

# The Legal Process and the Promise of Justice: A Conference to Honor the Work of Malcolm M. Feeley

October 22 and 23, 2015

## ABSTRACTS

### **SESSION I: The Process Is the Punishment**

9:30 – 11:30

**ROSANN GREENSPAN**, UNIVERSITY OF CALIFORNIA, BERKELEY (CHAIR)

**MARTIN SHAPIRO**, UNIVERSITY OF CALIFORNIA, BERKELEY (DISCUSSANT)

**HADAR AVIRAM**, UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF LAW

### **Adversarial Bias and the Criminal Process: Infusing the Organizational Perspective on Criminal Courts with Insights from Behavioral Science**

In *The Process Is the Punishment*, and in important works preceding it, Malcolm Feeley pioneered an organizational perspective on the criminal process. Rather than working toward one rational goal, he argued, lower court institutions were functional systems, orienting their work processes and relationships toward case processing and bargaining. This perspective also shaped his critique of Packer's two models, arguing that the models were not made of the same cloth; the due process model was normative and aspirational, while the crime control model described empirical findings in the field. Over the years, behavioral scientists, such as Kahneman and Tversky, have provided a wealth of evidence pointing to bounded rationality, biases and heuristics in human perception and behavior. In this paper, I argue that adversarial bias--the "tunnel vision" popularly critiqued in the context of prosecutorial misconduct and other miscarriages of justice--illuminates important aspects of Feeley's analysis. The rational goal model, as it turns out, isn't all that rational; it is strongly infused with cultural cognition and perception problems. But its more realistic counterpart, the functional-systems model, does not always lead to a strong incentive to bargain; sometimes, adversarial bias does not temper the bureaucratic wheels of justice, but rather leads to dangerously rigid adversarial positions. I end by providing an updated model, showing the various different ways in which the process can become the punishment.

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**ISSA KOHLER-HAUSMANN**, YALE UNIVERSITY

### **Malcolm Feeley's Concept of Law**

*The Process is the Punishment*, has undoubtedly reached canonical status. Perhaps because Malcolm bestowed it with a dangerously catchy title, the book is often cited for a fairly straightforward empirical conclusion: the burdens and hassles defendants experience in lower criminal court as the case is processed more often than not outweigh any formal sentence imposed when the case is concluded. Behind that conclusion—in fact premising it—is a set of complex and nuanced propositions about how we ought to conceptualize the law and what that conceptualization means for our study of it.

This paper will focus on detailing what I discern to be Malcolm's *concept of law* that animates his approach to the study of lower courts. I also hope to draw out the implications that concept has (or at least has had for me) on how we ought to conduct research on other living legal institutions. And finally, I will circle back to the empirical conclusion that made *The Process is the Punishment* so famous to reiterate why the book has achieved canonical status in the field of law and society. The conclusion is so interesting because it was derived by examining law as a "normative ordering" that is, always and necessarily, itself ordered in concrete organizational settings.

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**BerkeleyLaw**  
UNIVERSITY OF CALIFORNIA

Center for the Study of  
Law & Society

**Process as Intergenerational Punishment:  
Are Children Casualties of Parental Court Experiences?**

Ground-breaking work by Malcolm Feeley established that the experience of being processed by a criminal court can feel like punishment to a defendant, separate and apart from the outcome of the criminal case. The purpose of this paper is to explore whether that effect extends beyond the offender to his or her family, particularly children, and whether this effect exists even before incarceration is imposed.

There exists a significant body of literature that links parental incarceration to negative outcomes for children of prisoners (e.g., poor socialization, behavioral problems, poor school outcomes, etc.) Criminologists have also linked early childhood exposure to traumatic experiences (such as violence and deprivation) to later criminality. But neither of these literatures has specifically investigated the effect of criminal court processing of parents on their children, particularly when children witness court appearances or hearings.

We 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. Our interviews suggest that such experiences could have deleterious effects similar to those observed in research on the effects of parental incarceration. We present a conceptual model detailing the pathways between court processing and later behavioral outcomes that sets the stage for future empirical research in this area.

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SHAUHIN TALESH, UC IRVINE

**The Process is the Problem**

Malcolm Feeley's book, *The Process is the Punishment*, highlights how the cost to criminal defendants of invoking their rights in lower criminal courts ultimately ends up being greater than the benefits of the rights themselves. In doing so, Feeley reveals how the costs of the pretrial process are not only important sanctions in their own rights, but also how they in turn shape and are shaped by the nature of the court organization and the conceptions of substantive justice. Feeley's account, however, focused on criminal not civil cases. This article extends Feeley's analysis into civil litigation and alternative dispute resolution processes. I argue that in these contexts, the process is not the punishment, but rather, the problem. That is, the costs of invoking one's rights are not greater than the rights themselves, but *are* the rights themselves. Focusing largely on the procedural rules in court and alternative disputing processes, this article highlights how private organizations have redefined, confined, and controlled civil and consumer rights and significantly undermined citizens' access to justice. When individuals do invoke their rights and seek 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.

**SESSION II: Court Reform on Trial**

9:30 – 11:30

**JONATHAN SIMON**, UNIVERSITY OF CALIFORNIA, BERKELEY (CHAIR/DISCUSSANT)**LAWRENCE FRIEDMAN**, STANFORD UNIVERSITY**The Misbegotten: Infanticide in Victorian England**

This paper examines cases from the Old Bailey (the central criminal courts of London) in the Victorian period, in which young women in domestic service, unmarried, were accused of murdering their newborn child. This was considered a significant social problem in the period. Interestingly, 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 confirm 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.

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**ERIC FELDMAN**, UNIVERSITY OF PENNSYLVANIA**Vaping on Trial: E-Cigarettes, Law, and Society**

Conflict over the legal control of electronic cigarettes 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. What legal and policy principles are at stake in the conflict over the regulation of e-cigarettes? Is there a set of legal controls that is appropriate for a variety of different jurisdictions? What are the likely consequences, intended and unintended, of different policy choices on different population groups?

In examining the legal conflict over e-cigarettes, this paper will highlight three features of Malcolm Feeley's scholarship. First, a great deal of Malcolm's work involves the analysis of complex policy issues and identifies the problems with various policy choices. Second, much of his work is concerned with the nexus between law, policy, politics, and people, and the disparate impact of certain legal policies on less-privileged populations. Finally, Malcolm is a comparativist at heart, and his work shows a unique sensitivity to cross-border similarities and differences. This examination of the regulation (or lack thereof) of e-cigarettes will touch on those three aspects of his work.

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**DAVID JOHNSON**, UNIVERSITY OF HAWAII & **SETSUO MIYAZAWA**, AOYAMA GAKUIN/UC HASTING**Japanese Court Reform on Trial**

Court reform is on trial in Japan, and two things can be said about the verdict: it will take more time to make a sound assessment of the changes, and 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. As Malcolm Feeley (1983) observed in the Preface to his seminal analysis of court reform in the United States: "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." We use this and other insights from Feeley's work to explore the causes, contours, and consequences of reform in Japanese courts since the 1990s.

DAVID NELKEN, KING'S COLLEGE, LONDON

### **Court Reform and Comparative Criminal Justice**

One of the key ideas of Feeley's *Court Reform on Trial* is the need for policy makers and scholars proposing reforms to have a sound, empirically- based understanding of the social practices that are to be re-formed. This would seem to be obvious, but is advice often not followed because of the political environment in which decisions to make changes often owe more to value based positions or the need to do something about the fall out from unrepresentative scandalous events. In particular attention is given to the way reforms can duplicate or even undermine more appropriate incremental changes that institutions such as courts bring into play themselves.

In my contribution I will show how Feeley's ideas influenced my own work on puzzling issues such as the denial of prosecution discretion in Italy and the seemingly irresolvable problem of court delays. Applying Feeley's ideas to a foreign jurisdiction however also raises new questions about the role and limits of generalizing through explanatory social science. Over the years we have had continued (friendly) disagreements over how far, as he argues, all social science is inherently comparative, or whether, as in the more interpretative approach I follow, many of the instructive lessons of looking abroad come from seeing the difficulty of generalizing and the challenges of cross- cultural translation.

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ASHLEY RUBIN, FLORIDA STATE UNIVERSITY

### **The Birth of the Penal Organization: Why Prisons Were Born to Fail**

This paper applies the spirit, and some of the lessons, of *Court Reform on Trial* to American prison history. 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. This paper examines the transition away from capital punishment, an informal, ad hoc, temporary ritual, and the location of punishment within a formal, rational, semi-permanent organization. I argue that moving punishment inside an organization—housed in a semi-permanent building, employing administrators and staff charged with following ambiguous rules—introduces a wide range of non-penal logics, goals, and problems, which compete with and ultimately displace penal goals. This process, which I call “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 new question becomes, not why do prisons fail, but why we repeatedly expect prisons to succeed.

## **SESSION III: Judicial Policy Making and the Modern State**

3:30 – 5:30

**ROBERT A. KAGAN**, UNIVERSITY OF CALIFORNIA, BERKELEY (CHAIR/DISCUSSANT)

**LAUREN EDELMAN**, UNIVERSITY OF CALIFORNIA, BERKELEY

### **Judicial Deference in the Modern State**

In *Judicial Policy Making and the Modern State*, Malcolm Feeley and Edward Rubin argue that, beginning in the 1960s, some judges adopted an activist policy-making stance, working 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. In this article, I argue that judicial reliance on organizational standards does not always have such positive consequences. Focusing on the civil rights arena, I show 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. Drawing on work by scholars who write about prison litigation, I suggest that, at least in recent years, judicial deference to symbolic compliance also occurs in the realm of prison litigation.

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**PAUL FRYMER**, PRINCETON UNIVERSITY

### **Judges, Labor, and Economic Inequality**

It's a thematic that seemingly extends from the first Gilded Age to the second Gilded Age. Judges, it is argued by frequently by legal academics and seemingly 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 equally 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 seemingly multifaceted, from straightforward economic elitism to regulatory features of labor law that resist judicial cultures and sensibilities geared toward individual justice and resistant to group empowerment to criticism of labor litigation strategies. In this paper, I'll survey this conversation and focus on federal court decisions in the modern era with the hope of understanding further this critical institutional dynamic that too frequently serves to recreate economic inequality.

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**CHRISTINE HARRINGTON**, NEW YORK UNIVERSITY

### **Swept Under the Law: Sex, Drugs & . . . Prison Reform**

In general, the paper examines Malcolm Feeley's contributions to understanding state formation through the lens of judicial policy making. Central to this perspective, I argue, is attention to which forms of administering justice proliferate in what social contexts and political times. In light of Feeley's perspective, I examine Title IX campus sexual assault policy as an instance of how justice is administered when civil and criminal forms mutate.

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**CANDACE MCCOY**, CUNY, GRADUATE CENTER & JOHN JAY COLLEGE

### **After Ferguson: Anticipating the Pitfalls for Judicial Policymaking in Reforming America's Police**

In *Judicial Policymaking and the Modern State*, Feeley and Rubin analyze the federal judiciary's 1970s-1980s campaign to reform state and federal prisons. They state that in their efforts judges violated principles of federalism, separation of powers,

and the rule of law. They argue that this was okay, on the whole, because judicial policymaking is done within the structure of legal doctrinal case law development rooted in Constitutional interpretation. To this we might add: “and because it is undertaken to confront political institutions whose normal operations amount to persistent violations of human rights, and preferably only in those instances.”

The contemporary example closely analogous to prison reform is the movement to improve American policing. This paper applies the arguments and insights of Feeley and Rubin's book to an assessment of the potential for the federal courts to force changes in the operations of local police departments nationwide. While Feeley and Rubin's critique of federalism and the rule of law is quite convincing in the police context, a major problem they could not explore at the time the book was written -- i.e., the sad failure of the muscular judicial policymaking actually to accomplish meaningful changes in American prisons -- raises a caveat for police reformers: don't expect federal pronouncements, no matter how authoritative, to achieve structural reform unless there is buy-in from local officials.

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**STEPHEN RUSHIN, UNIVERSITY OF ALABAMA**

### **Judicial Policymaking and Police Reform**

Several recent, high profile police killings have renewed calls for the federal government to take decisive action to combat police misconduct. In response, Congress passed the Deaths in Custody Reporting Act (DCRA), which creates a national database on the circumstances surrounding civilian deaths in police custody. Many have applauded the passage of the DCRA. Supporters have argued that by making these sorts of statistics publicly available, the DCRA will spur localities to improve policing practices. Under this view, transparency will bring about locally supported police reform. This article argues that such a narrative fundamentally misunderstands the complex political and structural barriers to local, bottom-up police reform. Throughout history, local police departments have been unwilling or unable to respond to systemic police misconduct within their own ranks. This is in part because police misconduct often affects unpopular and politically marginalized groups. Correcting police misconduct is also expensive, requiring communities to reallocate scarce local resources. And politically powerful groups like police unions frequently oppose oversight mechanisms, claiming that additional oversight discourage officers from aggressively patrolling the streets. Under these circumstances, mere improvements in transparency may prove ineffective in spurring locally supported police reform. Judicial policymaking has and will continue to be the primary engine driving police reform in the United States.

## DAY TWO

### **SESSION IV: The Legal Complex and Political Liberalism**

10:00 – 12:00 **GORDON SILVERSTEIN, YALE UNIVERSITY (CHAIR/ DISCUSSANT)**

**TERENCE HALLIDAY, AMERICAN BAR FOUNDATION/NORTHWESTERN UNIVERSITY**

#### **The International Legal Complex: Wang Yu and the Global Response to Repression of China's Political Lawyers**

A central element of Feeley's work on lawyers and political liberalism has revolved around the politics of the legal complex, a new analytic tool for the study of lawyers' politics, collective action, lawmaking and law implementation. Feeley has argued that the concept of legal complex is particularly valuable insofar as it embraces what previously had been a study of judicial politics without lawyers. In the spirit of Feeley's inquiries, this paper advances the concept of the international legal complex. It argues that since the 19<sup>th</sup> century the political struggles by lawyers for basic legal freedoms in many parts of the world was not simply a national but an international phenomenon. It explores the dimensions of an international legal complex through an unprecedented repressive turn by China's Party-State, the case of Wang Yu, a leading human rights lawyer, who was "disappeared" on 11 July, 2015. This was the opening move by the state security apparatus against almost 200 human rights lawyers and activists, quite possibly the most extraordinary state action against lawyers by any major country in the last several decades. The response by lawyers outside China, by international rights organizations, NGOs, foreign governments and international media provide a rich body of data through which to explore the mobilization of an international legal complex, both in the structure of ties among legal professions and in their relationships with international civil society and global publics. It also opens up the question of how far an international legal complex can mobilize as a collective actor beyond legal practitioners and legal academics.

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**MENACHEM HOFNUNG, HEBREW UNIVERSITY OF JERUSALEM**

#### **Policy Making by Out of Court Settlements: Palestinian Informers at the Israeli High Court of Justice**

In their seminal work on *Judicial Policy Making and the Modern State*, Feeley and Rubin demonstrate how trial courts have been successful as policy makers in reforming prison conditions. As a result, Court rulings and their implementation became instrumental in introducing significant changes into US correctional institutions. Using Feeley and Rubin's theoretical framework as a starting point, I will argue that courts can serve as effective policy makers by avoiding detailed rulings and installing legal standards by forcing state agencies to accept out of court settlements.

The database for this research is comprised of close to 600 petitions by thousands of Arabs (mostly Palestinians) who are turning to the Israeli High Court of Justice and asking to be formally recognized as "informers" (a term commonly used in Israel to denote Palestinian collaborators with the Israeli secret services). In the absence of direct legislation, the court is handling dozens of these petitions every year. Out of the nearly 600 cases, there is only one clear victory for the petitioner. Interestingly enough, notwithstanding the negligible chance of winning, the number of petitions has risen steadily since the early 1990s. I will argue that by quietly settling petitions through out-of-court settlements instead of setting precedents that would be binding in the future, the Court can become an effective policy maker, while at the same time refraining from a direct clash with both the elected authorities and the security establishment.

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**MARK FATHI MASSOUD**, UNIVERSITY OF CALIFORNIA, SANTA CRUZ; LAPA FELLOW, PRINCETON UNIVERSITY

**The Legal Profession's Promise of Justice:  
Materialism and Idealism in Legal and Socio-Legal Work**

This paper illuminates a social theory of justice derived from Malcolm Feeley's scholarship on the legal profession. Feeley's conception of justice links the legal profession's idealism with its materialism. To show how Feeley's theory of justice is part of a broader call for normative socio-legal scholarship, the paper also engages with, among others, Philip Selznick's work on morality and personhood and Martin Krygier's work on the rule of law. Ultimately, Feeley's scholarship on the legal profession's promise of justice invites law and society scholars to think comparatively, to consider the margins, and to be contrarian.

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**EDWARD RUBIN**, VANDERBILT UNIVERSITY

**The Varieties of Judicial Independence and Judiciary's Role in Political Reform**

Judicial independence is a necessary condition for the legal complex -- as defined by Malcolm Feeley and his colleagues -- to serve as a force for advancing political liberalism. But it is a more complex issue than scholars often recognize. To begin with, it is not an inevitable element in democratic regimes, nor is it limited to these regimes. Second, it exists at different levels. Ordinary judicial independence means that the judiciary is not controlled by the government's executive function, that is, those who implement the laws cannot dictate decisions in particular cases. Judicial hyper-independence means that the judiciary is also not controlled by the legislature, that is, those who enact the laws cannot dictate the rules that the judiciary follows. Third, judicial independence and hyper-independence have a variety of functions that lead both executive and legislatures to support them. These issues will be considered generally and in the specific context of the two forms of judicial hyper-independence that exist in the American legal system: common law and constitutional law. It will describe how the hyper-independence of the common law was replaced by ordinary independence as the administrative state took hold, while the hyper-independence of constitutional law continued, but in modified form

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**KIM SCHEPPELE**, PRINCETON UNIVERSITY

**The Legal Complex and the Legal Loophole**

Legal complex scholarship has shown that lawyers think about politics differently than other politicians and often pull even illiberal governments toward liberalism. This paper argues that lawyers in power can also undermine liberalism by taking advantage of legal loopholes to evade the full force of the law. In Russia, President Vladimir Putin trained as a lawyer and his legalistic style shows in his governance. The use of "little green men" in Crimea – men said to be "volunteers" associated with no state army – evaded a clear legal prohibition against foreign invasion and annexation of territory. In Hungary, Prime Minister Viktor Orbán, also trained as a lawyer, took the bits and pieces of laws of other European Union Member States and stitched together these provisions to produce an illiberal constitution, a "Frankenstate." But Orbán evaded EU sanctions by invoking other states' comparable laws in self-defense – even though those laws were used in very different contexts. These two cases show that lawyers in power can use their legal training to find legal loopholes as much as they can use their legal talent for bringing governments closer to liberal legality.