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The Process Is the Punishment: Handling Cases in a Lower Criminal Court

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THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT.* By *Malcolm M. Feeley*. New York: Russell Sage Foundation. 1979. Pp. xxii, 330. $12.95.

To the outsider, the New Haven Court of Common Pleas is chaotic and confusing. The courtroom is always noisy and crowded, and the actors — defendants, judges, prosecutors, public defenders, private attorneys, bail bondsmen, clerks, and bailiffs — move through their roles so quickly that justice seems lost in a dizzying blur. Motions are rare, and trials so infrequent that public defenders arrange their files on the rails of the jury box while secretaries dispense forms from the witness stand. Professor Malcolm Feeley transforms this confusion into understanding in his thorough case study, *The Process Is the Punishment*.

Commentators have long recognized that lower criminal courts differ from those handling more serious crimes;[1] Feeley is among the first to explain why they function so differently. Chapter by chapter, he develops insights that challenge the reader's preconceptions about the people and process that dispense criminal justice. Carefully, he develops a thematic picture of the logic behind the system. He paints the lower court as a marketplace — an open arena where parties with conflicting goals bargain their way to a legal result. In this environment, justice is normative rather than procedural: the quest for the "right" result preoccupies actors who are freed from formal rules of procedure and evidence. And those actors are always aware that the pretrial process's costs for a defendant outweigh the costs of the sentence. Thus, the title and thesis of Feeley's study — the process is the punishment — is also the key to understanding the world he describes.

The first part of the book meticulously describes the environment, structure, and actors that constitute the Court of Common Pleas. The docket includes minor felonies (those with maximum sentences of five years or less) as well as misdemeanors. The typical defendants are failures — poor, unemployed, and encumbered by alcohol or drugs. The judges, prosecutors, public defenders, and even the clerks and secretaries obtain their jobs through political patronage, which values experience with the conflict and compromise of partisan politics more than formal legal training. A detailed look at bail bondsmen produces surprising conclusions. They are "gregari-

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1. Professor Samuel Dash emphasized this difference more than a quarter of a century ago. *See* Dash, *Cracks in the Foundations of Justice*, 46 ILL. L. REV. 385 (1951).

ous and friendly, always ready with a friendly word," (p. 106), and they provide desired services for defendants, attorneys, and court personnel alike. Feeley gives more cursory treatment to those who round out the lower court setting: bail commissioners, pretrial service representatives, and auxiliary court personnel.

Professor Feeley describes the case-resolution process in the second part of the book and compares it to a competitive marketplace. Trials are rare; there were none in Feeley's sample of more than 1600 cases. In virtually all cases either the prosecutor dismisses the charges or the defendant pleads guilty.[2] Because the adversaries almost invariably settle, with only a summary ratification by the judge, Feeley examines the process by which these agreements are reached. Contrary to the plea-bargaining model, in which prosecution and defense are already agreed on the facts of a case and simply trade reduced charges for a guilty plea, Feeley observes that prosecutors and defense attorneys debate the facts of the charge and the circumstances of the defendent to gauge the "worth" of each case. As in a supermarket, prices for different "goods" have been established — a dime for an apple, a $25 fine for a second petty theft by a young man with significant community ties. Parties spend their time arguing over what type of good is being purchased. Both sides see the objective of the debate as substantive, and not procedural, justice.

In the final part of the book, Feeley explains that for defendants it is the cost of the process, and not the outcome, that is paramount. Sentences are usually lenient, with few long jail terms and frequent fines of $25 or less. And defendants are unconcerned with the stigma of conviction or the long-run consequences of a criminal record. The costs of obtaining bail, missing work to attend court, and retaining an attorney are far more severe than the sentence. Defendants plead guilty because it saves them time and money; the costs of asserting due process rights of trial and appeal far outweigh potential benefits. In the marketplace, defendants with a minor purchase seek to minimize their time waiting in line, and pleading guilty opens up the express lane. Feeley's message is clear: once one realizes the high cost of invoking rights, the existence and value of those rights are called into question. Feeley concludes with reflections on the adjudicative ideal and rejects the "heavy-caseload" explanation for the pretrial dispensation of criminal justice.[3]

Because the author spices provocative analysis with fascinating

2. Feeley's extensive statistical analysis failed to explain the variation in adjudicative outcomes and sentences.

3. *The Process Is the Punishment* manifests few of the weaknesses that Lynn Mather found in Milton Heumann's recent book on plea bargaining in Connecticut, M. HEUMANN, PLEA BARGAINING (1978). *See* Mather, Book Review, 77 MICH. L. REV. 884 (1979). Unlike Heumann, Feeley exerted considerable efforts to distinguish the Court of Common Pleas from the Superior Court and to explore organizational and structural variables.

vignettes from his months in the courtroom, *The Process Is the Punishment* can easily be read in two or three evenings. When the last page is turned, one is left with feelings of relief and disappointment: relief that parties are seeking substantive justice (however biased their perceptions of it may be) rather than capriciously deciding outcomes; disappointment that, in the final analysis, there just isn't much "majesty of the law" in lower criminal courts. One book cannot bridge the gap in a literature that has directed nearly all attention to the handling of major felonies. Yet Feeley's case study is a fine attempt to kindle interest in lower courts and their handling of minor offenses. His combination of thorough empirical research with thoughtful analysis demands to be read, criticized, and savored.