

COPYRIGHT NOTICE:

**James L. Nolan, Jr.: Legal Accents, Legal Borrowing**

is published by Princeton University Press and copyrighted, © 2009, by Princeton University Press. All rights reserved. No part of this book may be reproduced in any form by any electronic or mechanical means (including photocopying, recording, or information storage and retrieval) without permission in writing from the publisher, except for reading and browsing via the World Wide Web. Users are not permitted to mount this file on any network servers.

Follow links for Class Use and other Permissions. For more information send email to: [permissions@press.princeton.edu](mailto:permissions@press.princeton.edu)

## INTRODUCTION

ON a drizzly December morning in 1992, a fourth-grade boy at Red Hook's Public School 15 in Brooklyn, New York, got in a fistfight with another nine-year-old. Upset by the altercation, the boy walked away from school in tears. When Patrick Daly, the popular principal of P.S. 15, learned of the situation, he left the school to look for the boy—an action consistent with the character of this man, who had been teaching at the school since 1966 and had been principal since 1986. Walking through Red Hook's crime-ridden housing projects in search of the young boy, Daly eventually found himself in the crossfire of a drug-related skirmish. A stray bullet hit Daly in the chest, and he fell to the ground. Edgardo Torres, a security guard and former marine who witnessed the shooting, reached the fallen principal and attempted to administer CPR. Daly's last words to Torres: "Thank you." At 12:10 p.m. Patrick Daly—described by many as a soft-spoken, dedicated, and caring educator—was pronounced dead at the Long Island College Hospital.

Three teenagers were later arrested, tried, and convicted for the murder of the beloved school principal, but the community was left grieving at its loss and determined to do something about widespread crime in Red Hook. Just a few years before Daly's untimely death, Red Hook had been featured in *Life* magazine as a degenerating community racked by rampant criminal activity and a raging crack epidemic. The streets of the Red Hook neighborhood, as depicted in the 1988 article, were littered with empty crack vials and hypodermic needles, terrorized by near-daily shoot-outs between rival drug operations, and populated by residents so frightened they rarely left their apartments. Almost anticipating Daly's murder, one resident, who was interviewed for the article, said of the crack gangs, "They kill each other and anybody in the way."<sup>1</sup>

The death of the principal, who happened to get "in the way," served as a catalyst for action. Charles J. Hynes, Kings County district attorney, and Judge Judith Kaye, chief judge of the New York Court of Appeals, with the help of New York's Center for Court Innovation (CCI), worked together to help bring about what would become a flagship community court: the Red Hook Community Justice Center. The court, which opened its doors in 2000, is located in a renovated building that was previously the home of a local parochial school. The judge-led program, which offers court-monitored intervention for a variety of low-level "quality of life" crimes (including petty theft, drug offenses, prostitution, and illegal vending), has been presided over by Judge Alex Calabrese since its inception.

## 2 INTRODUCTION

Described by Red Hook staff as “warm, friendly, and accessible,” Judge Calabrese engages directly with the offenders who come before his court, and he has a variety of resources available to him at the center to assist him in addressing such underlying problems as drug addiction, housing difficulties, and lack of basic education. One participant, José Hernandez, who had struggled with a heroin addiction for eighteen years, was assigned to the Red Hook community court as a consequence of a drug-related infraction.<sup>2</sup> He was mandated into a court-monitored treatment program and required to return to court periodically so that Calabrese could evaluate his progress. In one court session, Calabrese asked Hernandez about his family. “I remember one time your wife and child came to court,” he said. “How old is your child?” Hernandez indicated that his son was five years old. Calabrese then made reference to an essay Hernandez had written for the court (an exercise mandated by the court as one form of sanction). “What impressed me about your essay,” said Calabrese, “was not only that you have to face this problem for yourself, but you have a responsibility for your five-year-old boy, as well.” Hernandez agreed with the judge and added that his son is very attached to him. Calabrese continued, “Kids want to be like their dad. You have an important loved one looking up to you. There is no reason why you can’t do well. You have to do it for yourself. You have to do it for your son.” They talked briefly about Hernandez’s work and the evening classes he had started taking. In closing, Calabrese asked Hernandez if he had a picture of his son in his wallet and suggested that it was “always a good idea to have a picture of your kids in your wallet.”

Such interaction is typical of the kind of personal engagement between judge and participant to be found in the Red Hook community court. However, though the court functions in a team-oriented, problem-solving manner, the adversarial model is not dispensed with entirely. As Calabrese explains, lawyers directly engage in a more traditional adversarial manner in about one-tenth of all cases. On the same day of Hernandez’s appearance, another defendant, recently arrested for a vending violation, stood before Calabrese for the first time. This defendant had been charged with selling items (including door locks and nose-hair trimmers) without a license. The district attorney (DA) offered two days of community service. The public defense lawyer objected to this offer, explaining that the defendant had only recently arrived in the United States, could speak virtually no English, had no criminal record, and did not realize that what he was doing was illegal. The DA then offered one day of community service. The defense lawyer, visibly irritated, rejected the offer and committed to fighting the case. The defendant was released and a new court date was set.

When the Red Hook Community Justice Center was launched in April 2000, then New York mayor Rudy Giuliani prophetically announced, “Today we are opening what I believe will be an exciting new model for the court system well into the century, the Red Hook Community Justice Center. People will be coming here to find out how to do it in the rest of the city and the rest of the country.” In fact, visitors have come to Red Hook, not just from the United States, but from around the world. The Red Hook community court has become the prototype for the development of community courts internationally.

The first such transplantation occurred in England. After visits from such high-ranking British officials as Home Secretary David Blunkett and Lord Chief Justice Harry Woolf in 2003, Judge Calabrese was invited to England to discuss community courts with a number of British criminal justice officials. Persuaded by what they saw and heard, British officials hired David Fletcher in 2004 to be the judge of England’s first community court. The Liverpool Community Justice Centre, which officially opened its doors in September 2005, looks like the Red Hook court in many respects. For example, it is located in the heart of North Liverpool, a community similarly plagued by “antisocial” behavior. Also like the Red Hook court, the Liverpool Community Justice Centre houses a range of services to help the judge address defendants’ underlying problems. The court is even located in a renovated building that previously housed a local Catholic school.

Two years after the start of the Liverpool court, Australia launched its first community court, the Neighbourhood Justice Centre, in the Collingwood neighborhood of the city of Yarra (a northeastern section of Melbourne, Victoria). Here, as in Liverpool, Red Hook is credited as the model and inspiration for the new court. In laying the foundation for the court, officials from Victoria visited Red Hook and were impressed with its operations. Moreover, staff from the CCI traveled to Melbourne to meet with Victoria criminal justice officials to educate them on the concepts of community justice. When the Neighbourhood Justice Centre was launched on March 8, 2007—again in a renovated building that once served as an educational facility—Attorney General Rob Hulls recalled his trip to Red Hook. Hulls spoke of the “enormous privilege” it was to “witness the Red Hook Community Justice Center in action” and how it served as the spark that would lead to the initiation of Australia’s first community court. David Fanning, the magistrate hired to preside over the Neighbourhood Justice Centre, likewise recalled Hulls’s pilgrimage to Red Hook, referring to it as a “road-to-Damascus experience” during which Hulls became “a complete convert.”

The conversion experience continues internationally. Plans are under way for the development of community courts in Dublin, Ireland;

#### 4 INTRODUCTION

Glasgow, Scotland; and Vancouver, British Columbia, Canada. In each case, officials have looked to Red Hook and other community courts in the United States to serve as the essential blueprint for the proposed initiation of community courts in their respective countries. The development of community courts, however, is just one example of a much more widespread international phenomenon. In addition to community courts, a number of other problem-solving courts—including drug courts, mental health courts, and domestic violence courts—have been developed in the United States and exported around the world. This book is the story of the international problem-solving court movement, one that is still very much in the process of unfolding.

This analysis of the movement provides the reader with not only a detailed and comprehensive description of an important international legal development, but also an interesting case study of the processes of globalization. As with other cultural products exported from the United States, this innovation is embraced abroad with a curious mix of enthusiasm and concern—a sort of ambivalence, as we will see, that characterizes international attitudes toward the United States more generally. The effects of this particular export, however, are of potentially enormous consequence to importing societies. Embedded in American problem-solving courts are cultural assumptions that significantly challenge long-held understandings of the meaning and practice of justice—assumptions that when transplanted along with problem-solving courts may significantly challenge or alter the legal cultures of importing countries.

This comparative study reveals that some countries are more conscious and protective of traditional understandings of justice than are others. Even in the cases of more deliberate resistance, however, features of American culture still manage to penetrate the local legal cultures of the receiving countries. A fuller appreciation of the law's cultural entanglements helps to make sense of the nature and extent of such infiltration. Borrowers of American problem-solving courts often speak of these judicial innovations as though they are autonomous and easily adaptable legal products. Without a deeper understanding of the ongoing dialectic between law and culture, then, importers can underestimate the degree to which these programs carry with them unwished-for—even openly denigrated—features of American culture. The infusion of such cultural qualities, whether welcomed or resented, portends to fundamentally alter understandings of justice in the receiving countries.

The book is a natural sequel to my previous work, *Reinventing Justice: The American Drug Court Movement*, in that it follows the progression of an international movement that began with the development of American drug courts. This book looks at the expansion of the drug court model to other types of problem-solving courts in the United States and to

the transfer of these courts internationally. Specifically, this comparative study investigates six countries where the problem-solving court movement is most advanced: England, Scotland, Ireland, Canada, Australia, and the United States.<sup>3</sup> As in *Reinventing Justice*, ethnographic work features as the project's central research method. Between 1999 and 2008, I visited more than fifty different problem-solving courts around the world (some on multiple occasions) and made at least three research trips to each of the six countries represented in the study.<sup>4</sup> At the various courts, I typically interviewed the judge, magistrate, or sheriff presiding over the court; witnessed court programs in operation; and spoke with other staff associated with the courts, including probation officers, treatment providers, lawyers, program directors, victim support personnel, medical doctors, evaluators, and, in the case of aboriginal courts, elders and peacemakers. In addition to interviewing individuals working directly with the courts, in several instances I also interviewed government officials responsible for the initiation of specialty courts. On a number of occasions, I also observed various venues operating in conjunction with courts, including community and pre-court team meetings, as well as various treatment programs.

The fieldwork was supplemented with data from a variety of other sources, including government reports, parliamentary debates, evaluations of individual court programs, publications issued by such advocacy groups as the CCI, media accounts, public statements and articles by problem-solving court judges, and analyses of specialty courts in law reviews and other academic journals. In addition to visiting individual courts in all six countries, I also attended a number of national and international conferences on problem-solving courts (including conferences in Canada, Australia, Scotland, and the United States), where I talked with problem-solving court officials, attended relevant lectures and panel discussions, and collected materials put out by the various courts.<sup>5</sup>

Much of the work on problem-solving courts, especially in the United States, centers on the question of whether these courts work. Are they cost-effective? Do they reduce recidivism rates? This book is not an evaluation study. Thus, the reader will not learn about so-called best practices or find out which country is most "successful" at problem-solving courts. Rather, it is a study of the international transplantation of problem-solving courts and is particularly concerned with what the processes of legal borrowing reveal about cultural differences and changing legal cultures in a global context. From such a perspective, even the relevance of efficacy and the meaning of success are understood as culturally determined. For example, in a cultural context where a therapeutic idiom is more dominant, the notion of what constitutes success may not match up with such conventional criminal justice measurements as reduced recidivism rates.

## 6 INTRODUCTION

Or, depending on the particular treatment philosophies that inform different court programs, determinations of what constitutes success will vary. Thus, such questions as those put forth by a Canadian mental health court judge and his colleagues are salient: “Who defines success? What is a therapeutic outcome? By whose standards?”<sup>6</sup> The answers to these questions presuppose and are determined by particular cultural assumptions. This book, therefore, endeavors to make sense of such assumptions in relationship to the law through a comparative assessment of a new and expanding international legal movement.

With this basic focus in mind, the book first traces the development of problem-solving courts in the United States and summarizes the defining characteristics of the four most prominent types of problem-solving courts: drug courts, community courts, domestic violence courts, and mental health courts. This is followed by an analysis of the international transfer of problem-solving courts against the backdrop of broader discussions about globalization, the relationship between law and culture, processes of legal transplantation, and the new legal theories (i.e., therapeutic jurisprudence and restorative justice) that are commonly associated with these courts. The middle part of the book documents and explores the comparative development of problem-solving courts in the United States and England, Canada and Australia, and Scotland and Ireland, respectively. The closing chapters consider the relevance of the international comparisons to such broader themes as American exceptionalism, contradictory anti-American attitudes, and the promise of problem-solving courts to restore public confidence in criminal justice systems around the world.

New courts in both England and Australia have directly emulated the Red Hook community court in striking ways. Yet each case represents the importation of a court innovation into a culture and legal system very different from those of the program’s country of origin. The same could be said of the variety of problem-solving courts that have been transferred internationally. Countries importing problem-solving courts, therefore, must contend with these differences, either by rejecting certain parts of the American export or by adjusting the programs in such a manner as to make them more suitable to their new context. Observing the manner in which such transfers are negotiated offers insights into a range of broader social developments, including the processes of globalization, the nature of the relationship between law and culture, and the unique and contested place of the United States in the larger world community.