

2016

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Recommended Citation

Hadar Aviram, “What is Old is New Again”: Comments on Malcolm Feeley’s Tappan Lecture, 17 *Crim. Just.* 31 (2016).

Available at: https://repository.uchastings.edu/faculty_scholarship/1518

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E-ISSN 2332-886X

Available online at

<https://scholasticahq.com/criminology-criminal-justice-law-society/>

“What is Old is New Again”: Comments on Malcolm Feeley’s Tappan Lecture

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Invited Commentary

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Malcolm Feeley’s marvelous Tappan lecture includes several important features that students of criminal justice and criminology have come to associate with Feeley’s scholarly trademark. First, the breadth of Feeley’s scholarly interests is breathtaking, in terms of disciplinary variation (here, history, criminal justice, public policy, and economics), historical span (here, from the 17th century to the 21st) and geographical reach (here, an examination of the United States, Britain, and Australia.) Second, Feeley’s work is characterized by creative comparativism. His unbridled curiosity about everything under the sun leads him to ask broad questions: How did different punishments supplant or supplement other punishments? Why did a given policy succeed in one place and fail miserably in another? What can we learn from a phenomenon that occurred in a particular place and time about a phenomenon occurring in a completely different setting? These questions lead him to pair seemingly unrelated developments and see the commonalities between them in ways that are instructive and helpful. And third, Feeley’s characteristic openmindedness leads him to profound thinking, and to counterintuitive conclusions, about things that have come to be regarded as received wisdom in the field.

The comparison Feeley draws here between convict transports and electronic monitoring is reminiscent of a classic of criminal justice history:

John Langbein’s comparison of torture and plea-bargaining (1978). Rejecting the understandable tendency to regard medieval torture as barbaric, and in general, medieval justice as primitive and illogical, Langbein shows us that both methods were designed specifically to address serious problems in criminal procedure. Torture was a response to strict rules of evidence that required robust eyewitness testimony in the absence of a confession and was supposed to simplify the process to obtain the confession. Plea-bargaining was a response to the rising costs of criminal litigation and the complexities of jury trials and was supposed to supplant trials in cases of guilty pleas. Both methods—torture and plea bargains—created “fast track” alternatives to slow, unworkable official paths to the determination of guilt, and both had eerily similar unintended consequences: in particular, the risk of convicting innocent people.

Feeley’s lecture provides a similar counterintuitive comparison. Transportation and electronic monitoring emerged as public-private partnerships and created dramatic change in the criminal justice system by increasing punishment options. But, as Feeley argues, rather than decreasing reliance on options conventionally regarded as more barbaric—corporal punishment and incarceration—they ended up expanding punitive options and acting as an addition, rather than a substitution, to the punishment menu.

The comparison is apt in many ways, perhaps even farther than Feeley takes it: Feeley highlights the perennial involvement of private entrepreneurship in the punishment field, countering the narrative that privatization, in and of itself, is a major contributor to the correctional crisis in the 20th and 21st centuries. Focusing on private prison companies as the source of mass incarceration and its evils is a common progressive trope (Critical Resistance, 2014; Schlosser, 1998). The Israeli Supreme Court earned international praise for ruling against the establishment of private prisons (Dorfman & Harel, 2013; HCJ 2605/05). Bernie Sanders has been lauded by his supporters for making the eradication of private prisons a lynchpin of his campaign (Lerner, 2015). And, recently, the Obama Administration announced that the federal government would no longer rely on private prisons (Sullivan, 2016.) A recent report by the Committee on Causes and Consequences of High Rates of Incarceration (Travis & Western, 2014) highlights privatization as one of the forces that contributed to mass incarceration. But several scholars—including Feeley himself—have argued that the focus on privatization has missed the mark (Aviram, 2015b; Dolovich, 2005; Feeley, 2014; Pfaff, 2014; Shamir, 2014).

First, the share of private corporations in the overall incarceration project is extremely small; only 6% of U.S. inmates are incarcerated in private prisons (Pfaff, 2014.) This is even truer with respect to the federal government, which houses a minority of U.S. inmates as it is, most of them in public prisons (Speri, 2016). Second, though private prison companies lobby for more incarceration, their lobbying efforts are not significant enough to be a dominant cause of incarceration (Pfaff, 2014); if anything, their effect is more noticeable detention of undocumented immigrants, the new market these companies explore as the market for domestic incarceration shrinks (Aviram, 2015a). Third, as Shamir (2014) argues, the nature of public-private partnerships makes the distinction between public and private prisons unhelpful and fairly naïve: Even public prisons privatize a large share of their everyday functions, such as food, transportation, security, and health care. Fourth, as Dolovich (2005) and Aviram (2015) have argued, private prison companies have not cornered the market on providing unconstitutional and inadequate prison care and conditions, and the scandals from the last few years in the California prison system, which consists solely of public state prisons, is a case in point. Privatization may be a loathsome aspect of mass incarceration, but it is not its driving force; the lion's share of the blame for mass incarceration falls squarely upon the shoulders of federal and state governments.

Moreover, as Feeley's comparison reminds us, where privatization of punishment is concerned, it takes two to tango. Just as the evils of mass incarceration do not stem predominantly, or even markedly, from privatization, its benefits line public pockets as well as private ones. The transporters of the 1700s, the chain gang private owners of the late 1800s, and the private juvenile facilities operators of the 2000s, are motivated by profit, but so are the government officials who have sent them there—such as the Philadelphia judges who sold juvenile offenders to a private entrepreneur for kickbacks (Ecenbarger, 2012.)

Another important point is that the costs of employing punishment methods at any era—both the ones Feeley highlights and the ones they purported to replace—are frequently rolled onto the people subjected to these methods. Transportation may have been profitable for the entrepreneurs, but any savings in the conditions of transportation would come at the expense of the transported convicts. Similarly, the costs of electronic monitoring are, of course, considerably lower than those of incarceration, but people who wear the monitors are often expected to shoulder the costs of their release. Recently, the ACLU of Michigan brought a lawsuit regarding ankle monitors, whose technical limitations require that parolees spend hours near a plug to recharge them, avoid washing their leg, and sometimes suffer painful injuries associated with wearing the heavy device (Carmody, 2015.) The Michigan Supreme Court ordered a study of the monitors and their use (Wolf, 2015). The issue of costs also brings up questions of stratification: Some penal innovations are available to inmates who can foot the bill for their expenses, such as “pay-to-stay” jail schemes (Buchanan, 2007; Weisberg, 2007), and it would be interesting to closely examine whether entrepreneurial innovations like transportation and electronic monitoring cater to particular individuals.

However, Feeley's analogy leaves some issues unclear. Feeley relies on Rubin's data to show that transportation did not bring an end to executions; rather, those had tapered off before the beginning of transportation, which supplanted other penal outcomes, such as the more benign Benefit of Clergy. But his account provides little explanation for the original intent behind transportation. Electronic monitoring developed deliberately as a substitute for incarceration—pioneered by a judge who wanted to use it for that particular purpose—and ended up supplementing it. By contrast, even according to Rubin's account (2012), which argues that the architect of transportation was intended to supplant executions, Feeley shows that at that point, transportation had already been operating informally

for decades and that the rates of executions had already declined.

This is an important point, because Feeley’s analogy, like Langbein’s, highlight the unintended consequences of well-meant reforms. The lessons for today’s criminal justice reformers are obvious—to avoid what Stanley Cohen (1985) referred to as “widening the net” of social control. Today’s core incarcerated population in the United States—approximately 2.2 million people (Sentencing Project, 2013)—is surrounded by a penumbra of people subjected to penal control via parole and probation (Pew, 2009). Thinking about transportation through the same framework may teach us a grim lesson about the arc of progress in criminal justice. To the extent that transportation emerged as part of the “civilizing process” identified by Norbert Elias (1939)—because people in positions of power’s taste for state-perpetrated violence soured over time—the colonies provided an easy, out-of-sight-out-of-mind solution. But when we find new technologies and systems of domination intended to supplant incarceration, and end up supplementing it instead, the people we supervise walk among us as second-class citizens, while the original group whose suffering we hoped to alleviate remains hidden from sight.

That this provocative comparison, spanning centuries and continents, yields plenty of food for thought on issues pertinent to cutting-edge criminal justice reform is to Feeley’s credit, and one more testament to his scholarly stature and his very well-deserved Tappan Award. May we all continue to learn from him for many years to come.

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About the Author

Hadar Aviram is a Professor at the U.C. Hastings College of the Law. Prior to joining the Hastings faculty in 2007, she practiced as a military defense attorney in the Israel Defense Forces for five years. Dr. Aviram earned an M.A. in criminology from Hebrew University of Jerusalem and a Ph.D. in jurisprudence and social policy from the University of California, Berkley, where she studied as a Fulbright Fellow and a Regents Intern. Additionally, Dr. Aviram taught at Tel Aviv University. Professor Aviram's research focuses on the criminal justice system and examines policing, courtroom practices, and broad policy decisions through social science perspectives. Her methodology often combines quantitative, qualitative, and experimental tools. Professor Aviram's most recent projects and publications, including her University of California press book *Cheap on Crime: Recession-Era Politics and the Transformation of American Punishment*, analyze the impact of the financial crisis on the American correctional landscape and on California corrections in particular. She co-chairs the Hastings Institute for Criminal Justice and runs the California Correctional Crisis blog. She currently serves as the Vice-President of the Western Society of Criminology and will assume the presidency of the Society for a one-year term in 2017.