EAST ASIAN COURT REFORM ON TRIAL: COMMENTS ON THE CONTRIBUTIONS

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I. INTRODUCTION

I am honored to have my book, *Court Reform on Trial: Why Simple Solutions Fail*, serve as the organizing framework for this symposium.[1] The enterprise has proven valuable as it provided a reason to assemble a set of articles that focus on important changes in Asian courts in recent decades. Further, it appears that the reforms in three of the countries are loosely related to each other. While Japan had a head start on judicial reforms, both Korea and Taiwan embarked on the same path as soon as they had shed authoritarian rule. China has pursued a more ambitious project. Court reform is part of a massive effort to keep up with massive changes in society and the economy since the 1980s.

I want to underscore that my book is a study of the *failure* of reforms in American criminal courts. It is a study of failures even under *best case conditions*: where there were smart people, substantial resources, and broad-based support. The book was a sustained reflection on why good ideas were all but doomed to fail once they were put into effect. I did not find a single fatal flaw that led to failure and which, if overcome, would lead to success. But I almost invariably found failure, or at least a lack of any meaningful increment of change, in the expected direction.

My analytical framework drew from standard sources in organization theory and implementation studies. It was divided into two parts: the first examined the stages of change and problems that arise in each of them.[2] The second reflected on the nature of the criminal process and the adversarial

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[1] MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (1983).

[2] FEELEY, *supra* note 1, at 35–39.

system in the United States, and emphasized its hyper-fragmentation.[3] In my analysis of the stages of change, I emphasized the goal: what reformers wanted to achieve in the long term. I worked through the different stages necessary to get from here to there. They include: *diagnosis*, *initiation*, *implementation*, *routinization*, and *evaluation*. At each of these stages, distractions, obstacles, and misinformation can easily lead reformers astray.

Take some examples of how reforms can go astray at different stages. The public universally disapproves of disparity in sentences by race or age or social background, yet it persists.[4] A common response to this is to try to restrict judicial discretion by establishing sentencing guidelines.[5] This may help a bit, but it also raises other problems. For example, not all relevant factors can be anticipated in advance, so sentencing under the new system results in new forms of inequality and does not overcome old forms. Furthermore, guidelines are likely to enhance the power of prosecutors to charge. If so, disparities once visible in judges' sentencing may now be swept under the rug by prosecutors' selective presentation of facts and charges in plea bargaining. Neither determinate sentencing schemes nor sentencing guidelines focus precisely on the original problem, say racial disparity in sentencing, so it may continue unabated as officials tinker with guidelines. Or, to consider another problem: a well-funded pilot program run by a highly motivated staff may work wonderfully, but once it is up and running with less funds and a smaller staff, it can turn into a nightmare. New programs need to be carefully nurtured into maturity so that once made permanent, they have the resources and support they need to continue to work well.

Though important, these observations are not deep insights. Anyone who has undertaken a home renovation project or overseen even a modest curriculum reform in his or her academic unit is familiar with these sorts of issues. Things can go awry at any moment and for almost any reason. Key staff can depart; funding can be cut; programming can be co-opted; unanticipated obstacles can be encountered. These are challenges that everyone who seeks to change things in public service encounters. However,

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[3] *Id.* at 9–18.

[4] *See generally* William Rhodes et al., *Federal Sentencing Disparity: 2005*–2012 (Bureau of Justice Stats., Working Paper 2015:01, 2015), https://www.bjs.gov/content/pub/pdf/fsd0512.pdf; Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* (Univ. of Mich. Law School Program in Law and Economics, Working Paper No. 12-002), http://economics.ubc.ca/files/2013/05/pdf_paper_marit-rehavi-racial-disparity-federal-criminal.pdf.

[5] *How Sentencing Generally Works*, attorneys.com (November 10, 2017), http://www.attorneys.com/criminal-defense/what-are-mandatory-minimum-sentencing-laws.

they are compounded when applied to reforms of the American criminal process because the American criminal justice system is deeply fragmented by design and practice. The theory of the adversary process is like the theory of the market; it is supposed to work best when each part pursues its own objectives without central control. Furthermore, police are financed and supervised at the local level; corrections at the state level; courts at the county level. There is no ministry of justice to oversee it; not at the local level, not at the state level, and not at the national level. There are neither coherent political controls nor coherent bureaucratic controls. In most places, there are not even meaningful criminal justice coordinating councils. On top of this, courts deal with near-pathological problems that cannot be solved by more powerful social control institutions, such as the family, church, and school.

It is this combination of factors—the various stages of securing change on the one hand and the seemingly intractable problems and fragmented features of the American criminal process on the other—that led me to try to reorient thinking about court reform. Indeed, it led me to turn things upside down. Instead of offering advice on how would-be reformers can keep their eye on the ball and achieve success, I started with the assumption that failure is normal and natural, and that success is rare and unexpected. Feeley's law of court reform: *Unless a host of heroic conditions are present to overcome the myriad of built-in constraints, failure will almost certainly ensue*. Indeed, in the United States since the book was first published, still more reforms have been adopted and hundreds of billions of dollars spent to improve the criminal justice system; yet it is not clear that there have been any substantial improvements. And, even if so, it is not clear that these improvements are the result of planning. Most of the massive increases in funds were not used to develop more efficient and effective programs, but instead simply to arrest more people, impose harsher conditions on probation, increase the length of sentences, and restrict or eliminate parole.[6]

Planned change with innovative and carefully evaluated reforms is rare. Furthermore, the handful of careful evaluations that have been completed almost always reveal failure or near-failure. For instance, for nearly three decades between the late-1950s until the mid-1980s, as *Court Reform on Trial*

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[6] *See* MALCOLM M. FEELEY & AUSTIN SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968–1978 (U. Minn. Press 1980). *See also* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND THE SOCIAL ORDER IN CONTEMPORARY SOCIETY (Oxford Uni. Press 2002); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED DEMOCRACY AND CREATED A CULTURE OF FEAR (Oxford Uni. Press 2007).

shows, reformers in several big cities set out to reduce reliance of money bail and reduce the numbers of pretrial detainees. Despite commitments, vast amounts of special funding, and the establishment of a number of promising programs, no lasting changes were produced. Now, thirty to forty years after this concentrated effort, an even higher proportion of arrestees are held in jail before trial than fifty years ago.[7] The same sort of desultory result holds for sentencing reforms and pretrial diversion. Planned, thoughtful efforts at reform have made little or no difference and many appear to have been counterproductive. *Court Reform on Trial* did not fully anticipate the effects of the war on crime that was just gaining strength as the book was finished; but it was, I think, spot on as to why even carefully planned court reform continues to fail in the United States. [8]

[7] *See, e.g.*, Paul Heaton, Sandra Mayson & Megan Stephenson, *The Down Stream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711.

[8] *See, e.g.*, SIMON, *supra* note 6.