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EIGHTH ANNUAL CLIFFORD SYMPOSIUM ON TORT LAW AND SOCIAL POLICY ARTICLE:  
REFORMING **JUDICIAL** REFORM INSPIRED BY U.S. MODELS

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**SUMMARY:**

... First, there is a growing gap between the substantive legal commitments to justice reform and the persistent failures of **judicial** systems to satisfy frequently articulated rule-of-law objectives. ... Short of full occupation and micro-management by a foreign power or international institution, external pressure and assistance are limited in their effect on local behaviors of a **judicial** system. ... The United States utilizes four different institutional mechanisms for exporting models of civil justice reform. ... Which services or methods of reform design are most likely to lead to positive outcomes? Where should resources be invested? How important is computerization compared to string? How important is training in case management compared to the act of adjudication? Which should come first: empirical research or reform experimentation? How should that empirical research be developed: through survey, quantitative statistics, or qualitative observation? How should reform experiments be attempted: through pilot programs, and if so, how will they be delimited? Which comparison is more important: a cross-national comparison with a successfully reformed country or an intranational comparison of the status quo with the proposed changes? ... (9) Address the weaknesses of purely internal or external reform approaches by developing more collaborative institutional frameworks in order to supply (modest and carefully calibrated) foreign assistance only when necessary to bolster internal capacities (mentioned in (6)); ...

**TEXT:**

[\*351]

Introduction

This Article advances three critical observations. First, there is a growing gap between the substantive legal commitments to justice reform and the persistent failures of **judicial** systems to satisfy frequently articulated rule-of-law objectives. Second, the internal barriers to reform are so high that purely external remedies, including those based on U.S. models, are unlikely to succeed. Third, in order to improve the success rate of foreign **judicial** reform initiatives, the mechanisms, methods, designs, and embedded theories of external support for **judicial** reform require greater explication, comparative evaluation, and calibrated adaptation to meet the internal needs of reforming communities.

II. Substantive and Institutional Trends

A. Global Trends in Substantive Reform

Many national legal systems have made sweeping commitments to three areas of substantive political and economic reform. First, traditionally authoritarian political systems have sought to achieve greater democracy through popular elections, more accountable and transparent governance, and the effectuation of domestic human rights protections. Second, governments have loosened their grips on economic systems, embraced a freer marketplace, and recognized a broader range of real and intellectual property

rights. Third, the international community has embarked on a nearly uncontrollable and irreversible process of globalization. Unprecedented daily flows of capital, technology, goods, services, information, and people currently permeate national borders.

[\*352] In pursuit of these commitments (democracy and human rights; free, knowledge-based economies; and globalization and the reduction of cross-national barriers), countries have generated a daunting quantity of new substantive law including civil, commercial, and criminal codes, constitutional reforms, and treaties in support of new economic unions and an emerging international criminal justice system.

### B. The Institutional Rule of Law Challenge

The fulfillment of these legal commitments poses a formidable institutional challenge. The realization of the right to vote, the enforcement of contract, the protection of property and human dignity, and the ability to trade with other societies without predatory tariffs or unfair treatment all require institutional adherence to the rule of law. n1

It is a noted paradox of the rule of law, however, that states must be simultaneously strong and self-limiting. n2 The potentially paralytic effects of this paradox dissipate with a focus on the judiciary, or some functional equivalent, as not only the least dangerous n3 institution, but also the one best able to serve this dual function of strong enforcement and self-limitation. Impartial and effective adjudicative or dispute resolution institutions, help effectuate the rule of law. n4

The courts and supporting public and private institutions are therefore critical to the realization of widely shared twenty-first century objectives. n5 From this perspective, **judicial** institutions may hold the [\*353] greatest promise of providing an effective check on political, economic, and legal threats to the emergence of a democratic, prosperous, and law-based global society. n6 Through impartial judgment, no branch of government is better designed to hold political and economic actors accountable to law or to ensure that commercial and property rights and obligations are enforced. To perform this role, however, courts must be independent from undue political interference, maintain integrity in the face of private financial pressures, and operate at a high level of efficiency, especially given frequently inadequate human and financial resources. As Amartya Sen has emphasized in a broader context, "Our opportunities and prospects depend crucially on what institutions exist and how they function." n7

### C. Persistent Failures in Institutional Performance

The least dangerous branch of government is, sadly, also the most neglected. Courts are fragile political institutions, and their effectiveness is easily undermined by more resilient political, economic, and cultural forces. Judiciaries are underfunded, undersupported, undertrained, and underprotected. n8 National **judicial** systems have not been able to keep pace with substantive commitments to democracy, free markets, and globalization. Political and economic interference n9 combined with impartiality and delay in the administration of justice n10 currently undermine the achievement of core objectives in many [\*354] countries throughout the world. n11 Indeed, an excessively partial or slow process renders fundamental public legal principles ineffectual, eviscerates private legal rights and obligations, cultivates the conditions for corruption, n12 and favors the powerful over the weak. Institutional dysfunction thus undermines equality under the law and corrodes the incentives critical to legal compliance.

Ironically, the new demands on courts appear to intensify their ineffectiveness. As courts become more important, the political urge to influence them also grows. Despite the strong rhetorical commitments to independence, integrity, and efficiency, severe problems fester. n13

Illegal influence remains common. n14 In Indonesia, for example, the Supreme Court remains vulnerable to political intimidation, threats of violence, and enticingly large bribes. n15 In Tanzania, bribes of lay assessors, who are paid the equivalent of \$ 0.45 per sitting, are considered necessary to advance or defend claims successfully. n16 In surveys conducted in Bangladesh, 63.6% of the respondents indicated that they had bribed **judicial** officials (73.1% in cash, 53.3% paying their bribes in person); almost 90% said that it was almost impossible to get [\*355] a quick and fair judgment without monetary influence. n17 In sum, the law that proscribes corruption has profoundly limited effects n18 on the market incentives for bribery. n19

Additionally, the growing importance of recently implemented law has also imposed new burdens on courts. New rights create new forms of legally cognizable claims and disputes. In most market oriented or democratic countries, case filings are on the rise; yet, most countries are not close to keeping pace. n20

As one extreme manifestation of this common problem, Indian courts are falling further behind with each passing year. For example, in Ahmedabad, a city of approximately four million people in the state of Gujarat, the city's civil courts receive approximately eight thousand cases and resolve only two thousand, leaving the remainder for subsequent years of court work or eventual abandonment by the parties. In September 2000, when I last visited the civil court in that city, the fourteen judges assigned to civil matters (beyond small causes) for the entire city were hearing cases filed between 1986 and 1990. n21 In three Latin American countries (Argentina, Ecuador, and Venezuela), from 1981 to 1993, disposition times increased by 85% in part because of economic changes. n22 In Russia, between 1987 and [\*356] 1997, the number of civil cases in the courts doubled from 1,839,000 to 3,916,839, and "the judiciary has been overwhelmed by a new demand for its services." n23 Delay is not limited to developing countries. Systems ranging from England to Italy are struggling to combat delay as well. n24

#### D. Systemic Causes in Poor Performance

The causes of this common failure are deeply systemic. Two brief examples illustrate the number of factors that may contribute to court failure.

In Indonesia, for example, political and private interference are attributable to three major factors: strong incentives, weak disincentives, and ample opportunity. Weak terms of **judicial** employment including low salaries, politicized appointment, transfer and promotion systems, insecure terms of office or tenure, and limited forms of economic and personal security increase the need to seek illegal monetary payments and to avoid political affronts. Frequently, the disincentives are equally weak. Vague ethical norms, poor monitoring capacity, corrupted review systems, and ineffectual prosecution and enforcement substantially reduce the risk of illicit behavior. n25 Opportunities for corruption remain unchecked by an opaque procedural system of limited joint communication, reason-giving or publicity, a slow and fragmented process with multiple steps and appeals, a poorly regulated and fragmented body of legal professionals, and a state monopoly on the resolution of legal disputes that puts too much discretion in too few hands. n26

In India, as another example, backlog and delay derive from a lack of accountability, discipline, versatility, and finality. Court administration systems lose track of matters, events, records, and evidence. Case processing is discontinuous, fragmented, protracted, and excessively permissive of adjournments, provisional ex parte procedures, and appeals. Settlements are rare, and few alternatives to trial are available or well-developed. Litigation is still viewed as the primary [\*357] means of dispute settlement, not to mention dispute escalation. Finality is elusive, as appellate rights are excessively permissive. Cases linger beyond the life-span of the original parties, thus triggering the need for additional hearings to satisfy notice and process requirements for new rights-holders directly affected by the judgment. Provisional and post-judgment remedies for failure to comply with final judgments are additionally inadequate to deter noncompliance. n27

#### E. Lessons

In sum, there is a significant difference between the expectation and actual performance of **judicial** institutions, n28 and the gap may be growing as a result of quick normative and slow institutional change. Without responsive ways of bridging this gap, **judicial** systems will be trapped in an endless pendulum swing from high hope to bitter disappointment. To avoid this trap, two lessons from the foregoing discussion must be kept in mind.

First, without adequate investments in institutional development of the courts or other supporting institutions (e.g., **judicial** councils, ombudsmen, or mediation centers), the legal commitments that set in motion a process of democratization, privatization, and globalization may make matters only worse, at least in the short term. Law takes on greater importance; legally-cognizable claims increase; more people come to the courts expecting justice; and stakes in the outcome rise. The only phenomenon that flattens this higher demand is a continued failure of the **judicial** system: if litigants distrust the system or find it ineffective, they will pursue private, extralegal strategies or simply lump their legal injuries and internalize the costs. n29

Second, substantive commitments are easier to achieve than institutional reforms. Common assumptions of perfect enforcement or uniform imperfections in enforcement trivialize the importance of primary agents in the legal process, whose individual incentives produce different systemic behavior and outcomes. n30 Developing institutional [\*358] performance means changing behaviors that are difficult to affect without structural changes in these incentive structures (and the feedback systems by which agents react to these changes and opportunities). n31

What then are the internal and external capabilities for closing this gap between substantive commitments and institutional performance?

### III. Internal Barriers to Reform

Before evaluating the ability of external agents to reform **judicial** institutions, it is necessary to assess the internal barriers to reform. n32 As a complement to Bryant Garth's leading exposition of these structural barriers, n33 this section sketches a wide array of systemic impediments and inhospitable reform conditions.

#### A. Systemic Impediments

##### 1. Empathetic Accounts

Particularly from an external perspective, reformers can easily fail to see the functional justifications for phenomena they criticize. For example, anti-independence measures may emerge to regulate an entirely venal judiciary. n34 Corruption may flourish as a response to the inefficiencies of a tenured civil service and an invasive and excessively bureaucratic regulatory system. Delay may be a sign of the system working hard to achieve factual accuracy and substantive justice without cutting corners. Adjournment cultures may develop because it is difficult to get to court on time when one has to travel great distances and notification systems are poor. n35 For example, British colonial authorities in Tanzania wrongly attributed delays to incompetence rather [\*359] than to the economic conditions of rural life. n36 As reflected in the Chagga saying: "It is no use claiming a cow from a man who does not have one," n37 claimants may reasonably wait to prosecute a claim "until the original debtor's son or grandson prospers." n38

Beyond these points, however, there are less empathetic accounts of the deep impediments to reform.

##### 2. Powerful Interests

Problems persist in part because they serve the interests of powerful politicians, monopolists, and professional elites (including lawyers themselves). n39 Political leaders rarely appreciate the benefits of limits on their own power. Rich families and corporations may prefer to purchase justice rather than subjecting themselves to impartial decision-making. Lawyers paid by the number of court appearances have strong incentives to protract litigation into a series of fragmented, discontinuous proceedings, and those paid substantial amounts upfront have little reason to push matters forward. Therefore, reforms meet substantial resistance from those who benefit from the status quo. Shortsighted analyses of the ostensibly apolitical nature of court reform, n40 coupled with excessive optimism to affect change, are likely to result in deep disappointment. n41

##### 3. Mutual Reinforcement

Problems of failed performance tend to reinforce one another. Poor terms of employment make judges more vulnerable to corruption and less likely to combat delay with sufficient industry. Political interference and delay are also conducive to corruption because these conditions give administrators (e.g., from the Ministry of Justice to the court registrar) the ability to extract rents for altering outcomes or pushing matters forward or back. If judges are corrupt, the legitimacy and integrity necessary to give them more independence is lacking, and the incentives to create delay increase.

[\*360]

##### 4. Limited Resources

These problems have an adverse effect on the human and financial resources a **judicial** system can attract through either the public or private sector. n42 Human resource deficiencies are critical. Lawyers in many societies are still at a relatively low rung of professional rankings, and legal educators struggle to attract talented students. This is changing in many dysfunctional systems, particularly those transitioning to a new market system; however, the talented students attracted to law, in Russia for example, are interested in transactional settings far removed from the practical operation of the courts. **Judicial** positions are far less desirable than one would presume in a U.S. context. An important form of psychic income is unavailable to judges in systems that allot them weaker civil service roles.

Even if one could solve these recruitment problems, limited financial resources pose an additional impediment. Experts bemoan the low level of public financing in the courts; however, beyond intentional neglect, political institutions may be reluctant to invest in institutions that function so partially or poorly.

Lawyers in these systems complain about the way they struggle to make a living, and judges observe that their salaries are substantially lower than those of the bar. However, it is unlikely that a legislature or clientele would reward a judiciary or bar when there is very little perceived social value rendered by their services. Again, these vexing problems cannot be understood outside of their systemic context and the functional motivations of different participants.

In a vicious cycle of positive feedback (rendering negative effects), solving one problem seems to require solving them all simultaneously. Yet, solving them all seems entirely impossible because the conditions on the ground are not conducive to reform.

## B. Inhospitable Reform Conditions

Several additional conditions are deeply inhospitable to effective reform.

### 1. Low Level of Local Participation

The improved performance of a **judicial** system ultimately is a matter for the reforming community. Short of full occupation and micro-management by a foreign power or international institution, external pressure and assistance are limited in their effect on local behaviors of [\*361] a **judicial** system. The failure to involve local actors in the reform process can easily lead to reactionary viewpoints and recalcitrant behaviors. Furthermore, the communities most in need of effective reform tend to have the lowest levels of participation in the reform process.

### 2. Limited Self-Awareness

Reform proposals based on inaccurate self-assessments are not likely to have a positive impact in addressing critically important problems. This is particularly true in systems where there is a large deviation between law and practice. Self-awareness depends on candor, quantitative empirical tools, and qualitative assessments. Unfortunately, powerful interests may repress candid assessments, and very few reforming communities have an adequate set of empirical tools; even where both are available, most quantitative analysis is often deficient in a qualitative assessment of what value the **judicial** system should produce and at what cost. n43

### 3. Isolation from Worldwide Models

Broad exposure to other models liberates contemporary thinking, punctures local dogmas, and liberates reformers to think beyond overly-simplistic models of alternative **judicial** institutions and processes. In-depth exposure to other systems also provides legal reformers with a comprehensive checklist of detailed considerations to be addressed in a sustainable reform initiative. Many legal communities, however, have been severely isolated and have little awareness of other models. Still others are closed to the idea of drawing on the experience of all but a few nations with whom they identify (such as the United States, former colonial powers with whom origins are shared, or neighboring countries with similar value systems or levels of development). n44 The common isolation or narrow focus of legal communities produces a parochial perspective that limits the range of conceivable remedies.

[\*362]

### 4. Limited Creativity in Adapted Design

Exposure to foreign systems is helpful but seldom sufficient for effective reform design. Reform models are more likely to succeed if they are not merely copied or transplanted into the system. The argument that transplants are easy and common, although based on substantial historical evidence, profoundly undervalues the relationship between law and external social objectives. n45 Furthermore, reforms conceived as blunt negations of the status quo are not likely to be successful. n46 Reform proposals based on foreign systems or in reaction to recent domestic experience require careful adaptation. Most communities, however, are not familiar with the tools of adaptation and tend to think of foreign models as package deals to accept or reject, but rarely to alter, and alterations tend to graft one institution onto another without comprehensive consideration of the system as a whole. n47

### 5. Shaky Ground for Consensus-Building

As Linn Hammergren explained, "Justice reform also implies political change in its broadest sense." n48 Reform, therefore, depends on a political strategy that can overcome the powerful forces in support of the status quo. However, few experts in **judicial** systems have the sophistication to develop a political

strategy, and reformers thus have difficulty aligning political leadership at the top with the demand for change at the street level.

## 6. Additional Factors

Several additional conditions affect the ability to develop and apply an effective implementation strategy. These factors include the following: inexperience with strategic planning and implementation; the financial [\*363] needs of the reforming legal system for outside support and the demands of the donor community for internal action; and personal and professional security concerns for those engaged in reform.

First, communities that have not had the opportunity to determine the design of their own legal system have a comparative disadvantage in reform. Legal cultures n49 accustomed to exclusively top-down reform tend to be passive in developing their own views and complacent in holding authorities accountable to plans for implementation. Furthermore, actors who benefit from a system hindered by institutionalized corruption or protracted delays are likely to feel threatened by reforms and their consequences.

Second, the process and implementation of effective reform can be expensive. Frequently, both internal and external sources of financial support are required. Domestic matching, counterpart funding, or in-kind contributions of time and resources reflect a positive internal commitment to reform. Yet, internal sources by themselves are often insufficient, and reforming communities need to draw on available funding from the donor community. Understandably, the donor community requires assurances that money invested in reform is well and effectively spent. This dynamic frequently poses a "Catch-22" scenario. The host community needs resources and expertise to develop an implementation strategy worthy of donor funding; however, the donor community conditions funding on the development of an effective and credible reform strategy.

Finally, as I pointed out earlier, significant reforms threaten the vested interests of stakeholders who benefit from the status quo. Those in support of reform may risk their careers or their personal safety. Ample security for those working on sensitive reform initiatives is rarely, if ever, available.

## C. The Internal Reform Challenge

Given these impediments and conditions, reforms frequently fail. Failures take at least three different forms. First, reforms may merely render disappointing results. For example, case management reforms in the United States have not demonstrated any appreciable, multidistrict impact on savings of cost or time. n50 **Judicial** councils aimed at [\*364] improving **judicial** performance, for example, appear vulnerable to the same problems they are designed to address: political interference, corruption, and bureaucratic delay. n51 Second, interventions for one purpose frequently undermine other equally important objectives. Strong **judicial** independence measures, such as the "one-roof" reform in Indonesia, may further insulate the judiciary from anti-corruption and accountability measures. n52 Efficiency measures, for example, that integrate **alternative dispute resolution** may undermine values of publicity because settlements are confidential and normativity because no judgment is produced to shape the law applicable to others. n53 Finally, reforms may completely backfire. According to a former Chief Justice of the Indian Supreme Court, the Court's refusal to allow the executive branch to play any role in **judicial** promotions has led to more interference, not less. n54 Severely repressive anti-corruption measures, such as in the People's Republic of China, may drive illicit behavior further underground and enhance those with power and discretion in those systems to extract rents from those vulnerable to attack. n55 Additionally, efficiency measures may have a paradoxical effect: by making the courts and appended processes more attractive to disputing parties, reformers may unintentionally attract larger numbers of litigants who would otherwise have settled or lumped their disputes. [\*365] Thus, anti-backlog measures may unintentionally create new backlogs. n56

These disappointments result in part from the failure to understand the internal dynamics of the **judicial** process from the bottom-up. For example, court reform that does not contemplate the incentive structures underlying professional behavior is not likely to succeed. n57 In India, legislated reforms of the civil procedure code were immediately suspended by nationwide lawyer strikes because the views, practices, and interests of the system's key participants were not taken into account in developing the reform. n58 Comparative research in Europe has shown that the neglect of taking lawyer compensation schemes into account may completely undermine civil justice reform aimed at containing cost or delay. n59

Thus, to improve the success rate of **judicial** reform, reformers face a daunting internal challenge. Reform efforts must take into account the deeply embedded causes of the problems they confront, whether through empathetic accounts or more critical confrontations with the status quo, the dynamic interplay of problems, or limited resources. Reform processes must also seek to increase local participation, cultivate greater self-awareness, expand the alternative reform arrangements to be considered, adapt them to local conditions, build political consensus, pursue effective implementation strategies, build experience, increase investments by showing results, ensure security for agents of reform, and address the incentive structures for key participants in the process. Improving the role of external forms of assistance therefore depends heavily on attending to these internal factors.

#### IV. Limits of External (U.S.) Reform Remedies

The undervaluation of these internal factors often leads to an overvaluation of the role of external remedies. If local dynamics are ignored, external institutional interventions, methods, models, and theories tend to raise exaggerated hopes of success. When reforms [\*366] fail, it then becomes easier to blame the disappointment on the intermeddling of a foreign or international institution, its coercive methods, its inapplicable models, or its ideologically-driven theories of institutional change. These sudden swings of high hopes and deep disappointments would be better moderated by a working presumption that external remedies are unlikely to overcome internal barriers, even when they are properly adapted to improve or complement internal reform commitments and capacities.

The critique of external approaches to justice reform is hardly novel. n60 Many observers have illuminated difficulties encountered in failures of the "law and development" movement of the 1960s and 1970s. n61 Thirty years ago, deeply influenced by this critique, Professor Franck admonished: "What is needed is help given and taken, with mutual respect, and without strings, to promising projects, backed by responsible individuals and institutions." n62 Twenty-five years ago, Professor Merryman effectively summarized these problems in a review of law and development scholarship. He cited four critical weaknesses in the export of American legal models to the developing world: (1) unfamiliarity with the host legal system; (2) the absence of a respectable theory; (3) immunity from consequences and an artificial access to power; and (4) a resulting tendency to project and impose U.S. attitudes and ideas. n63 Over ten years ago, Professor Alvarez revisited these issues, albeit a bit more optimistically, in a thorough review of "rule of law" programs administered by USAID in the 1980s. n64

Most recently, in *Aiding Democracy Abroad: The Learning Curve*, n65 Thomas Carothers skillfully captured the common features of a diverse range of democracy aid projects funded by the U.S. government, [\*367] more specifically USAID. Specifically, he identified several related problems in the external model, including a lack of humility, n66 superficial assessment, n67 simplistic modeling, n68 a misplaced emphasis on ends rather than process, n69 and weak evaluative n70 tools n71 and commitments. n72

Beyond recommendations for more self-criticism, deeper assessments, more sophisticated modeling, an investment in the reform process, and a stronger commitment to continued evaluation of aid projects, all of which reduce the risk of external error, how might external [\*368] approaches to reform be improved to overcome internal barriers to reform and reduce the risks of failure?

In order to assess and improve upon external forms of assistance, four aspects of any external approach must be distinguished as independent variables. A more detailed picture of each variable will counter the tendency for over-generalization and stereotypical characterizations of a very diverse range of approaches, illustrated by the following questions. First, which institution is best suited to provide external assistance? The U.S. State Department (including the former U.S. Information Agency), USAID, the World Bank, the International Monetary Fund, and private foundations (e.g., the Ford Foundation) n73 each have different levels of experience and expertise in different types of justice reform. Related to the choice of institution is the particular mechanism used to encourage reform in a host system. Conditionality, technical assistance, aid, exchange, or private grants are each distinctive mechanisms for providing assistance. Second, what is the particular service that is provided? Computerization, training, comparative or statistical research, and consulting on reform designs are each different forms of assistance. Third, which models are promoted through assistance? Anti-corruption commissions, court management, case management, **alternative dispute resolution**, and new commercial courts each have varied track records in different national settings. Finally, what is the working theory of institutional change that informs the reform effort? Approaches based on the expectation of fast or slow, systemic or incremental, and top-down or bottom-up reform differ substantially in their underlying theories of organizational change.

Each of these variables may have an independent impact on the success of a **judicial** reform. The institution providing assistance may be distrusted, lack competence, or use coercive methods that are resented or noncoercive methods that provide no extra incentive to overcome local barriers. The particular service provided may fail to answer a local need or skew local determinations of which models would be most effective as solving institutional problems. The design itself may be poorly adapted to overcome negative receptivity factors. Finally, the theory of institutional change may reflect a conventional wisdom that on further inspection has no impact on local dynamics.

[\*369]

## A. Export Processes

### 1. Institutional Mechanisms

The United States utilizes four different institutional mechanisms for exporting models of civil justice reform. n74 First, as an arguably predominant approach, the United States provides aid or technical assistance to foreign countries engaged in these reforms. The institution primarily responsible for this approach is USAID; n75 however, the State Department and, more indirectly, the World Bank n76 and International Monetary Fund (who are both subject to deep American influence) also utilize this approach. Second, the United States supports exchange of legal opinion leaders in foreign countries with American experts. The United States Information Agency, now integrated into the State Department, is the primary institution of the government that emphasizes cross-national exchange. Third, the United States, through the international financial institutions (the World Bank n77 and International Monetary Fund), provide financial support mainly through loans to foreign governments, the provision of which funding is conditional on structural reforms, including legal and institutional change. n78 Finally, the United States supports, mainly through political access, public grants, and tax credits, the work of private corporations, n79 foundations, and non-governmental organizations that are interested or dedicated to civil justice reform abroad.

[\*370] These mechanisms differ in several key respects: the recipient of funds (U.S. or foreign, public or private organizations), the method of funding (grant or loan), the ambition of the project (from cultural exchange to structural reform), and the level of coercion in the dynamics between external and internal agents.

To date, reformers do not have the benefit of an independent comparative study of these varied approaches: how well, and under what circumstances, do aid, conditionality, exchange, or privatized forms of assistance work? This remains a critical weakness in the attempt to improve upon foreign-assisted reform models.

### 2. Reform Methods

Independent from the export mechanism, the services provided in support of reform vary widely. Computerization, training, consulting in the design and implementation of reform, and the provision of academic expertise in comparative law or empirical methods are all common tools of the export trade. Observations of these methods in active reform projects paint a mixed picture.

#### a. Computerization

The value of computerization is nearly self-evident. Computerization is a powerful tool of information management, central to increasing efficiencies in the administration of the courts and their dockets. Accountability for case and event tracking, notification systems, filing systems, and allocations of workload are all enhanced by computerization of the courts. n80 Singapore, for example, has boasted great achievements in its computerization efforts. n81 However, many computerization projects, particularly in poorer countries, have rested on limited understanding of local practices and needs or human and financial resource limitations. Computerization also overshadows simpler [\*371] solutions for pressing needs. Many far less expensive services are capable of achieving efficiencies without the need of computers. For example, in India, simple case summary forms may allow judges to quickly determine the time needed for getting a grasp on the matter before the court. In Angola, according to one of my colleagues, the courts need string to bind documents together in one file, and the inability to hold large files together wastes valuable court time and resources.

#### b. Training

Training, too, is a logical approach to advance changes in procedural behavior. n82 New codes necessitate more legal education. Procedural reforms require training in management, alternative forms of dispute resolution, or oral direct and cross-examination. However, training also is often divorced from the functional needs of the system and rarely touches the most central function of all: the act of adjudication and opinion-writing. Many **judicial** training centers have advanced reform through new instruction methods; however, others remain empty shells of limited value to improvements of the **judicial** process.

#### c. Comparative Method

**Judicial** reform efforts (e.g., anti-interference, anti-corruption, or anti-delay) often rely on a comparative theory about which features of a **judicial** system cause or alleviate these problems. Comparative theories fall into two frequently overlapping categories. Spatial theories rely on cross-national comparisons between a reforming country and one that appears to be performing satisfactorily. Temporal theories rely on intranational comparisons of the current problems and the anticipated changes and their impacts at a later time. Indeed, reform proposals necessarily rely on the second type of theory, even if they are not motivated or guided in any way by cross-national comparisons.

Thus, success of **judicial** reform is dependent in part on the quality of the cross-national or intranational comparisons that serve to justify specific proposals. Elsewhere, I have argued that these comparisons are often unclear in purpose, skewed in their choice of content, or imprecise in their tools of differentiation. n83 If the comparisons are [\*372] weak, one might reasonably expect that the reforms upon which they are based carry a greater margin of error and are less likely to be successful.

#### d. Statistical Method

An increasingly common approach to reform is the use of empirical or statistical methods. On its face, this method makes a significant contribution to the accuracy in assessing the practical operation of the system. However, among the several limitations to quantitative methods, I would like to emphasize one particular propensity here.

Empiricists tend to favor examining phenomena that are easily measured. Thus, there is a strong tendency to avoid exploring qualities that are difficult to quantify or operationalize. That is, despite the immediate benefits of the data, the deficiency of complementary, qualitative assessment often raises more questions than the data can answer. n84 For example, a recent World Bank study in Argentina and Mexico found far less backlog and delay than previously estimated due to a great number of cases that were eventually "abandoned." n85 However, the study does not express any evaluation of the merits of those dropped cases, any diagnosis of why they were dropped (e.g., an early failure at obtaining injunctive relief, an internalization of the likelihood of an endless delay, or the depletion of money used to pay off the registrar to keep the case moving), and the social or economic effect of their abandonment (non-compliance with contract and property rights or increase in the risk and cost of doing business). Notwithstanding the merits of gathering data to support or refute mere perception, without a qualitative evaluation, it is far from clear what to make of these "empirical" findings.

### 3. Reform Designs

A third independent variable is the design of the reform. Too little is understood about the impact of specific designs in different contexts to be confident of a reform's likely success. Take, for example, the question of **judicial** independence and accountability.

[\*373] Measures that advance independence do so in relative, not absolute, ways. n86 To what extent does a life tenure system enhance independence? Judges with tenure may not lose their jobs, but they may be deprived of resources, such as salary or administrative budget, subject to discipline or removal, or vulnerable to public pressure through political statements or media attention. That is, a life tenure system does not in itself guarantee full, or even sufficient, **judicial** independence. To what extent does an external disciplinary system enhance accountability? External systems may have limited resources, limited access to information, or limited protection from corruption in their own midst. That is, an external disciplinary system by itself is no guaranty for establishing full or even partial accountability. The net result of any reform measure is an empirical question, about which we know much too little, that if we knew more would render answers in quantifiably relative, rather than in absolute, terms. The question of how to design a sufficiently independent and accountable judiciary renders a wide range of institutional responses. Therefore, there is rarely a clear answer in response to questions about the most appropriate reform design.

Despite these questions about the relationships between a particular model and its probability of success, U.S. civil justice system features are intensely promoted. These features fall roughly into categories of greater and lesser interest, and three factors appear to influence the different levels of demand: what the United States promotes, what foreign reformers view as successful, and what appears best to answer local needs.

#### a. Features of Greater Interest

Beyond constitutional features, particularly the ideal of **judicial** independence and its more affirmative conception as **judicial** review n87 or the generally perceived processes of the Americanization of European legal culture, n88 U.S. civil justice reform features of greatest interest [\*374] abroad include a wide range of anti-delay reforms, from court n89 and case management n90 to **alternative dispute resolution**. n91 Court management systems promise efficiencies in the back-office management of the system and the information flows intersecting with the legal process, including case and event tracking systems and sophisticated calendar systems for the allocation of **judicial** resources and for continued self-study and evaluation.

Case management is attractive for the discipline it offers in **judicial** control over the lawyers and the parties they represent. The export of case management to countries in continental Europe or former colonies with "civil law" models meets much less resistance than it does in Anglo-American systems. The stronger tradition of **judicial** control, coupled with the incapacity in many systems of the judiciary to exert that control, makes case management a particularly attractive export. n92

Finally, **alternative dispute resolution**, which includes arbitration, mediation, conciliation, **judicial** settlement, and other hybrid forms are also extremely popular. Many see these alternatives to trial as not only faster and cheaper, but also potentially superior forms of dispute settlement that privatize the state's monopoly on dispute resolution. Many countries can easily find social or pre-colonial analogues to modern mediation as a source of legitimacy for what would otherwise be viewed as a foreign export. However, many of the concerns of U.S. experts about these interventions are echoed abroad. Judges and lawyers worry about the lack of publicity, transparency, and normativity of these processes, as well as their potential corruptibility.

Again, here, we might ask why these are of greater interest. Three explanations spring to mind. First, these strategies have been heavily promoted by USAID in its projects abroad. Second, many perceive, somewhat too favorably, that these interventions have been uniformly successful in the United States in creating greater efficiency and access to justice. Third, and most importantly, the primary interest in these [\*375] techniques stems from local perceptions of the extent to which they address local needs.

#### b. Features of Lesser Interest

It would be easy to reach the conclusion that the foregoing evidence of U.S. influence establishes an affirmative answer to the central question raised by this panel. That would be premature and inaccurate, however, without scanning other U.S. features of lesser interest or relevance.

Two features stand out in this category: the U.S. jury and discovery systems. n93 Both are considered anathema to civil justice in most countries. Objections to the jury system run long and deep: the opaque nature of jury decisions, the quality and qualifications of the decision-maker, the dramatic tactics thought to persuade jurors, or the propensity for legal nullification. Also, as I am sure Professor Subrin will explicate (far more ably than I), U.S. discovery is viewed with even more disdain: the lack of privacy protections for litigants, the extensive breadth of information sought, the lack of active **judicial** oversight, the impact of uneven financial resources, the duplication of evidentiary process with that of the trial, or the sheer cost. Most foreign observers consider this a fishing expedition in which the mode of capture is to drain all of the water from the fishing pond.

Notwithstanding the force of these generalizations, there are two important qualifications. Although the jury system is of no interest, the continuous trial is increasingly regarded as a key to eliminate the adjournment culture that is so common throughout the world. Second, although practically no one wishes to adopt the U.S. discovery model, out-of-court evidence taking is attractive to **judicial** reformers who appreciate the inability of courts to gather, file, store, and retrieve evidence with efficiency and the impracticality of forcing parties to come to the courts (sometimes at great expense from long distances) to submit or take evidence.

Again, one may understand this lack of interest in the jury and discovery systems in three ways. First, the United States does not promote these as reforms worthy of adaptation to other systems. Second,

neither of these two features, with the exception of the qualifications I noted, appears to be successful in the views of foreign reformers. Third, there is no perceived pressing local need that either model would address. Very few countries utilize a jury system, though quite a few more use lay assessors in one way or another. Very few countries [\*376] allow any form of private discovery. Thus, these are of limited interest.

Additionally, it is important to appreciate that many national civil justice systems are pursuing reforms that are not based primarily on U.S. models. For example, **judicial** training or human resource programs for a permanent, career judiciary n94 may find little in the United States to draw upon. Surely, the Federal **Judicial** Center and the National and State **Judicial** Colleges have much to offer, but foreign reformers must go to each of these institutions to piece together what is often unified in many other countries. Additionally, **judicial** commissions and councils are popular in many national communities. n95 Instead of one model institution, the United States offers a wide range of different institutions with different functions that might all fall under one **judicial** commission model (e.g., the California Commission on **Judicial** Performance, the Federal **Judicial** Conference and Circuit Councils of the Administrative Office of the Courts.) The fragmented nature of these models, from a foreign perspective, renders these U.S. institutions more difficult to promote or adapt.

#### 4. Reform Theories

One presumption necessary to export reform theories posits that U.S. models are easily importable or transplantable with a comparable level of success. This suggests that reform occurs with the mere introduction of a foreign model.

What, if anything, is wrong with this presumption? Skepticism is justified for at least four reasons. First, the level of success achieved by the civil justice system within the United States is far from clear. Second, reports of successful receptions of U.S. models are scarce and failures are widely cited. n96 Third, the profound uniqueness of the U.S. system (**judicial** selection, private discovery, the aggressive use of **Alternative Dispute Resolution** (ADR), high settlement rates, the cost, the adversarial use of experts, and the jury system) should caution reformers that one feature's success in a U.S. context may not work as well within a different set of dynamic interactions of features. For [\*377] example, many U.S. judges express the view that the jury system enhances **judicial** independence by providing a political cushion against public reactions to verdicts they view as unjust. Absent a jury system, therefore, the combination of features necessary to achieve an appropriate balance between independence and accountability may differ significantly.

Finally, as suggested above, this view is often supported by embedded theories of institutional change. These theories frequently underestimate the resilience of local impediments to change (recalcitrant judges, lawyers and their fee mechanisms, political resistance to strengthening the courts, deeply embedded corrupt practices, the absence of human and financial resources, and the priority of other social, economic, and political problems). Yet, whether to approach these problems from the top-down or bottom-up, with speed or patience, incrementally or systemically, remain open questions.

Every approach to civil justice change abroad carries this kind of theory for why a project is carried out and how it is expected to enhance the likelihood of success. Unfortunately, these embedded theories are rarely expressed and even less frequently examined. Explication of these mechanisms and methods is extremely important in the development of methodologies that would allow us to articulate rationales for the acceptance or rejection of different reform methods or models. n97

#### B. The External Reform Challenge

In order to change justice reform abroad, new light must be shed on the wide variety of export institutional mechanisms, methods, models, and theories in support of civil justice reform. The first step in this process is to raise the issues that are upstaged by pollyannic reformers or cynical detractors.

Which is a more effective institutional mechanism: conditionality, technical assistance, exchange, private grants, or interaction?

Which institutions and procedures are more likely to satisfy design goals of independence and accountability, impartiality and integrity, or efficiency and justice in different systemic contexts?

Which services or methods of reform design are most likely to lead to positive outcomes? Where should resources be invested? How important is computerization compared to string? How important is [\*378] training in case management compared to the act of adjudication? Which should come first: empirical research or reform experimentation? How should that empirical research be developed: through

survey, quantitative statistics, or qualitative observation? How should reform experiments be attempted: through pilot programs, and if so, how will they be delimited? Which comparison is more important: a cross-national comparison with a successfully reformed country or an intranational comparison of the status quo with the proposed changes?

Which theories of institutional reform are more sound? To what extent should the reforms be sequenced gradually n98 or aggressively pursued on a comprehensive basis? n99 Will reform begin from the top-down or the bottom-up? How will political strategies be developed to align political support among elites and participants in the **judicial** system?

The absence of ready answers should not suppress attention to these pressing questions. A continued evaluation of the alternative responses, their theoretical justifications, and evidentiary support is critical to maximizing the positive impact, and minimizing the potential harm, of external forms of assistance.

## V. Conclusion: Reforming Reform

### A. Responsive Strategies

The critical evaluation of the impediments to civil justice reform and the limitations of externally driven U.S. projects to advance civil justice reform, particularly in countries of profound need, may lead to some potentially reconstructive strategies.

Accordingly, in this brief conclusion, I would like to restate the issues raised above as an outline of a dozen strategies that might improve [\*379] the success rate of civil justice reform abroad promoted or inspired by U.S. institutions or models:

- (1) Focus on institutions and their performance in pursuit of articulated values;
- (2) Recognize the critical importance and fragility of courts (or their functional equivalent);
- (3) Respond to the urgency of bridging the gap between stated civil justice commitments and the failure to realize them;
- (4) Understand the internal, underlying causes of court failure and take them heavily into account in reform initiatives;
- (5) Address the internal impediments to reform, including the:
  - (a) benefits of institutional failure;
  - (b) powerful interests in support of the status quo;
  - (c) mutually reinforcing effects of underlying problems; and
  - (d) impact of institutional failure on financial and human resources;
- (6) Improve local capacity for reform within host community, including increases in the:
  - (a) level of local participation in the design and process of reform; n100
  - (b) candor and self-awareness in assessment of the problems;
  - (c) openness to a wide variety of reform approaches;
  - (d) creativity in adapting models (foreign or imagined) to local circumstances; n101
  - [\*380] (e) consensus-building and its alignment with the views of political elites; n102 and
  - (f) financial investments in the process of reform design and consensus-building and security protections for reformers;
- (7) Anticipate the likelihood of reform failure by thinking through likely systemic outcomes of reform interventions;
- (8) Evaluate and choose among independent variables in the structure of a reform initiative, including choices of institutional mechanism, method, design, and theory of reform, according to the needs and aspirations of host system;
- (9) Address the weaknesses of purely internal or external reform approaches by developing more collaborative institutional frameworks in order to supply (modest and carefully calibrated) foreign assistance only when necessary to bolster internal capacities (mentioned in (6)); n103

(10) Broaden the comparative approach beyond the U.S. to include a wider variety and greater number of national experiences (particularly within the region or at the same level in economic development of the reforming country) and hypothetical reform models designed to broaden the available alternatives under consideration;

(11) Recognize the utility (and limits) of statistics and other complementary research methods to broaden the comparative informational basis for reform; and

(12) Appreciate that each decision in the process of reform will be in part a choice of unsatisfactory alternatives, that is, dilemmas of method and design determinations. n104

[\*381]

#### B. From Method to Methodology

To make this a baker's dozen, I would like to add one last recommendation that is arguably more important than any of the others.

Reformers and academics cannot be sure of the success of any particular mechanism or model in civil justice reform, including those inspired by the particular features of the U.S. system. Nonetheless, we can inform the process of reform by identifying, evaluating, and attempting to improve upon these methods. In that sense, our most fruitful contribution to reform may rest in our ability to develop methodologies that are capable of articulating rationales for the acceptance or rejection of different methods. n105

The notion of methodology causes us to ask what strategies are being employed and exposes them for critical evaluation. Ultimately, this form of comparative evaluation may help us to develop in the longer run a positive feedback system for distinguishing better approaches to reform in different contexts.

In this final sense, a methodology for improving the available approaches may help to bolster both the theory and practice of justice reform. Given the critical contemporary need for improving **judicial** performance worldwide and the impediments confronting reformers engaged in that project, a collaborative intellectual investment in exploring the nature of these problems and the effective ways of approaching them is well worth the trouble.

#### FOOTNOTES:

n1. See Axel Hadenius, *Institutions and Democratic Citizenship* 97 (2001) (stating that democracy "is stimulated too by the existence of institutional structures based on administrative order and the rule of law, and by the separation of powers ...").

n2. See Jeffrey D. Sachs, *Globalization and the Rule of Law* (Yale L. Sch., New Haven, Conn., 1998), available at <http://www.law.yale.edu/outside/html/Publications/pub-sachs.htm> (last visited Sept. 3, 2002).

n3. See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed. 1986).

n4. See, e.g., Edgardo Buscaglia, Jr. et al., **Judicial Reform in Latin America: A Framework for National Development** 1 (Hoover Inst., Essays in Pub. Pol'y No. 65, 1995) (stating that "even the best legislation is meaningless without an effective **judicial** system to enforce it"); Justice Delayed: **Judicial Reform in Latin America** chs. 8-11 (Edmundo Jarquin & Fernando Carillo eds., 1998) [hereinafter *Justice Delayed*] (relating the importance of **judicial** institutions to economic performance, property rights, civil society, and democratization).

n5. See, e.g., Andres Rigo Sureda & Waleed Haider Malik, **Judicial Challenges in the New Millennium**, in **Judicial Challenges in the New Millennium: Proceedings of the Second Summit of the Ibero-American Supreme Courts and Tribunals of Justice** 3 (Andres Rigo Sureda & Waleed Haider Malik eds., World Bank Technical Paper No. 450, 1999) [hereinafter **Judicial Challenges in the New Millennium**], available at <http://www-wds.worldbank.org> (last visited Sept. 3, 2002)

(reflecting upon "common understanding that the twenty-first century will be a knowledge century" and awareness that "a proactive role of the judiciary is essential in leading change and adapting to new realities") (emphasis in original).

n6. See William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law* 1 (2000) (stating that "a strong judiciary is essential for checking potential executive and legislative breaches of the constitutional order, laying the foundations for sustainable economic development, and building popular support for the democratic regime").

n7. Amartya Sen, *Development as Freedom* 142 (1999).

n8. For an incisive treatment of these problems in Peru and **Latin America** more generally, see Linn Ann Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* 6 (1998) (stating that "it is conventional wisdom among Latin Americans that their judiciaries and indeed their entire justice systems are the orphan branch of government, underfinanced, bypassed by modernization, and politically dominated by the executive and legislature or by various governmental and nongovernmental elites"). See also John T. Noonan, Jr., *Bribes* (1984); John T. Noonan, Jr., *Corruption and the Global Economy* (Kimberly Ann Elliot ed., 1996); John T. Noonan, Jr., *Corruption and Development* (Mark Robinson ed., 1998).

n9. Robert E. Klitgaard, *International Cooperation Against Corruption*, *Fin. & Dev.*, Mar. 1998, at 3, available at <http://www.imf.org/external/pubs/ft/fandd/1998/03/pdf/klitgaar.pdf> (last visited Sept. 3, 2002); Robert E. Klitgaard, *Controlling Corruption* (1988); Susan Rose-Ackerman, *Redesigning the State to Fight Corruption: Transparency, Competition, and Privatization*, *Pub. Pol'y For Private Sector* (Viewpoint Note No. 75, Apr. 1996), available at <http://www.worldbank.org/html/fpd/notes/75/75ackerm.pdf> (last visited Sept. 3, 2002); Susan Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (1999).

n10. See, e.g., *Justice Delayed*, *supra* note 4.

n11. See, e.g., Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* (World Bank Technical Paper No. 319, 1996) (documenting the extent to which public institutions in the region have not been able to respond effectively to the challenges of markets, with the courts "experiencing lengthy case delays, extensive case backlogs, limited access by the population, a lack of transparency and predictability in court decisions and weak public confidence in the **judicial** system").

n12. Buscaglia et al., *supra* note 4, at 8.

n13. See, e.g., Mark Ungar, *Elusive Reform: Democracy and the Rule of Law in Latin America* 119-68 (2002) (discussing the absence of **judicial** independence in **Latin America**); Juan E. Mendez, *The (Un)rule of Law and the Underprivileged in Latin America* 227-337 (1999) (discussing institutional reform and access to justice).

n14. See, e.g., Edgardo Buscaglia, *Judicial Corruption in Developing Countries: Its Causes and Economic Consequences* (Berkley Olin Program in Law & Econ., Working Paper No. 28, 1999), available at <http://repositories.cdlib.org/blewp/28/> (last visited Sept. 3, 2002).

n15. Hiram E. Chodosh, Indonesia, in *Legal Systems of the World: A Political, Social, and Cultural Encyclopedia* 705-10 (2002).

n16. Hiram E. Chodosh & Stephen A. Mayo, Inst. for Study & Dev. of Leg. Sys., *Tanzanian Legal Study 709 (Phase Two Report 2002)*. See also R.N. Ben Lobulu, *Corruption and the Administration of Justice*, in *The National Integrity System in Tanzania: Proceedings of a Workshop Convened by the Prevention of Corruption Bureau, Tanzania* 89, 91 (1995) ("Corruption in law courts is no longer the cottage industry it used to be; it has grown by leaps and bounds and has matured into one of the commanding heights of the economy. It is a thriving business."); *Tanzanian President Urges Judges Off Corruption*, *Xinhua News Agency*, Nov. 7, 2001 (reporting that President Mkapa called for "advocates with knowledge of the laws of the land rather than those who 'know judges and magistrates through corrupt means'").

n17. Mansoor Hasan, *Corruption in Bangladesh Surveys: An Overview*, at <http://www.ti-bangladesh.org/survey/overview.htm> (last visited Sept. 3, 2002). See also Maria Dakolias & Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 *Wis. Int'l L.J.* 353, 366-67 (2000) (reporting that polls in **Latin America** indicate comparably high perceptions of corruption; in Argentina, 57% see corruption as a main problem; in Honduras, three out of every four polled see the judiciary as corrupt; and in Costa Rica, 54% believe that external pressures affect **judicial** decisions).

n18. See Transparency International Releases New Bribe Payers Index (BPI) 2002, available at <http://www.transparency.org/pressreleases/archive/2002/2002.05.14.bpi.en.html> (last visited Sept. 3, 2002) (stressing the ineffectuality of domestic and international law: "The BPI shows that US multinational corporations, which have faced the risk of criminal prosecution since 1977 under the Foreign Corrupt Practices Act, have a high propensity to pay bribes to foreign government officials," and "the BPI results signal the rejection by multinational firms of the spirit of international anti-bribery conventions").

n19. See generally Peter H. Schuck, *The Limits of Law* 434-44 (2000) (discussing interaction between law, social norms, and markets).

n20. See Maria Dakolias, *Court Performance Around the World: A Comparative Perspective* (World Bank Technical Paper No. 430, 1999).

n21. Hiram E. Chodosh & Stephen A. Mayo, Inst. for Study & Dev. of Leg. Sys., *The Ahmedabad Mediation Project* (2000) (on file with author).

n22. Buscaglia et al., *supra* note 4, at 10 (stating that "the frustrations of backlogs ... as well as litigants' desires to get their cases heard and won, provide the opportunities for the courts to extract rents"). See also *Transition to Democracy in Latin America: The Role of the Judiciary* (Irwin P. Stotzky ed., 1993); Martha A. Field & William W. Fisher, III, *Legal Reform in Central America: Dispute Resolution and Property Systems* 14-20 (2001) (illustrating the "gross inefficiency that is produced by maintenance of the traditional system in today's society and economy").

n23. Peter H. Solomon, Jr. & Todd S. Foglesong, *Courts and Transition in Russia: The Challenge of Judicial Reform* 114-15 (2000).

n24. Adrian A.S. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, in *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* 3, 23 (Adrian A.S.

Zuckerman et al. eds., 1999) (noting that in Italy, for example, "it is not uncommon for plaintiffs to be forced to wait 10 years for final judgment").

n25. Judge J. Clifford Wallace, Resolving **Judicial** Corruption While Preserving **Judicial** Independence: Comparative Perspectives, 28 Cal. W. Int'l L.J. 341, 346-48 (1998) (discussing the diversity of approaches used in Asian **judicial** systems to discipline judges).

n26. Chodosh, *supra* note 15, at 708-09.

n27. Hiram E. Chodosh et al., Indian Civil Justice System Reform: Limitation and Preservation of the Adversarial Process, 30 N.Y.U. J. Int'l L. & Pol. 1 (1998).

n28. Many others have made similar observations. See, e.g., Prillaman, *supra*, note 6, at 2 (noting a "deep and widening gap between the role that institutions theoretically serve in a democracy and that which they actually perform").

n29. For example, a recent World Bank study in Argentina and Mexico found far less backlog and delay than previously estimated, due to a great number of cases eventually "abandoned." See Linn Hammergren, Reforming Courts: The Role of Empirical Research, (World Bank Prelim. Notes, No. 65, Mar. 2002), available at <http://www1.worldbank.org/prem/PREMNotes/premnote65.pdf> (last visited Sept. 3, 2002).

n30. See Douglass C. North, Institutions, Institutional Change and Economic Performance 54 (1991).

n31. See *id.* at 7.

n32. See, e.g., Daniel Craig, Tradition and Reform in an Iranian Village, in 1 Access to Justice 147-70 (Mauro Cappelletti & Bryant Garth eds., 1978) (noting that many states have been unsuccessful in their efforts to reshape the traditional social and legal system of their rural population, and explaining the structural factors that impeded the Shah's efforts to supplant the feudal system with a democratically elected court with formal procedures).

n33. In addition to his contribution in this symposium, see Bryant G. Garth, Rethinking the Processes and Criteria for Success, in Comprehensive Legal and **Judicial** Development: Toward an Agenda for a Just and Equitable Society in the 21st Century 16-21 (Rudolph V. Van Puymbroeck ed., 2001) (identifying structural complications for the importing and exporting of the rule of law: the long histories of legal institutions; unique aspects of the U.S. model; the relative lack of legal autonomy in host systems; and the influence of local contexts and struggles for prestige and power).

n34. See Mary L. Volcansek & Jacqueline Lucienne Lafon, **Judicial** Selection: The Cross-Evolution of French and American Practices (1988).

n35. See Chodosh et al., *supra* note 27, at 37-38 n.117.

n36. Sally Falk Moore, Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts, 26 Law & Soc'y Rev. 11, 29 (1992).

n37. Id.

n38. Id.

n39. See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* 198 (2000) (noting that "most lawyers in developing and former communist countries have been trained not to expand the rule of law but to defend it as they found it").

n40. Dakolias, *supra* note 20, at 6 (stating that "efficiency is a promising starting point for the study and design of **judicial** reform because of its relatively apolitical nature").

n41. See Hammergren, *supra* note 8, at 297.

n42. North, *supra* note 30, at 61 (stating that "it takes resources to define and protect property rights and to enforce agreements").

n43. See, e.g., Simeon Djankov et al., *Courts: The Lex Mundi Project* (1951 Harvard Institute of Economic Research Mar. 2002), available at <http://post.economics.harvard.edu/hier/papers/2002list.html> (last visited Sept. 3, 2002) (treating efficiency as the mere absence of delay).

n44. Ironies abound. Take, for example, the continued primary interest of Indonesians in Dutch reforms, or the disturbing realization that a group of reformers from Pakistan have to rely on U.S. expertise in India to answer questions about the structure, process, and impacts of the *lok adalat* (People's Court) system in neighboring India.

n45. Watson, for example, took the position that "many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness." Alan Watson, *Legal Transplants: An Approach to Comparative Law* 96 (2d ed. 1993).

n46. Deprived and demoralized constituencies also have an understandable propensity to make purely self-interested proposals rather than to justify or reject reforms based on what benefits they provide to the broader society. Rigorous facilitation to redirect their thinking toward the functional goals of the **judicial** system is therefore frequently required.

n47. Donald L. Horowitz, *Constitutional Design: Proposals Versus Processes*, in *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* 15, 17 (Andrew Reynolds ed., 2002) (stating that "despite international consultations many countries produce constitutions that are more or less impervious to whatever international wisdom has purveyed or, for that matter, to what a careful examination of comparative experience might reveal").

n48. Hammergren, *supra* note 8, at 31.

n49. For a superb collection of essays on transplants, adaptation, and legal culture, see *Adapting Legal Cultures* (David Nelken & Johannes Feest eds., 2001). For an excellent body of essays on American legal culture in global perspective, see *Legal Culture and the Legal Profession* (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

n50. See generally James S. Kakalik et al., *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (1996).

n51. See, e.g., Bayelsa CJ Wants National **Judicial** Council Scrapped, *Afr. News Service*, May 14, 2001, available at <http://www.thisdayonline.com/archive/2001/05/14/20010514news17> (last visited Sept. 3, 2002) (noting hand-picking of members of **judicial** council in Nigeria as "absolutely wrong"). See also Ungar, *supra* note 13, at 169 (stating that "**Latin America's judicial** councils have already been caught up in party politics, institutional rivalries, and counteraccusations from the officials being investigated"); Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* 35 (Carnegie Endowment, Working Paper No. 28, 2002), available at <http://www.ceip.org/files/pdf/wp28.pdf> (last visited Sept. 3, 2002) (noting that in many Latin American countries, the judiciary would literally be replaced at the change of a national administration and, as a result, "[they] came to be staffed by politically compliant judges of dubious substantive competence and still more questionable ethical proclivities").

n52. Under Law number thirty-five of 1999 in Indonesia, the entire administration of the courts will shift from the Ministry of Justice to the Supreme Court by 2004.

n53. For the most influential essay pointing out these weaknesses, see Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984).

n54. See *Advocates-on-Record Association v. Union of India*, *India Supreme Court* (1993); V. VenKatesan, *Judiciary and Social Justice*, *Frontline*, Oct. 14-27, 2000, available at [www.flonnet.com/fl1721/17210960.htm](http://www.flonnet.com/fl1721/17210960.htm) (last visited Nov. 25, 2002) (stating "as the judiciary becomes over-protective of its powers vis-a-vis the executive, the nature of its social base causes concern").

n55. See Willy Wo-Lap Lam, *China Defends Corruption Claims* (Mar. 9, 2002), available at <http://www.cnn.com> (last visited Nov. 25, 2002) (reporting that China's top graft-buster disputes claim that "the more one fights corruption, the worse it gets").

n56. See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 *B.U. L. Rev.* 527 (1989).

n57. See, e.g., Stacey Steele, *The New Law on Bankruptcy in Indonesia: Towards a Modern Corporate Bankruptcy Regime*, 23 *Melb. U. L. Rev.* 144, 152-60 (1999) (arguing that the reform of Indonesia's bankruptcy legislation will have little influence on the economic stability of the nation in the absence of substantive changes to the country's legal culture).

n58. See *India Code Civ. Proc. ord. x rule 1(a)-(c)*, 89 (as amended by *Code of Civil Procedure (Amendment) Act* (1999)) (directing court to utilize dispute resolution mechanisms, including arbitration, conciliation, **judicial** settlement, and **judicial** settlement through lok adalat, or mediation).

n59. See Zuckerman, *supra* note 24, at 51-52.

n60. For an excellent commentary on the U.S.-based critique of the law and development movement, see Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 *Am. J. Int'l L.* 470 (1995) (book review).

n61. See generally Beverly M. Carl, *Peanuts, Law Professors and Third World Lawyers*, 1986 *Third World Legal Stud.* 1; James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (1980); David F. Greenberg, *Law and Development in Light of Dependency Theory*, 3 *Res. L. & Soc.* 129 (1980); Gridley Hall & Burton Fretz, *Legal Services in the Third World*, 24 *Clearinghouse Rev.* 782 (1990); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *Wis. L. Rev.* 1062.

n62. Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 *Wis. L. Rev.* 767, 770.

n63. See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *Am. J. Comp. L.* 457, 481 (1977).

n64. See Jose E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 25 *Geo. Wash. J. Int'l L. & Econ.* 281 (1991).

n65. Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (1999).

n66. Carothers criticizes the lack of self-criticism and expressed awareness of weaknesses in the U.S. system. He admonishes: "Democracy promoters, however, need to be more conscious of and more explicitly about the flaws of American democracy, and pay more attention to them in aid programs." *Id.* at 63. "These issues should be built into ... programs ... so that others can anticipate the problems that arise in democratic systems and learn from American efforts, successful or not, to address them." *Id.* at 64.

n67. Carothers observes that the external model often inculcates superficial views of problems, with the tendency of focusing on symptoms instead of deeper pathologies. For example, he claims that there is a tendency to focus on **judicial** reform as a purely institutional problem without addressing deeper power structures that are important determinants. In his discussion of **judicial** reform, he notes that the aid community has underestimated several inhibiting factors, including: the economic incentives of corruption, the decentralized nature of **judicial** institutions, the independent-mindedness of **judicial** officials; the limited will to reform; the vulnerability of a small group of reformers to removal from positions of power; and resistance to reform by vested interests of judges and lawyers who may benefit from a dysfunctional system through their ability to manipulate and get compensated for manipulation of the system. In order to address these problems, Carothers encourages a more direct confrontation of power and incentive structures that lie beneath the appearances of formal institutional structures. *Id.* at 163-74.

n68. Carothers criticizes the uniformity, U.S.-centricity, and inflexibility of the core model and strategy for building democracy abroad, including the assumed sequencing of change. He also observes that there is little borrowing from academic literature. In response, he suggests a broadening of models to be studied, the use of non-American, regional experts, creativity in the design of programs, and study of multiple alternatives of reform sequencing. For example, he advocates greater use of local or regional expertise with more common grounding in the national

context, e.g., Latin American or European experts used in Latin American **judicial** reform projects. *Id.* at 104.

n69. Carothers notes the tendency for "endpoints [to] dominate over process." *Id.* at 93.

n70. Carothers, *supra* note 65, at 93.

n71. Carothers points out that many experts are: (1) reluctant to publish and share information; (2) resistant to deep self-evaluations; and (3) inclined to zealous action rather than self-critical reflection. *Id.* at 8-9. This leads to insufficient learning, the frustration of wheel reinvention, and no middle ground between avid proponents and cynical detractors. *Id.* at 10.

n72. Carothers identifies problems in the evaluation of success and the extent to which aid enhanced reform, including the specification of criteria, the measurement of satisfaction by qualitative and quantitative means, and the identification of key causes. He distinguished three different kinds of evaluation and argued for their specialization: first, the provision of material to convince others of merits of program; second, the provision of information on effects, weak spots, room for improvement, and other issues of implementation and development; and finally, critical engagement in deep learning about aid that questions assumptions, finds new approaches, and understands how aid projects are perceived and valued. Carothers stresses the need for beginning with modest expectations. *Id.* at 281-313.

n73. See Ford Foundation, *Many Roads to Justice: The Law-related Work of Ford Foundation Grantees Around the World* (Mary McClymont & Stephen Golub eds., 2000), available at [http://www.fordfound.org/publications/recent articles/docs/manyroads.pdf](http://www.fordfound.org/publications/recent%20articles/docs/manyroads.pdf) (last visited Sept. 3, 2002).

n74. See, e.g., Thomas Carothers, *The Many Agendas of Rule of Law Reform in Latin America*, in *Rule of Law in Latin America: The International Promotion of Judicial Reform* 4, 7 (Pilar Domingo & Rachel Sieder eds., 2001) [hereinafter *Rule of Law in Latin America*] (noting the expansion of the donor country agenda to the broader notion that "the rule of law generally is critical to democracy").

n75. See, e.g., Margaret Sarles, *USAID's Support of Justice Reform in Latin America*, in *Rule of Law in Latin America*, *supra* note 74, at 47 (quantifying over twenty years of aid in nineteen Latin American countries at a cost of \$ 300 million and total grants of \$ 50 million in 1999).

n76. See Ibrahim Shihata, *The World Bank*, in *Justice Delayed*, *supra* note 4, at 117 (noting that the assistance is provided "through a number of financial instruments, including adjustment loans, investment loans, institutional development loans, and diagnostic studies in preparation for lending activities").

n77. See, e.g., Maria Dakolias, *Legal and Judicial Reform: The Role of Civil Society in the Reform Process*, in *Rule of Law in Latin America*, *supra* note 74, at 80, 97 (emphasizing the importance of working with "'reform-minded' groups and individuals in civil society," and noting the expansion of the donor country agenda to the broader notion that "the rule of law generally is critical to democracy").

n78. See, e.g., Francois Gianviti, *The Reform of the International Monetary Fund (Conditionality and Surveillance)*, 34 *Int'l Law* 107 (2000) (exploring the interrelationship between reform by the Fund and reform of the Fund).

n79. There are also other vectors of influence that do not depend on public support, such as U.S. law firms (and their deep impact on the practice of law) and universities (and their growing influence on legal education abroad). See Symposium, *The Future of the Legal Profession: Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *Case W. Res. L. Rev.* 407, 423-26 (1994) (discussing the influence of the Cravath model); Wolfgang Weigand, *Americanization of Law: Reception or Convergence*, in *Legal Culture and the Legal Profession*, supra note 49, at 137-40 (noting the influence of U.S. universities and law firms on Europe, e.g., examinations in Germany, post-graduate education in the Netherlands, or firm structure, style of legal argument and contract, etc.).

n80. In 1994, Chief Justice Ahmadi of the Indian Supreme Court implemented a comprehensive computerization program for the Supreme Court and reduced the Apex Court's caseload from 120,000 in October 1994 to 28,000 cases in September 1996. Dr. Abhishek Singhvi, *Clearing Arrears: Apex Court on a Fast Track*, *Indian Express*, Jan. 1996.

n81. Karen Blochinger, *Primus Inter pares: Is the Singapore Judiciary First Among Equals?*, 9 *Pac. Rim L. & Pol'y J.* 591, 593 (2000) (stating that "within three years ... the backlog of thousands of cases was cleared and now cases are being heard within weeks of being filed").

n82. See Judge J. Clifford Wallace, *Judicial Education and Training in Asia and the Pacific*, 21 *Mich. J. Int'l L.* 849, 849 (2000) (arguing that "such programs can provide invaluable assistance to the judiciary in its essential role of administering justice and resolving disputes").

n83. See generally Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 *Iowa L. Rev.* 1025, 1067-1127 (1999).

n84. See Hammergren, supra note 29 (stating that "**judicial** reform must be built on a solid empirical base").

n85. *Id.* "In both countries a large portion of cases were considered 'abandoned' (unresolved). Such cases are technically open, but their files indicate that the parties are no longer pursuing them, whether because of an unrecorded settlement, frustration, or some other reason." *Id.*

n86. Charles Gardner Geyh, *Customary Independence*, in *Judicial Independence at the Crossroads: An Interdisciplinary Approach* 161 (Stephen B. Burbank & Barry Friedman eds., 2002) (stating that "[the] critical inquiry thus becomes, how much of each? Where should independence end and accountability begin?").

n87. See generally 2 *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (Mads Andenas ed., 2000); Martin Shapiro, *The "Globalization" of Judicial Review*, in *Legal Culture and the Legal Profession*, supra note 49, at 119-20 (evaluating the "global vogue in American-style, constitutional, **judicial** review"); *id.* at 131 (stating "if we mean by globalization the spread to Europe").

n88. Weigand, *supra* note 79, at 137, 140-41 (noting the influence of American institutions on civil procedure in Europe (e.g., arbitration, bankruptcy, constitutional law, and other areas of substantive law)).

n89. See generally Ivan Lavados Montes & Juan Enrique Vargas Viancos, **Judicial Management**, in *Justice and Development in Latin America and the Caribbean* 17-32 (Carlos Cordovez ed., 1993).

n90. See, e.g., Justice Carlos Mario Velloso, **Judicial Management Information Systems**, in **Judicial Challenges in the New Millennium**, *supra* note 5, at 35-36.

n91. For a survey of these trends (outside the Latin American and Caribbean regions), see John Linarelli & Carolyn Herzog, *Model Practices in Judicial Reform: A Report on Experiences Outside the Region*, in *Justice Beyond Our Borders: Judicial Reforms for Latin America and the Caribbean* 1-52 (Christina Biebesheimer & Francisco Mejia eds., 2000).

n92. See Hiram E. Chodosh et al., *Egyptian Civil Justice Process Modernization: A Functional and Systemic Approach*, 17 *Mich. J. Int'l L.* 865, 913-14 (1996) (emphasizing the ways in which case management and **judicial** mediation address critical needs in Egyptian **judicial** reform).

n93. Punitive damage doctrines provide a prominent third example.

n94. See, e.g., Discussion on "Autonomy and Budgetary Independence and Education in Ibero-America," in **Judicial Challenges in the New Millennium**, *supra* note 5, at 27-33.

n95. See Hector Fix-Zamudio, *Bodies that Govern and Administer the Judicial Branch of Government in Latin America*, in *Justice and Development in Latin America and the Caribbean*, *supra* note 89, at 39-60 (discussing the introduction of **judicial** councils in **Latin America**).

n96. See, e.g., Yves Dezalay & Bryant Garth, *The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars*, in *Adapting Legal Cultures*, *supra* note 49, at 241, 245 (stating that "it is fair to suggest that neither the independence nor the efficiency of the courts, according to most observers so far, has improved significantly").

n97. See Chodosh, *supra* note 83, at 1039 (stating that "without a methodology, decision makers and commentators have no set of available justifications for the acceptance or rejection" of a particular approach or decision).

n98. See North, *supra* note 30, at 6 (stating that "institutions typically change incrementally rather than in discontinuous fashion"). *Id.* at 89 (stating institutional change is "overwhelmingly incremental"). Incrementalism is itself often seen as a political strategy in the face of strong opposition. See, e.g., Buscaglia et al., *supra* note 4, at 21 (stating that "reforms that seem threatening to those in power should be undertaken in stages"). See also Solomon & Foglesong, *supra* note 23, at 177 (advocating "a moderate reform agenda," differing from more radical and minimal approaches to reform that focuses on "building and improvement of courts and legal practices rather than their transformation"); Maria Dakolias & Javier Said, *The World Bank, Judicial Reform: A Process of Change through Pilot Courts* 2-3 (1999), available at <http://www4.worldbank.org/legal/publications/JudicialReform-72.pdf> (last visited Sept. 3, 2002)

(arguing that pilot project alleviate barriers of inexperience in reform, allow for more focused testing, and help to build consensus).

n99. See Prillaman, *supra*, note 6, at 137-61 (discussing that in Chile's encouraging (though tentative) success, the pace of reform was gradual, but the scope and breadth were comprehensive).

n100. Participation may be seen as both an end in itself and a principal means of developing responsive reforms. See Sen, *supra* note 7, at 36 (emphasizing both a constitutive and instrumental role of expanding freedom in development).

n101. Creative comparative approaches to design would not rely entirely on existing foreign systems; they would attempt to massage and tweak features in ways that may not have been tried in the past. Adaptation includes the fusion of foreign or other imagined models with domestic institutions and processes to produce a well-tailored reform designed to address current and local needs. Reforms in which I have been involved, including Egyptian mediation of disputes against the government, are heavily adapted. See Law No. 7 of 2000, Concerning The Establishment Of Conciliation Committees in Certain Litigations To Which The Ministries And Juridical Persons Are Parties, Official J. No. 13 bis (Apr. 4, 2000) (Egypt); Prime Minister's Decree No. 1193 of 2000, Concerning The Establishment Of Harmonization Committees in Certain Disputes Where The Ministries And Juridical Persons Are Parties Thereto, Official J. No. 22 (June 1, 2000) (Egypt) (establishing mandatory mediation before panels of retired judges in all cases brought against the government). Israeli case management systems of central judges who control the docket are also unique. Within less than two years, the Tel Aviv trial courts have used this adaptation to eliminate (almost entirely) a backlog of over 17,000 cases filed from 1988-1994. A study of this reform is forthcoming next year. See Inst. for Study & Dev. of Leg. Sys., Phase Four Report: Israeli (2002 Legal Study) (on file with author). Even successful reforms raise issues that must be continually addressed, and a creative intellectual capacity is an important tool in sustaining success. Thus, it is useful to inculcate creativity in order to broaden the potential alternatives to be considered.

n102. Reforms are more likely to be successful if political support from above and below can be developed and aligned before implementation. Effective implementation depends on the receptivity of the primary actors in the legal community. Thus, building a bottom-up consensus among judges and lawyers on the substance and process of reform enhances the likelihood of implementation. However, effective implementation also relies heavily on political support at the highest levels of public decision-making. Therefore, the probability of effective implementation increases if reform designs cultivated through consensus from the bottom-up are consistent with top-down policy determinations.

n103. For a description of these more collaborative approaches, see Chodosh et al., *supra* note 27, at 19 (stressing the joint involvement of local and foreign experts).

n104. Strategies developed to emerge through these dilemmas are first proposed in Hiram E. Chodosh, *Emergence From the Dilemmas of Justice Reform*, 38 *Tex. Int'l L.J.* (forthcoming 2003).

n105. See Hiram E. Chodosh, *Global Justice Reform: A Comparative Methodology* (forthcoming NYU Press).