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INITIAL RESEARCH ON THE MALFUNCTIONS OF THE CRIMINAL PROCESS[†]

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Translated by Timothy Webster^{†††}

I. INTRODUCTION [295]

In recent years, as China's legislature has placed the amendment of the Criminal Procedure Law on its legislative plan, more and more legal scholars are paying attention to the problem. Legal academics have produced a series of theses and books, and qualified scholars have even organized experts' drafts of the Criminal Procedure Law, offering comprehensive and systematic theoretical works on how to revise the law. I participated in scholarly activities organized by the Criminal Affairs Committee of the All China Lawyers Federation, and drafted the first lawyers' edition of the revised Criminal Procedure Law. Thus, the next revision of the Criminal Procedure Law will not be the product of legal research conducted solely by the legislative department, but will for the first time be influenced by the collective research of legal scholars.

Generally speaking, the amendment of the Criminal Procedure Law involves changing the regulations of the criminal process, and includes adding, deleting, and changing various provisions. Among the possible changes include adjusting the powers of the public security bureau, the procuratorate, and the courts; expanding the procedural rights of suspects, defendants and defense lawyers; and establishing a new procedural system. What are the basic problems confronting the implementation of China's criminal procedure? [296] Each legal scholar could answer this question in his own way or give his own response: the defense rights of suspects and defendants must be expanded; the illegal extraction of evidence by investigating personnel (i.e., the public security bureau) must be deterred; the problem of witnesses not appearing at trial must be solved; the scope and application of bail must be expanded; indefinite detention must be restricted; the admissibility of various types of evidence must be given even clearer

[†] Chapter 8 of CHEN RUIHUA, XING SHI SU SONG DE ZHONGGUO MO SHI [A Chinese Model of Criminal Procedure] 295-331 (2nd ed. 2010). Footnotes from the original version have been omitted.

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instructions. If we look beyond the “perfection of criminal process on paper” to examine the implementation of the criminal process, the above problems are extremely important, but by no means fundamental. The *fundamental* problem facing the implementation of China’s criminal procedure is neither limitations on the defendant’s procedural rights, nor the reallocation of power among the public security bureau, procuratorate, and courts. Rather, the fundamental problem is the malfunctioning of the criminal process. The “malfunctioning of the criminal process” means that the legal procedures established by the legislature are evaded or set aside in actual practice, such that the written regulations of the Criminal Procedure Law are, to varying degrees, empty formulations. We often say that “court trials have been reduced to formalism,” but in fact the various regulations on court trials contained in the Criminal Procedure Law have been set aside. For instance, the generally recognized rule of “one final appeal” (that a defendant may appeal his conviction once, and that the appeal is final) has been largely emptied of content. Likewise, the notion that a collegiate panel, once formed, will not reconvene, has not been implemented in actual practice. Similar examples of failure to implement abound: the transformation of bail into a substantive punishment, the acceleration of arrest into a conviction, the hollowing out of a criminal defendant’s trial rights, the importance of the dossier in criminal trials, courts’ refusing to acquit defendants even without sufficient evidence, and so on.

To be sure, the malfunctioning of the criminal process refers primarily to the fact that there is no way to effectively implement the procedures legally prescribed by the legislature. But it is not the case that the three judicial organs¹ simply do not follow procedural norms during the course of the criminal process. Instead, what they actually implement are “latent regulations” or “hidden systems” that have not yet been formally recognized in law. These regulations or systems are formed when the three judicial organs handle cases and devise convenient ways to dispose of them. Over time, they gradually gain wide acceptance in the criminal process. They are norms that arise spontaneously in the practice of criminal process. Though frequently criticized by academics as inappropriate, these latent regulations and hidden systems have a great deal of vitality, and have largely replaced the authoritative status of formal legal procedures. Examples of this kind of substitution include the following: [297]

¹ *Translator’s note:* Judicial organs refer to the three agencies responsible for the administration of criminal justice in China, the public security bureau (which investigates crimes), the procuratorate (which prosecutes crimes) and the courts (which adjudicate criminal trials).

- Instead of the collegial panel, courts frequently promote the “presiding judge system.”
- Instead of the principle of “a suspected crime is no crime,” courts almost universally enforce such flexible methods as “a suspected crime gets a lighter punishment” or “send the case back to the other organs for additional investigation.”
- Since it is impossible to implement the principle that a defendant’s confession should be voluntary, there is, in practice, the notion that “those who exercise their defense rights should be punished more severely.” Moreover, courts often take the defendant’s “bad attitude toward admitting his guilt” [i.e., not admitting one’s guilt] as a basis for increasing the sentence. This shows that defendants may be punished more heavily if they exercise their right to defense.
- The court rarely notifies witnesses, experts and victims to testify in court. Instead, a norm has developed where witnesses, experts and victims simply submit written testimony. The “trial” consists mainly of the court reading out the dossier and records.
- Initially intended as a compulsory measure to ensure the smooth operation of the criminal process, arrest should be both temporary and done according to procedure. But in judicial practice, it has commonly become a precondition to conviction and prediction of punishment.
- Bail initially served as a substitute for indefinite detention, or to reduce the use of detention. But the public security bureau and procuratorate commonly use it to deal with minor criminal cases, or in cases where the evidence is weak, transforming bail into a substantive punishment.

We cannot merely evaluate the theoretical justifications for the avoidance of formal legal procedures, or the abundance of “latent regulations.” Such an evaluation is of course necessary, but ultimately insufficient. We must instead conduct a more penetrating investigation of the malfunctions of China’s criminal process using the techniques of social science. On the one hand, we must earnestly research the primary manifestations and categories of procedural malfunctions, and produce theoretical models to the greatest extent possible. On the other hand, we must face the malfunctions themselves, draw on a series of changes from outside areas, and produce credible interpretations of the causes of these flaws.

This essay proposes five sources of China's malfunctioning criminal process, based on a great deal of factual and empirical analysis. I call them the "5 great precepts of the malfunctions of the criminal process." First, the Criminal Procedure Law has not established a mechanism to implement procedures, which runs the risk of avoiding or shelving criminal procedures. Second, implementation costs for several of the procedures designed by the legislature [298] were too high, lowering the efficiency of procedures, and making them difficult for the judicial organs to tolerate. The organs then shied away from applying these procedures. Third, due to the monitoring and evaluating of courts, even if decision-makers strictly followed procedure, they would not be rewarded, and in fact could be punished for doing so. This led to the avoidance of certain procedures. Fourth, the legislature's introduction of certain legal procedures from the West stoked heated conflict with local legal traditions; these procedures posed challenges to criminal policy, which led judicial personnel to abandon the formal procedures altogether. Fifth, certain procedures imported from the West have no specific protections in the judicial system. Given the backward state of judicial reform, such "avant-garde" criminal procedures are hard to implement.

Of course, in resolving these basic problems, we will confront many serious difficulties. This book aims to reveal the existence of these problems as well as their root causes, to advance a general understanding based on this analytical foundation, and then to put forth common interpretations of the sources of these problems. As for final solutions to these problems, some will require enormous reforms to the national judicial system, some will await the end of social transition, while still others will need a change in social conditions. But if we do not attend to the root causes of these problems, any thoughts or actions intended to advance reform of the criminal procedure system will be blind or risky.

II. IMPLEMENTING MECHANISMS OF CRIMINAL PROCEDURE LAWS

From one perspective, the malfunction of the criminal process stems from the impossibility of implementing formal criminal procedures. Why is it impossible? We must first consider the methods of implementing criminal procedure laws before we can expose the reasons why implementation is impossible.

The substantive law of criminal procedure can be essentially categorized into authorized provisions, obligatory provisions, and prohibited provisions. But no matter how we categorize them, they are basically

comprised of assumptions, punishments and liabilities. Of course, we could lump assumptions and punishments together under the rubric of “normative content.” Liabilities, on the other hand, can be seen as “legal consequences,” which flow from violating certain binding laws. Thus, implementing the substantive law raises two basic conditions. First, the rights, duties and prohibitions contained in a provision must have clear and specific contents. Second, the person who violates [299] the right, omits the obligation, or commits the prohibited act should meet with an unfavorable legal consequence. But the implementation of substantive law cannot be achieved automatically. Concretely speaking, whether a right, obligation, prohibition or legal consequence, none can be realized by itself, but rather must rely on an external implementing mechanism. This requires procedures to explain the burdens of proof and production, the standards of proof, and corresponding adjudicative methods and relief channels. From this perspective, procedural law serves as both tool and method of ensuring the implementation of substantive law, and ensures the application of each right, obligation, prohibition and liability guaranteed by the substantive law.

Like substantive law, procedural law also has authorized provisions, obligatory provisions, and prohibited provisions, and also has assumptions, punishments and liabilities. But the liabilities or legal consequences of procedural law do not have the same meaning as they do under substantive law. Generally speaking, liability for civil compensation, liability for administrative punishment, criminal liability, or liability for disciplinary actions only involves announcing that the act is invalid. This means that the “principle that one bears liability for his own actions,” as emphasized in substantive law, is not applied in procedural law. The agent of a procedural violation will not necessarily suffer a personal loss for the violation, but instead simply not enjoy the benefit he would have had without the violation. Of course, this is only a judgment of a procedural violation on a general level. If a procedural violation reaches a particularly serious level, such that it violates a particular provision of substantive law, then a procedural violation becomes a substantive violation. This would occasion unfavorable legal consequences on two levels: substantive law and procedural law.

The uniqueness of procedural sanctions distinguishes it from the implementation of substantive law. But the differences do not end there. Unlike substantive law, the implementation of procedural law cannot rely on another procedural law for implementation. No state can promulgate a specialized “implementation law for procedural law”; the implementation of procedural law must rely on itself. In that case, what methods can

procedural law use to implement its legal provisions? First, procedural law must establish an operable mechanism for pronouncing certain acts invalid. It could resort to the abovementioned “procedural legal liability.” For example, the implementation of the Criminal Procedure Law first needs mechanisms to announce that certain conduct is invalid, rules to exclude evidence from an illegal investigation, rules to invalidate an unlawful indictment, and mechanisms to vacate verdicts resulting from unlawful prosecutions. Second, procedural law must establish a specialized adjudicatory mechanism to spell out the legal consequences of violating procedural law. This is the “procedural adjudication” that I have been emphasizing. [300] For instance, to implement the exclusionary rule, one must decide which side exercises the authority to bring the motion, which stage of litigation to bring the claim, whether the court will accept the motion, the method of adjudication, the division of the burden of proof, standards of proof, and the corresponding channels for a judicial remedy. If we do not establish procedural mechanisms, then there is no way to implement so-called “procedural adjudication,” and the various procedural violations cannot be determined to be invalid, or effectively restricted.

When a suspect or defendant and his defense lawyer exercise procedural rights, the aforementioned methods to implement procedural law can become “methods to obtain redress.” No right without a remedy—a right that cannot be remedied is essentially not a right. For example, in order to ensure that a suspect or defendant effectively exercises his right to apply for bail, the Criminal Procedure Law must guarantee consequences for wrongfully refusing bail. If the decision to refuse a bail application is invalidated, any evidence obtained for the bail decision cannot have evidentiary value. At the same time, the Criminal Procedure Law still must offer some operable channels of redress for suspects or defendants who have been refused bail. They could appeal to a court, which would conduct judicial review of the wrongful action.

According to the basic principles of implementing procedural law noted above, we can summarize the first precept of the malfunctions of the criminal process: *as long as criminal procedure laws do not establish a mechanism for announcing the invalidation of procedural violations, and as long as they do not establish a basic judicial mechanism to enforce this announcement of invalidity, the relevant criminal procedure regulations are incapable of implementation, and will likely malfunction.*

It is not difficult to argue that this precept has been established. We can find many examples of malfunctioning criminal procedures, and thereby show that this precept has broad applicability. For instance, in 1996 the

National People's Congress established that lawyers have "the right to meet with detained suspects" during the investigation phase, but did not establish any mechanism to guarantee the right was actually realized, creating an essentially empty right as far as judicial practice is concerned. The legislature did not prescribe any legal consequences for violating procedural rights. It could have provided, for example, that evidence obtained in a certain way would not have evidentiary value, or a prosecution arising from restricted access to counsel would not have legal effect. Furthermore, whenever investigating personnel made an arbitrary restriction, or deprived someone of his right to a lawyer, neither the suspect nor his lawyer would have the opportunity to seek judicial redress from a neutral court. Not that a court would ever accept a case concerning the legality of an investigation. As a result, regulations on a detained suspect's access to counsel not only lacked an effective mechanism to protect his right to counsel, but also these regulations could not be litigated or lead to redress. Though there are many reasons why investigating personnel may impose arbitrary restrictions, or deprive someone of his right to counsel, the inability to implement the regulation on "Detainees' Access to Counsel" was certainly an important factor in creating various problems. [301]

Likewise, the current Criminal Procedure Law gave suspects and defendants the right to change their compulsory measures, such as the right to apply for bail, indicating the legislature's concern for indefinite detention. But in judicial practice, every time a suspect or defendant applied for a change in compulsory measures or for bail, one of the judicial organs would often object, rendering this procedural right, to a great extent, unenforceable. There may be any number of reasons for this situation. But looking solely at the issue of implementing criminal procedure, was it ever really possible to enforce a regulation giving a suspect or defendant the right to apply to change a compulsory measure? The answer can only be no. This is because the legislature created no legal consequences for procedural decisions. Even if there should have been a change in a compulsory measure, there was no change; even if bail should have been granted, it was refused. There is no mechanism to render illegal procedures *invalid*, particularly in cases of illegal arbitrary detention, nor is there a rule to exclude evidence obtained during the indefinite detention. Furthermore, when a suspect or defendant applied for a change in compulsory measure or for bail, yet was refused without reason, there was no opportunity to seek redress from a specialized, neutral court. As soon as this problem emerged, neither the procuratorate nor the court could provide a hearing for the suspect or defendant to seek relief. Thus, a suspect or defendant had the right "to apply for a change in

compulsory measures,” or “to apply for bail,” but this became an unenforceable legal regulation, and the corresponding right became an irremediable right. The malfunction and evasion of this legal regulation became an inevitability.

The current Criminal Procedure Law provides for a number of procedural rights intended to secure a fair trial, such as applying for new witnesses to appear in court, applying for another investigation of the scene of the crime, applying for review, applying for new expert testimony, supplemental expert testimony, and so on. Yet, because the law established no regulations to protect these procedural rights, these rights were largely unenforceable. Take the example of applying for a new witness to appear in court. When a defendant or defense lawyer applied to notify a witness to appear in court in order to testify, the courts often refused for any number of reasons, yet never put their decisions in writing. The current law has no regulation that spells out legal consequences for unreasonably refusing a request for a witness, nothing to suggest that a refusal would “influence a fair trial,” nothing to suggest that a refusal would lead an appellate court to vacate the trial court’s verdict, or lead to a retrial. Furthermore, if a defendant or his lawyer appealed and requested an examination of the legality of the refusal, the appellate court could also arbitrarily refuse [302] to accept the case, claiming such refusals were outside the scope of appeal. This means the trial court’s refusal becomes unchallengeable, and the defendant’s right to apply for a new witness un-redressable. Such is the right to apply for a new witness, but the same holds true for the right to apply for a renewed investigation of the scene of the crime, and the right to apply for a renewed or supplementary appraisal.

Of course, one might object: it is not that China’s current legal system has not established any mechanisms to adjudicate procedural violations. Indeed, under Article 191 of the Criminal Procedure Law, if the trial court “violates legal procedures” and “influences the fairness of the trial,” an appellate court may vacate the original judgment. Likewise, judicial interpretations of the Supreme People’s Court have established a Chinese-style exclusionary rule. But these procedural adjudication mechanisms are largely unable to implement criminal procedure regulations. Given this, is the problem of an implementing mechanism for procedural law really the reason behind the malfunctioning criminal process?

To be sure, from the point of view of implementing criminal procedures, whether vacating initial judgments or excluding illegally obtained evidence, both protect relevant procedural regulations, while in themselves constitute procedural regulations. According to the above

interpretation, any procedural regulation without an adjudicative mechanism will simply become an unenforceable regulation. But even if the legislature established a procedural adjudication mechanism to deal with procedural violations, the mechanism could not implement itself. For example, effective implementation of the exclusionary rule would require the following mechanisms to provide protection: the court would first have to decide whether to accept a case involving a defendant's claim that the investigating personnel violated procedural rights and the evidence should be excluded; if the court refuses to accept the case, it should provide a written explanation for its refusal, and give the opportunity to apply for a remedy; if the court accepts the case, it should arrange for the prosecution to examine the defendant's claim; if facts require verification, it must arrange a judicial hearing; the court must reasonably allocate the burden of proof, and establish standards of proof; after evaluating defendant's claims, it should explain the reasons for its judgment; and the legislature must then give defendant and prosecution the opportunity to apply for a judicial remedy if the court decides to exclude the illegal evidence.

Likewise, to effectively implement the vacating of initial verdicts, the appellate court should accept cases where the defendant claims a procedural violation, and conduct judicial review of this kind of claim; if there are facts that require verification, the appellate court should conduct an open hearing, giving both sides the opportunity to argue about the legality of the trial court's procedures. Obviously, without these kinds of concrete procedural adjudication mechanisms, whether for the exclusionary rule or the vacating of initial verdicts, these procedural regulations cannot be implemented, and it will be difficult for them to protect procedural rights.

From this we can see that the exclusionary rule and the system of vacating original verdicts are statutorily prescribed procedural adjudication systems in Chinese law, but both suffer from difficulties in implementation. But this is not enough to cure the first precept of a malfunctioning criminal process. Any procedural regulation, whether substantive or procedural, needs a relatively complete implementing mechanism to guarantee the regulations. When a legal procedure becomes an unenforceable regulation, when a procedural right becomes irremediable, malfunctions of criminal process will proliferate. It is clear that the problem of malfunctioning criminal process—with authorized regulations, obligatory regulations and prohibited regulations—likewise influences the implementation of procedural adjudication regulations flowing from the legal consequences of procedural violations. [303]

III. COST ISSUES OF LEGAL PROCEDURES

Legal procedures typically involve some investment of litigation costs. As an activity that requires judicial resources, including the investment of human resources, material resources and time, the issue of efficiency of these procedural activities must be squarely confronted. Any plan to reform the criminal justice system that reduces procedural efficiency, or delays the resolution of cases, stands no chance of realization. As Chief Justice Burger put it, to reduce the percentage of cases that plea bargain by 10% would require the doubling of resources for police, prosecutors and courts in both federal and state systems. Justice Burger was concerned about a proposal to abolish the plea bargain. But it can also be interpreted in this way: *if designing a legal procedure will increase litigation costs and reduce efficiency, and these changes exceed the limits of the criminal justice system, the malfunction issue once again emerges.* This is the second precept of the malfunctions of the criminal process.

Until now, when legal values are involved, especially when there is a conflict between procedural fairness and litigation efficiency, [304] certain scholars assume haughty airs, raising “all manner of theoretical assumptions about fairness and efficiency.” But this theoretical assumption lacks the support of actual experience, devolving into pure “metaphysical” fancy, without the remotest chance of implementation by the judiciary. Judicial experience shows that designing legal procedures must completely account for the increase in litigation costs, as well as conflicts with other aspects of the criminal justice system. It must also consider the limitations of the criminal justice system. Otherwise, a procedural design based on idealistic legislation will become a castle in the air, standing no chance of implementation. Whenever this situation occurs, the judiciary spontaneously puts out a “latent regulation” to substitute for a procedure that may seem perfectly reasonable, but for which the judiciary is woefully under-resourced to implement.

The 1996 National People’s Congress’ reform of “criminal adjudication methods” is a typical example. The legislators knew that the original adjudication methods gave judges too much investigatory power. Over the course of trial, the judges would lead both the trial investigation, as well as oral argument, such that the prosecution and defense were unable to mount a sufficient argument. And since the pretrial dossier already contained an investigation of the evidence, courts typically encountered the problems of “convicting first, trying later,” and “trials devolving into formalism.” To solve these problems, the legislature abolished the pretrial

review system, greatly restricting the scope of documents a judge could see before trial; changed the order and method of court investigation; weakened the judge's position to evaluate the evidence; and introduced cross-examination, allowing the prosecution and defense additional opportunities to review the evidence. The legislators believed that, with the Anglo-American adversarial method as a blueprint, they could guarantee that a defendant would more fully exercise his right to defense, and better serve the function of trial. At the same time, to avoid the prolongation of trials under the adversarial model, legislators also established summary procedures, which are quicker and less work intensive. For crimes punishable by less than three years of imprisonment, a defendant could voluntarily elect to undergo a summary trial.

Yet, although the advancement of summary procedures had positive effects, there was still no way to solve the most pressing issue facing the criminal justice system: the judiciary's lack of resources to handle cases. For instance, the Haidian District Court in Beijing introduced common summary procedures at the trial level, but that did not really solve the contradiction between the limits on judicial resources and the huge increase in the number of cases being tried. [305] According to statistics, the Haidian court processed 464 cases through summary procedures in 1997, about 35% of the entire caseload; in 2000, that number reached 1,000, about 50% of the entire caseload. But because the base number of criminal cases steadily increased, there was no release of the pressure to try cases. Indeed, the push to establish adversarial procedures and the implementation of a new presiding judge system increased the pressure. In Criminal Division One, with only three presiding judges, each judge would conduct over 350 regular trials per year. Only under this nearly intolerable pressure did the court establish a "simplified model of ordinary trial procedures," which allowed uncontroversial cases to be tried more quickly using simplified "ordinary procedures." Consequently, cases that normally took three hours to fully try took less than an hour under the "simplified ordinary procedures."

The Supreme People's Court expanded the Haidian court's "simplified ordinary procedures" to courts all throughout the country; now it is as common as the regular summary procedure used when "defendant admits guilt." As I see it, the simplified ordinary procedure could be used with crimes punishable by more than three years of imprisonment. Of course, spontaneous reform in trial methods by a trial court could be interpreted as an important path in the growth of the legal system, a vital system nurtured by the needs of society and limited judicial resources. But as far as legislation seeking to promote the adversarial system was concerned, when

basic courts implemented “simplified ordinary procedures,” at least in those cases where the defendant admitted guilt, this amounted to evasion and shelving of new trial models based on the Anglo-American system. The experience with this kind of simplified ordinary trial procedure trial was in fact clear proof that the adversarial trial system was malfunctioning.

But the influence of the 1996 reform of trial methods extends far beyond. Initially, legislators grew concerned that the core problem of Chinese criminal courts was that they “convict first, try later,” and that trials were so many exercises in formalism. But the legislators could not devise an effective medicine for this problem. So instead they occupied themselves with changing models used in trial procedures. Despite many borrowings and transplants from the adversarial system, the basic problem of court formalism remained unsolved. As I see it, among the procedures used in today’s criminal trials, courts actually hew towards a dossier-centered style of adjudication. Nearly all of the prosecutor’s evidence is reviewed by the court simply by reading out the dossier prepared by investigating personnel. [306] Especially for witness testimony, victim statements, and defendant testimony, courts allow prosecutors to directly read out the investigator’s written record of the oral statements made by witnesses, victims and defendants. For evidence obtained by investigators—through investigating the scene of the crime, inspections, searches, seizures and identifications—courts similarly review the material by reading it aloud. Since witnesses, victims and experts do not testify in the vast majority of cases, the so-called “courtroom essentials” consist of letting the defendant and defense attorney express their opinion *after* the court has read out the relevant documents from the dossier. It is impossible to cross-examine the witnesses, victims, experts or even the investigators. At the end of the trial proceedings, the prosecutor hands over the entire dossier, the members of the collegiate panel examine the dossier, and conduct additional investigation of the evidence outside of the courtroom. In this way, the entire process of court proceedings is reduced to formalism. The substantive act of judging by the courts occurs in the post-trial stage of reviewing the dossier and conducting supplemental investigation.

After trial courts experimented with the “simplified ordinary procedures,” the adversarial procedures designed by the legislature have been partially evaded. Why, then, are the remaining adversarial procedures still avoided in ordinary criminal process? In my opinion, the costs and investments needed to follow the procedures were too great. This is because even if the defendant pleads not guilty, or argues he is not guilty, the operation of “adversarial trial procedures” still expends a lot of judicial

resources. True adversarial trial procedures mean that both prosecution and defense present all of the evidence in court, all providers of oral evidence come to court and testify, both prosecution and defense conduct a full investigation of the evidence, both prosecution and defense may subpoena and cross-examine every witness, victim, expert, defendant, and even police investigators if their techniques may have been illegal. This means that the judge both examines the admissibility of the evidence, and confirms that the facts of the case match up to the adopted evidence, in the presence of both the prosecution and the defense, who may independently evaluate the evidence while in court. This kind of trial method doubtless requires courts to make considerable investment of personnel, material support, financial assistance, and time, all of which would radically transform the working habits of criminal judges. Such a trial would pose a serious challenge for judges long accustomed to going through the motions in court, or for judges whose results of adjudication come from “office work.” Moreover, Chinese courts, in an attempt to raise efficiency and reduce excessive detention, have imposed on criminal judges increasingly strict demands on the time in which they dispose of cases, or place time limits on litigation. According to my studies, in many trial courts and intermediate level courts, criminal judges are required to complete the trial work for an entire case half a month after taking the case. This includes all of the pretrial preparations, the court trial, investigation and fact-checking outside of court, reading the case after trial, writing the trial report, [307] drafting the verdict, and also includes the reports to the chief judge, division head, and head of the court, as well as the discussions of the judicial committee. Relatively influential cases must also report to a higher court and perhaps other authoritative bodies. One can say that, beneath the politicized and bureaucratized structure of the court’s trial work, even a minor reform in trial procedures will lead to major changes across the system of criminal justice.

The National People’s Congress used the Anglo-American adversarial model as the blueprint for its 1996 trial reforms. Local courts’ experimentation with “simplified ordinary procedures” showed that many of the procedures were avoided or set aside. This clearly shows that designing any trial procedure must consider the limitations of the criminal justice system. If the procedural design is incompatible with the judicial resources at the court’s disposal, if a procedural reform radically transforms a judge’s work methods, and if the corresponding administrative customs and performance rating mechanisms will not substantively change, then such a design—“inconvenient” and “excessively costly” to courts and judges alike—is destined to fail.

Procedural costs impose restrictions on designing procedures, as the example of the malfunctioning collegiate panel amply evinces. The “collegiate panel system” refers to a decision-making process where two or more judges or lay assessors sit through the same trial, discuss the case, and then come to a decision by majority rule. According to the general interpretation, the collegiate panel system is an expression of a “democratic concentration,” since it benefits from the abilities and knowledge of several arbiters’ reviewing evidence, establishing facts, and applying laws, while avoiding the due process concern of one judge representing an entire court. Based on the experience of the Chinese judiciary, the collegiate panel system avoids the risk of concentrating all judicial decision-making power into a single judge. By having multiple judges or lay assessors jointly make decisions, we minimize external pressure and influence. Moreover, the members of the panel can supervise and check one another, avoiding injustice or corruption by the judiciary. Precisely because of this, with the exception of minor cases using summary procedures, many criminal cases are tried by a collegiate panel comprised of three or more judges, or three or more judges and lay assessors.

But from the day the collegiate panel system was introduced into China, it has not been effectively deployed. In practice, the system of “decision-makers” or “decision-making judges” was promoted. Formally speaking, the court entrusted three judges or lay assessors to collectively try one criminal case, meaning that the three judges or lay assessors had similar responsibilities within the trial, and did similar work. But in reality, the core work of the trial, and responsibility for the final decision, fell to the “decision-maker.” First, various divisions of the court allocated cases to individual judges, [308] who became the “decision-maker” for the individual case, and person in charge of it from start to finish. Second, from the pretrial preparation, initial review of the dossier, the organization of the actual trial, the post-trial review of the entire case, the examination of the core evidence, preparation of the trial report, drafting of the verdict, to the briefing of the tribunal head and reporting to the judicial committee, and even the request for instructions from higher level courts, all are handled primarily by the “deciding judge.” The other two members of the collegiate panel are there mainly to maintain the appearance of the collegiate panel, and only rarely participate in the trial. They are far more concerned with the cases in which they are serving as the deciding judge; they are not terribly concerned with cases where they play the supplemental role, and are not excessively involved in them. Last but not least, as far as an individual trial is concerned, the deciding judge will want to get effectiveness ratings from

the tribunal, the court where he sits, and higher level courts. Generally speaking, the trial will be recorded in the person's "number of cases adjudicated." But once a case is appealed, mediated, concluded, or becomes the subject of a petition with government officials—especially if the case is vacated by the appellate court, retried, or overturned—liability is not attributed to the members of the collegiate panel, but to the "decision-maker."

Thus, since the "decision-maker" serves as the sole arbiter in a case, the so-called "collegiate panel system" is itself avoided to a great extent. This not only means that the collegiate panel itself is simply a formality, but the systems related to the collegiate panel are also formalities, and difficult to effectively implement. For instance, once the collegiate panel cannot function as such, the group evaluation process envisioned by the procedure law must also be shelved. Because the substantive adjudicative power resides in the decision-maker's hand, discussions and decisions by the members of the collegiate panel are unnecessary. In judicial practice, the group evaluation procedure is either completely avoided, or retains a solely formalistic and symbolic significance. For example, the lay assessors in a collegiate panel—given the concentration of adjudicative power in the decision-maker—have an even more symbolic significance, at most helping the court to decide that there are too few people to adjudicate cases. In many basic level and intermediate level courts, lay assessors can only participate in the court trial process itself. The evaluation of the case, briefing of the tribunal head, and discussion with the judicial committee all fundamentally belong to the decision-maker. We can see that the collegiate panel and assessor system may have a close relationship, but as soon as the collegiate panel is rendered meaningless, the assessor system is not far behind. Similarly, since the collegiate panel system cannot be put to good use, explanations in the verdict also devolve into formalism. The collegiate panel system is supposed to allow all members of the panel to express their opinions about the case equally; even a minority opinion should be included in the verdict. The so-called "explanation of the verdict" is supposed to include the opinion and reasons given by the majority of members, but should also explain the opinion and reasons of the minority. But verdicts primarily express the decision-making judge's adjudicative opinion; the reasons for the adjudication are also [309] the proof for the final opinion, and nothing more. There is seldom any trace of the minority members' opinions.

So why is the collegiate panel avoided? In my observations, the collegiate panel system as a whole does not suit the current Chinese judicial

system. After all, a hierarchical management system with a top-down administration does not fit well with the ideas of the collegiate panel, such as equal discussions, rational debate, and collective decision-making. Given the current system, where the head of the tribunal endorses cases, the judicial committee discusses cases, lower courts seek instruction and provide reports to higher ones, there is no space for a collegiate panel to operate. But, when we consider the problems of the collegiate panel itself, such as whether the procedural costs of establishing the panel are too high, we may find that strictly implementing the system would place an enormous burden on the courts.

With an increasing crime rate and the concomitant criminal caseload, courts are under greater pressure to adjudicate cases. The most effective measure to increase efficiency and spare resources would be for a single judge to handle the greatest number of cases. In comparison with three judges collectively trying one case, a single judge as “decision-maker” would naturally increase efficiency. To maintain the appearance of the collegiate panel system, two “assessing judges” spend an additional two to three hours in trial, which will not at all expedite the cases for which they serve as the “decision-maker.” Moreover, when the pressure to adjudicate cases is too great, courts can still arrange lay assessors to participate in the collegiate panel, which decreases the pressure on the “assessing judges.” In those cases that require judges in the collegiate panel, two “assessing judges” can refrain from asking questions during the trial proceeds, or simply review the files and materials in the cases for which they are the “decision-maker.” They occasionally raise their head and focus on the ongoing trial to show that they are participating. After the trial has concluded, the decision-making judge himself will take care of all the adjudicative work. Moreover, in investigating liability and evaluating effectiveness, it is far easier to evaluate a single decision-maker instead of the multiple members of a collegiate panel. This adjudicative model of “one decision-maker is responsible for one case” greatly reduces administrative and management costs for a court. Since the evaluation standards are clear, and the judge understands the responsibilities and risks he faces in a particular case, the court calculates a number based on the number of cases adjudicated and other factors, and it is extremely simple and easy to implement the evaluation system. By comparison, with a collegiate panel comprised of three members, the court must allocate responsibility based on the size of the panel, which is very complicated and difficult to operate, and also leads to all manners of disputes and contradictions.

Given the natural tendency that the collegiate panel system will be avoided, and the current spike in adjudication pressures forcing many courts to rely on decision-making judges, why do we still want [310] to use the collegiate panel system in most cases? If we seriously face reality, and do not take an overly dogmatic position, by assigning one judge (or one judge and two lay assessors) to the vast majority of cases, we would save resources for criminal trials and greatly reduce litigation costs. Who would not benefit? Of course, some will point out that such a method will destroy the collegiate panel system. But if we face the fact that the system as commonly practiced does not operate as initially designed, we should save it only for the minority of cases—the most serious or complicated cases—instead of using it in the majority of cases. Single judges should hear most cases. We will take corresponding countermeasures for any problems that may emerge from the single-judge system. But the collegiate panel has largely drifted into formalism. When discussing judicial concepts and procedural designs, we should pay attention not to exceed the limits of the criminal justice system. Otherwise, judges and courts alike will render the procedure meaningless, taking a thoroughly expeditious approach, unworthy of the name.

IV. SUFFERING LOSSES BY FOLLOWING PROCEDURES

In any society, people who strictly follow the laws should be encouraged; at the very least, they should not suffer loss because they follow the laws. This is a self-evident proposition. Likewise, officials who investigate, prosecute, and adjudicate cases should be clearly rewarded for strictly following legal procedures; at the very least, they should not be punished for it. This too is a tacitly accepted judicial principle.

Nonetheless, a glaring problem confronting the implementation of Chinese criminal procedure is the existence of the “goal management and effectiveness evaluation system.” Public security officers, procurators and court personnel occasionally suffer loss because they strictly follow the laws. To avoid these losses, decision-makers often have no choice but to pursue “proper” corrective measures, and do not mind sacrificing statutory procedures in so doing. We can say that, *so long as the personnel not only will not be actually rewarded for strictly following the law, but also may in fact suffer loss, then he cannot have any internal motivation to correctly implement legal procedures. Likewise, if he is punished when a decision is overturned, he will take alternative actions not permitted by law in order to*

avoid punishment, even avoiding the criminal procedure law itself. This is the third kind of malfunction.

Of course, people in charge of cases are generally not punished simply because they strictly followed the law. [311] But those who strictly follow legal procedures will typically not be encouraged or rewarded for doing so. Once he receives an unfavorable “effectiveness rating” after a decision is overturned, he could be punished, or suffer losses. In other words, once a decision or result is deemed mistaken, even if he strictly followed legal procedures, he will receive an unfavorable evaluation, and may even be directly punished for it. Thus, the “effectiveness rating” system has two obvious characteristics. First, in the procedural model where work flows from the public security bureau to the procuratorate to the courts, the subsequent institution can decide whether the previous institution made a “correct” decision. And in cases that are appealed, higher courts decide whether lower courts made a “correct” decision in their final adjudication. Second, even if personnel strictly follow legal procedures, if his decision or result is deemed “mistaken,” there is the possibility that he will experience a loss. In order to avoid the unfavorable results of the effectiveness rating system, people in charge of cases actively avoid the trial procedures as prescribed by law.

At present, various local courts have passed “goal quantification administrative regulations” and “yearly evaluation measures,” “number of concluded cases,” “rate of concluded cases,” “appeal rate,” “appellate court acceptance rate,” “rate of appellate court upsetting a verdict” (whether through ordering a retrial or reversing the judgment), “mediation rate,” and “number of overdue cases,” which serve as important indicators of quantified administration and evaluation. For instance, in a Jiangsu trial court, the “Annual Trial Work Evaluative Regulations” assigns judges a certain number of cases to conclude, and further includes the following provisions: “add .8 points for each additional case concluded; subtract .8 points for each case not concluded as compared to the standard;” “mediation and case withdrawal rates should reach 60%, of which the mediation rate should be at least 40%; for any percentage point above 40%, add one point;” “average case time”: if a judge has averages under 15 days to conclude a criminal case using summary procedures, or under 30 days to conclude a criminal case using ordinary procedures, and has an appeal rate of under 10%, add two points; “if no cases or appeals are brought against the court for an entire year, add 1 point;” if a judge has a reversal rate of less than 1%, add two points; if no cases are reversed, add two points; if there is a retrial at the appellate level, or the trial court retries the case and reverses, subtract

two points; if the appellate court makes a serious reversal, subtract one point. If the reversal rate exceeds 1%, penalty per case may be doubled.

The added and subtracted points are directly related to the person's effectiveness rating. [312] If the rating is low, it will influence the judge's year-end bonus, performance evaluation, and other issues. It will influence his reputation, status, and subsequent promotions; in extreme cases, it can even decide whether a judge is fit to conduct trials. Since adding points is intended to encourage a judge's trial work, and subtracting points is intended to impose a certain degree of punishment, what is the actual effect of the performance rating on a judge's adjudication?

First, using "number of cases concluded," "rate of concluding cases," and "number of overdue cases" as an evaluative standard will lead a judge to decide the maximum number of cases in a given time, and moreover to conclude the greatest possible number of cases in the shortest possible period of time. This will certainly push judges to reduce unnecessary delays and raise the rate of concluded cases. But, if a judge takes inappropriate actions in order to satisfy these evaluation standards, even if the rate of concluded cases or effectiveness of trials increases, the quality of the trial could well decrease, in turn spurring the judge to avoid strictly following the procedures. We can ask ourselves, of all the pretrial preparations required by the criminal procedure law—witnesses appearing in court to testify, cross-examination by the procurator and defense attorney, protection of the defense attorney's rights, and a court's examination of the legality of the investigation—which one is helpful in raising effectiveness or increasing rate of concluding cases?

Second, evaluative indicators such as mediation rates and withdrawal rates could have negative effects on private litigation and supplemental civil litigation (that is, a civil lawsuit attached to a criminal trial). Mandating the "rate of mediating cases" and "rate of parties withdrawing the cases" will no doubt push judges, to the greatest extent possible, to push case resolution short of litigation. But whether a party accepts mediation, or withdraws his lawsuit, these are choices properly within his right to sue, premised on the notion that the party knowingly and voluntarily exercises his right to choose. Otherwise, this will deviate from the original purposes of mediation and withdrawal systems as established by law. When a judge makes reasonable efforts, yet cannot successfully mediate a case, it is difficult to persuade a litigant to withdraw it. In such a situation, the case will go through formal trial procedures. This is as it should be. But if mediation rates and withdrawal rates are the established goals, a judge will feel pressure to obtain certain results and will exert influence, induce, or pressure the parties

to choose a form of dispute resolution outside of litigation. This forces a judge to “pull sprouts to help them grow,” and often will lead to “forced mediation,” “using trial to force mediation” or even “forced withdrawal.” In the end, this may make it difficult for legally established mediation and withdrawal procedures to run their normal course.

Lastly, the “rate of reversal on appeal” will push a trial court judge to choose various kinds of pragmatic methods in order to decrease retrials and reversals at the appellate level. For instance, a trial court judge [313] will actively seek instructions from, and report to, appellate judges even before the case is decided at the trial level. In this way, the judge will get a clear indication of the appellate judges’ thoughts, and render his decision based upon this indication. A trial court decision cannot avoid obtaining the appellate judges’ will and opinion. Likewise, when a trial judge hears that one of his cases may be remanded, or reversed, by the court of appeals, he can directly exert influence and pressure on the appellate judge, and possibly convince the appellate court to uphold the original decision. Similarly, some trial courts, in order to decrease their reversal rate, will use all of their courts’ strength to exert influence and pressure on the court of appeals, thereby decreasing the number of retrials and reversals rendered by the court of appeals. To cope with the problem of changes on appeal, a trial court judge will often cause the appeals court to render a final decision according to the trial court’s suggested outcome, so that the court of appeals will give “face” to the trial court and support its decision to the greatest extent. This kind of internal communication between lower and higher courts directly guts the appeal system, such that the “final appeal rule”—that the second court’s (the appellate court’s) decision is final—exists in name only. It also makes the internal independence between the trial and appellate courts very difficult to maintain.

When the procuratorate and public security bureau implement similar quantified administration and evaluation systems in their offices, this will also cause those involved in investigation, detention, and prosecution to skirt legal procedures in order to obtain more ideal results, and adopt pragmatic methods that violate the criminal procedure laws. For example, under the “Quantified Goal Administration and Evaluation Measures” used by one basic-level procuratorate in Beijing, “if a court renders a verdict of not guilty, and the verdict was subsequently confirmed by a verification process” then the responsible procurator is “given a first-class demerit, and loses six points.” If an arrest warrant is authorized, “but after the arrest, the suspect is not indicted, the indictment is withdrawn, or the suspect is found not guilty, the investigating supervisor bears responsibility,” and the procurator who

authorized the arrest warrant is “given a first-class demerit, and loses six points.” In a case where the procuratorate commences its own investigation but “withdraws the case after indictment, fails to prosecute, or results in a not guilty verdict,” the investigators “bear responsibility,” and the procurator responsible for the investigation “is given a first-class demerit, and loses six points.” It is worth pointing out that a “first-class demerit” is the most serious kind of demerit and that losing six points is the most severe kind of punishment. Moreover, up until now, almost all local-level procuratorates have imposed similarly harsh regulations on rates of solving cases, rates of indictments, rates of unauthorized arrests, and rates of non-prosecution (especially non-prosecutions after arrest). In so doing, they have concocted complicated systems of indicators that involve adding and subtracting points.

The system of quantified administration and goal evaluation systems has negatively influenced the ways that the procuratorate follows legal procedures. First, the requirement of clearly indicating the rate of solving cases frequently forces the investigators to adopt [314] pragmatic methods in conducting investigative activities. Consider the ways that procuratorates investigate cases of corruption, bribery or dereliction of duty. The investigative methods are extremely limited, and eavesdropping, tailing, inducement, secret recording and other secretive techniques are strictly regulated, so investigators have no choice but to rely primarily on pretrial questioning. Thus, the pragmatic investigative methods violate legal regulations on pretrial questioning. In judicial practice, though naked “forced confessions” are relatively rare, certain pretrial investigatory methods that cause physical or emotional pain are still pervasive. Of course, in time-sensitive or otherwise urgent cases where the public security bureau is under intense pressure, it may behave even worse.

Second, clear restrictions on “rates of unauthorized arrest” and “rates of non-prosecution,” and unfavorable consequences for procurators who exceed the limits, will prompt them to reduce the proportion of unauthorized arrests and non-prosecutions. This will lead to evasions of the arrest authorization system and non-prosecution system. In fact, when procuratorates restrict the proportion of unauthorized arrests or non-prosecutions, many cases where it is perfectly legal not to authorize an arrest, or not to prosecute someone, will lead to authorizations of arrest or prosecutions. This itself leads to problems in the arrest and prosecution process.

Third, whether it is the investigator, the person authorizing the arrest, or the person bringing the indictment, the most influential evaluative

indicator is the rate of not guilty verdicts. Of course, once the procuracy withdraws the case, declines to prosecute, or otherwise disposes of the case without a guilty verdict, the investigator or person authorizing the arrest will receive a similarly unfavorable evaluation.

Take the example of a court delivering a verdict of not guilty. Until now, if a court finds someone not guilty, the procuratorate responsible for bringing the case will suffer an unfavorable evaluation from the higher level procuratorial organ, and the chief procurator will either get an unfavorable rating, or his professional development path will be negatively impacted. As for the procurator in charge of the case himself, any kind of unfavorable rating or influence will surge forth in all directions. Theoretically speaking, it is possible that a not guilty verdict will not directly harm the procurator, but he will invariably be subjected to various kinds of examination, such as repeatedly writing reports about the case, preparing explanations for the particular procuratorate's administrative department and supervisory department, and perhaps even being subjected to examination by a higher level procuratorate. Once held responsible for a not guilty verdict, a procurator will receive an unfavorable evaluation. Of course, this is only the direct consequence. There may be indirect consequences as well: the procuratorate [315] could very well assign the procurator to record-keeping, eliminate opportunity to receive a favorable evaluation, overlook him for promotion, or even transfer him to a position outside his professional ability. This could have tragic results for a procurator's job prospects within the procuracy.

Once a verdict of not guilty is handed down, the procurators responsible for investigating the case, authorizing the arrest, and litigating the case will receive very unfavorable evaluations. As a consequence, when faced with a case that "by law should be treated as not guilty," will the procurator blithely follow legal procedures and passively accept the court's verdict of not guilty? No. In order to avoid a verdict of not guilty, many procurators will instinctively pressure the presiding judge, making all kinds of private communications, contacts and arguments. At the present juncture of the Chinese judiciary, judges in the court's criminal division and the litigating procurators in the local procuratorate have formed cozy relationships, rather like that of colleagues. They have lived and worked in the same city for many years and engaged in criminal adjudication. They have many opportunities to meet in their work. Some develop strong emotional bonds, even to the point of intimate relations. Sometimes, litigating procurators and trial judges could very well form various kinds of beneficial relationships, forming a "common interest community." Given

this kind of judicial system where mobility is relatively rare, a judge may find it hard to deliver a verdict of not guilty, even when “the facts are unclear and the proof is inadequate.” To do so would risk “not giving the procurator face,” or “destroying the procurator’s reputation.” A judge would not only offend a procurator, he could even be seen as a renegade by the entire local political-legal community. On the other hand, in localities where the relationship between the procuratorate and court has grown strained, if a judge renders a verdict of not guilty, he could be investigated for criminal activity, such as corruption, by the procuratorate. While this would be a rare and unlikely situation, since the procuracy is the body that supervises the law, it is theoretically possible to investigate a judge in this manner. [316]

More frequently, when faced with a situation where “the facts are unclear and the evidence is inadequate,” a court will usually refrain from rendering a verdict of not guilty, and instead suggest that the procuratorate withdraw the case, or impose a mitigated sentence based on the principle of mitigating suspected crimes. Even an appellate court, facing pressure from the procuratorate and lower-level courts, will not easily render a verdict of not guilty, but rather vacate the initial verdict and remand the case. After the case has been remanded, the court will either decide to withdraw the case, or impose a mitigated sentence. In the end, this kind of adjudicatory method will allow the procurator to avoid an unfavorable evaluation due to a not guilty verdict and permit the procuratorate to avoid paying state compensation. Recently, a few high profile cases—such as the Du Peiwu case in Yunnan, the She Xianglin case in Hubei, and the Chen Guoqing case in Hebei—show that this logic of adjudication objectively exists and is somewhat widespread in application.²

In most instances, when faced with a case where “the facts are unclear and the evidence is inadequate,” a court will not follow the clear provisions of the criminal procedure law to render “a verdict of not guilty because the evidence is inadequate, and the charged crime has not been established.” Instead, following the logic of “a suspected crime should be treated lightly,” a court will render a “flexible” guilty verdict, or permit the procuratorate to withdraw the case. This is a perfect example where courts evade the principle of “a suspected crime is not a crime.” An important factor in producing this procedural flaw is the quantified management and effectiveness rating system analyzed above, whereby a procurator suffers losses for a not guilty verdict, and a trial court judge suffers losses when his

² *Translator’s note:* These are all cases where defendants were tortured and then convicted based on illegally extracted evidence.

case is overturned on appeal. Under this system, even if the procurator or a judge is fully aware of the importance of a legal procedure, once he realizes that he will suffer losses for strictly following legal procedures, he will do anything to avoid legal procedures and evade the legal system. To put it fairly, the procurator and the judge do not *intend* to produce procedural flaws. Instead, to avoid unfavorable ratings, they have no choice but to evade these legal procedures that in fact may harm them. [317]

V. TWO LEGAL TRADITIONS PLAY CHESS

China's current criminal procedure and related judicial interpretations contain a number of self-contradictory systems. Sometimes, after the legislature introduces a new system, the Supreme People's Court and Supreme People's Procuratorate will issue a judicial interpretation that creates a contrary system, such that the legislature's system is undermined or avoided to varying degrees in judicial practice. In other circumstances, the legislature will borrow and transplant a few Western systems, which directly conflict with the current criminal policy in effect. These policies in turn directly affect cases handled by the public security bureau, procuratorate and courts, as well as the procedural regulations these bodies are using. This too creates malfunctions in the legal system.

The malfunction in the regulation that "a suspected crime is no crime" provides a cogent example. According to the 1996 revisions of the Criminal Procedure Law, trial courts—upon discovering that the evidence was inadequate and that they could not find the defendant guilty—were supposed to render "a verdict of not guilty because the evidence is inadequate, and the charged crime has not been established." As far as the legislature's policy makers were concerned, establishing the principle that a "suspected crime is not crime" was an important instance of the presumption of innocence. But whether it was an intentional choice or an unintentional oversight, the legislature still kept the original regulation to "suspend suspected criminal cases," meaning that suspects would linger in detention even if there was not enough evidence to convict them, in the same section of the Criminal Procedure Law. On the one hand, the procurator could suggest that the court delay the trial if "the facts were unclear, and the evidence was inadequate," so he could further investigate. On the other hand, the appellate court—upon finding "the verdict's facts were not clear, or evidence was not adequate"—could overturn a case after checking the facts, or could vacate the verdict, and remand the case to the original trial court. We might ask: given that the law clearly spelled out that a court—upon finding that the

facts were unclear and the evidence inadequate—should render a verdict of not guilty because the charged crime was not established, why did the legislature permit the procuracy to conduct further investigation during trial? Faced with this kind of situation, why would an appellate court not simply render a verdict of not guilty, but instead order a retrial? This kind of system would lead a defendant to face multiple criminal prosecutions for the same underlying conduct, which is inconsistent with the presumption of innocence.

After the promulgation of the Criminal Procedure Law, the Supreme People's Court and Supreme People's Procuratorate issued judicial interpretations to implement it. According to these judicial interpretations, a procurator could apply to the court to withdraw prosecution if he discovered, during trial, that the facts were unclear or the evidence was inadequate. The court [318] could grant the withdrawal after appropriate examination. After the procuratorate withdrew the case, it could continue the investigation, and then either refile the case, decide not to prosecute, or suggest that the public security organ terminate the case. That is, by establishing the withdrawal system, the Supreme People's Court and Supreme People's Procuratorate counteracted the principle of the presumption of innocence, even without clear authorization from the Criminal Procedure Law. In implementing the withdrawal system, the judiciary evaded the principle of "a suspected crime is no crime at all." After all, in light of the foregoing analysis, under the influence of the current evaluation system, once the court delivered a verdict of not guilty, the procurator responsible for the case would receive a very unfavorable rating, as might the procuratorate where he worked. This clearly shows that, after the legislature introduced the principle of "a suspected crime is no crime," if the law and judicial interpretation contained contradictory regulation and practices, then the principle could not be effectively implemented.

On a deeper level, the flaws of newly introduced legal procedures manifest two kinds of value conflicts. Recently, as legislative policymakers, judicial officials, lawyers and legal scholars accept more and more experiences and ideas from Western criminal justice, revisions of the Criminal Procedure Law and judicial interpretations absorb more and more procedures from Western countries. At the same time, the establishment of Western procedures has encountered "stubborn resistance" from local legal traditions, which often mix like oil and water. In the end, latent regulations emerge and take root. In fact, the reason why the principle of "a suspected crime is no crime" has been avoided is because the presumption of innocence butts up against the state prosecution organs. In the end, it was

not really accepted by the legislature or judiciary. It does not matter whether it is the legislature or the judiciary; everyone still believes that as long as a defendant actually committed the crime, he should not escape the law. Even if the evidence is inadequate, the court should still guarantee that “the loose net of the law only catches those who are guilty.”

The conflict between different legal traditions, to a large extent, reflects the awkward position that admirers of Anglo-American legal tradition find themselves in their legislative free-for-all. If early 20th century Chinese transplants came from civil law, and mid-20th century transplants came from Soviet law, then Anglo-American law has become the prime reference for Chinese law since the 1980s. This is quite apparent in the revision of the Criminal Procedure Law.

The 1996 revisions to the Criminal Procedure Law referred in many ways to the Anglo-American legal experience, though of course it also borrowed systems devised in other countries. For instance, to solve the problem of “convict first, try later,” to realize the court’s trial functions, and to enhance the adversarial character between the prosecution and defense, the legislature adopted some elements from the common law adversarial system, urging judges to go from being active judicial investigators to neutral adjudicators. [319] The work of presenting evidence, documents, and records in court, and examining witnesses, would henceforth fall primarily to the prosecution and defense. The judge would attend to listening to the evidence and adjudicating, instead of actively conducting court investigation, and directly gathering evidence outside of court. Judicial interpretations subsequently issued by the Supreme People’s Court further established cross-examination procedures and changed the order and practice of questioning witnesses. In another example, the revised Criminal Procedure Law buttressed the role of defense attorneys in the criminal investigation phase, giving lawyers the right to meet with clients in detention. These changes bore the influence of the presumption of innocence, particularly the regulation that courts should render a verdict of not guilty if the evidence was inadequate, and the charged crime could not be established.

But as more and more experience showed, these Western systems encountered more and more resistance, and numerous reform ideas were roadblocked. In my observations, nearly every single revision that the legislature made to the Criminal Procedure Law encountered difficulties in implementation. Every reform measure proposed by scholars experienced some backsliding in judicial practice. A series of “latent regulations” permeated the practice of Chinese criminal justice. These latent regulations

did not exist in the written laws; they were to be enforced but not spoken of, as long as they suited China's unique judicial system. To the extent they won the hearts and minds of the people, they became a kind of "living law." One can say that the introduction and transplantation of Western law encountered resistance from these latent regulations; they gradually lost the functions and goals expected by the legislature. In the end, these reforms failed.

Surprisingly, though more and more Western legal ideas confronted the stubborn resistance of local latent regulations, scholars refused to take note of the resistance and changes brought about by the mingling of Chinese and Western legal traditions; no one saw it as a pressing problem. Most scholars clung to the free-for-all idea, and continued to study how to introduce and transplant Western, especially Anglo-American, legal systems. Looking at the research and reform experience conducted by scholars in the past few years, academics universally support the full establishment of the presumption of innocence, the thorough implementation of procedural justice, and the use of Anglo-American evidence law as the basis for Chinese criminal evidence regulations. For example, to solve the problem of forced confessions, academics universally support the establishment of the right to remain silent, to ensure that suspects and defendants would not be forced to admit their guilt. In creating a principle to exclude illegal evidence, courts would be able to deny the evidentiary value of a defendant's confession, victim statements, or witness testimony if obtained through illegal means, and thereby exclude it from the court's purview. In establishing common law hearsay rules and civil law principles of direct and oral trials, courts would ensure that witnesses, victims, experts and investigating personnel all testified in court, thereby restricting the prosecutor's ability to present different kinds of written evidence. In establishing the defense attorney's right to be present during the investigating personnel's interrogation of a suspect, [320] they would ensure that a defense lawyer would be present for the entire pretrial questioning process

On the one hand, as Western legal systems increasingly interacted with local "latent regulations," there was more evading and shelving. On the other hand, legal scholars still swore by Anglo-American law, resolutely taking the spirit and resources for reform from Western legal systems. This inevitably raises the concern: in the long run, can China's formal criminal procedure system ever have its own life? Can these laws on the books ever transform into "living law"?

We can analyze this problem using the evidentiary value of testimonial records and the voluntariness of a defendant's confession as examples.

According to the legislature's system, the procuratorate can only send "copies and photographs of the primary evidence" to the court during the indictment phase. It cannot send the entire case file to court prior to the court date. All evidence must be presented in court by both sides for cross-examination and oral argument. This was seen as a partial rejection of the "dossier delivery system" and an important sign of increased adversarialism. The legislature assumed that such a reform would minimize to the furthest extent the judge's predetermination and partiality. Instead, the judge would focus on hearing the evidence, cross-examinations, and arguments made by both sides in court and fulfill the trial functions of the court. Yet after a decade of practice, this trial-type reform, based on common law, has been completely replaced by another set of latent regulations. First, there is no cross-examination throughout the entire trial. The court's examination of evidence is based solely on reading aloud documents and presenting the dossier. Especially with the investigation of oral testimony—witness testimony, victim statements, defendant's testimony—there is considerable reliance on the testimony and records of the investigating personnel. In the vast majority of cases, no one notifies the witness, expert or victim to appear in court to testify. Second, the prosecutor does not read out or present all of the investigators' testimony and victim's statements, instead selecting those portions most favorable to the prosecution's case. Third, the prosecution only reads out summaries of the testimony and records, typically those portions least favorable to the defendant, and not the testimony as the witness herself construed it. Finally, in the rare case when a witness actually appears in court to testify, the court still allows the prosecution to read out the witness's testimonial records in a selective and summary manner; it places no restrictions or obstacles on the evidentiary value of the testimony and records. At the same time, as judicial practice shows, when a witness appears in court to provide testimony favorable to the defendant, or refutes the testimony and record as initially introduced by the investigating personnel, the court almost universally requires the defense to produce evidence verifying what the witness said in court to ensure its credibility. Otherwise, the court refuses to accept the new testimony given by the witness in court. While the court accepts the written record of testimony that witnesses provide to the investigating personnel, they will not accept oral testimony as verified through court procedures [321], meaning China's criminal judges assume that written testimony is somehow more credible. In

the end, after the court has gone through a “court trial” based on reading out records, it announces the trial is over, the collegiate panel accepts the dossier and materials handed over by the procuratorate, comprehensively reads and examines them, and seeks a factual and evidentiary basis to produce a final adjudication. Of course, many times, when the factual circumstances are not clear, the presiding judge can directly conduct the necessary examination outside of the court, or verify the evidence by talking to the witnesses, experts, victims or even the investigating personnel. Yet this examination and verification work is all conducted by the presiding judge, not through additional courtroom examination, nor with the participation of the procurator and defense attorney.

Obviously, the reform of trial methods that the legislature undertook in 1996, based on Anglo-American models, has not achieved the expected effect. The set of trial procedures designed by the legislature has not been effectively implemented in judicial practice. The array of trial regulations created by judicial interpretations from the Supreme People’s Court and Supreme People’s Procuratorate in the end did not avoid their fate of avoidance. Most regrettably, very few scholars have taken a reflective attitude about this. Indeed, some scholars continue to push for “continued reform of trial methods,” and continue to promote the introduction of hearsay regulations and the establishment of the principle of direct and oral trials. They believe that only by establishing a complete set of evidence regulations can a Chinese version of the adversarial system finally be implemented.

As one can easily glean from the example of testimonial records, the academic movement to introduce Western legal concepts has encountered enormous frustrations. It is no exaggeration to say that each time we successfully amended our law on the books to introduce a Western legal concept, the concept is either avoided or set aside. In judicial practice, it is replaced by latent regulations. This problem urgently seeks a solution, but it is also part of the academic contribution that Chinese scholars can make to the reform process. As this problem cuts deeper and deeper, I focus on the malfunctions of the criminal process, which produces an even keener interest in researching them.

Apart from testimonial records, the voluntariness of a defendant’s confession is also an issue worth serious study.

Theoretically speaking, the principle of voluntary confessions is commonly accepted by academics. Defendants have a right to counsel, as is confirmed both by the Constitution and Criminal Procedure Law. At the same time that the current Criminal Procedure Law established the status of

the defendant as a party and his right to counsel, it also strictly forbade both forced confessions and obtaining evidence through threats, inducement, fraud, and other illegal means. [322] Both the Supreme People's Court and Supreme People's Procuratorate promulgated judicial interpretations such that any defendant statement, witness testimony, or victim testimony obtained through a forced confessions, threat, inducement, fraud or other illegal means cannot serve as the basis for a procuratorate's indictment or a court's conviction. Looking at the current state of research, most academics take the position that "no person can be forced to admit his crime," thereby establishing the principle of voluntary confessions, which stands at the core of the right to remain silent. Because of this, some scholars suggested reforming the system of investigation and interrogation, demanding clear restrictions on the time, place and number of pretrial interrogations, and even that the defense attorney be present for the investigation and interrogation process. The Supreme People's Procuratorate and public security bureau alike began to advocate, within limits, that the entire process be taped, whereby the entire process of interrogating the suspect could be objectively recorded. It should be noted that this series of reform measures would definitely ensure that defendant's statement would be voluntary, and not forced. This idea of reform, based on the spirit of Western legal systems, was widely accepted by Chinese academics.

In judicial practice, then, what were the problematic regulations involved in defendant's statements? According to the criminal policy of "light punishment for those who speak frankly, heavy punishment for those who resist," suspects and defendants who refused to admit their guilt were uniformly considered to have "resisted" and would therefore be punished more severely. During the investigation stage, the suspect has an obligation to answer the investigating personnel's questions truthfully. The investigator could record in the file whether the suspect kept silence, professed his innocence, or changed his story. Since China has a closed investigation system, suspects who keep silent or profess their innocence are likely to be relentlessly interrogated for long periods of time, which is akin to forcing a confession. Moreover, because the suspect is keeping silent, or professing his innocence, the investigator can extend the time needed to handle the case, which will in turn lengthen the detention period. During the trial stage, the fact that the suspect kept silent or professed his innocence during the investigation, together with his refusal to admit guilt during trial, can become "attitude evidence" and a basis for the court to aggravate the defendant's sentence. In recent years, no more typical case has emerged than that of Anhui Province's Vice Governor Wang Huaizhong. The court

sentenced Wang to death in its written verdict, the primary reason being that the “defendant Wang Huaizhong . . . faced with incontrovertible evidence, devised countless schemes, refused to admit guilt, had a terrible attitude, and should therefore be punished severely.” In addition, [323] even the Supreme People’s Court recognized Wang’s “attitude towards admitting guilt” as an aggravating sentencing factor. This shows that, to a certain extent, the so-called “aggravation for those who refuse to admit guilt” is in reality “aggravation for those who offer a defense.” Suspects and defendants who exercise their right to defend themselves experience unfavorable legal consequences, even harsh punishment. Such are the contradictions between a defendant’s status as a party and the enjoyment of one’s legal right to defense.

Why did the legislature stress the suspect’s and defendant’s status as a party, and gradually expand his right to defense, yet at the same time maintain such regulations as “the suspect must answer truthfully to the investigator’s questions”? The basic logic of exercising one’s right to defense is that, since the court respects the defendant’s right to defense, it should also protect his right to argue that he is not guilty. At the very least, the court should not punish the defendant who exercises the right to claim he is not guilty. Why, then, do Chinese courts still commonly use “attitude towards guilt” as an aggravating sentencing factor?

In fact, this self-contradiction between procedural design and judicial practice fundamentally reflects the legislature’s and judiciary’s ambivalent attitude towards the status of suspects and defendants. A defendant is the primary party in the criminal process, and his status is dual. On the one hand, as a party, the suspect or defendant has an independent human dignity and enjoys many procedural rights, including the core right to defense. The “voluntariness of a defendant’s confession” derives from this essential concept. On the other hand, as a party who knows the facts of the case, the suspect or defendant provides his own testimony and can help the public security bureau, the procuratorate, and the court understand the true facts of the case. He thus becomes an independent “source of evidence,” on which the important concept of the “truthfulness of the defendant’s statement” is based. In emphasizing the suspect or defendant’s status as a party, the legislature strengthened his right to defense; this is a legislative measure taken on the basis of respect for his status as a subject to litigation. According to this idea, criminal procedure seeks to maintain a basic “form of litigation,” which must ensure a rational opposition between the suspect or defendant and the state’s prosecutorial organ. Only when the suspect or defendant has not been compelled to admit his guilt and can freely choose

his particular role in litigation; only when he can make a voluntary decision about whether to plead not guilty, or to make a statement about his guilt, can this form of litigation be maintained. At the same time, the legislature and courts seem to worry about going too far, giving the suspect or defendant too strong a right to defense, and making it impossible to get the defendant's statement, a key piece of evidence. Based on these considerations, the Criminal Procedure Law maintained a regulation on so-called "truthful answering," [324] which imposes on suspects an obligation to "make a truthful statement of criminal facts." Courts, under the principle of "heavy punishment for those who refuse," impose severe sentences on defendants who refuse to admit their guilt. This means that a suspect and defendant not only lacks the status of a litigant, but also must submit to the tools and means of state punishment of criminals.

At present, nearly all scholars advocate the principle that "no person must be forced to admit his guilt," and a system of procedural protections that ensures the defendant's statements are made voluntarily. Nevertheless, if the criminal policy is still "light punishment for those who speak frankly, heavy punishment for those who resist," if a suspect still has a duty to "answer truthfully," and if a court can still punish a defendant more severely if his "attitude towards admitting guilt is not good," then it will be practically impossible for a suspect or defendant to maintain his status as litigant.

Having analyzed examples of "a suspected crime is no crime" and "voluntariness of defendant's confession," we can distill the following formulation: *Once a procedure or regulation established by law encounters self-contradiction, or the regulation conflicts with existing criminal policies, then the malfunctions of criminal process emerge. As long as deeply rooted conceptual conflicts in China's legal culture are not effectively resolved, the Criminal Procedure Law will remain mired in the mud of non-implementation.*

VI. PROTECTING THE JUDICIARY'S LEGAL PROCEDURES

According to the above analysis, if we do not establish a procedural mechanism to invalidate conduct that violates procedural law, the Criminal Procedure Law cannot be implemented, and violations of procedural rights cannot be remedied. But even though certain procedural mechanisms have been established in our written law, they still face the problem of implementation. For example, under the current Criminal Procedure Law, an appellate court can "vacate the initial judgment, and remand for retrial,"

if it finds that a procedural violation by the trial court “influences the fairness of the trial.” But the system for punishing procedural violations through “vacating the original verdict” has proven difficult to implement in practice. Likewise, according to the relevant judicial interpretations issued by the Supreme People’s Court, a court cannot use oral evidence obtained through forced confessions, threats, inducement or fraud as the basis of a conviction. But this procedural punishment, targeted at illegal investigations, has likewise been avoided in judicial practice. [325]

Why were these two procedural systems so difficult to implement? In my interpretation, it is a problem of the judiciary’s influence on criminal procedure. As I see it, the implementation of nearly the entire criminal process is done by specially designated judicial systems. To add a normative regulation system to the criminal process, criminal procedural law will use state organs to implement the regulations, which must support the proper allocation of powers among the various state organs. At the same time, it needs the procuratorate and different levels of the courts to maintain rational relationships. In fact, *criminal procedure and the judicial system have a very tight relationship, like lips and teeth. When problems emerge in the relationships of the public security bureau, procuratorate and courts, or when relationships among the judicial organs become twisted, the criminal procedures designed by the legislature are almost uniformly avoided.* This is another precept of the malfunctions of China’s criminal procedures.

We can once again analyze the two types of procedural systems mentioned above. Initially, effective implementation of the system of “vacating original verdicts” was premised on the idea that normal cases would have one appeal, which would be final. According to the legislature’s plans, the appellate court would examine not only the trial court’s facts and application of substantive laws, but also whether it followed legal procedures. They would announce cases where the trial court violated legal procedures, and correct the procedural error through a retrial. We can say that, by vacating the initial judgment, the appellate court wants the trial court to implement the following procedural punishment: by announcing the violation, the court openly condemns the violation; by announcing the conduct invalid, the court provides a kind of retribution for the violation; by remanding the case, the court restrains and deters illegal activity, whether by targeting specific deterrence of illegal activity, or general deterrence of latent illegal activity. But because of present abnormalities in the different levels of China’s courts, namely that there is no way to maintain the “internal independence” between trial and appellate courts, we note a certain vertical control between trial and appellate courts, just as we see between different

levels of administrative organs. In light of this background, a judicial custom has gradually emerged whereby lower courts communicate internally with, request instruction from, and report to higher ones on individual cases. Particularly in sensitive cases, or ones with particularly large social influence, lower courts generally seek internal guidance of a higher court's tendencies and opinions, and make a ruling that conforms to them. Once a trial court's judgment manifests an appellate court's will, the notion of an appeal itself is meaningless, as is the idea that the appellate court's judgment is final. If the defendant and his lawyer raise the objection that the trial court made a procedural violation, and even appeal for this reason, the appellate court often ignores this, and affirms the initial judgment.

If we say that the system of vacating the initial verdict needs a normal appeal system and independence within the judiciary, then [326] the implementation of the exclusionary rule will be determined by whether the courts can conduct an authoritative examination of whether the investigation was legal, that is, by establishing the principle that the judiciary can make a final judgment. According to the general interpretation, a court's exclusion of evidence obtained illegally by investigating personnel means announcing that the investigation was illegal, and therefore invalid, and that the evidence obtained through an illegal investigation has no evidentiary value. Judicial review of the legality of the investigation constitutes the premise of the exclusionary rule. Only by excluding illegal evidence will a court be able to effectively inhibit illegal investigations, show that courts are the last enclave of justice, and avoid being accomplices or abettors of illegal investigations by allowing in illegal evidence. But in today's judicial system, Chinese courts can at best examine the legality of the public security bureau's administrative punishments through the administrative litigation process. They cannot formally examine the criminal investigation conducted by either the public security bureau or the procuratorate. In current criminal practice, courts cannot review the legality of any part of the examination process (search, seizure, identification, on-site investigation, examination, etc.) or any compulsory measure (detention, arrest, bail, etc.). The defense can raise objections to the legality of these various measures, but a court is unlikely to accept them. Given this situation, most courts simply do not allow a defendant to question the legality of the prosecution's evidence. In the rare instance when a court agrees to consider it, the examination will be formalistic at best. The court has no way to demand a procurator take "responsibility to prove that an investigation was legal," or compel the investigating personnel to testify in court. Rather, courts typically accept the investigator's written explanation that his investigation was legal. We can

say that a court's inability to conduct judicial review of the investigation is an important factor in the avoidance of the exclusionary rule.

The aforementioned examples of procedural flaws reveal the important influence of the judicial system in modern criminal procedure. Regrettably, when China's legislature and judicial organs borrowed and transplanted these criminal procedure regulations, they neglected systemic factors needed to enforce the regulations, either because it was too difficult to change China's special judicial system, or because they lacked deep knowledge of this point. As a result, while the written law contains many procedural regulations that first appeared in the West, they are difficult or impossible to implement due to systemic restraints on the judiciary.

The legislature's 1996 establishment of a system whereby lawyers can meet with detained suspects provides an example worth studying. The legislature assumed that by allowing the lawyer to meet with the suspect during the investigation phase, the lawyer could understand the case at an early stage of its development, sufficiently prepare his defense for the court, and inhibit to some degree the illegal evidence gathering by investigative personnel. [327] But when a criminal suspect was placed in detention, it was usually indefinite detention by the public security bureau in a detention center. Under current Chinese law, the public security bureau is responsible for investigating most criminal cases, during which time it exercises its right to investigate and right to detain indefinitely. Because both of these powers are concentrated in the public security bureau, if a lawyer wishes to succeed in meeting his client, he must apply to a detention center run by the public security bureau. Given that the vast majority of cases are investigated by the public security bureau, the detention center places all manner of restrictions on lawyer's visits: impeding the lawyer's access to the suspect, listening in on their conversations, or even secretly taping them. Moreover, the current Criminal Procedure Law requires that a lawyer obtain authorization from the investigating department detaining the suspect. And once this application is denied, the lawyer can only seek a remedy from the investigating organ itself; he cannot file a formal claim in court. In China's current judiciary, a court would not participate in litigation over the investigative stages, while the procuratorate can only examine and approve the investigating department's application for arrest. The procuratorate has no right to grant a remedy when the investigating department restricts a lawyer's rights. In other words, the lawyer's right to apply to meet a suspect has really become a right to apply for the investigating department's authorization to meet the suspect.

The reason it has become difficult to implement the lawyer's right to meet his detained client is because the current judicial system has become the bottleneck restricting its implementation. Obviously, in a system where the right to investigate and right to detain are concentrated in one organ—the public security bureau—access to counsel requires the authorization of the public security bureau. And since courts do not participate in pretrial activities, a lawyer must apply to the investigating department to meet his client and cannot but apply to the same department to obtain relief. If these two facets of the judicial system continue, it does not matter what kind of system the legislature puts forward, the problems facing access to counsel will remain. Perhaps, as we continue to reform the trial system by expanding the rights of defense lawyers, we must ask ourselves: why did the “right to counsel,” as provided by the legislature, in practice become “the lawyer's right to apply for authorization from the public security bureau”?

Up until now, academics almost universally assumed that the reform of China's criminal procedure system is predicated on the principle that the judiciary should render the final judgment. That is, the vast majority of academics believe that any trial procedure involving the deprivation of personal freedoms, and other basic rights, must be authorized by a “neutral arbitrator,” such as the courts. Any suspect or defendant harmed by trial procedures should apply for judicial relief from neutral courts. This would require the establishment of a pretrial [328] examination and warrant system, to establish a Chinese-style investigation judge, pretrial judge or public security judge system. This would also require the establishment of a modern judicial system wherein the investigation and prosecution could withstand judicial review. Whether we talk about the reform of compulsory measures, or legal restrictions on compulsory investigation, whether it is the establishment of a system to present evidence, or the implementation of the exclusionary rule, all are premised on the strong interference of a judicial adjudication organ.

Nevertheless, in the current Chinese criminal judiciary, judges do not participate in any pretrial litigation activity. Only after accepting the procuratorate's indictment does a court render authoritative judgments about substantive questions. This means that, during the entire pretrial stage of criminal litigation, the suspect and defense lawyer conduct their case without the participation of a “neutral arbitrator.” The investigating body both authorizes itself to conduct, and then implements, the entire investigation: not just detention, bail, residential surveillance and other compulsory measures, but also search, seizure of property, seizure of assets, freezing accounts, investigation of the crime scene, factual investigation,

identification, and other parts of the investigation. It is difficult to produce even the most minimal “form of litigation” for the entire investigation process; one must have administrative punishments. Furthermore, the criminal justice system has yet to set up an examination mechanism to determine the legality of the litigation procedures to allow courts to effectively examine the investigation, even during the trial phase. Courts thus have no ability to invalidate even the most egregious of procedural violations by the investigators or procurators. This ensures that the exclusionary rule will not be implemented, and that concepts such as “evidentiary value” and “admissibility” remain theoretical abstractions but never legal conclusions drawn by the judiciary. In fact, if there can be no judicial review of legality of the investigation, then what is the point of deciding whether certain evidence has “evidentiary value” or “is admissible”?

But the problems do not end here. In the current system of criminal justice, the procuratorate serves as the state’s “supervising organ of law,” and has the power to supervise the legality of both investigation and adjudication activities, and to correct violations of procedure. This means that the law endows procurators with the authority to implement criminal procedure laws. Yet, when the procuratorate serves as the investigative organ as authorized by the state, it exercises the power to investigate; when it serves as the state’s prosecuting organ, it has a professional relationship to the criminal case—a basic desire to seek a beneficial outcome to the case. The procuratorate cannot effectively supervise its own adherence to legal procedure. There is a conflict of interest in its effective implementation of procedural law; a procurator must often make the difficult choice between strictly adhering to legal procedure and ensuring a victorious result in court. This explains the natural faults and inadequacies of authorizing the procuratorate to oversee supervision of criminal procedure. Without reforming the Chinese judicial system, [329] is it not an impractical fancy for academics both to introduce Western judicial review, the warrant system, and judicial relief mechanisms, and to assume that courts will be the last line of defense in preserving procedural justice?

VII. CONCLUSION

In this discussion, I have explained the basic reasons for the flaws in criminal procedure from five angles and then raised five precepts to address them. Of course, such debate and argument are preliminary, based on a series of concrete procedural regulations that have been avoided and

rendered meaningless, from which I have deduced several basic suppositions. To conduct a comprehensive debate about the five precepts, we must delve more deeply, such that the causal relations between the results of the flaws of the criminal process, and the five factors, are more cogent. But, the current analysis and debate can at least lead us through the surface of avoided criminal procedures to the “deep structures” wherein legislative change has not effectuated change—and in the end reveal the widespread flaws of the criminal process. From this angle, even preliminary study is valuable, if only as a precursor to future study.

The flaws of criminal procedure are actually the avoidance of legal procedure by the investigative organ, the prosecuting organ and the courts; this leads to the non-implementation of criminal procedure laws. Of course, at the same time that formal legal procedures are avoided or rendered meaningless, a series of informal “latent regulations” are actually implemented in judicial practice. Why do the investigative organ, prosecuting organ and courts refuse to implement formal legal procedures? First, the criminal procedure laws themselves are neither implementable nor remediable. The criminal procedure laws have not established a system to target procedural violations. Since courts refuse to conduct judicial review of the legality of investigations, prosecutions and trials, illegal conduct by any of these organs is not exposed to effective judicial review, and there is no way to establish legal liability for the corresponding acts.

The flaws of criminal procedure are also tightly linked to the high costs of implementing procedural regulations. We have analyzed the examples of the collegiate panel system and reform of trial methods, and debated the principle that if the litigation costs of new procedures and the costs associated with the reforms exceed the limits of the public security bureau, procuratorate, and courts, then in the end it will be very difficult for such procedures to be implemented. This reminds us: no matter what legal values we attach to the goals of judicial reform, we must always consider the costs and investments associated with reform, [330] and honestly weigh the limitations of the public security bureau, procuratorate and courts.

Having analyzed the various malfunctions of the criminal process, we discovered one exogenous variable: the collision of different legal traditions. The principles of “a suspected crime is no crime,” and “the voluntariness of a defendant’s statement” have both proven to be Western procedural designs incapable of implementation in China, whereas local Chinese systems have deployed a number of “latent regulations” that predominate. In fact, whenever regulations established by a law stand outside the mainstream

values expressed in judicial practice, it does not matter from which legal system the regulation originates, it has no possibility of implementation.

There is a close link between the judicial personnel's avoidance of certain criminal procedures and the direct losses they may suffer if they adhere to the procedures. In the original system of criminal procedure law, the investigating personnel, the prosecution, and court personnel should not have had any direct interest at stake in the outcome of the case. But the public security bureau, procuratorate and courts all have internal performance ratings, such that in the process of deploying criminal procedures, the subsequent organ directly decides whether the proceeding one made a "mistake," which influences the prior organ's effectiveness rating. This kind of system, which relies on standards created by a subsequent organ's substantive handling of the case, creates a class of judicial personnel whose goal in the criminal litigation process is the pursuit of favorable ratings, and who pay absolutely no attention to implementing legal procedures. Obtaining favorable ratings can even be achieved through the avoidance of legal procedures.

Finally, restrictions on the current legal system become another factor in a malfunctioning criminal process. By not creating a judicial system where reasonable relationships link the investigative, prosecutorial and court organs, there is no foundation on which Western procedures can rest. At present, the judicial system has already become the bottleneck in the criminal law reform process. Without large-scale judicial reform, there will be no space for revision of the Criminal Procedure Law. A few procedural regulations based on certain judicial ideals, lacking protection from the judicial system, will be universally avoided in the end.

Clearly, in perfecting criminal procedural laws and reforming the criminal justice system, the most urgent topic is to solve the problem of the malfunctioning criminal process. As for scholars who use social science methods to study legal problems, the malfunctions of the criminal process could make it difficult to create a foundation for the Chinese legal system, or they could provide a sterling example for how to correct the problems of China's procedural laws more generally. As for scholars who aspire to promote the modernization of the Chinese legal system, before selecting which Western models to import into China's criminal procedural laws, we must ask ourselves: can such models really be implemented, or will they be thoroughly avoided?