

## 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.<sup>1</sup> 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.<sup>2</sup> The second reflected on the nature of the criminal process and the adversarial

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<sup>1</sup> MALCOLM M. FEELEY, *COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL* (1983).

<sup>2</sup> FEELEY, *supra* note 1, at 35–39.

system in the United States, and emphasized its hyper-fragmentation.<sup>3</sup> 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.<sup>4</sup> A common response to this is to try to restrict judicial discretion by establishing sentencing guidelines.<sup>5</sup> 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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<sup>3</sup> *Id.* at 9–18.

<sup>4</sup> 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 Rehani, *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-rehani-racial-disparity-federal-criminal.pdf](http://economics.ubc.ca/files/2013/05/pdf_paper_marit-rehani-racial-disparity-federal-criminal.pdf).

<sup>5</sup> *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.<sup>6</sup>

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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<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

## II. COURT REFORM ON TRIAL IN ASIA

The articles in this symposium reveal that court reforms in Asia have followed a somewhat different path. Most efforts have been relatively modest and with limited objectives. Within these parameters, most have been at least partially successful, as best we can tell. Certainly they have not been the spectacular failures that my book recounts for the United States. Nor are the authors of the studies in this volume as pessimistic as I am.

The differences are not due to the failure of the framework in *Court Reform*. The authors of the case studies are faithful to the framework and employ it. Some of the studies reveal how inchoate ideas took form and developed, and then were examined—at times, in depth and for several years. They were then formulated and modified in negotiations before being adopted and then altered again at the implementation stage, and once again as they were institutionalized. Some were carefully evaluated; others were not. Most of them have not been around long enough for anyone to be confident about their long-term effects. Still, most of them are well past their birth stages. The headaches I described in conception, birth, and maturation are readily apparent in the accounts offered by the several authors. Still, most have survived and, by their own terms, have been modestly successful. The reforms are so different and the accounts so varied and dense that it is

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

<sup>8</sup> See, e.g., SIMON, *supra* note 6.

impossible to summarize them here. But after Setsuo Miyazawa's helpful introduction to the symposium,<sup>9</sup> they should jump out at the reader.

What, then, underlies the disparity between my assessment of American reforms and those of the authors in this symposium? Two reasons can account for it: differences in A) *structure* and B) *substance*.

A. *Differences in Structure*

In *Court Reform on Trial*, I identified three causes of dismal failure: a dysfunctional adversary process, a fragmented criminal justice system, and a fragmented governmental system. In contrast, the authors in this symposium all focus on civil law systems—systems common to most Asian countries. These systems may have some adversarial features, but are decidedly more integrated, centralized, and hierarchical than those in the United States. Although there are vast differences and ranges of examined reforms among the four countries under consideration in this symposium, all four countries share two features that distinguish them from the United States. First, they are all *unitary* countries with one national justice system. While some may be more decentralized than others, each has only one unitary criminal and civil justice system. They have one judicial system. They have one centralized prosecutorial system. They have one central law enforcement system. They have one centralized penal system.

In contrast, consider the United States. The country is a federal system, yet it administers criminal justice almost entirely at the state and local level. Accordingly, there are fifty-plus criminal justice systems in the United States. Within the states, criminal justice administration and policy is decentralized. Although criminal law is adopted and applied statewide, it is administered locally. This means that there is not one prosecutor's office, but one for each county—58 in California, 254 in Texas, and 3142 nationwide. There are roughly this many courts, with judges usually selected at the county level. Furthermore, there are over 18,000 separate law enforcement agencies; almost every city, town, or county, however small, has its own separate police force. Although nominally required to enforce and apply state law, local norms shape how the law is enforced and administered.

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<sup>9</sup> Setsuo Miyazawa, *East Asian Court Reform on Trial: Introduction to the Symposium*, 27 WASH. INT'L L.J. 1 (2017).

In short, the American criminal justice system is extremely fragmented. This means that policies adopted at one level must be administered by agencies at another level. Their competence and priorities may be quite different. For example, county-based prosecutors and judges are acutely aware that if they impose a term in the county jail when charging and sentencing convicted offenders (usually less than a year), the county must pay the costs of incarceration. But, if the prosecutors send the offender to prison for one year or more, the state bears the cost of incarceration. This factor is often of significant consideration in sentencing decisions.

As another example, each of the four countries examined in this symposium has a powerful national ministry of justice whose major task is to oversee and coordinate criminal justice and judicial functions. The United States federal government, states, counties, and cities do not have a ministry of justice. There is no one in charge of thinking about—or even coordinating—common concerns in the administration of justice or reflecting on how changes in one place affect others elsewhere. This tends to result in reforms which are often promoted by people from outside the system and with little buy-in from core justice system officials. Alternatively, they are instituted by one agency in the system, with little support from others. In either situation, reform is often like a child squeezing a balloon: she may squeeze it at one place, but it only pops out at another as the air shifts.

Although Asian courts have this advantage, this by itself does not guarantee success. As Miyazawa and Mari Hirayama's article suggests, reforms may have their own pathologies in Asian courts as well.<sup>10</sup> Still, whether a reform is initiated by a group within a ministry of justice or wholly outside it, at a minimum a central ministry is able to bring stakeholders, both inside and outside the government, to the table to seriously consider the reform. It must be admitted, however, that a powerful ministry has the capacity to keep reform issues off the agenda and to ensure that they will garner no serious attention.<sup>11</sup> Still, the various case studies of reform in this symposium all reveal that whether initiated from within or from without a ministry of justice, ministries eventually became central players in the planning process.

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<sup>10</sup> Setsuo Miyazawa & Mari Hirayama, *Introduction of Videotaping of Interrogations and the Lessons of the Imaichi Case: A Case of Conventional Criminal Justice Policy-Making in Japan*, 27 WASH. INT'L L.J. 149 (2017).

<sup>11</sup> See, e.g., DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* (2007) (offering a sustained comparison of Japanese and American criminal process in action).

In Japan, for instance, in each of the case studies of reforms, ministry officials and their allies were able to stall, co-opt those wanting more expansive reform, and narrow the range of options up for serious consideration. In short, they dominated or almost dominated the process from start to finish. For example, as Matthew J. Wilson's article shows,<sup>12</sup> Ministry officials were able to stall considerations of the reintroduction of the jury system for over forty years. When they finally yielded, they defined the issue so narrowly that it all but gutted the bar's original rationale for it, which was to curb the prosecutor's domination of the courtroom and strengthen the position of the defense attorney. Similarly, Miyazawa and Hirayama show how a plan to restrain the vast interrogation power attributed to police and prosecutors has increased the power of police and prosecutors.<sup>13</sup>

### B. *Differences in Substance*

The second factor that distinguishes the Asian reforms from those I examined is substance. My project focused on four reforms with well-defined substantive aims. Bail reform was designed to reduce the number of arrestees held in jail prior to adjudication and reduce bail amounts; pretrial diversion was designed to redirect some jail-bound defendants into community programs that would allow them to avoid conviction and jail time; speedy trial reforms were designed to reduce time between arraignment and disposition and to reduce pretrial detention; and sentence reforms were aimed at reducing disparity. Judges, prosecutors, defense attorneys, and other officials involved in the criminal justice system generally supported these changes. Furthermore, either Congress or state legislatures supported them with ample funding. In short, they should have been "best case" examples of reforms.

Still, for different reasons, the reforms have not produced their anticipated results and have been, in some instances, counter-productive. After years of reform efforts and numerous established special bail reform programs and pretrial release agencies, there is no evidence that they have produced these results. Thirty-five years later, the problem is worse.<sup>14</sup> Similarly, there is no evidence that pretrial diversion programs and speedy trial initiatives have worked. Pretrial diversion was designed to redirect jail-bound offenders into community programs where they would avoid both

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<sup>12</sup> Matthew J. Wilson, *Assessing the Direct and Indirect Impact of Citizen Participation in Serious Criminal Trials in Japan*, 27 WASH. INT'L L.J. 75 (2017).

<sup>13</sup> See generally Miyazawa & Hirayama, *supra* note 10.

<sup>14</sup> Heaton, Mayson, & Stephenson, *supra* note 7.

conviction and jail. Over the past thirty years, study after study has shown no effect. The vast majority of those enrolled in diversion programs would not have gone to jail absent the programs. Instead, they would have received straight probation.<sup>15</sup> These programs expand, rather than contract, the net of social control.<sup>16</sup> Similarly, speedy trial rules may have reduced case-processing times overall, but they do so by converging towards the mean. Some cases take less time, but others now take more time. Sentencing reforms have, quite simply, led to disaster.<sup>17</sup>

In contrast to the American reforms that I examined, all the reforms addressed at length in this symposium focus on *process*. The aims of the most ardent proponents of the reforms were either indirect or obscure. The Japanese bar mounted a decades-long struggle to revive the jury trial that once operated in Japan. Its hope was that jurors would be independent enough to weaken the prosecutor's hegemony in the criminal process so that jurors could exercise real power.<sup>18</sup> This hope, however, was dashed when Parliament adopted a mixed jury system, in which lay jurors sit with professional judges. This arrangement does little if anything to weaken the powers of the prosecutor. If anything, it provides a symbol of lay participation without much, if any, substance.<sup>19</sup> Perhaps jurors will do more in the future, but I have seen no evidence that they will.

Indeed, Wilson's contribution in this volume emphasizes that jury trials have been extended to only a tiny handful of cases, and that evaluations focus almost exclusively on how smoothly the new jury system has been implemented. The Ministry of Justice, he reports, is concerned with the "halo effect" of the new jury system—public support it has generated and the sense of efficacy that people feel after they have served on a jury.<sup>20</sup> There has been

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<sup>15</sup> Thomas G. Blomberg, *Penal Reform and the Fate of Alternatives*, in PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON MESSINGER (2003).

<sup>16</sup> Stanley Cohen, VISIONS OF SOCIAL CONTROL (1985). This book brought this seemingly inevitable consequence to the fore in studies of criminal justice reform.

<sup>17</sup> MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN THE AMERICAN PENAL SYSTEM (Oxford Uni. Press 2004) (an excellent survey and analysis which reports on the counter-productive effects of American sentencing policies since the late 1970s are voluminous). See also GARLAND, *supra* note 6; SIMON, *supra* note 6.

<sup>18</sup> At least this was the hope of the many Japanese lawyers I spoke to at meetings of the Jury Trial Study Groups in Osaka, Kobe, and Tokyo throughout the late 1980s.

<sup>19</sup> Wilson's study, *supra* note 12, does an excellent job providing context and history of this reform and describing its reception. He seems to think the reform is a modest success. In addition, there is rapidly expanding literature in both English and Japanese that assesses the early experience with the new jury system in Japan.

<sup>20</sup> See Wilson, *supra* note 12, at 104.



virtually no attention to whether the jury system has shifted power relations among prosecutors, defense attorneys, and judges.

Similarly, Daniel H. Foote's study traces the history of the bar's effort to diversify the judiciary by recruiting mature, experienced, and independently-minded lawyers: people who could be skeptical of claims made by police and prosecutors and who would be less subservient to the judicial bureaucracy and Ministry of Justice.<sup>21</sup> However, the effort resulted in a system that excluded such lawyers. It instead promoted diversity by sending young assistant judges on postdoctoral-like experiences abroad or to work for law firms in Tokyo or Osaka—experiences that might be valuable, but not likely to weaken the hegemony of the judicial bureaucracy and the Ministry of Justice.<sup>22</sup> Foote emphasizes that a number of practical factors stood in the way of more substantial changes, but he goes on to note that there were no serious efforts to overcome them because no one in the Ministry really wanted them. The results were marginal changes that marginally useful. But none of the grand objectives sought by those who initiated the reform effort were even pursued, let alone realized.<sup>23</sup>

Japan's new policy that allows victims to sit with judges on the bench during a criminal trial is fascinating to this American observer, since by American standards it is a major change. In Japan, in some serious cases, the victim can now participate in the process, and even ask questions of the accused and offer statements to the court. This appears to be a dramatic and unique change. The United States accords victims no similar opportunities. In Japan, as in the United States, many cases are dropped early on in the process, but those that remain go on to trial. In the United States, only a handful of even the most serious cases go to trial; almost all cases are resolved through plea bargains, leaving few trials in which victims could participate.<sup>24</sup> Of course, in the United States, victims appear as witnesses in open court hearings, both at trial and sentencing and in some pretrial hearings. Likewise, in some states, victims have an opportunity to present a victim's impact statement at sentencing, and some do so. Still, they do not sit near the judge in the trial and intervene at will, as they now can in Japan. An American might be concerned that a victim's more active role in the guilt phase of the

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<sup>21</sup> Daniel Foote, *Diversification of the Japanese Judiciary*, 27 WASH. INT'L L.J. 7 (2017).

<sup>22</sup> *Id.* at 48.

<sup>23</sup> *See id.* at 66–68.

<sup>24</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. EMPIRICAL LEGAL STUD. 459, 472–73 (2004).

trial would unduly influence the jury and judges, but this has not been a problem in Japan. Conviction rates already approach 100% in Japan, so victim participation is unlikely to increase the likelihood of conviction, though of course it might influence the length of the sentence.<sup>25</sup> Furthermore, in eighty percent of cases, victims decline to participate. However, as Erik Herber concludes, this new policy “in itself can be qualified as a successful legal reform, or at least the beginning of one.”<sup>26</sup>

Despite limits on the role of victims in the United States, this qualified success may have an American counterpart. In the late 1970s, the criminal courts in Dade County, Florida began notifying victims of the court dates of their alleged assailants and inviting them to attend.<sup>27</sup> This extended to plea negotiations that took place in open court, and victims were invited to comment on the proposed deal. Researchers assessing this innovation reported two important findings: a vast majority of victims appreciated being invited to these meetings, but very few in fact showed up.<sup>28</sup>

Miyazawa and Hirayama emphasize that the policies of diversification of the judiciary described by Foote, the introduction of lay judges discussed by Wilson, and the introduction of victim participation analyzed by Herber, were all extraordinary policies because they did *not* originate within the court system or the Ministry of Justice. Instead, they were successfully pressed on the courts by forces outside the bureaucracy and, in two cases, outside the party system. Despite this, as we have seen, the Ministry and the judicial bureaucracy were able to water down the proposals, adapt them to their own concerns, and then support changes that worked to their advantage.

In contrast, the proposal to videotape police interrogations originated *within* the Ministry of Justice. The proposal was initiated by a new reform Minister in response to scandals in several cases that revealed prosecutorial abuse of interrogations.<sup>29</sup> Thus, presumably it had the weight of the government behind it. Furthermore, the proposal was adopted by the Diet and is scheduled to go into full operation in 2019. But between adoption and implementation, as Miyazawa and Hirayama show, the Ministry of Justice

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<sup>25</sup> Erik Herber, *Victim Participation in Japan*, 27 WASH. INT'L L.J. 119, 137–38 (2017).

<sup>26</sup> *Id.* at 147.

<sup>27</sup> Anne Heinz & Wayne Kerstetter, *Pretrial Settlement Conference: Evaluating a Reform in Plea Bargaining*, 13 L. & SOC'Y REVIEW 349 (1979).

<sup>28</sup> *Id.*

<sup>29</sup> Miyazawa & Hirayama, *supra* note 10.

quietly supported prosecutors and police who opposed it, and turned the law on its head.

While initiated and adopted as a device to monitor prosecutors, the experimental use of videotaping of interrogations shows that it may become a new tool for prosecutors. The caveats, qualifications, and exceptions built into the law and regulations ensure that prosecutors can videotape at their discretion and in ways that enhance their ability to obtain confessions. Miyazawa and Hirayama make a convincing case that videotapes will rarely, if ever, be used to challenge prosecutorial misconduct. So, videotaping of confessions is a reform without content. Indeed, it is worse; the reform is likely to give the appearance of improvement without any substance. In this sense, it begins to look like court reforms in the United States, i.e., not just inconsequential, but counterproductive.

Here, Miyazawa and Hirayama explain, important modifications quietly took place between initiation and the adoption. After the modest proposal<sup>30</sup> was introduced, it was sent to the Ministry of Justice where it was sliced and diced and used as part of a bargaining process involving other criminal justice matters. The eventual law was announced with fanfare as a bold new policy, but as Miyazawa and Hirayama show, it had no bite.

I think that Miyazawa and Hirayama intend their article to do much more than provide a pessimistic forecast for the future impact of this legislation. Rather, they intend their case study to be an object lesson about how criminal justice reforms in Japan generally fare. If so, their conclusions hit the mark. The several Japanese case studies on reform—whether originated by powerful groups outside government or from within—point to the same general conclusions: it is not that conservatives always win; rather, bureaucrats in the Ministry of Justice always win. They can co-opt change agents, study a proposal at length, identify and manufacture a thousand objections to a proposal, doggedly persist when others shift interest or are exhausted, and then promote a pale shadow of what was initially introduced. Something like this appears to be the case in the several bold new initiatives that were examined in the case studies on Japan.

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<sup>30</sup> Miyazawa & Hirayama, *supra* note 10, at 160–64 (emphasizing that the initiative was never directed at the police, who undertake interrogations which prosecutors heavily rely upon for their cases. Rather, it was aimed at only a tiny handful of salient cases in which prosecutors intervene to interrogate suspects).

The other three articles in this symposium address reforms in Korea,<sup>31</sup> Taiwan,<sup>32</sup> and China.<sup>33</sup> How do they fare in contrast to both the United States and to Japan?

### 1. Korea

Yong Chul Park's article is one of three articles in this symposium that focuses on the introduction of lay participation in the criminal process.<sup>34</sup> With the establishment of a stable democratic government in South Korea in 1987, the governing parties faced a dilemma: how to transform repressive governmental institutions into ones compatible with democratic values. The judiciary was one such institution. The Korean judiciary had been party to repression in the earlier non-democratic regimes. The new democratic movement considered any number of creative reforms: replacing sitting judges, electing the judiciary, other forms of public participation in judicial selection, creating a constitutional court, including lay people on this court, and creating a jury system.<sup>35</sup> Park's analysis focuses on this last proposal in the context of certain criminal cases. A law providing for jury trials was enacted and immediately instated in 2008.<sup>36</sup>

Park identifies several reasons for the law's limited success. In an early and highly-publicized case, a jury convicted the defendant, only to have the verdict overturned by the Supreme Court. The reversal led many supporters of the reform to believe that the power of the new jury system was an empty promise.<sup>37</sup> But Park identifies other more fundamental weaknesses of the jury. It is supposed to "realize democracy in the criminal justice system,"<sup>38</sup> but it is not provided for in the Constitution. Accordingly, he thinks that this lack of a constitutional foundation has precipitated endless debate among legal scholars, which has undercut the jury's legitimacy.<sup>39</sup> This may be true; I would like to see some evidence to support the claim. More convincing is his analysis demonstrating that the jury trial—unlike its counterpart in

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<sup>31</sup> Yong Chul Park, *Advance Toward "People's Court" in South Korea*, 27 WASH. INT'L L.J. 177 (2017).

<sup>32</sup> Kai-Ping Su, *Criminal Court Reform in Taiwan: A Case of Fragmented Reform in a Not-Fragmented Court System*, 27 WASH. INT'L L.J. 203 (2017).

<sup>33</sup> Margaret Woo, *Court Reform with Chinese Characteristics*, 27 WASH. INT'L L.J. 241 (2017).

<sup>34</sup> See also Foote, *supra* note 21; Su, *supra* note 32.

<sup>35</sup> Park, *supra* note 31, at 177–81.

<sup>36</sup> *Id.* at 179.

<sup>37</sup> *Id.* at 186.

<sup>38</sup> *Id.* at 199.

<sup>39</sup> *Id.* at 200–01.

Japan—is not mandatory and is only an option for the accused depending on the discretion of the court. Furthermore, a jury verdict is only advisory. The judge can disregard it, though Park reports that judges support the jury’s decision ninety percent of the time.<sup>40</sup> Finally, jury trials are available in only a tiny handful of very serious offenses—and even then, in sexual assault cases, victims can request a judge to reject a defendant’s request for a jury trial.<sup>41</sup>

It is not surprising, then, that only a very small portion of all criminal cases involve jury trials; in fact, only a fraction of that small group of cases permits jury trials. Before the Jury Trial Act was adopted, it was estimated that there would at least be 300 jury trials a year in Korea—a tiny number to begin with given the population of the country. But the actual number has been far less,<sup>42</sup> and even after the law significantly expanded opportunities for jury trials, the number of jury trials has declined.<sup>43</sup> As Park notes, “[a]ny future attempts to increase the number of criminal jury trials do not look promising.”<sup>44</sup> He acknowledges that most people who have served on juries view their experience positively,<sup>45</sup> but because there are so few jury trials and they are of such low visibility to the public, he cannot imagine them having any widespread effect on public opinion.

## 2. Taiwan

Kai-Ping Su’s analysis of court reform in Taiwan focuses on two important reforms that have been introduced since the new era of democracy: the “reformed adversarial system,” adopted in 2002,<sup>46</sup> and the proposal for lay participation, which has been advocated for by the judiciary since at least 2011.<sup>47</sup> Su uses the first of these reforms as background for his analysis of the second proposed reform to permit laypeople to sit in court with judges.<sup>48</sup> Unlike Japan and other mixed systems, the judges’ proposal in Taiwan is to allow lay participation, but to give laypersons no formal role in decision-making.

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<sup>40</sup> *Id.* at 190.

<sup>41</sup> *Id.* at 192–96.

<sup>42</sup> *Id.* at 190.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 198.

<sup>45</sup> *Id.*

<sup>46</sup> Su, *supra* note 32, at 204.

<sup>47</sup> *Id.* at 203.

<sup>48</sup> *Id.* at 204.

What is most intriguing about Su's paper is the reform he takes for granted. His study examines the mixed effects of reforms introduced in 2014 against the backdrop of an even more important reform introduced in 2001. That reform established a complicated new hybrid judicial system.<sup>49</sup> He does not tell us who proposed it or how it came about, but thinks that it has been successful. The reader infers this because Su identifies the tensions inherent in the judicial role that flow from a mixed adversarial and inquisitorial system.<sup>50</sup> He seems to be saying that this relatively new hybrid reform is the cause of the judicial initiative to introduce lay participation. The judicial concern, as he sees it, is that public opinion polls consistently reveal that judges are held in very low and declining esteem.<sup>51</sup> Additionally, a series of high-profile corruption cases involving judges have further eroded public trust in the judiciary.<sup>52</sup> These and various other concerns led Taiwan's President Tsai In-Wen to establish a Judicial Reform Conference in 2014.<sup>53</sup> It is comprised of 101 ordinary citizens, lawyers, judges, and government officials tasked with proposing ways to build a judicial system "belonging to the people, responding to the expectations of the people, and being trusted by the people."<sup>54</sup> Among the Conference's priorities is the judges' long-standing proposal to introduce lay participants into the criminal trial process.<sup>55</sup> As Su notes, this proposal continues to be supported because of the judges' strong belief that if the public sees them in action, it will view them more favorably.<sup>56</sup>

Su argues persuasively that this proposal does not sufficiently tie its objectives to its likely effects. Indeed, he points out that a number of other reforms with much the same objectives have been adopted, but to no avail. Support for judges continues to plummet in public opinion polls.<sup>57</sup> Furthermore, he points to an assertion in *Court Reform on Trial* which holds that disillusionment about courts results in part from unreasonably high expectations on the part of victims and the public alike.<sup>58</sup> But his central point is that it is naïve to think that permitting lay participation will improve transparency and increase peoples' trust in courts; this is especially true because so few cases would even permit lay participation and permitted lay

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<sup>49</sup> *Id.* at 206–07.

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at 228–36.

<sup>52</sup> *Id.* at 223–24.

<sup>53</sup> *Id.* at 226.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 225–27.

<sup>56</sup> *Id.* at 236–40.

<sup>57</sup> *Id.* at 235–36.

<sup>58</sup> *See id.*

participation would be severely circumscribed anyway. The distance between the vague objective and the proposed action, Su argues, is therefore so great that it is unreasonable to expect it to have much impact.

No doubt he is correct in this, but what intrigues me most is his assertion that the low opinion of judges was at least in part brought about by the reform that created the “hybrid” adversary-inquisitorial judiciary. His claim seems to be that this change increased public expectations about courts while undermining their ability—or at least their perceived ability—to do their jobs effectively. In *Court Reform on Trial*, I argue that at times, the better a court performs, the worse it may look.<sup>59</sup> Is this an example of that paradox? Perhaps. However, I would like to see the evidence that links the decline in public support to changes in the court structure. The proximate cause of low support for judges is likely a history of corruption, continuing scandals, and a well-publicized uproar over a court’s dealing leniently with a man charged with sexual assault of a young girl. One also wonders to what extent the low grades given to judges may stem from a lingering resentment rooted in the long period of military and one-party rule that only ended in the 1990s. How many of the current judges, for instance, also held office during this period of repression in which the courts were implicated?

Most importantly, I would like to know more about the history of the apparently successful establishment of a hybrid judicial system that combines both adversarial and inquisitorial features. Su suggests that such a change was possible because the Taiwanese political system is hierarchical and capable of taking decisive measures.<sup>60</sup> Whatever the case, this seems a dramatic and potentially far-reaching change worthy of sustained analysis. It seems to me that this, and not the introduction of lay participation, is the more important innovation.

Still, Su’s skepticism over the proposal to introduce lay participation is warranted. He notes that the courts have already introduced several other similar efforts to no avail, and there is no reason to think that lay participation will be any more effective.<sup>61</sup> Furthermore, his skepticism is strengthened by Wilson’s and Park’s analyses of lay juries in Japan and Korea, neither of which report that the reforms have had any significant effects. Despite this,

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<sup>59</sup> See generally, FEELEY, *supra* note 1.

<sup>60</sup> Su, *supra* note 32, at 239–40.

<sup>61</sup> *Id.*

he does not identify any potential downside to the proposal. At best, it may make little difference and at worst, no difference.

### 3. China

The court reforms in China that Margaret Y.K. Woo examines are of a completely different nature than the others considered in this symposium and in *Court Reform on Trial*. In contrast to the incremental changes described in the other articles in this volume, Woo reports on a series of momentous changes in both law and the courts in China. She characterizes these changes as “a reflection of national goals and identity.”<sup>62</sup> She emphasizes that China has been in the midst of near continuous political upheaval since 1949 and, since the end of the Cultural Revolution in 1979, law and legal order have been central to plans for economic growth and political stability.<sup>63</sup> She identifies a series of momentous changes that are designed to create, in effect, a dual legal system. One system is designed to facilitate international trade and investment, where rules are clear and disputes can be settled smoothly and efficiently. The second system is designed to manage internal domestic affairs, where disputes are handled under the watchful eye of the Communist Party which, if need be, can place its thumb on the scales of justice.<sup>64</sup>

However, Woo’s focus is on developing the state’s capacity to handle “ordinary” civil litigation. Here, architects of the Chinese legal system have faced awesome challenges. Among other things, in 1949 the new communist government did away with law, lawyers, and law schools, and returned to a version of traditional Confucian mediation with a communist twist. In the 1970s, with the shift to a modified market economy, modern law was introduced, and so too was Western-style regulation, courts, litigation, legal training, and lawyers.<sup>65</sup> These changes had to be built from the ground up. Since the 1980s, the economy has grown by leaps and bounds in ways that have transformed society from top to bottom, and then transformed it again. The state and the guiding Communist Party have had to scramble to try to manage such rapid and extensive change. Woo provides an account of how

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<sup>62</sup> Woo, *supra* note 33, at 242.

<sup>63</sup> *Id.*

<sup>64</sup> See, e.g., TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (Cambridge Uni. Press 2009); *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tamir Moustafa & Tom Ginsburg eds., 2008). It is not unusual for contemporary autocratic states to have one law for businesses in order to attract international investment and trade, and another for social control of domestic matters.

<sup>65</sup> Woo, *supra* note 33, at 242–44.



those charged with law, courts, and the design of the legal system—both administrators and Party officials—have coped with these overwhelming challenges. Rapid change produced disruption on a massive scale, and ordinary citizens were swamped in a mire of legal problems, which were compounded by inefficient and corrupt public institutions. The state responded by trying to establish rule by law, promulgating written administrative codes and regulations, creating courts, opening new law schools, and fostering a legal profession all in order to manage burgeoning legal needs, demands for meaningful resolution of disputes, and an end to corruption.<sup>66</sup> Legal institutions faced the twin problems of coping with rising expectations and demands on the one hand and shifting priorities of the national government and Party on the other.<sup>67</sup>

Woo identifies two factors that account for the failure of the rule of law reforms of the 1980s. The change from traditional, informal mediation to formal adjudication was too abrupt,<sup>68</sup> and the new and more complicated system could not cope with the onslaught of demands brought about by the dislocations and disputes that flowed from rapid development.<sup>69</sup>

Her article describes how quickly the strong central government, supported by a strong central political party, was able to shift back to informality and a modified form of mediation, which was both much faster and cheaper.<sup>70</sup> Overnight, judges were transformed from adjudicators into mediators.

However, mediation had its own problems. Although faster and more efficient than litigation in resolving conflicts,<sup>71</sup> it did little to establish precedents, clarify rules, and develop systematic procedures in ways that facilitate the development of a modern market economy. In addition, Woo reports, local mediation was a recipe for favoritism and corruption.<sup>72</sup> However, the return to mediation allowed government officials time to come up with a new plan for a modern legal process that facilitated the rule of law, uniformity, and the reduction of localism and corruption. They adopted an

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<sup>66</sup> *See id.* at 242–51.

<sup>67</sup> *See id.* (describing the economic and political forces guiding legal reforms in China).

<sup>68</sup> *See id.* at 267–69.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 252–56.

<sup>71</sup> *Id.*

<sup>72</sup> *See id.* at 251.

experimental approach, selecting a few regions in which to try out their new system and then proceeding by trial and error to expand their policies.<sup>73</sup>

The reform Woo focuses on is the creation of a new type of appellate court for civil cases. These courts are not appellate courts in the Western sense of the term. They are proactive, not reactive. They reach out to trial courts to identify and then review important decisions. They do not listen to appeals from lower courts, affirm or correct errors, and then return cases to the trial courts for rehearing. Rather, they reach out to identify significant cases and publish summaries of them in order to publicize important principles that add to and clarify the law. It is common law on a fast track.

These courts serve still other functions. They are regional courts and thus are not closely connected with any particular region. This serves two purposes: they are more likely to be drawn into provincial-wide corruption schemes and they are more likely to promote nationwide legal norms. Furthermore, judges on these tribunals are selected not only for their legal abilities, but also for their fidelity to the central government. That is, they are not likely to be corrupt, and they are adept at shifting to follow Party policies.<sup>74</sup>

Woo reports that this approach appears to be working well. The new circuit courts are able to develop legal principles and policies much more rapidly than conventional appellate courts. Furthermore, because the circuit courts take their cues from national party leaders, they can shape the law in ways consistent with national policy. Circuit courts can clarify legal policy and combat local corruption. They are also effective at transmitting national directives on how to deal with troublesome issues and institutions—for instance, with regard to religious groups and non-governmental organizations pressing for increased freedom of expression and criminal defense attorneys seeking to zealously represent their clients.<sup>75</sup> Indeed, the new circuit courts have played an active role in the increasingly repressive regime under the Chinese Communist Party General Secretary Xi Jinping.

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<sup>73</sup> *Id.* at 264–67.

<sup>74</sup> *Id.*

<sup>75</sup> This is a real and substantial problem. For a sustained analysis of this in one area, criminal defense work, see SIDA LIU & TERRANCE HALLIDAY, *CRIMINAL DEFENSE IN CHINA: THE POLITICS OF DEFENSE LAWYERS AT WORK* (2016).

### III. CONCLUSION

The authors of the case studies in this symposium found it useful to work through the five stages of reform set out in *Court Reform on Trial*. They found what I found: good ideas can flounder as they move from planning to implementation, and then to institutionalization. Their accounts allow the reader to trace changes in the process—transformations of goals, shifts in stockholders, and measures of success. Dreamers gave way to practical bureaucrats; expansive objectives were scaled downward and, at times, transformed into symbolic responses. However, in most instances where giant steps were first announced, baby steps were eventually taken. Still, in almost all instances, the final products are recognizable from the initial designs, just substantially scaled down and retooled, even if overblown in claim.

Only in one country—China—were reforms dramatic and far-reaching; and these reforms were perhaps even more dramatic and far-reaching than their initial architects anticipated. There, court officials, swamped with cases in an unworkable legal system and urged on by the Central Committee of the Community Party, undertook a series of far-reaching changes and implemented them. When this bold initiative to replace mediation with formal adjudication became bogged down and overwhelmed, these same officials were charged with stepping back and rethinking the problems anew. They came up with another even more dramatic solution which they also imposed quickly and decisively: back to mediation. And then from this they moved on, again with bold plans.

The new process was also substantially different. They experimented with alternative ways to combine local decision-making with central oversight. To do so, they devised a nuanced and complicated process that balanced competing interests in a stunning manner: handle cases expeditiously at the local level and promote consistency through centralized controls; provide better and faster justice; and create stronger centralized control that reduces corruption. Part of me was inclined to stand up and cheer for this bold and brilliant act of judicial administration. But then I realized that this scheme is designed in part to impose harsher methods of social control across China. In light of this, decisiveness, effectiveness, and efficiency, especially in top-down, disciplined one-party countries, look somewhat less impressive.

Turning to the reforms in other countries, I have taken the liberty of suggesting that some of them were modest in scope and made for largely symbolic reasons. Therefore, they came with few consequences. In my opinion, new provisions for lay participation fit this description. So too do the projects to videotape interrogations and allow victims to participate in trials (though we have to await careful empirical investigation before any conclusion can be drawn). Still, before I dismiss them as merely symbolic, it is important to remember that symbols are meaningful, and even symbolic reforms can be important. The advocates of these reforms may be right; eventually some of them may promote more respect for, and understanding about, the criminal courts and public officials. But even if they do not contribute in any measurable way to public support for the criminal justice system, there is no evidence that they have made things worse. As we shall see shortly, this in itself is no small achievement. The authors of the case studies in this symposium focus on one or two reforms, but some of them also identify others of significant import. For instance, in Japan, the package that allowed for the creation of the jury system also provided for plea bargaining. In Korea, Park focuses on the stalled efforts to establish citizen participation. They did not have much effect, but he does acknowledge the success of the more far-reaching changes that established the *reformed* adversary system, as well as other reforms. And, of course, Woo identifies a series of massive changes that were part of a successful campaign based on trial and error.

Considering these reforms as a group, their impacts ranged from modest to symbolic successes. Furthermore, most of them are aimed at altering processes: shifting from a judge-only to a collaborative judge and jury decision, allowing more citizen participation, marginally altering the recruitment process of judges, and the like. In contrast, the innovations I assessed in *Court Reform on Trial* aimed to produce substantive changes: decrease pretrial detention, redirect jail-bound offenders to pretrial diversion and treatment programs, reduce case processing time, and reduce disparities in sentencing. The problems I uncovered with these reforms is that in each case the results ran contrary to expectations: pretrial detention reforms did not decrease but increased pretrial detention; pretrial diversion caught up probation-bound and not jail-bound arrestees; speedy trial rules did not reduce delays, but shifted them; and sentence reform increased disparities and sentence lengths. Despite good intentions, well-funded experimental programs, and well-intentioned advocates, they failed to make significant dents in the problems they addressed and usually made things worse. Such was not the case with the reforms in Asia reported in this symposium. The

reforms make a marginal difference at best and no substantial difference at worst. The only obviously counter-productive innovation reported in these case studies was the introduction of videotaping of interrogations by prosecutors, which Miyazawa and Hirayama believe strengthens, rather than limits (as was its intention), the power of prosecutors. And, of course, Woo's description of the powerful and successful new circuit courts has ominous implications in a country in which the courts are under the sway of a single powerful political party.

Of course, the sample size is too limited and the relevant explanatory factors too numerous to be able to make any firm conclusions about the conditions for success and failure. But I want to conclude with a brief discussion of two possibilities that should be regarded as hypotheses and not explanations.

First, the United States court reforms failed in part because they took on difficult substantive aims and were met with both opposition and indifference. Even when they had considerable political and administrative support, they became bogged down in the hyper-fragmented system. In contrast, Asian reforms took place in a quite different environment: the courts are hierarchical and closely associated with national ministries that can support (and often are the internal sources for) reforms. When the bureaucracy is mobilized, it can fashion proposals that are likely to be adopted and institutionalized. Of course, in the process, bold ideas can be replaced and transformed in all sorts of ways. But reform can be embraced and effected.

Second, the American criminal process is well established and stable. It may be highly dysfunctional as my discussion above suggests, but its components are entrenched and powerful. Furthermore, this entrenched and powerful system is part of a larger legal system that is highly fragmented and is itself almost impervious to efforts at systemic change. In contrast to the American legal system, those of Asia are brand new. At the earliest, they were created after World War II and for years operated in a one-party state. China and Japan are still one-party states, although the differences between them are night and day. But in China, the current legal system stems from the momentous changes beginning around 1980. Similarly, in both Korea and Taiwan, the current legal system was created after shedding autocratic one-party control in the very recent past—1987 in Korea and 2000 in Taiwan. Their legal systems within functioning democracies are in their infancy and

are not fully formed. Every facet of their operation is characterized by change and experimentation, including the desire to distinguish themselves from the process during earlier autocratic periods. Indeed, this same observation holds for their governmental systems as a whole: their institutions are new and still in the process of being formed. Setting aside the special case of China, one might expect Japan to be a model for future development. It has the oldest and most stable legal system, and its courts and Ministry of Justice appear to be the most rigid and the least receptive to change and experimentation. If governments remain stable in Korea and Taiwan, we might then expect their criminal justice agencies and ministries of justice to follow suit. If so, we can expect fewer reform initiatives and, when they do occur, to see them co-opted and domesticated by judicial bureaucracies and ministries of justice.