Malcolm M. Feeley, ***The Process Is The Punishment.*** New York: Russell Sage Foundation, 1979. $10.00.

PAUL WILES

The Process Is The Punishment is the report of a study of the Court of Common Pleas in New Haven, Connecticut. The original intention of the study was to carry out a straightforward empirical examination of what factors were related to the outcomes of criminal charges. This project proved disappointing and all we are now allowed to see of it are truncated remains in a chapter containing what the author admits are largely negative results. However, it was not the negative results as such that led Feeley to change the nature of his study but reasons at once more general for sociology and more important for courts as social institutions. Since these reasons shaped the book we now have they may be worth examining in some detail.

As the author watched the social process whose outcome he was trying to explain he realized that the concepts, and therefore the categories, he was using for his study were inadequate. The attempt to explain and predict by correlating other factors to outcome *assumed* that those "other factors" were derived from a true description of what occurred; but Feeley quickly realized that they belonged instead to some special version of what ought to happen. At one level this is no more than a report of the death of another positivist, but as always in such situations the real interest is not in that event but rather in what form the rebirth will take. In Feeley's case the omens look good since he starts with an intricate and subtle realization of the relationship between ideology, description, and explanation. The author's suggestion that all concepts somehow emerge out of fieldwork is, I think, ultimately incorrect because it reduces in the end to the same brute empiricism from which he has just escaped. Nevertheless, this is not a treatise on methodology but a study of a court, and therefore has the great strength that though discussions of methodology are rare they are always grounded in the subject matter that engendered them.

The second main impact of watching courts on Feeley was that he suffered the same sense of profound shock experienced by nearly all previous observers. The hurly-burly, vulgar banality of what seems to be happening in lower courts just does not

https://doi.org/10.2307/3053273 Published online by Cambridge University Press

look like any picture of courts we carry in our heads. Indeed, it is easy to entertain doubts as to whether what is being observed can properly be called a "court" at all. It should be noted here, since I will return to this later, that these same doubts occur to both Americans and Britons watching their lower courts, and perhaps also to observers in other cultures. Such doubts present us with two kinds of problems. First, how are we to explain what we perceive in these courts and second, is it proper to regard such perceptions as justice. This book is a record of one scholar's attempt to try to answer these problems.

Feeley begins his task by attempting to delineate the precise nature of his problem. He argues that our mental picture of a court is dominated by the idea of the adversarial process. Yet of all the cases he examined not a single one went to trial. His questions therefore become: why does the criminal process in the lower courts never (in his sample) culminate in the adversarial process, and can justice be done without that process?

Such questions are, of course, neither new nor original and therefore Feeley's first task is to examine the validity of previous answers. The argument that these problems are to be explained by large workloads and lack of resources is dismissed after a painstaking and carefully constructed empirical comparison between New Haven and another, less busy, Connecticut court. An alternative suggestion that the explanation lies in an historical decline in the use of the adversarial process in the lower courts is demonstrated to be factually incorrect, and indeed the recent "constitutionalization" of such courts would seem, if anything, to argue in the opposite direction. The more sociological argument that the situation is a consequence of the bureaucratic nature of the courts is challenged by Feeley on the ground that courts are not true bureaucracies but rather "open ended systems." Although this points to an important conceptual distinction, I think some of Feeley's own evidence—for example, that concerning the organizational structures of courts—suggests that the concept of bureaucracy still has explanatory value. Nevertheless, he is correct to point out that merely to call a court a "bureaucracy" or a "production line" in itself explains nothing.

The more fashionable contemporary response to what is perceived in criminal trial courts is to lay the blame at the door of plea bargaining (what Feeley perceptively calls the realist alternative to the idealist model of due process). It is in examining this contention that the common sense descriptive

https://doi.org/10.2307/3053273 Published online by Cambridge University Press

methodology of the study is seen at its best. We are told that if you actually observe what happens during plea bargaining then only very rarely does bargaining take place. Instead the process is one of negotiation about the meaning of an individual case in relation to what David Sudnow (1965) called "normal crimes." Once a common understanding has emerged then appropriate penalties are a necessary part of that understanding. Real bargaining, in other words, only occurs in those unusual cases when a new typification is necessary. The symbolism of "bargaining" is only presented to the defendant, it is suggested, to gain his compliance and as a justification and rationalization of what defense lawyers do. Although I have not had the opportunity to observe American plea bargaining, this account seems highly plausible. At any rate, when combined with the fact that the great majority of cases in New Haven were *not* settled by plea bargaining, it supports Feeley's argument that plea bargaining cannot be a sufficient explanation of what happens in courts.

Feeley's alternative explanation, once he has rejected both the due process and the plea bargaining models, is what he calls the "pretrial process model," in which the relative costs of alternative decisions determine the defendant's choice. Put simply, it is cheaper to take one of the escape routes out of the process rather than go to trial, and for the overwhelming majority of defendants in lower courts this remains true even were they eventually found not guilty. Though "costs" in this context does not mean just dollars the most interesting section in this part of the book is a most revealing analysis of the economics of bail bondsmen. The facts reported about costs are undoubtedly correct, but the problem is how to interpret them.

Such an interpretation is important because Feeley wishes to argue that this cost distribution renders it to the defendant's advantage to minimize his costs by escaping from the process as quickly as possible by whatever means are open to him. Furthermore, curtailing this expensive process is to the mutual advantage of all those involved in the lower courts, so that formal justice is replaced by substantive justice. The chaotic appearance of the lower court is then the product of an organizational structure designed to minimize the time of every participant in the process.

What is surprising about this argument is that having shown such insight in explaining how "bargaining" is a subtle process of interaction and the negotiation of meaning, Feeley now wishes to place *homo economicus vulgaris* at the center of

https://doi.org/10.2307/3053273 Published online by Cambridge University Press

his theory. Because the court process can be characterized as a cost effective model and defendant's actions fitted to a curve of cost minimizing behavior, it does not necessarily follow that defendants actually hold such reasons or that such models should be used to explain their action. It is as if the post-Keynesian theory of the firm necessarily implied that all managers were motivated by profit maximization and that this was a sufficient explanation of their actions. Furthermore, even if the process tries to make defendants act like cost minimizers (for example, by imposing harsher sentences on those who insist on going to trial and are convicted) it does not follow that they like being coerced, or that they adopt such actions as part of their selves.

In order to demonstrate a congruence between Feeley's model and the defendants' behavior we would need information about their reasons, motives, and meanings. Unfortunately, the research provides little evidence about how defendants perceive the process. This deficiency, it should be noted, not only affects the validity of the explanation being offered but also the judgment that formal justice is traded for substantive justice in lower courts. The Weberian concepts employed by Feeley imply that justice (law) is to be distinguished from mere coercion by the fact that power, in the former, is exercised by a legitimate authority. The alternative to some such notion would be a positivistic concept of law that would render Feeley's initial question about justice meaningless and the answer tautological. If we follow the Weberian line, then the judgment that what happens in court is justice cannot depend merely on whether the outcome is consistent with an individual calculus of self-interest. A defendant may pursue self-interest and still believe he has been treated unjustly, but surely we would not therefore regard him as deluded.

Ironically, although little work has been done on the lower courts in England, two pieces of published research have tried to address the questions posed in this book (further work by McBarnet (1979) is to be published shortly). This research is worth examining because English Magistrates' courts display most of the squalid features described so graphically by Feeley. Yet for all that they are organized in a very different fashion and this (superficially, at any rate) casts some doubts on the importance Feeley attaches to organization as an explanatory variable. In a study by Bottoms and McClean (1976) a comparative scarcity of contested trials (93 percent of the defendants pleaded guilty) was explained not just by a cost calculus but by

https://doi.org/10.2307/3053273 Published online by Cambridge University Press

additional variables, such as notions of deference. Such an interpretation has the great merit of relating to a structural analysis that can explain *why* costs are distributed the way they are within the court process. The same authors also attribute the rushed tempo of court proceedings to the organization created by the court clerk, who acts within a curiously bifurcated ideology that they characterize as "liberal-bureaucratic" (1976: chap. 9). Although Feeley discusses the importance of ideology at the beginning of his book it actually plays little part in his final explanation. Carlen (1976), on the other hand, has explored in great detail the social techniques deployed to manage, control, and constrain the defendant's choice or attempted assertion of meaning during the court process. It is a shame that Feeley seems to have been unaware of these works since they might have helped him push his analysis even further. (It would, however, be churlish to blame him for this omission since my reading of American sociology long ago indicated that American information retrieval systems have a curious xenophobia programmed into them.)

What both of the above works do is to relate the explanation of what happens in court to the wider social world. Feeley's book also contains frequent examples of how the external world intrudes into and shapes the court. Most dramatically, this occurs through the control of court jobs by the party machine. So pervasive is this influence that it can corrupt attempts to reform aspects of the legal process, as happened in the case of the Bail Commissioners in New Haven. It is a pity that such examples are not given more of a place in the model of the court that is finally proposed.

This review may seem rather critical, but only because Feeley's book is in fact so good that it forces the reader to ponder and focus on the points of disagreement. What the book does possess is a feature that has long been the hallmark of good American sociology: it recreates a believable world of real men and women. The Bail Commissioner who moonlights as a taxi-driver and the court official who bought his job by political loyalty may not be the most attractive human beings, but they have the earthy smell of reality about them. Having read Feeley's book I think I now know what it feels like to be in New Haven's Court of Common Pleas, and that is no mean achievement for any author.

https://doi.org/10.2307/3053273 Published online by Cambridge University Press

REFERENCES

BOTTOMS, A. E. and J. D. McCLEAN (1976) *Defendants in the Criminal Process*. London: Routledge & Kegan Paul.

CARLEN, Pat (1976) *Magistrates' Justice*. London: Martin Robertson.

McBARNET, Doreen (1979) *Conviction: The Law, the State and the Construction of Justice*. London: Macmillan.

SUDNOW, David (1965) "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," 12 *Social Problems* 255.

https://doi.org/10.2307/3053273 Published online by Cambridge University Press