biases toward inculpatory evidence, the defendant is at a disadvantage.

Furthermore, the mistakes do not occur randomly: The judicial system is biased in favor of the prosecution and against the defendant. This matches with what Perrow calls “normal accidents” — “normal” is coined not in the sense that accidents happen every day, but in the sense that they result from normal functioning. Similarly, at Justice Inc., a rightful conviction and a wrongful conviction are dealt with in the same manner, passing the same procedures and being tried and judged with the same mentality.

The dynamic process of decision-making at Justice Inc. is characterized as an increasing commitment to conviction in any given case, instead of checking for quality and correcting errors. Firstly, the vision of the judge is biased toward conviction because of the affinity between the judge and prosecutor and certain routines at trial. Secondly, the bias grows and evolves into a conviction over a gradual process, and this incremental escalation consolidates the judge’s confidence in her/his vision. The escalating investment in
conviction prevents Justice Inc. from fulfilling its most important calling — discovering errors and correcting them.

My research challenges the popular belief that death sentences are reached based on solid, indisputable evidence, and persuasive arguments and narratives, and only imposed upon those who deserve them. A close look at 10 years of capital judgments shows the death penalty is not immune to the many mistakes that happen at Justice Inc.
Zusammenfassung
Translated by Prof. Dr. Thomas Weigend, Director of the Institute for Foreign and International Criminal Law, University of Cologne

Zum „Warum“: In welcher Weise erlaubt oder ermutigt das System die Beteiligten, Todesurteile zu produzieren? Durch welche Dynamik entgehen der Justiz-AG Fehler, und welche Elemente der Organisationskultur erleichtern solche Fehler?

In Bezug auf das statische Bild der Justiz-AG stellt meine Untersuchung fest, dass die Geschichten, die in Todesurteilen erzählt werden, des sozialen Kontexts entkleidet sind und dass der Täter häufig als ein Individuum gezeichnet wird, das die Straftat in einem Vakuum außerhalb aller sozialen Strukturen begeht. Von den 62 untersuchten Urteilen wiesen 10 erhebliche Fehler in Bezug auf den Kern des Narrativs (die Beweisführung) auf. Auch waren die Urteile nicht sehr erfolgreich bei dem Versuch, die Verfassungsmäßigkeit der Todesurteile darzulegen.


Die Untersuchung des Fehlverhaltens von Organisationen hat gezeigt, dass schwere Fehler als triviale, harmlose Episoden beginnen, aber im weiteren Verlauf eskalieren und mit anderen Unregelmäßigkeiten interagieren, bis sie am Ende zu katastrophalen Ergebnissen führen. Die Überprüfung der Entscheidungsprozesse in Fällen mit Todesurteilen hat gezeigt, dass die üblichen Verfahren im Justizsystem die Akkumulation von Fehlern fördern und ihre Aufdeckung und Korrektur erschweren. Die Aufspaltung einer Hauptverhandlung in zahlreiche Einzeltermine zum Beispiel ist eine scheinbar harmlose und neutrale


Appendix 6
Summary (Hungarian)


Összefoglaló

Első fejezet  Igazságszolgáltatási gyakorlat a halálbüntetéses esetekben

I. A kutatás kérdésköre és tudományos vonatkozása


A „Hogyan?”. Hogyan is néznek ki az ítéletek szociológiai szempontból? Hogyan jellemezhetőek a beszámolók, amelyek alapján az Igazságszolgáltatás Rt. elveszi embereket életét? Mik a halálos ítéletek kulturális vonatkozásai? Az Igazságszolgáltatás Rt. a halálos ítéletekkel becsületességet teremt?

A „Miért?”: A folyamat milyen módon hatalmazza fel, avagy bátorítja a tisztviselőt abban, hogy ilyen döntést hozzon? Mi a dinamikája annak, ha az Igazságszolgáltatás Rt. nem fedez fel a rendszerben lévő hibákat, és milyen szervezeti kultúra segít ezek kiszűrésében?

A halálbüntetések vizsgálata jól bemutathatja egy társadalom működését jogi és kulturális nézőpontból egyaránt. A modern államközösségek igazságszolgáltatási rendszerei különbözőek lehetnek, azonban közös tulajdonságuk, hogy „igazságosságot” teremthetnek az embereknek. (Az viszont, hogy ez eredményes jogalap lesz-e, avagy sem, az már államonként különböző lehet.) Az Igazságszolgáltatás Rt. számos szolgáltatása közül jellemzően minél szigorúbb a büntetés, annál nagyobb körültekintéssel hozza meg a releváns döntést. Más szóval, a legszigorúbb büntetést kiszabó döntéstípus az
Igazságszolgáltatás Rt. legfőbb szolgáltatása, és erre fordítja a legtöbb forrását is. Ezáltal, egy-egy ilyen döntés vizsgálata megfelelően megmutathatja a jogi rendszer működésének minőségét. Ebben az értelemben a halálbüntetések vizsgálata helyzeti képet ad a jogi rendszer egészről. Vessünk tehát egy közeli pillantást a tajvani halálbüntetésekre, ezáltal nem csak speciális ismeretre tehetünk szert a témában, hanem általánosságban is segít megérteni, hogy hogyan kezelik az élethez való jogot egy demokratikus államban.

II. Történelmi és kulturális háttér

Tajvan modernizálódása a japán uralom alatt kezdődött 1895 és 1945 között. Ez alatt az ötven év alatt vezették be és alkalmazták Tajvanban a vizsgálóbírói jogrendszer – a II. Világháború végéig, amikor is a japán uralom véget ért. A Háború végétől kezdve – amit az azt követő Hidegháború csak erősített – Tajvan az Egyesült Államok nagyfokú befolyása alá került. Ezáltal a vizsgálóbírói jogrendszer fokozatosan változott peres jogrendszerre. A Büntetőeljárási Kódex 2003-as módosítása volt a legfontosabb lépés a „módosított peres jogrendszer” kialakulásában. Ebben a módosított peres jogrendszerben a büntető eljárást az ügyészség és a védelem vezeti, ebben azonban, az angolszász esetjoggal ellentétben nincs esküdtszék, és a bíró egy személyben a tényállás megállapítója, és jogi döntéshozó.

A vizsgálóbírói jogrendszer peres jogrendszerre való átalakulása során a jogi gyakorlatok bevett szokásai, csakúgy, mint a történelsi szokások mélyen berögzödtek a bírósági eljáráskokba, és bírói gondolkodásmódokba. A témánkhoz kapcsolódó legszembevetőbb jelenség a bíró és az ügyész egysége, amelyben ezek a résztvevők ugyanolyan minősítést és ugyanolyan szakképesítést kapnak, és ugyanazon a helyen dolgoznak egyfajta speciális viszonyt kialakítva.


Az utóbbi tíz év során, 2006 és 2015 között, összesen 62 eset végződött halálbüntetéssel. 2006 és 2009 között egy rövid időre titokban felfüggesztették a halálbüntetéseket, de ez hamar véget ért, amikor egy törvényhozó nyilvánosságra hozta, és a felkeltett hatalmas közfigyelem eredményeként a társadalom követelte a halálbüntetéseket és azok rendes
végrehajtását. Az ilyen ügyekben történő kivégzések száma évente általában tíznél kevesebben. Nincsenek írott szabályok arra vonatkozólag, hogy a raboknak mennyi időt kell a kivégzésre várakozva eltölteniük, illetve titkos az is, hogy milyen kritériumok alapján döntik el, hogy kit mikor végeznek ki.

III. A kutatás területe

A kutatásm során az összes végrehajtott halálbüntetési esetet vizsgáltam, amelyek 2006 és 2015 között történtek Tajvanban. Minden esetben több ítéletet is hoztak, van, ahol csak hármat, van ahol akár huszonötöt is. A jogerős ítéletek a legutolsók, melyeket a Legfelsőbb Bíróság hoz, és inkább a jog alkalmazására vonatkoznak, mintsem a tényállás megállapítására, vagy az utolsó előttiek, melyeket a Fellebbviteli Bíróság hoz, és a ténykérdések vitapontjait tisztázza. A Fellebbviteli Bíróság döntését erősíti meg a Legfelsőbb Bíróság döntése, amely az “utolsó ténybeli ítélet”-nek is neveznék. A legtöbb esetben az utolsó ténybeli ítélet felüllírja az első döntést, és eldönti az ügyet. Miután a Legfelsőbb Bíróság jogi pontok fellebbezéseivel foglalkozik, és ő maga nem avatkozik be a tényállás megállapításába és a bizonyítékok vizsgálatába, az utolsó ténybeli ítéletek vizsgálata a legalakmasabb téma a kutatásomhoz, mivel bővelkedik érdekes “sztorikban”. Emiatt a kutatáson fő forrásait ezen ügyek utolsó ténybeli ítéletei adják. A kiegészítő források a következők voltak: (1) egyéb ítéletek előtte vagy utána, amelyeknél a történetek alakulásában bekövetkezett változásokat releváns nyomon követni; illetve (2) peranyagok, amennyiben további információkra volt szükség az összefüggések, a valószerűség vagy a történet felépítésének vizsgálatához.

Az utóbbi tíz év mind a 62 halálos ítéleteké esetében gyilkosság történt. Ezek közül 30 esetben határozat úgy, hogy előre megfontolt szándékkal történt a gyilkosság, a többi esetben nem előre megfontolt szándékkal. 50 ügyben közvetlen szándék, a további 12 ügyben közvetett, pontosabban meg nem nevezett, vagy bizonytalan volt a szándék (Chang, 2015). A nem előre megfontolt, vagy a közvetett szándékkal elkövetett gyilkosságok nem tekinthetők a “legsúlyosabb bűncselekménynek”. Ezért a 67 esetből 37eset az ENSZ Polgári és Politikai Jogok Nemzetközi Egyeségokmányának (ICCPR) nyílt megszegése. Ez az okmány kiköti, hogy halálbüntetés csak a “legsúlyosabb bűncselekmény” esetében szabható ki. A kutatáson arra is rávilágít, hogy a 62-ből 10 esetben súlyos hibákat követtek el: a gyilkossági történetek lényege nem alátámasztott, vagy volt valami, ami ellentmondott a bizonyítéknak.
Második fejezet Az ítélet: Egy történet és annak eredménye

Véleményem szerint egy ítélet nem csupán egy, a nyelv használatával kifejezett bírósági intézkedés a beszédalkotási művészet elméletének felhasználásával. Ahhoz, hogy elemezni tudjunk egy bírósági törvényt, meg kell vizsgálnunk annak nyelvhasználatát, mert azon keresztül érvényesíti a törvényt. Ez azt is jelenti azonban, hogy egy ítélet nyelvhasználatának vizsgálata során nem szabad elfelejtenünk, hogy ez egy bírósági törvény, amelynek minden szava jogi következményekkel jár.

Korábbi irodalmakat segítségül véve (Umphrey, 1999; Rideout, 2008), ezen kutatás során kritikus szemmel vizsgáltam a halálbüntetéssel végződő esetek ítéleteit az alábbi kritériumoknak megfelelően: (1) valószínűség (hogy az ítéletben szereplő tények megállapítása szilárdan alá van-e támasztva a bizonyítékokkal); (2) következetesség (hogy az ítéletben szereplő beszámoló magában következetes és logikus-e, összhangban a tapasztalatokkal); és (3) a saját összegzésem és kiegészítésem különböző anyagok felhasználásával.

A bírói tévedésekről szóló szakirodalom egy másik fontos, a kutatásomhoz kapcsolódó terület. Miután megvizsgáltam a jogtalan halálos ítéletek vonatkozó tényezőit, a listázott esetek nyilvánvaló jellemzője, hogy minden előforduló hiba külső szervezetektől vagy egyénektől származik, nem pedig a bíróságtól. Ebből az következik, hogy a bíróságok nem követnek el hibákat, és semmi közük nincs a jogtalan elitelésekhez. Itt felmerül egy újabb kérdés megválaszolásra, hogy akkor mégis MIÉRT történhetnek jogtalan elitelések?

Ahhoz, hogy megértem azt a társadalmi folyamatot, ami által egymással összefüggésben lévő hibák történnek az igazságszolgáltatási rendszerben, a szervezeti károkozást tanulmányoztam. Egy bírósági tárgyalás kimenetele egy olyan folyamatból adódik, amelyben a gyanúsított elitelése felé hajlanak, eközben a hibák halmozódnak és egymásból alakulnak ki, ezáltal erősítve a vádlott iránti negatív előítéleteket. A bírói tévedéseket statikusan és dinamikusan, jogilag és szociológiai megközelítéssel vizsgálva, ellenőriztem, mivel „az egyéni döntéshozatal szerves része a szervezeti rendszereknek és kultúráknak, amik viszont szintén szerves részei a nagyobb intézményi és társadalmi környezetnek. Ezen összefüggések körültekintő rekonstrukciója és alapos vizsgálata lehetővé teszi, hogy megérthessük a döntésekhez vezető irányelveket és eljárásmódotokat, valamint azok értelmét” (Lofquist, 2001, p. 192).

Harmadik fejezet Módszertan

A kutatásom kétfélé perspektívából is vizsgáltam a halálbüntetéses eseteket. A döntések tartalmát is gőrő alá vettem, és úgy tekintettem, mint jogi döntéshozók által
összerakott elbeszélések, amelyek ezáltal a büntetőeljárás során összfüggő történetekké álltak össze a gyűjtött információk és bizonyítékok alapján. Ez a kutatás ekképpen igyekszik ismertetni azt, hogyan is néznek ki a halálbüntetétes esetek, és egyben statikusan elemzi is ezeket a “történeteket”, az ítéletek kialakulásának folyamatára is főkuszálva. Az ítéleteket az igazságszolgáltatási rendszer szolgáltatásának, a jogtalan elítéléseket pedig “közönséges véletlennek” tekinti, amely nem a gongoszskelő egyének által elkötött törvényellenes magatartás következménye, inkább a rendszer szereplői által megszokott rutinműködés része.

Ahhoz, hogy jobban megérthessük az utóbbi tíz év során (2006-2015) Tajvanban hozott halálos ítéleteket, a kutatásomban felhasználtam vádirat-elemzéseket, és megpróbáltam az ítéletek szövege “möge” látni, hogy megragadjam a jogi történetek által szemléltetett és elbeszált kulturális jelentéseket. Ebben a kutatásban egy három fázisú módszertant dolgoztam ki. Az első fázisban kódokat használtam annak érdekében, hogy lerövidítsem a szöveget és megragadjam, felismerjem az elemzett anyagokat. A második fázisban összefoglaltam, hogy lerövidítsem a szöveget, meghatározzam a történetek szerkezetét, a rábizonyításokat, és az elítéléshez vezető érveléseket, és a bemutatott és felhasznált bizonyítékokat, amelyre a történet épült. Az előbbi két fázis alapvetően szükséges ahhoz, hogy megértsük, vagy statikusan elemezhessük a szövegeket. Majd a harmadik fázisban a motívumokat rendszereztem, hogy rekonstruálni tudjam a folyamatot, melyek során a hibák keletkeznek és egészen az ügyek végéig meg is maradnak.


Negyedik fejezet A halálos ítéletek mikéntje: statikus kép

I. A történet kezdete

Egy történet kezdete magával hozza az egyén erkölcsi álláspontját és megítélését. Mint minden más beszámoló, a halálos ítélet megírása során is az elérhető információkból
szelektálják a lényegeseket. A kutatáson szerint 29 ítélet (a 62-ből) a vádlott bűnügyi nyilvántartásával kezdődik. A büntetett előélet máris rossz emberekként állítja be őket, és azt sugallja, hogy a gyilkosság, amivel vádolják őket, csak a gonoszletteik egyik epizódja.

Ha egy, a bűnügyi nyilvántartásban lévő korábbi bűne megmutatja egy ember személyiségét, akkor a büntetlensége ugyanúgy irányadó? A válasz: nem. Egyetlen ítélet sem kezdődik azzal a megjegyzéssel, hogy a vádlott bűntetlen előéletű, sem azzal, hogy bármis más személyiségjegygel jellemeznék a vádlottat, minthogy “bűnöző”. Például nem a vádlott foglalkozását taglalják. Az a 33 eset, amelyekben a beszámoló nem a vádlott büntetett előéletének tagalásával kezdődik, négy kategóriára osztható: (1) Azok a történetek, melyek a vádlott és az áldozat közötti nehezletelés vagy haragos kapcsolat leírásával kezdődnek, mint például egy megkeseredett párkapcsolat, vagy egy kifizetetlen hitel. Ezek a történetek a vádlott nehezletelésének leírásával kezdődnek, hogy abba az irányba tereljenek, mely szerint a vádlott gyilkosságát szándékozott elkövetni. (2) Azok az elbeszélések, amelyek a szükség magyarázatával kezdődnek, amelyek a vádlottat a bűncselekményre készítették. Ez általában hirtelen pénzszükséglet komolyabb hitel visszafizetésére. Ez a fajta bevezetés egyben már az indítéket is kijelenti. (3) Azok a történetek, amelyek azzal kezdődnek, hogy a bűncselekmény elkövetésének lehetőségét részletézik. Ez lehet például annak bemutatása, hogy a vádlottak hogyan találkozhattak, vagy hogyan ismerték meg az áldozatot, és terveztek meg a bűncselekmény elkövetését. Általában a bűncselekmény az áldozat tulajdona vagy szexuális szabadsága ellen irányul. Ismét, ez azt sugallja, hogy a vádlottnak volt indítéka, vagy olykor, hogy a vádlott összesküvést szőtt a többi vádlottal. (4) Azok a beszámolók, melyek magával a bűncselekménnel kezdődnek, mint például a bűntárgyak beszerzésének, és egyéb, a bűncselekmény előkészítésére tett lépések részletezése, vagy a helyszín és a résztvevők bemutatása. Ezek azok az esetek, amelyekben a vádlott nem ismerte az áldozatot a bűncselekményt megelőzően.

A bírók általában, - ha nem mindig - figyelmen kívül hagyják a társadalmi kontextusokat, amikor az információkat szűrik ki a halálos ítéletek meghozásakor. Az egyik leggyakoribb indíték bűncselekmény elkövetésére a pénzhiány. A döntéskor felvázolt történet egyszerű és világos: A vádlottnak pénzre van szüksége, ezért gyilkol, hogy megszerezze azt. A bűncselekmények változatossága és összetettsége árnyalódik, és a szerkezeti problémák a homályos háttérbe szorulnak.

Azok az ítéletek, amelyek nem a vádlott büntetett előéletének bemutatásával kezdődnek, azok is azzal indulnak, hogy a vádlottat bűnözőként mutatják be, vagy egyből a
bűncselekmény elkövetésére irányuló indíték vagy eszközök kerülnek említésre. Akár büntetett, akár büntetlen előéletű a vádlott, a legtöbb bírói végzés nem dokumentálja a foglalkozását, vagy más személyiség-jellemzőjét. Ez a mulasztás biztosítja, hogy az olvasók már kizárólag bűnözőkként ismerjék meg a vádlottakat – semmi egyéb információ nincs róluk. “Bűnöző” – ez a vádlottak első, és a legtöbb esetben egyetlen beazonosítása.

Természetes, hogy a halálos ítéletek esetében a vádlottakat bűnözőknek tekintjük, mivel elítélésről van szó. Azt azonban érdemes megjegyezni, hogy a vádlottak olyan bűnözőkként vannak bemutatva, akik egy társadalmi hatásoktól elszigetelt rendszerben követték el a bűncselekményt. Semmilyen más egybevágóság nem kerül említésre, és a szerkezeti, társadalmi tényezőket nem veszik figyelembe a kár okozásakor, még akkor sem, ha, mint azt előbb láttuk, lényeges és odaillő információk találhatóak a peranyagban. Ennek eredményeképpen a halálbüntetéses esetek leírásai már teljes mértékben felelőssé teszik a vádlottat a bűncselekmény elkövetésére.

II. A történet fő része

A. A bűnös szándék

Az ítéletekben lévő beszámolók egyik szembetűnő jellemzője, hogy aprólékosan a jogi követelményeknek megfelelően készültek. Mégis kérdéses, hogy a bizonyíték és az érvek alátámasztják-e ezeket a beszámolókat, és, hogy megfelelnek-e a következetességi és valószerűségi követelményeknek. Általánosságban a bűnös szándékot adottnak tekintik a halálbüntetéses esetekben, és egyszerűen kijelentik a Tények résznél bizonyítékok vagy érvek nélkül. A gyilkossági szándék megállapítása már bonyolultabb akkor, ha a bűncselekmény során nem halálos módszert használtak, mint például fojtogatás, vagy gyújtogatás.

Azoknál az eseteknél, amelyekben az áldozat ismerte az elkövetőt, gyakori, hogy az ítélet szerint az elkövező szándéka volt “gyilkolni, hogy eltávolítsa a tanút” (殺人滅口). A kutatásokban vizsgált 62 esetből 28-ra ráillik ez az állítás. Ezek közül sok esetben nem is támasztják alá bizonyítékokkal az állítást, inkább egy alkalmas megoldásként használják a gyilkossági szándék megalapozására.

Általánosságban, a gyilkossági szándék a gyilkosság egyik olyan szerves része, amely nem kap elegendő figyelmet a halálbüntetéses esetekben. Annak kijelentése, hogy egy vádlott megölni szándékozott az áldozatot, sokszor nincs alátámasztva kellő érvekkel és
bizonyítékkokkal (ez a valószerűséget csökkenti), vagy gyenge érvekkel van alátámasztva (ez az összefüggéseket gyengíti).

B. Bizonyíték-láncolat a gyilkossági esetekben

Mint ahogy azt a Harmadik fejezetben már említettem, a gyilkossági esetek bizonyíték láncolata a „vádlott – gyilkos fegyver – áldozat” összefüggésre épül. Ez a láncolat a gyilkossági történet egyik alapvető állítása, és ha ez bármely ítéletben megszakad, azt az elitélést a kutatásomban hibásnak tekintem. Összesen 10 ilyen esetet állapítottam meg a vizsgált ügyek között, és ezeknél részletesen kifejtem a bizonyíték-láncolat hibás pontjait.

C. Egyéb kérdéses körülmények

Vannak bizonyos tényezők, amelyek befolyásolják a jog alkalmazását a halálos ítéletek során. Ha, egyes esetekben bizonyítékokkal eredményesen alátámasztják a történések sorozatát, és a gyilkossági szándék megerősített, de a vádlott a bűncselekményt önvédelemből, vagy súlyos mentális betegség befolyása alatt követte el, vagy a vádlott a tajvani 2006-os jogszabályi változtatások előtt még feladta magát, akkor a halálbüntetés nem alkalmazható. Ezek a tényezők kizárják a halálos ítélet lehetőségét. A vádlott alacsony IQ-ja vagy mentális betegsége szintén enyhítő körülmény lehet a büntetésben, de ezek a tényezők elbagatellizáltak és következetlen érveléshez vezetnek.

III. A történet tanulsága

Miután feltárta az ügyben fennálló tényeket, és jogi véleményt alkotott arról, hogy mi történjen a vádlottal, az ítélet még nem ér véget, hiszen tanulságot is kell szolgáltatnia. Mi is a halálbüntetés értelme?

A kutatásom során azt találtam, hogy az ítélet bizonyítása két részből áll. Az első a halábüntetés jogosságának egyedi megindokolása az ítélet magyarázatára összpontosítva. A beszámoló általában azt részletezi, hogy a vádlott erőszakos és gonzos, a bűncselekmény erőszakosan és rosszindulatúan elkövetett, az áldozat és családja veszteséget szenvedett, a társadalmi rend megbomlott és a közbékét megzavarták. Sajnálatos módon a részletes indoklásból gyakran hiánysik annak bebizonyítása, hogy az adott bűncselekmény a legsúlyosabb bűncselekmények körébe tartozik, így aztán nem indokolja meg maradéktalanul a halábüntetés jogosságát.

Az ítélet bizonyításának második része a halábüntetés egy általános megindokolása magyarázó módon (megmagyarázva, hogy a halábüntetésnek egy bizonyos rendeltetése van a közhő érdekében), vagy védekező módon (hogy sem az Alkotmány, sem az ENSZ Polgári és Politikai Jogok Nemzetközi Egyezségokmánya (ICCPR) nem tiltja az államnak, hogy
halálbüntetést használjon megtorlásképpen). Meggyőződésesem, hogy az emberi méltóság az alkotmányosság alapvető lényege minden modern köztársaságban, és minden ember méltóságát meg kell védeni, legyen az egy rabló, vagy egy szent, jó vagy rossz.

Németországban, az Egyesült Államokban és Tajvanon nyilvánvaló, hogy az emberi méltóság ezen országok alkotmányainak keretében nem azonosítható egyes emberekre jellemző jellemvonásokkal, hanem inkább egyformán minden ember joga. Az emberi méltóság inkább leíró, mint irányadó, az „emberi mivolt” egyik szinonimája, utalva az emberi lét minőségére, állapotára vagy körülményeire.

Az élethez való jog minden egyéb jog előfeltétele, beleértve az emberi méltósághoz való jogot is. Az emberi méltóság védelme egyenértékű az élethez való jog védelmével, mivel nem lehet elvenni valakinek az életét anélkül, hogy az emberi méltóság sérülne. Mivel a Tajvani Alkotmány értelmében feltétlen védelmet kap, az emberi méltóság előfeltétele – az élethez való jog - természeténél fogva szintén feltétlen védelmet kellene, hogy élvezzem.

Ötödik fejezet  A halálos ítéletek miértje: egy dinamikus folyamat

I. Kapcsolat a bíró és az ügyész között

A bírók és az ügyészek közötti kapcsolat olyannyira alapvető fontosságú a tajvani igazságügyi kulturában, hogy a tárgyalás minden szakaszában lényeges tényező, és a bírói megállapítások minden szempontját befolyásolja. Megvizsgáltam ennek a kapcsolatnak a történelmét és a jelenkori sajátosságait, és ezek alapján bemutatom, hogy a bíró és az ügyész egységét szakképesítésük (ugyanazokat a vizsgákat teljesítik, ugyanazt a képzést kapják, és válthatnak a két állás között) és szervezeti hovatartozásuk (a két szervezet általában ugyanabban az épületben van, hasonló nevekkel, és a bírók és ügyészek fix párosításokban dolgoznak) jellemzi. Sőt, a bíró és ügyész közötti szoros kapcsolatot alapvetően nyilvános elismerés és elfogadás övezi. Egy közvélemény-kutatásban a válaszadók 72%-a tévesen úgy gondolta, hogy az ügyészek a bírói karhoz tartoznak (Lin, 2015). 1980-ban a bíróságok átálltak a végrehajtój ágazatról a bírói ágazatra, és ez vagy egy rituális változás volt, vagy egy kevés sikerrel járó reform. Nem vetett véget a bírók és ügyészek összemosódásának, és egy átalakulási irányvonalat indított, ami mostanra még inkább megerősödött. Azonban a bírók és az ügyészek elkülönülése és függetlenítése még nem következett be, egységük továbbra is a bírósági kultúra gerincét alkotja. A bíró és az ügyész együttműködése rávilágít a jogi döntéshozatalra és arra, hogyan alakulnak ki a hibák a bírósági eljárások során.

II. Hibák a bírósági eljárások során
A tárgyalási folyamatot három szakaszra osztottam – a tárgyalást megelőző rész, maga a tárgyalás, és az újratárgyalás – és a hibákat szakaszonként fejtem ki. A tárgyalási szakaszt az értekezés megkönnyítésére további fázisokra osztottam fel: eljárásbeli, és tényleges tárgyi tartalomra. Annak bemutatására, hogyan alakulnak ki a hibák a külső forrásokból, és maradnak meg egészen az ítéletig, minden egyes szakaszra megvizsgálok (1) a bíróságon kívülről eredő félreértéseket, (2) a szervezeti kultúrát, és (3) a bíróság által elkövetett tévedéseket.

Érdemes megjegyezni, hogy a “szervezeti kultúra” alatt a bírósági rendszer szereplőinek előírt gyakorlatát és irányelveit értem, legyenek azok egyértelműek, mint a törvény által meghatározott szabályok és eljárásmódok, vagy kevésbé egyértelműek és közvetettek, mint a résztvevőket körülvevő igazságszolgáltatási rendszer légköre és hagyományai. Egy ilyen elemzés nem azt állítja, hogy a bírósági rendszer az egyedüli, ítéletek meghozásáért felelős szereplő, inkább azt, hogy több különböző társadalmi tényező együttesen alakítja ki az igazságszolgáltatási folyamatot és egy olyan szervezeti kultúrát hoz létre, amely lehetővé teszi a tevédek és hibák kialakulását és felhalmozódását.

Ugyanilyen fontos ismételten hangsúlyozni, hogy ebben a fejezetben a “hibákat” annak megállapításával tárgyalom, hogy a szervezeti igazságtalanság gyakran egy sor rutinszerűen végzett, ártalmatlanul tűnő eljárás során keletkezik. Ha egyenként tekintünk a rendelkezésekre, lehetséges, hogy nem is túnnekn “rossznak”, de ha már összeillesztjük, és a jogi döntéshozatal részeként tekintjük őket, akkor már nem is olyan ártalmatlanok.

Dinamikus elemzés segítségével megpróbálom felhívni a figyelmet arra, hogy egyes rendelkezések lehetővé teszik a tevédek felhalmozódását, amelyek aztán a halálos ítéletekben lévő hibákhoz vezetnek.


A. A tárgyalás előkészítése

A tárgyalást megelőző szakaszban a bíróság által elkövetett hiba általában a részrehajlás a terhelő bizonyítékok és a tanúvallomások felé.

Onnantól kezdve, hogy a bírók megkapják az ügyet, odáig, hogy megtartják az első meghallgatást, csakis az ügyészségre támaszkodhatnak, ami inkább terhelő, mint felmentő bizonyítékokkal szolgál (máskülönben ezt a vásakat), és inkább tanúvallomásokra alapuló, mint tudományos bizonyítékokat vonultat fel (a rendőrség és az ügyészség közötti bevett ügyintézési gyakorlatnak megfelelően). Ebben a szakaszban a bíróknak az esetről alkotott véleménye legfőképpen a vádlott ellen szóló tanúvallomásokra épül. Ez az, amit úgy nevezek, hogy “részrehajlás a tanúvallomásra alapuló bizonyíték felé”, és “részrehajlás a terhelő bizonyítékok felé”. Kétségkívül, bizonyos bírók elfogulatlanok tudnak maradni.

Egyesek talán képesek ellenállni a szervezeti kultúra befolyásának. De ez nem jelenti azt, hogy az időhúzás, mielőtt a védelem bemutathatná az esetet, ne befolyásolná a tárgyalás tisztességes mivoltát. Az Alkotmánybíróság 737. számú rendelkezése egyértelműen megmagyarázza, hogy az információk kiegyensúlyozatlansága a vádlott tisztességes eljárásokhoz való alapvető jogát sérti (Yuan ügyészség fordítása, 737. sz. rendelkezés, 2016. április 19.). Nehéz elképzelni azt az esetet, hogy a vád engedélyezné, hogy az intézkedés megakadjon, ezáltal a bíró hónapokig csak a védelem anyagait tanulmányozzha.

Az időhúzás tartama alatt egy tévesen megállapított vádészet pontosan ugyanúgy néz ki, mint más halálbüntetéses esetekben – a vádlott beismerő vallomást tett. A rendőrség és az ügyész megnyugodhat miután megszerezte a beismerő vallomást, a bíró színtén.

Hasonló esetek össze a vádlottakat a 3.-es és 11.-es ügyekben. Mindketten “vallottak” az időhúzás alatt, de később, az első eset a Yuan Kormányzati Egységhez (Control Yuan), a főügyészhez, és Taichung város Ügyészségéhez is került, akik szerint ártatlannal ítelték el, míg a második esetben minden kétséget kizáróan bűnösnek ítelték.

Mind az időbeni késleltetés, amely visszatartja a védelem, mind pedig a bírók és ügyészek szoros kapcsolata akadályozza a bírót a téves vallomások felismerésében. A félrevezető információknak – mint például kínzással kikényszerített vallomásoknak, a többi vádlott összeférhetetlenségből fakadó, hamis vallomásainak, vagy a tanúknak a nyomozók illetékével befolyásolása miatti félrevezető nyilatkozatainak – van idejük győkeret verni a bírók fejében. A tárgyalás ezen szakaszában a felmentő bizonyíték még nem is kerülhet elő a védelem távollétében, vagyis semmilyen információ nem elérhető az esetleges hibák
feltárásához. Így aztán nagy az esélye, hogy a hibákra nem derül fény, és tovább folytatódnak a következő szakaszból.

B. Eljárási hibák a tárgyaláson

Az itt felsorolt, eljárásban lévő hibákat általában a “protokoll” miatt magától értetődőnek veszik, és semlegesnek tekintik a vár és a védelem irányába. Talán fursának tűnik úgy jellemezni, mondjuk “a nyomozás rendszerét”, mint egyfajta “hibát”, de az én véleményem szerint, ahogy ebből a kutatásból is kiderül, ezek a látszólag ártatlan rendelkezések megerősítik a tárgyalás előtti szakaszból kialakult, terhelő bizonyítékok felé való részrehajlást, és hozzájárulnak a hibák felhalmozódásához.

A bírósági tárgyalási szakaszban az eljárási hibák lehetnek (1) a tanúvallomásokra való túlzott támaszkodás, (2) a felmentő bizonyítékok részletekben történő akadályozó bemutatása, és (3) a bíró igazságtalan utasításai.

Képzeljük el a bírósági tárgyalást úgy, mintha egy kosárlabda meccs lenne két csapattal, akik egymás ellen mérkőznek, és egy játékvezetővel, aki érvényesíti a szabályokat, így érthetőbbé válik. Először a tanúvallomások, aztán egyéb bizonyítékok hangzanak el a tárgyalás során. Ez olyan, mintha a cserejátékosok lépnének először pályára, és a legjobb játékosok csak később, amikor már eldőlt a játék. Következőképpen, az ítélet túlzottan a tanúvallomásokra épül. Másodszor, a terhelő bizonyítékok bemutatása egyben történik, míg a felmentő bizonyítékokat csak részletekben tudják előadni. Ez olyan, mintha az egyik csapatnak megengednénk, hogy egyszerre egy időben öt játékos legyen a pályán, míg a másik csapatot lekorlátoznánk, és egyszerre csak egy játékos küldhette ne ki a pályára. A játék bármely pillanatában, ez öt az egy elleni játék, még akkor is, ha mindkét csapatnak technikailag öt játékosa van. Következőképpen, a felmentő bizonyítékok vizsgálati értéke szisztematikusan alábécült. Harmadszor, a bíró egyben a vádló, és a döntéshozó szerepéért is játsza. Ez olyan, mintha lenne egy játékvezető, aki egyben az egyik csapat edzője is lenne. Következőképpen, a bíró nem pártatlanul vezeti le a tárgyalást, és akadályozza a vádlott jogait. A tárgyalás előtti szakaszból kialakult, terhelő és tanúvallomásokból eredő bizonyítékok felé való részrehajlás nagy valószínűséggel folytatódik és fokozódik a tárgyalás során.

C. Alapvető tárgyi hibák a tárgyalások során

Az alapvető tárgyi hibák lehetnek különböző ellentmondások és következetlenségek, és, mint ahogy ebben a kutatásban tapasztalhatjuk, vannak (1) hibák a szakértői vizsgálatok során, (2) felrevezető tanúvallomások, és (3) a bizonyítékgényűjtés elmúlasztása. Ez a három,
tárgyaláson előforduló alapvető hiba egymással szorosan összefügg. A bírónem jártasak az
igazságügyi szakértők munkájában és a kriminalisztikában, így nem veszik észre a
törvényszéki vizsgálatokban lévő hibákat. Mindeközben a vallomások már a tárgyalás
legelején a bíró asztalára kerülnek, és ezeket az ügyész szépen összerakta összefüggő
történetté, a másik fél beszámolói nélkül. Természetes tehát, hogy a bíró inkább
támaszkodik a vallomásokra, hogy megértse az adott bűncselekményt. Továbbá, a fizikai
bizonyítékok gyűjtésében és megőrzésében való hiányosságok ellehetetlenítik a törvényszéki
vizsgálatokat, amelyből kifolyólag a bíró még inkább csak a vallomásokra támaszkodhat a
döntése során.

D. Hibák az újratárgyalások során
Vannak olyan tévedések, amelyek megmaradnak egészen a tárgyalás végéig anélkül, hogy
fény derülne rájuk, bár az újratárgyalás célja az esetlegesen előforduló tévedések
helyrehozása. Egyes esetekben az újratárgyalás során újabb hibák is keletkezhetnek.A
szervezeti kulturának két olyan tényezője is van, amik hozzájárulnak az újratárgyalás során
elkövetett hibák kialakulásához: 1) Az újabb tárgyalás nem történik meg amikor az ügyet
visszaküldik alsóbb fokra, és 2) a bírók munkájának értékelése ösztönzi az alkalmazkodást.

III. Az ötödik fejezet összefoglalása
Az Igazságügyi Rt. dinamikus folyamatait illetően a kutatásomban azt állapítom
meg, hogy az alapanyag, amit az Igazságügyi Rt. készen kap, hibákkal van átszőve:
koholmányok, félreértelmezések, előítéletek, pontatlanságok, és nyílt hazugságok. Sajnos,
noha az Igazságügyi Rt. egyik

A szervezeti igazságtalanságok irodalmának vizsgálata fatális hibákra mutat rá, melyek
kezdetben csak triviálisnak és ártalmasnak tűnnek, de a folyamat során kiterjednek, és
más szabálytalanságokkal is kölcsönhatásba kerülnek, felhalmozódódnak, végül katasztrófát
okozva. A halálbüntetéses esetekben a döntéshozatal folyamatának vizsgálata azt mutatja,
 hogy az igazságügyi rendszer rutin működése általában hozzájárul a hibák
felhalmozódásához, és csökkenti azok felderítésének és kiigazításának lehetőségét. A nem
folytonos, szakaszos meghallgatások elrendelése egy tárgyalás során például látszólag
ártalmatlan és semleges rendelkezés, azonban ha több tényezőt is hozzáadunk az
egyenlethez, mint például a bíró és az ügyész között lévő egyetértést, a védelem
felszólalásának késleltetését, és a terhelő bizonyítékok felé való részrehajlást, a vádlott
máris hátrányba kerül. Továbbá, ezek a hibák nem véletlenszerűen fordulnak elő: a bírósági rendszer elfogult az ügyészség felé, és a vádlott ellen. Ez megfelel annak, amit Perrow “közönséges véletleneknek” nevez - amiben a “közönséges”, vagy normális nem azt jelenti, hogy ilyen véletlenek minden nap történnék, hanem inkább azt, hogy a mindennapi működésből adódnak. Hasonlóképpen, az Igazságszolgáltatás Rt.-nél egy jogos elítéléskor és egy jogtalan elítéléskor azonos módon járnak el, ugyanazokat az eljárásokat fogadják el, és ugyanazzal a gondolkodásmóddal állítanak bíróság elé és ítélnek el.

Az Igazságszolgáltatás Rt. döntéshozatalának dinamikus folyamata egy, az elítélésbe való járulékos befektetésként értelmezhető, a minőség biztosítása és a hibák kijavítása helyett. Először is, a bíró véleménye részrehajló az elítélés felé, az ügyéssel való szoros kapcsolata, és a tárgyalás a gyakorlatban megszokott rutinja miatt. Másodszor, a részrejárásmód erősödik, és fokozatosan meggyőződése fokozódik, és ez a növekvő meggyőződés megszilárdítja a bíró magabiztosságát a véleményében. Ez a fokozódó befektetés megakadályozza az Igazságszolgáltatás Rt.-t legfontosabb feladatának teljesítésében – a hibák felfedezésében és kijavításában.

Hatodik fejezet  Hibák történnek

I. A közvélemény megkérdőjelezése

A kutatáson vitába száll azzal az általános véleménnyel, mely szerint a halálbüntetést egy sor szilárd, vitathatatlan bizonyíték támasztja alá, hogy csak azokra szabják ki, akik jogosan megérdekelik azt, és, hogy meggyőző érvek és beszámolók mellett teljesítkék. Ha egy közeli pillantást vetünk a halálos ítéletekre, akkor láthatjuk, hogy a halálbüntetés nem mentes különböző hibáktól, amelyek az Igazságszolgáltatás Rt.-ben történnek. A negyedik fejezetben azt állítom, hogy a Tajvanban hozott halálos ítéletek egyoldalúan beszélők el a bűncselekmények történetét, melyekben a vádlott nem érdemel kegyelmet (akkor sem, ha a peranyagok szerint lenne rá alapos ok), és, hogy jelentős számú esetben nem egyértelmű, hogy a bíróság által kinyilatkoztatott történetek igazak-e. Az ötödik fejezetben azt bizonyítom, hogy a halálos ítéletek egy olyan folyamat során születnek, amelyekben a terhelő bizonyítékok és a tanúvallomások felé való részrehajlások fokozatosan felhalmozódnak, ami egy egyoldalú, a vádlott számára kedvezőtlen kimenetelű történet irányába terel.

II. Javaslatok az Igazságszolgáltatás Rt.-nek

A kutatás eredményei alapján technikai és alapvető változásokat javasolok az Igazságszolgáltatás Rt.-nek. Ezek a következők: (A) akta nélküli vádirat, (B) folyamatos
meghallgatások, (C) szakértői vizsgálatok megreformálása, (D) nyomozások rendszere, és (E) az ítélet-megírás formátuma.

Összefoglalva az előbbi javaslatokat, ha a bíróságok elfogadják az A és B ajánlásokat, a védelem késleltetési ideje kiküszöbölhető, és a felmentő bizonyítékok darabos és akadózó bemutatásának igazságtalansága javulni fog. Így a tárgyalási eljárások nem segítik elő a terhelő bizonyítékok felé való részrehajlást, és nem adnak előjogot egyik félnek sem. Ezen felül a C, D és E javaslatok megfogadásával a bíróságok meg tudják oldani az eljárási és független hibákat: A nem-tanúvallomás alapú bizonyítékok is súlyozó tényezők lesznek, hogy kiegyensúlyozzák a tanúvallomásra épülő bizonyítékokra való túlzott támaszkodást. Ez nem fogja kiküszöbölni a szakértői vizsgálatok és tanúvallomások tevédeéseit, de a C, D és E lépések növelhetik a hibák felismerésének valószínűségét.

Még alaposabban, a kutatásom eredményei alapján, szeretném megmutatni az irányt amely felé az Igazságszolgáltatás Rt.-nek. Fejlődnie kellene. Ahogyan azt az ötödik fejezetben bizonyítottam, a bíró és az ügyész szoros kapcsolata meghatározza az Igazságszolgáltatás Rt. szervezeti kulturáját, és minden szempontból intenzív hatással van annak minden vonatkozására. Mivel a szervezeti igazságtalanság gyakran túlmutat az egyéni tevékenységeken, és inkább a szervezeti kultúra egyedi szabályozásából ered, az átfogó képnek változni kell, ha az Igazságszolgáltatás Rt. megpróbálja csökkenteni a szervezeti igazságtalanságok és hibák kockázatát. A bíró és az ügyész tisztségét két, különböző szerepként kellene kezelni, és a szakképesítéseknek, és a hivatással összefüggő gyakorlatoknak különbözők kellene a bírók és az ügyészek számára. Máskülönben egyszerűen természetesnek hatna a személyzeti áramlás a kétféle szerepkör között, mivel ugyanabban a szakképesítésben és gyakorlati oktatásban részesülnek. Továbbá, erősen javaslom, hogy hagynak fel a bírók és ügyészek összepárosításának megkötéséért, hogy biztosítsák a bíró semlegességét a védvédelem felé is.

A 62 eset közül 10 esetnél a beszámolók lényegi része súlyos tévedéseket tartalmaztak. Gyakran idézett statisztikák hasonló arányt mutatnak: Az Egyesült Államokban, 1976 óta minden hét kivégzésre esik egy eset, amikor a halálos ítéletet később megváltoztatták (Vago, 2016, pp. 210-211). A kutatásom alapján az én megállapításom az, hogy csaknem minden hat halálos ítéletből az egyik súlyosan hibás. És itt érdemes azt is megjegyezni, hogy egyáltalán nem biztos, hogy a másik 52 esetben nem történt tévedés. Ahogyan korábban bizonyítottam, azon a 10 problémás eseten túl, sok másik ügyben is vannak eljárásbeli vagy
egyéni tévedések. Mi több, előfordulhat, hogy néhány igazságtalan elitélést nem ismertem fel elegendő információ hiányában. Nem minden peranyag volt elérhető az ügyekhez, és ezidáig még senki nem talált ki száz százalékosan pontos módszert a bírósági tévedések kimutatására. A bírósági tévedések vizsgálata meghatározza, hogy az igazságtalan tízélet százalékos előfordulása elég magas ahhoz, hogy komoly aggódalmat keltsen a halálbüntetést illetően, és a kutatásomból kiderül, hogy a hibák nem csak a problémás esetekben, hanem sok egyéb esetben is előfordulnak. A halálbüntetésekben, és egyéb, az Igazságszolgáltatás Rt. által hozott jogi döntésekben is ugyanúgy előfordulnak hibák; nem is olyan kivételesek, inkább a megszokott gyakorlat részei. A tévedések inkább normálisak mint abnormálisak.

A kutatásm újításai alapján javasolt lenne a halálbüntetés eltörölése, ha nem is az emberi méltóság miatt, akkor azért, mert az emberek még nem tudtak kialakítani egy olyan mechanizmust, amely garantálja egy visszafordíthatatlan kimenetelű büntetés kiszabásának hitelességét. Tekintettel arra, hogy az életfogytiglani büntetések hatékonyan megakadályozzák a javíthatatlan, erőszakos elkövetőket abban, hogy több bűncselekményt kövessenek el, a halálbüntetés szükségével kockázatot jelent ártatlan életek kioltására, és túlzott intézkedésnek kellene tekinteni.

III. Előnyök és hátrányok

Annanak teljes tudatában, hogy a tudományos társadalom kiemelten nagy tehetségekből áll, szeretném megemlíteni, hogy mi az, amivel ez a kutatás hozzájárulhat a tudományos élethez, és milyen korlátozások állanak.

Először is, a kutatásomban kifejlesztett módszerek alkalmazhatóak más jogi, vagy társadalmi vizsgálatok során is, és áthidalhatják a két tudományág közötti hézagot. Folyékonyan véve, hogy a ténymegállapítást alacsony szinten tanítják a tajvani jogi egyetemekben, és sok más országban is, ezen kutatás módszerei ellensúlyozhatják ezt a mulasztást, és több értekezésre és kutatásra ösztönözhetnek a ténymegállapításról.

Másodszor, a kutatásom az ítéletet egy dinamikus folyamat részeként kezeli, nem csak egy statikus dokumentum tüzetes áttanulmányozása. A kutatásomban a dinamikus elemzéssel megpróbálkoztak magyarázatokat megfogalmazni arra vonatkozóan, hogy, egyrészt ne egyszerűsítsük le a szervezeti igazságtalanságokat csak emberi hibákká, másrészt, csökkenti az emberek kognitív diszharmóniáját, ha bírósági tévedésekről hallanak. Még ennél is fontosabb, hogy csak akkor tudjuk tovább tökéletesíteni a rendszert, ha már azonosítani tudjuk az Igazságszolgáltatás Rt. hibáiért felelős strukturális tényezőket. Harmadszor, a kutatásom az utóbbi tíz év tajvani halálbüntetéses eseteit vizsgálja, válogatás nélkül. Ezzel
elkerülhető az a kritika, amivel gyakran illették a halálbüntetés eltörlését szorgalmazó mozgalmat: “Csak az igazságszolgáltatás tévedéseire összpontosít, ami a halálbüntetések esetében inkább kivételes, mint általános”. Ezzel az átfogó áttekintéssel, a kutatásom segít bemutatni, hogy hibák nem csak az igazságtalan ítéletekben vagy néhány kivételes esetben fodulnak elő.


További korlát a “kvázi tévedések” alacsony száma. Ahogy a második fejezetben is említettem, módszertani azok a tényezők, amelyek szerepet játszanak a bírói tévedésekben, csak az igazságtalan ítéletek és a “kvázi tévedések” összehasonlításával azonosíthatóak. 2006-tól 2015-ig 62 halálos büntetést hoztak, de csak öt esetben volt “kvázi tévedés”, vagy olyan eset, amikor a halálraítélt később mégis felmentették. Ez a kis minta lehetetlenné teszi, hogy érdemi összehasonlításból következtetést vonhassunk le.

IV. A halálbüntetés megkérdőjelezeése

Miután részletesen átolvastam az utóbbi évtized halálbüntetéses eseteit, arra jutottam, hogy az Igazságszolgáltatás Rt. legfrőbb szolgáltatásának általános minősége messze nem kielégítő. Amikor a diplomamunkámban a rendelkezésekből idéztem, folyamatosan szükségesnek és fontosnak tartottam, hogy hú maradjak az eredeti kínai szöveghez, nehogy az olvasók pocsék fordításának gondolják az értelmetlen mondatokat. A lektorom az egyik emailjében így kommentálta ezt: „Az esetek felében úgy tűnik, hogy talán még a bírók sem tudják, hogy mire céloznak, és nem is különösen érdeklő őket! A dolgozatod példáinak olvasása teljesen ledöbbentett.” Gyakran megesett, hogy el kellett magyaráznom a lektoromnak, hogy a bírók mire gondoltak, mert tudtam, hogy a szövegeknek egyáltalán semmi értelme nincs.
Hibák tehát csúszhatnak a halálos ítéletekbe – abba a büntetési fajtába, ami megfosztja az embereket az élethez való joguktól, és az összes többi joguktól is, és az egyetlen ítélet, ami visszafordíthatatlan hatású. Ezt az egyszerű tényt soha nem volna szabad figyelen kívül hagyni a halálbüntetések megvitatása során.
Conference presentations based on this thesis
International Conference Against the Death Penalty: Life and Death in Taiwan (December 6-7, 2014, in Taipei, Taiwan)

The publications based on this thesis
抽絲剝繭邱和順案 (June 28, 2015, Storm Media, http://www.storm.mg/article/54851)

Declaration upon oath

I hereby declare upon oath that I have written this dissertation independently and have not used any sources or aids other than those stated. I declare that I have not used commercial doctoral advisory services. This dissertation has not been accepted in any other doctoral program, nor deemed insufficient by any other doctoral program.