

Introduction: Past as Prologue

Hadar Aviram, Rosann Greenspan, and Jonathan Simon

We live in what some sociolegal scholars might be tempted to call a Feeleyian moment in the course of law and liberal societies. “What?” you might say, “Feeleyian?” That would be a reference, of course, to the influential and wide-ranging scholarship of political scientist and legal scholar Malcolm Feeley. While history may not repeat itself, its well-known propensity for echoing or rhyming (the latter being attributed with no apparent evidence to the writer Mark Twain) seemed evident when a group of noted scholars in sociolegal scholarship gathered in Berkeley to present new work in the fields that Feeley sowed in some cases decades earlier. What links these diverse fields, besides the farsightedness of one of our most productive scholars (as marked by the 2015 Kalven Prize of the Law & Society Association)? We think it lies in the fact that his work was planted directly in the agonistic struggles (Goodman, Page, and Phelps 2017) and occasional seismic moves of that lingering sense of justice in the procedures of law that we sometimes call due process, without quite knowing what authorities and responsibilities it conjures. Consider, to take one example, the cascading interest in urban criminal trial courts, including those dealing with less serious crimes (Gonzalez Van Cleve 2016; Kohler-Hausmann 2018). Feeley explored the emerging war on crime from the vantage of lower criminal courts in one of his most famous studies (and indisputably best titles), *The Process is the Punishment: Handling Cases in a Lower Criminal Court*, which was first published in 1979. Feeley’s argument was quite well summarized in his title – for most people whose cases were being handled by lower criminal courts, it was not the prospect of conviction and prison time, the dominant concerns of appellate courts and television dramas both, but the petty indignities and discomforts of being processed through arrest, jail detention, and the chaos of court itself.

These lessons have never really been forgotten (as is marked by the fact that the book never went out of print and continues to be read by students), but in the age of mass incarceration (Alexander 2010; Simon 2014) sociolegal scholars and criminologists, among others, could be forgiven for shifting focus to the importance of incarceration (Zimring and Hawkins 1991; Feeley and Simon 1992; Garland 2001). In the last few years, however, a four-decade-long escalation of imprisonment rates

in the United States (paralleled in some other countries including the United Kingdom) has come under sustained attack from within the political and legal establishment (even if by no means a consensus), and has modestly declined since 2012. As state criminal justice systems in the United States begin to look for ways to reduce their reliance on imprisonment (and jails) while not reducing the overall scale of their commitment to governing through crime (Simon 2007), the lower portions of the court systems have returned as important sites of both policy entrepreneurship (Feeley 2018) and critical social science inquiry. With the long-dominant value of increasing incapacitation through maximizing the potential of the pre-trial phases of the criminal process to yield prison sentences (or at least jail time) more contested than ever, it is possible to see, as Feeley did in his study, that criminal courts manage myriad social problems and address many community goals (some of them now objectionable, like maintaining white supremacy).

Feeley's next topic, the subject of a second Russell Sage Foundation study, *Court Reform on Trial: Why Simple Solutions Fail* (1983), addressed a range of reforms undertaken by states eager to improve criminal courts along a number of dimensions (and not just maximizing prison time), including fairness and equality. The story of these reforms and the landscape of public problems they capture is another reminder of the diversity of values that were replaced by the turn to the monoculture of mass imprisonment and the logic of incapacitation that unexpectedly followed. The criminal court has many roles to play in a democratic society, and *Court Reform on Trial* provides a reminder of how many of those other vital values have suffered under the hegemony of mass incarceration. Today, a tremendous amount of interest is again focused on reforming courts as a way now of shrinking the carceral state, including bail reform and more aggressive pretrial case management to reduce time to resolution, while plea bargaining is once again coming under fire (Lynch 2016).

A third example of renewed activity in an area historically captured by Feeley's work is courts as engines of social and institutional reform. The major framework is laid out in his study, done with Ed Rubin (1999), of the judicial revolution in prison reform that began in the 1960s using the traditionally spare authority of the Eighth Amendment's ban on "cruel and unusual punishments." Today, much research suggests that at the state level these court battles failed to achieve their goals to reduce reliance on incarceration. The legal challenges to prison conditions, which prisoner advocates hoped would force states to adopt alternatives to imprisonment, instead seemed to push fiscally conservative legislatures past their reluctance to fund a prison boom (Lynch 2010; Schoenfeld 2018). Building new prisons, rather than closing them, turned out to be a common outcome.

But if the politics of court reform are always unpredictable in a Feeleyian universe, *Court Reform on Trial* captured a more enduring institutional feature of federal courts in our constitutional system. The long debate about whether courts should be policy makers had ignored the conditions under which they could be

policy makers. Here history matters. Today, with a new set of brutal and under-invested prison systems, many times the scale they were in the 1970s, we see federal courts cautiously weighing back in using just the kind of methodology Feeley and Rubin would expect (Simon 2014). How far any new period of judicial policy making in the penal field can be expected to go depends on developments beyond the courts that can provide sources of objectification and restraint (see Simon this volume).

Ironically, one of these developments may be what Feeley and Simon (1992) called “the new penology,” i.e., the shift toward penal justice being framed in terms of risk management. Then, the authors saw the focus on offender risk as an analog to the rapidly spreading logic of mass imprisonment. As they later acknowledged, punitive populism, not actuarial categorization, seemed a more proximate cause of more and longer prison sentences. Yet today, as greatly expanded prison systems face escalating financial costs associated with aging and health care, as well the threat of renewed court challenges, many are turning to actuarial risk assessment as a possible framework for ordering or managing prison downsizing.

Prisons are not the only parts of the control state facing legitimacy challenge in the United States and other advanced democracies, and courts are not the only sources of policy making that need structures of objectivity, including expanding roles for both national and transnational executive power. Police, immigration detention and deportation, and the treatment of homeless people as well as people living with disabilities and with mental illnesses are frontiers of emerging legalities.

A final example does not rhyme with history because it is history in the making. The rise of liberal democracies seemed to have momentum as recently as the Arab Spring of 2012. Today, with illiberal political parties growing in both new and established democracies, the direction of history is less clear. Feeley’s work with Terrence Halliday and Lucien Karpik (2007; 2012) on the role of the “legal complex” of lawyers, judges, and other legal professionals in establishing the anchors of political liberalism (which itself is quite close to the rule of law and constitutional democracy) confronts these issues as they occur.

Across these examples, we observe the agonistic struggles over bureaucratic control and human dignity playing out in those institutions that place the liberal state most pointedly in danger of legitimacy deficit (if not crisis). Moreover, we observe the role of law, not as an autonomous source of legitimacy, but as an incomplete project of legitimation and of the possibility of justice as dynamic that is simultaneously emerging and necessarily “unfinished.” There is also a sense of conjunctural change coming through this research, at least as to the role of the criminal side of the state in the United States, although with broader repercussions for the legitimacy of political liberalism there and elsewhere. Feeley began his career as the war on crime and its parallel campaigns to reform and expand the criminal justice side of state and local government was unfolding, and his work has in many respects chronicled its integration with and influence on American government more broadly. Today the size and power of the criminal apparatus is under stress, and the whole range of

insights Feeley's work generated, based on the quite different set of baselines he documented, should be reassessed and reinterpreted.

We organized the conference and this book largely around these central axes, inviting authors to present their own work in light of one or another of these classics. The reader will recognize Feeley's distinctive book titles in the headings of each section: Part I: The Process Is the Punishment; Part II: Court Reform on Trial; Part III: Judicial Policymaking and the Modern State; Part IV: Political Liberalism and the Legal Complex. Before discussing the authors' contributions, we proceed to discuss Feeley's intellectual path along each of these axes in turn.

PART I. FEELEY AS AN ORGANIZATIONAL SOCIOLOGIST: THE PROCESS IS THE PUNISHMENT

Feeley came to the study of criminal courts at a pivotal moment in scholarship. As a graduate student in political science at the University of Minnesota in the mid-1960s, he was fortunate to be exposed to a richer framework than the average legal scholar of that time. In addition to Sam Krislov and Harold Chase, his mentors in political science, he studied positive political theory with Ed Fogelman, anthropology of law with E. Adamson Hoebel, sociology of law with Arnold Rose, legal history with Robert Gerstein, and the philosophy of law with Jeffrey Murphy, and wrote a dissertation on state supreme courts. This eclectic training led him to move beyond the law in the books and law in action dichotomy that framed so much of the empirical work on law the time. The Vietnam War, the civil rights struggles and the findings of the presidential crime commission further prompted him to look skeptically at the much-hailed Warren Court's due process revolution (Packer 1968). These guideposts came in handy in his observations, interviews, and data collection on the New Haven lower court during his post-doctoral study at Yale. Taking a page from organizational sociologist Amitai Etzioni (1961), Feeley looked at the court through fresh eyes: not as a Weberian, rational beacon of justice with clear goals and coordinated effort to achieve those goals, but as a system comprised of different personal and institutional actors, each of which might pursue different goals. Feeley recognized that the courts that affect citizens most and bustle with the most courthouse activity are those at the bottom of the courthouse hierarchy, the misdemeanor courts.

The result was the landmark study of lower criminal courts, *The Process Is the Punishment*, Feeley's answer to the question of "why, even after winning these due process rights and guarantees in the Supreme Court, do so many people plead guilty in lower courts?" His insights were fresh and original. The problem did not lie in heavy caseloads; it lay in the complex organization of law in the dance of cooperation and competition among the courtroom actors trying to do justice, and the costs of the process and the toll it took on defendants. Nevertheless, as Mark Massoud notes in his contribution to this volume, "In his empirical studies of lower courts, Feeley watched prosecutors, defense lawyers, and judges toil for justice, despite the

obstacles they faced and regardless of whether they succeeded. Even prosecutors, he found, had a sense of role morality.” Feeley was aware of broader societal issues underlying these mechanisms – he explicitly discusses race and class in the introduction with acute awareness of their importance. His contribution lies in the multilevel complexity of his explanation.

The authors in Part I grapple with and extend Feeley’s legacy in the study of the legal process as theory, method, and substance. Hadar Aviram’s “Adversarial Bias and the Criminal Process: Infusing the Organizational Perspective on Criminal Courts with Insights from Behavioral Science” is an effort to reconcile the “big-time evils” we see on the news – colossal miscarriages of justice, prosecutorial misconduct, and wrongful convictions (supposedly stemming from unhealthy hyper-adversarialism) – with the daily evils Feeley observed: assembly line justice that is frustrating and impenetrable to everyday defendants and other visitors to the court (supposedly stemming from inappropriate cooperation). Aviram relies on the work of Kahneman, Tversky, and others to explain that both types of evils, which appear to be contradictory, can be explained by the same set of heuristics and biases on the systemic level.

Issa Kohler-Hausmann’s “Malcolm Feeley’s Concept of Law” considers how and why *The Process is the Punishment* “has achieved canonical status in the field of law and society.” After a careful review of Feeley’s empirical findings and his explanation of those findings, Kohler-Hausmann offers a surprising linkage between Feeley’s deeply pragmatic approach to the study of law as revealed in lower courts and John Dewey’s concept of normative ordering. As she observes, *The Process Is the Punishment* became a canonical text precisely because its approach differed from the more common “law in action” writings about the court; the book offers an examination of law as a “normative ordering” that is, always and necessarily, itself ordered in concrete organizational settings.

In *The Process is the Punishment*, Feeley showed that the experience of criminal court processing can feel like punishment to a defendant, separate and apart from the outcome of the criminal case. In their contribution, Kay Levine and Volkan Topalli explore how that effect extends beyond defendants to their families, particularly children, and whether this effect exists even before incarceration is imposed. In “Process as Intergenerational Punishment: Are Children Casualties of Parental Court Experiences?” the authors interviewed prosecutors and active offenders in a major southeastern city to identify their perceptions of the short- and long-term effects of witnessing court processing on children of offenders. Their interviews suggest that such experiences could have deleterious effects similar to those observed in research on the effects of parental incarceration. They conclude by offering some policy suggestions for how the court system might mitigate these effects in the future.

Finally, Shaubin Talesh’s “The Process Is the Problem” extends Feeley’s analysis into civil litigation and alternative dispute resolution processes. Talesh argues that in these contexts the process is not the punishment, but rather the problem. Focusing largely on the procedural rules in court and alternative dispute processes, this chapter highlights how the United States Supreme Court has trimmed procedural

protections in civil courts and alternative dispute forums. With the advocacy and support of private organizations and the defense bar, due process rights and procedural protections have been redefined, and consequently citizens' access to justice is significantly undermined. When individuals do invoke their procedural and due process rights and seek substantive relief in court or arbitration, they are subject to a process filtered with organizational values and influence in subtle and sometimes not-so-subtle ways.

PART II. FEELEY AS AN EVALUATOR OF THE LEGAL PROCESS: COURT REFORM ON TRIAL

In a recent article, Feeley wrote, "The American criminal court system rests upon the quest for perfection . . . I want to explore the reasons why this quest for a Rolls Royce has led to the acquisition of a wreck . . . I want to focus on the machinery of criminal justice . . . My argument is that the institutional design of the adversary process fails in fundamental ways to provide a workable system of misdemeanor justice, and that its problems are compounded by the American governmental structure" (Feeley, 2018: 70). That article was the culmination of many years of observing and analyzing and hoping for better from the legal process. In *Court Reform on Trial*, Feeley centered on the issue of disappointment: why do so many seemingly good ideas, such as bail reform, pretrial diversion, speedy trials, and determinate sentencing, fail to bring positive change to the system? The typical answer to this question among both legal scholars and some social scientists has been to blame the plea bargaining system, which has granted prosecutors immense power over charging decisions and, as a consequence, over the system in general. But Feeley's unique organizational lens saw plea bargaining not as an evil undermining the adversarial system, but as its logical outcome (Feeley 1983). The problem with reforms, he argues in the book, has to do with the nature of reform itself. Reformers – typically outsiders to the system – come to the task of reform with unrealistic expectations, where they encounter a splintered system with fragmented decision making, politicians who are counterincentivized to resist change, voiceless constituencies, and the demons of their own grandiosity. The book is not only a tour de force in mapping the clashing forces for and against court reform, but it is also an example of Feeley's real investment in change: his tone and style address the reformers themselves, offering some guidelines toward change.

The chapters in Part II continue in Feeley's footsteps in exposing the cultural and political underpinnings of policy and reform, as well as their unintended consequences. Also in the spirit of Feeley's exploration as a comparativist across space and time, these authors take us on geographic and historical journeys.

As Eric Feldman says in "Regulating E-Cigarettes: Why Policies Diverge," Feeley's work often engages complex policy choices, and analyzes the range of policy approaches available to state actors. This study follows his example by exploring a thorny policy question – the regulation of e-cigarettes – and examining

a spectrum of policy approaches. Moreover, Feeley's "work is almost always concerned with the law in action, and demonstrates a deep engagement with how legal rules and practices affect the populace, particularly marginalized populations." Feldman follows in Feeley's comparative footsteps in his examination of systemic problems and challenges in the legal control of electronic cigarettes in the United States, Japan, and China. Conflict over the regulation of this novel product has emerged throughout the industrialized world, with policymakers in small towns, large nations, and international organizations debating the pros and cons of nicotine vaporizing devices. As major multinational tobacco companies have increasingly taken control of the e-cigarette industry, what was at first a battle between small business and government regulators has become a fight involving billions of dollars and fundamental issues of public health. Feldman examines the legal and policy principles at stake in the conflict over the regulation of e-cigarettes and compares the regulatory markets in three nations. He finds considerable differences in the set of legal controls that each jurisdiction deems appropriate, and also finds that the different policy choices generate different consequences, both intended and unintended.

In "Japanese Court Reform on Trial" David Johnson and Setsuo Miyazawa consider some major changes in the Japanese court system that have been introduced in recent years: the creation of lay judge panels to adjudicate serious criminal cases, and changes in legal education aimed at reshaping the legal profession by introducing postgraduate professional law schools and increasing the number of new lawyers admitted to the bar. Citing *Court Reform on Trial*, they point to one of Feeley's important insights in that study: "One of the central problems of the courts is that there is no agreement on what constitutes acceptable practice and hence no agreement on what improvements should be made. Practices that are regarded by some as signs of decline may, when seen through someone else's eyes, be seen as strengths." As it is early days in the reforms Johnson and Miyazawa examine, they recognize that "it will take more time to make a sound assessment of the changes." Moreover, if Feeley is correct, as they believe he is, "when the conclusion comes it will be a hung jury because different people expect different things from the Japanese reforms, and they are not all compatible."

In "Court Reform and Comparative Criminal Justice," comparative criminologist David Nelken considers *Court Reform on Trial* and its lessons for comparative methodology. Nelken takes us on a journey through not only what the book can teach, but importantly what it can learn from comparative criminal justice. Applying Feeley's ideas to a foreign jurisdiction – the Italian criminal justice system – raises new questions about the role and limits of generalizing through explanatory social science. Nelken considers whether all social science is inherently comparative as Feeley suggests, or whether, as in Nelken's more interpretative approach, many of the instructive lessons of looking abroad come from seeing the difficulty of generalizing and the challenges of cross-cultural translation.

The last two chapters in this section apply the spirit and insights of *Court Reform on Trial* to historical settings. In “The Birth of the Penal Organization: Why Prisons Were Born to Fail,” Ashley Rubin argues that, like courts, prisons are the subject of exaggerated claims and unrealistic expectations grounded in a fundamental misunderstanding of prisons’ nature and operation. The prison itself was a significant reform – one that repeatedly failed, only to be replaced through reform by a new iteration of itself. Her chapter examines the transition away from capital punishment, an informal, ad hoc, temporary ritual, and the location of punishment within a formal, rational, semipermanent organization. She argues that moving punishment inside an organization – housed in a semipermanent building, employing administrators and staff charged with following ambiguous rules – introduces a wide range of nonpenal logics, goals and problems that compete with and ultimately displace penal goals. This process, which Rubin calls “organizationalization,” is attended by many of the problems Feeley has identified with court reforms’ conception, implementation, and routinization. It also creates a context of inevitable failure that leads to the prison’s history of ongoing cycles of reform. With this understanding in mind, the question becomes not why prisons fail, but why we repeatedly expect prisons to succeed.

Finally, legal historian Lawrence Friedman’s “The Misbegotten: Infanticide in Victorian England” is a nod not only to the issue of unintended consequences in *Court Reform on Trial*, but also to another area of Feeley’s scholarship – the history of female offenders. While working on historical plea bargaining in the Old Bailey, Feeley came across a curious phenomenon: a large percentage of female offenders, even in areas of crime that are not “typically female.” He expanded this study to other European courts, finding a similar pattern that transcended local changes and incidents. In works with Deborah Little (1996) and Hadar Aviram (2011), and relying on work by social historians of gender, Feeley explained the “vanishing” of female offenders from the criminal court map as part of a shift in patriarchy styles from public to private. Friedman’s chapter in this volume examines cases from the Old Bailey in the Victorian period, in which young unmarried women in domestic service were accused of murdering their newborn children. Although it was considered a significant social problem in the period, the defendants were almost never convicted of this crime; almost half were acquitted, and most of the rest were found guilty only of a lesser crime (concealing the birth of an illegitimate child). The cases reveal a kind of Victorian paradox. On the one hand, a strict and harsh moral code bore most heavily on women, and made their situation truly desperate if they gave birth out of wedlock – particularly if they were poor women in domestic service. And yet the (all-male) juries were extremely lenient. Scattered evidence from other parts of England confirms the findings from London. Gender stereotypes may explain the paradox: the idea that women were in general naive, innocent, and easily seduced, and that they, despite their sins, were actually victims in these cases, may have acted to save them from the gallows.

PART III. FEELEY AS AN ANALYST OF THE COURTS' POWER IN BRINGING ABOUT SOCIAL CHANGE: JUDICIAL POLICY MAKING AND THE MODERN STATE

A more optimistic perspective on the power of reform is in evidence in Feeley's 1998 collaboration with Edward Rubin. In *Judicial Policy Making and the Modern State*, they argue that, between 1965 and 1990, federal judges in almost all of the states handed down sweeping rulings that affected virtually every prison and jail in the United States. Without a doubt, judges were the most important prison reformers during this period, though they collaborated with reform-minded litigators and corrections professionals to challenge state prison systems with the worst conditions. Activist judges relied upon standards that had been devised within the corrections field to combat recalcitrance and pressure prisons into ending inhumane practices. Feeley and Rubin use their account of this process to explore the more general issue of the role of courts in the modern bureaucratic state. They provide detailed analyses of how the courts formulated and sought to implement their orders, and how these actions affected the traditional conception of federalism, separation of powers, and the rule of law.

But can courts bring about social change in other contexts as well? And if not, why not? The chapters in Part III compare Feeley and Rubin's analysis of prison reform with other legal areas in which activists sought to increase dignity and equality through litigation and found varying degrees of success.

In "Judicial Deference in the Modern State," Lauren Edelman argues that judicial reliance on organizational standards does not always have the positive consequences Feeley and Rubin found in the deference to professional correctional standards in prison litigation. Focusing on civil rights in the employment arena, Edelman shows that judicial deference to organizational structures is becoming increasingly common in the modern state. Yet because organizations create compliance structures that symbolize legality, judges tend to assume that the mere presence of these structures constitutes compliance with antidiscrimination law irrespective of whether those structures are effective in combating discrimination. Judicial deference to symbolic structures helps to explain why race and gender inequality persist in the American workplace more than a half-century after the landmark 1964 Civil Rights Act. Citing recent work by scholars studying prison litigation, Edelman suggests that, at least in recent years, judicial deference to symbolic compliance also occurs in this arena.

Paul Frymer finds a similar judicial reluctance to intervene in the context of labor. In "The Law of the Workplace," he begins with a thematic extending from the first to the second Gilded Age: judges, as argued by legal academics and illustrated in repeated judicial decisions that interpret labor statutes, have consistently been resistant to extending the rights of workers who wish to organize and join unions. Furthermore, courts have been unwilling to extend legal protections to individuals

on the basis of economic class, even during a revolutionary era when such rights were expanded to other demographic categories. The reasons for this judicial bias are multifaceted. In part, it stems from straightforward economic elitism. It is also the result of regulatory features of labor law that resist judicial cultures and sensibilities that are geared toward individual justice and resistant to group empowerment. And in part it reflects judicial criticism of the strategies of labor litigation. Frymer surveys this conversation and focus on federal court decisions in the modern era with the hope of further understanding this critical institutional dynamic that too frequently serves to recreate economic inequality.

Christine Harrington recognizes in Feeley and Rubin's classic analysis of the institutional dynamics of judicial policy making a more general framework for understanding how policy making is both legally and politically contested. In "Administrative 'States' of Judicial Policy on Gender-Motivated Violence" Harrington applies this framework to the example of the Violence Against Women Act of 1994 (VAWA), a statute that created a comprehensive new federal civil right for individuals to be protected against a wide array of sexually charged violent acts. In the 2000 decision of *Morrison v. Olson*, the Supreme Court invalidated the central component of VAWA, holding that Congress exceeded its authority under the Commerce Clause and the Fourteenth Amendment, and was impinging on the proper authority of the states under the broad conservative doctrine of federalism. Harrington focuses in on this judicially led countermobilization against a newly established right and shows how Feeley and Rubin's dynamics can be used by a conservative judiciary to push back against new rights in favor of traditional values and legal doctrines. Feeley and Rubin showed how individual federal judges could use a combination of traditional doctrinal tools like metaphor, analogy and classification along with a new recognition of the "bureaucratic element" in doctrinal implementation to become policy-making powers in the modern administrative state. Harrington shows how the federal judiciary as a whole, and through its leadership, has built since the 1920s a formidable bureaucratic power of its own to help shape the modern administrative state through complex negotiations and lobbying with Congress and, ultimately, as in *Morrison*, to draw on both bureaucratic imperatives (like efficiency and scientific management) along with revitalized conservative ideals of federalism to stymie those pieces of rights legislation that are enacted over its objections.

Jonathan Simon extends the analysis of *Judicial Policy Making and the Modern State* well into the 2010s in "Can Courts End Mass Incarceration?" In his chapter, Simon observes that federal courts in the 1970s and 1980s were able to use the Eighth Amendment to find numerous substantive requirements for the humane and decent treatment of prisoners that effectively dismantled a system of southern plantation-style prisons that had survived Reconstruction, the New Deal, and the Great Society. Ironically, the very success of the prisoners' rights revolution, however, helped lay the foundation for mass incarceration by forcing states to build new prisons not