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978-0-521-77734-6 - Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons

Malcolm M. Feeley and Edward L. Rubin

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## **Judicial Policy Making and the Modern State**

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. This book provides an account of this process, and uses it to explore the more general issue of the role of courts in the modern bureaucratic state. In doing so, it provides detailed accounts of how the courts formulated and sought to implement their orders, and how this action affected the traditional conception of federalism, separation of powers, and the rule of law.

The authors argue that judges have always made policy, and will continue to do so, especially in the modern administrative state. The modern administrative state embodies notions of government as an active policy maker, rather than a passive adjudicator of conflicts. This concept, the book argues, applies to courts as well. The modern administrative state requires an active, policy-making judiciary and, perhaps more importantly, a different and more activist concept of law.

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# Judicial Policy Making and the Modern State

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at Berkeley*

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PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK <http://www.cup.cam.ac.uk>

40 West 20th Street, New York, NY 10011-4211, USA <http://www.cup.org>

10 Stamford Road, Oakleigh, Melbourne 3166, Australia

Ruiz de Alarcón 13, 28014 Madrid, Spain

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First published 1999

Reprinted 2000

First paperback edition 2000

Printed in the United States of America

Typeset in ITC New Baskerville 10/12 pt. in Penta™ [RF]

*A catalog record for this book is available from the British Library*

*Library of Congress Cataloging in Publication data*

Feeley, Malcolm.

Judicial policy making and the modern state: how the courts reformed America's prisons / Malcolm M. Feeley, Edward L. Rubin.  
p. cm. – (Cambridge criminology series)

1. Prisons – Law and legislation – United States. 2. Judicial process – United States. 3. Political questions and judicial power – United States. I. Rubin, Edward L., 1948 – . II. Title.

III. Series.

KF9730.F44 1997

344.73'035 – dc21 97-25523

ISBN 0 521 59353 0 hardback

ISBN 0 521 77734 8 paperback

Cambridge University Press

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*To Jacob, Miriam, Amir, and Rivka*

*and*

*Alexander, Gregory, Juliette, Timothy, and Ilene*

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## Preface

In academic year 1989–90, the authors jointly taught a seminar to graduate and law students on prison conditions litigation. Feeley, a political scientist, had long taught a course, Courts and Social Policy, which at times had examined the judicial reform of conditions in prisons and jails. Rubin, a lawyer, had focused on prison conditions in his course on administrative law. The joint seminar, in which many students adopted a local prison or jail that was under court order, allowed us to share our perspectives and explore the process of judicial policy making. This book was born from that collaborative effort.

In producing such a large book over such a long period we have incurred a great many intellectual debts, too many to enumerate and properly credit. Yet both jointly and individually we feel obliged and pleased to record our debts and thanks to those people who have played a central role in helping shape our ideas and facilitating the completion of this book. Feeley wishes to thank Dennis Curtis, Daniel J. Freed, Roger Hanson, Jim Jacobs, Shelly Messinger, Kenneth Schoen, and Jon Silbert, who over the years have influenced his thinking about prisons and prison litigation. Rubin is grateful to the many colleagues who have influenced his thinking about courts and law, particularly Robert Cooter, Meir Dan-Cohen, and Robert Post. In addition we wish to express our deep appreciation to Allen Breed and Thomas Lonergan, two of the nation's most well-respected corrections experts and special masters, for sharing their time and knowledge with us. Two other experts, Anthony Newland, of the California Department of Corrections, and Thomas Blomberg, of the University of Florida, also provided useful information and insights over the years. More generally, Philip Selznick and Philippe Nonet's ideas about

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“responsive law” have affected our thinking on the role of law and courts in more ways than we would have realized before we started this project.

Over the years, some of the sections in this book, usually in quite different form, have been presented in seminars, workshops, and at scholarly conferences or have been published in quite different form elsewhere, and we appreciate the comments of all those who have responded to these materials. In addition to several of those already mentioned in this preface who have been helpful in this regard, we also wish to thank Bradley Chilton, Mary Coombs, John DiIulio, Jeffrey Gordon, Robert Kagan, Samuel Krislov, Lynn Mather, Paul Mishkin, Henry Monaghan, Kevin Reitz, Judith Resnik, Paul Rock, Steven Ross, Harry Scheiber, Kim Scheppele, Jerome Skolnick, Peter Strauss, Larry Yackle, and the late Herbert Jacob.

Each of the case studies in this book was the result of an effort, by one or both of the authors, and in turn we were aided by colleagues and officials familiar with each of the research sites. At each site, we talked to dozens of people – judges, correctional officials, lawyers, scholars, inmates, and still others familiar with the cases. The number of people who gave generously of their time are far too many to enumerate here. However, for each site there was a handful of people who facilitated our work enormously, and we must acknowledge them here. In Arkansas, we wish to thank Mary Parker for help in arranging meetings with a great many officials involved in the Arkansas litigation, arranging a tour of that state's prison system, and sharing her own knowledge and her dissertation on that case with us. In Texas, we wish to thank Ben Crouch and James Marquart, Steve Martin and Sheldon Ekland-Olson, authors of two books that chronicle developments in the Texas prison litigation. These books, as well as conversations with these authors, were indispensable to our own work. In Texas we also wish to acknowledge the help of the late George Beto and his colleague Rolando del Carman for hosting one of us at Sam Houston State University and for helping to arrange a visit to the state prison in Huntsville. Research on the Santa Clara County (San Jose, California) case was initially undertaken by a superb research assistant, Deborah Little, whose contribution to that section of Chapter 3 is gratefully acknowledged. In Colorado, we wish to thank Roger Hanson and Karen Feste for helping one of us to establish contacts with correctional officials and lawyers in that state's case, providing us with background information about developments there, and for housing one of us upon occasion. For help on Marion, we thank Norman Carlson, who arranged the visit, and Gary Henman, for hosting one of us.

We also wish to acknowledge the contributions of several other students who aided us in the early stages of this project and have since been launched in careers of their own: Ted Storey, Jutta Lungwitz-Klapisch, Susan Poser, Noga Morag Levine, and Dan Krislov.

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PREFACE

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The crucible for interdisciplinary research and teaching provided by the Jurisprudence and Social Policy Program at Boalt Hall School of Law at Berkeley is unique and unparalleled in American higher education. Social scientists and lawyers work together, at times jointly offering courses for both law and graduate students. This book emerged from one such joint enterprise, and we hope it serves as a modest testimony to Sandy Kadish and Philip Selznick, who had the vision and the skill to establish this unique experiment in higher education. The authors also received support for their teaching and research from the Daniel and Florence Guggenheim Foundation, which provided funds to support the Law School's Guggenheim Crime Policy Program. The Foundation's award reinforced the philosophy of the Law School's Jurisprudence and Social Policy Program, and helped support the research of both students and faculty, which has resulted in the publication of numerous articles and several books, including this one. We are deeply grateful to the Foundation, and especially to Oscar S. Straus, its president, and Jameson Doig of Princeton University, its liaison with us, for their confidence, support, and responsiveness.

Portions of this book were written when Feeley was a Fellow at the Institute of Advanced Studies at Hebrew University, during 1993–94. He is indebted to the convenors of the criminal justice group there, Mordechai Kremnitzer and Eliyahu Harnon, for hosting him and for bringing together such a stimulating set of colleagues whose interest in this project was contagious.

This book went through several drafts. We are deeply grateful for the typing and editorial assistance of Sheila John, Kiara Jordan, Kay Levine, Margo Rodriguez, and the indefatigable Susan Peabody.

With all the help we have had, there should be a good many people with whom to share the blame for this book's shortcomings. But alas, if we failed to heed their advice, we alone must assume responsibility for its defects.