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COURT REFORM FROM BAIL TO JAIL

*Wade H. McCree, Jr.**

COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL. By *Malcolm M. Feeley*. New York: Basic Books. 1983. Pp. xvii, 251. \$14.95.

Court reform is an endeavor that has never wanted for practitioners, but if contemporary criticism of the courts is to be credited, success, except in mostly isolated and insignificant instances, has eluded the reformers. Arthur T. Vanderbilt, the late Chief Justice of New Jersey, is remembered for his admonition that court reform is "no sport for the short-winded."¹

Malcolm Feeley, a political scientist, has written a useful book which, as its subtitle proclaims, expatiates his analysis of the reasons why so many loudly trumpeted reforms have failed to fulfill their promise. Like most writers in this field, Feeley focuses on the role of American courts in the criminal justice system, the face of the law whose blemishes are most familiar to the public. Professor Feeley is well-informed about the workings of the criminal justice system and he tests his thesis in examining four recent efforts to reform the system: bail reform, pretrial diversion, sentence reform, and the reduction of trial delay.

His operating premise is that courts are complex institutions with components and participants whose different and often conflicting goals and priorities must remain in a state of accommodation if the criminal justice system is to function at all. Some of these interacting elements are the victim, the accused, the arresting officer, the arraigning magistrate, the bail bondsman, the prosecuting attorney, defense counsel (retained or appointed), investigators, witnesses, the trial judge, and the probation officers who investigate for pre-sentence reports and supervise probationers. A reform that changes the accustomed role of any one of these participants without serious regard for what Feeley calls its "hydraulic pressure" on all the other players in the process is likely to give rise to other and different problems, perhaps as serious as the one addressed by the reform, by skewing the working balance that has developed. He also reminds

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I. A. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xix (1949).

us that only a small percentage of all offenders go through the courts and that our expectations of the results of a court reform should be tempered by that fact. Certainly, for that reason, courts should not bear the primary responsibility for a perceived rise in crime — the usual catalyst for campaigns to reform the courts. Feeley is no friend of crisis-inspired court reform.

In the body of the book he proceeds to examine the four innovations that he has selected, to identify the assumptions underlying them, to appraise the expectations concerning them, and to identify and explain the reasons for their failure.

His discussion of bail reform includes an account of the familiar early work of the Vera Institute of Justice in New York. Under the leadership of Herbert Sturz, project staff interviewed persons who had been arrested about prior criminal records, family ties, employment and school experience, length of residence in the community, and other factors believed to be relevant to predicting attendance at future court proceedings if the arrested person should be released on his personal recognizance.²

Feeley concludes his discussion of bail reform by observing that the project worked only as long as there were funds (from the Vera Institute) to employ persons outside the criminal justice system to interview the detainees. When these funds and other outside support, including Law Enforcement Assistance Administration (LEAA) money, dried up, many courts that had "experimented" with the reform reverted to dependence on bail bondsmen because overworked public defenders lacked the resources to procure the background information needed to inform the bail-setting function of the court.

Feeley's treatment of pretrial diversion begins with the recognition that informal diversion has long been practiced in America as part of prosecutorial discretion and that many effective defense attorneys have been successful in having charges dropped if their clients would make restitution, or, during wartime, enter the armed forces. He traces the origins of special diversion programs conducted by the Vera Institute and by other sponsors using LEAA and, before that, other federal funds authorized in the Manpower Development and Training Act of 1962. The theory behind this reform was that unemployment is a factor in criminal conduct and that if an offender could obtain a job he would be less likely to be driven to criminal activity. Feeley believes that diversion has fallen from pop-

2. Feeley is apparently not aware that the United States District Court for the Eastern District of Michigan inaugurated a similar release on recognizance project in 1960 under Chief Judge Theodore Levin. Sturz has acknowledged that this program, then unknown to him, antedated the program that he subsequently launched in New York. See *Doing Better By Themselves*, TIME, June 3, 1966, at 44.

ularity because it failed to involve defense counsel sufficiently. Also, since persons charged with serious crimes were rarely eligible for diversion, many defense lawyers preferred to bargain informally for outright dismissal of the charge or for its reduction to a noncriminal violation instead of subjecting the client, if found eligible for diversion, to supervision and the possibility of prosecution in the future. Feeley compares the disappointment with diversion to the disillusionment with juvenile courts, a much-heralded innovation seventy-five years ago. There, too, great hopes were inspired but, as pointed out in *In re Gault*,³ new problems were created.

The two remaining reforms that he examines, measures to reduce sentence disparity and trial delay, have also failed to achieve the expectations of their sponsors, essentially because of inadequate analysis of the causes of the problems and because of the absence of judicial support. Although these reforms, unlike bail reform and pretrial diversion, did not require a new agency and funding, they nevertheless altered the way things were done without convincing the actors that change was needed. In an adversary system, delay is rarely neutral, and it will be used by the party to whose advantage it will work in a given case. Courts may have little interest in which case will be tried first, and sometimes delay promotes settlement.

Feeley is no curmudgeon who denounces court reform as undesirable or unachievable. He intends, however, to convince the reader of the difficulties inherent in the process, and he succeeds. And this is all that the title of the book promises.

Nevertheless, he undertakes in his final chapter, "Toward a Strategy of Change," to indicate how court reform might be undertaken successfully. After observing that many unanticipated but much less-dramatic-than-expected benefits have resulted from reforms that failed, he praises, with good cause, the significant contributions of the Vera Institute as an outside research and development agency for the system in New York. He reiterates his warning about avoiding sweeping new policy programs in response to a perceived crisis and asserts his preference for what he calls a problem-oriented approach, a concept that he does not develop adequately.

In his chapter on strategy Feeley demonstrates a surprising confidence in and reliance on the courts and litigation to effect reforms in the criminal justice system. He writes:

Litigation is well suited to pursuing change in complex institutions. It is problem specific: it focuses on particular problems and individuals. It is ameliorative: remedies can be tailored to fit specific conditions and circumstances. It is incremental: it proceeds by steps, leading to concrete remedies. It is experimental: if one remedy fails, another can be substituted, or a successful approach can be used again and en-

3. 387 U.S. 1 (1967).

larged. And litigation is relatively inexpensive: it does not require that legislative majorities be mobilized. In contrast, legislation is general. In order to pass, it must often be left vague. It is time-consuming and costly. And because legislatures are keenly aware of public opinion, it tends to elevate the atypical — the newspaper headline — to the usual. Finally, legislative failures are more difficult to acknowledge, let alone change, than court orders. [P. 214, footnote omitted].

The closest he comes to telling us why he chooses the courts as the preferred forum for reform is, “Adversarial combat asserting rights is the hallmark of the judicial process” (p. 215).

Court action in the areas discussed here does not preclude legislative action and should in fact stimulate it. I have emphasized the potential importance of the courts in an effort to counter the growing belief that courts do not have the capacity to tackle complex social problems. New bureaucratic institutions that try to prop up shortcomings of the criminal court system (for example, diversion programs, pretrial release agencies) are not compatible with the adversary process. Slow, incremental adjustments aimed at concrete problems are preferable to wholesale changes based upon the illusions of formalism. Finally, the solution to the failings of the adversary process is strengthening the process, not trying to circumvent it. [Pp. 215-16].

Feeley seems to be shifting his case here. Throughout the preceding chapters he emphasized the need for reformers to take into account the interests of all players in the criminal justice system. Indeed, he finds that fragmentation is one of the “central and continuing obstacles to change in the criminal justice system” (p. 205), and that the adversary process is one of the basic components reinforcing that fragmentation (p. 11). It is incongruous for him to contend later that the adversary process is the best approach to such delicate, multi-faceted interest balancing.

But for this terminal confusion, this is a useful book that should be read by anyone considering any reform of the criminal justice system and by serious students of its operation.