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James L. Nolan, Jr.: Reinventing Justice

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Introduction

The history of punishment can serve as a lens to illuminate major cultural changes in a society.

—Myra C. Glenn

ONE OF THE MORE interesting and too often overlooked figures in American maritime history is Uriah P. Levy, an enigmatic nineteenth-century Jewish naval officer. Variouslly described by historians as “pugnacious,” “controversial,” and “flamboyant,” Levy was an anomaly for his time. Few Jews in the early nineteenth century were naval officers. Fewer still rose to the rank of Captain. Uriah Levy’s colorful career as a sailor included fighting in the War of 1812, chasing pirates in the Caribbean, surviving a shipwreck off the coast of Honduras, challenging and killing a man in a duel, and saving the life of a fellow U.S. sailor in a Rio de Janeiro street brawl. For his heroism in the latter episode and his overall reputation as an exceptional seaman, the Emperor of Brazil offered Levy command of a new sixty-gun Brazilian frigate. Ever the uncompromising American loyalist, Levy turned down the offer claiming that he would “rather serve in the American Navy as a cabin boy than as a captain in any other service in the world.”¹ A great admirer of Thomas Jefferson, not only did Levy procure and donate to the U.S. government a statue of the nation’s third president, but he purchased Monticello from the debt ridden descendants of Jefferson in 1836 and sought thereafter to restore the beleaguered two hundred-acre estate.² His mother, Rachel Levy, is buried on the site, which remained in the Levy family until it was purchased by the Jefferson Memorial Foundation in 1923.

But Levy is perhaps most famous neither for his devotion to Jefferson and curatorial care of Monticello nor for his successes in American maritime, but for the unusual forms of discipline he employed on the ships he commanded. In fact, Levy viewed as among his greatest accomplishments his role in ridding the U.S. Navy of corporal punishment. On his tombstone it is recorded, as directed by his will, “Father of the law for the abolition of the barbarous practice of corporal punishment in the United States Navy.”³ During his life, Levy was known for his opposition to corporal punishment, but he was even better known for the alternative forms of punishment that he imposed. Curiously, in his attempts to stamp out corporal punishment, Commodore Levy reverted to forms of discipline more typical of the colonial period.

Instead of flogging drunken sailors, the usual practice of the time, Levy made each violator wear a black wooden bottle inscribed with the words “punishment for drunkenness” around his neck. Petty thieves would be made to wear a wooden collar or some other badge proclaiming their crime. Those who engaged in fighting would be made to drink a pot of sea water to “cool the blood and clean the stomach.”⁴ Levy’s most notorious act of punishment occurred on 7 July 1839. At the time Levy was the Commander of the *U.S.S. Vandalia*. A mess boy named John Thompson had mimicked a junior officer. For his infraction Thompson was strapped to a gun in front of a crowd of sailors, his pants were then removed, and tar and parrot feathers were applied to his buttocks.⁵

Levy’s actions angered many of his fellow officers who eventually had him court martialed. George Hooe, Levy’s first lieutenant on the *Vandalia*, formally charged his commanding officer with “scandalous and cruel conduct.” The punishment was particularly abhorrent to Hooe because it “humiliated and degraded a sailor in front of his peers.” The court reviewing the case upheld Hooe’s charges and decried Levy’s actions as not only “unusual but wholly unlawful and at the same time exceedingly cruel.” And this, because its aim was to “dishonor and degrade” Mr. Thompson.⁶ For this incident Levy was stripped of his command and ultimately dismissed from the Navy.⁷

Punishment and Culture

This extraordinary anecdote in the annals of U.S. military history raises several important questions as it concerns the larger issue of the meaning and practice of punishment. Why were Levy’s actions viewed as so draconian? More generally, why are some forms of punishment considered acceptable in one period and regarded as scandalous in another? How are we to understand the social acceptance or the implausibility of particular types of social control at different historical moments?

Central to answering these questions is understanding the cultural context within which particular types of punishment are practiced. As sociologists have long held (albeit from varying theoretical vantage points), the moral codes and symbols pervading a particular culture at a particular time greatly influence which behaviors will be regarded as deviant and what types of punishment will be used to sanction them. Today Americans clearly reject the shame-based disciplinary practices of Puritan New England as well as the types of corporal punishment used during the antebellum period. Changing cultural codes of moral understanding have played no small part in effecting departures from these previous practices.⁸ But what new disciplinary practices have emerged in the criminal

justice system at the turn of the twenty-first century, and how has culture shaped these new forms of social control?

For Uriah Levy to have sent someone to court monitored treatment for drunkenness would have been regarded as just as unacceptable in 1839 as making someone wear a scarlet letter for adultery or disciplining another through some form of corporal punishment would be today. Why would employing Levy's disciplinary practices as well as those he was trying to abolish be regarded as entirely unacceptable in the contemporary United States? Relatedly, what does the current acceptance of alternative forms of social control tell us about contemporary American culture? And how do culturally inspired new forms of legal social control, in turn, shape public understandings of justice, guilt, and crime? A comprehensive examination of the American drug court movement promises to offer insights into these questions.

The burgeoning drug court movement first developed in response to the growing number of drug cases overcrowding America's criminal court calendars. The drug court offers mostly drug offenders the choice of participating in an intensive court-monitored treatment program as an alternative to the normal adjudication process. The innovative adjudicative model draws heavily on the American therapeutic idiom to give direction and meaning to its philosophy, forms, and procedures.⁹ Since the first drug court was launched in Dade County, Florida, in 1989, more than eight hundred similar courts have been initiated or are in the planning stages.¹⁰ The model has received almost uniformly positive media coverage and overwhelming public support at both the national and local levels. Judges celebrate the drug court as an exciting movement, a new way of justice, even a revolution in American jurisprudence. Before considering a detailed account of the historical developments that led to the emergence and proliferation of drug courts, we first make some initial forays into several of America's local drug courts, where we find a form of criminal adjudication as dissimilar as one could imagine to the types of punishment practiced by Commodore Levy.

Snapshots of America's Drug Courts

On a summer afternoon in 1998 several dozen drug offenders sat in the Hayward County Criminal Court, situated about forty miles outside of San Francisco. These defendants were participants in Hayward's drug treatment court, presided over by Judge Peggy Hora. After an introduction by the court clerk, Judge Hora entered the courtroom and seated herself behind the bench. Before starting into the court calendar the judge made several special announcements. A drug court participant who had

recently passed his GED test was called forward and presented with a graduation balloon. The judge explained that graduation balloons are hard to find in August and that she had trudged through several stores before finally locating one.

The judge then orchestrated a raffle of sorts, where the names from a pool of successful drug court “clients” (as they are commonly referred in the drug court setting) were selected to receive special prizes. One client received four tickets to a Giants baseball game; another, a mug; and another, a hat. After each name was drawn and announced the whole court applauded. The judge then made another special announcement. This day was the last for the drug court defense attorney, who after being with the court since its inception was getting a new assignment. For her service to the court the defense lawyer was awarded a balloon, a cook book, and a certificate. Taken aback, the defense attorney began to cry. She stood up to receive her gifts, then turned to address the audience of drug court participants. “You guys make everything worthwhile,” she said. “I want so bad for you all to succeed. We all want you to do what you need to do to get through this. I am going to miss you. This is the hardest part of my reassignment.” Appearing touched by the sentiments conveyed, the judge invited participants to come forward and share their thoughts. One participant presented the departing defense attorney with a large cup of cappuccino coffee he had purchased especially for her. Another came forward, hugged the lawyer, and tearfully thanked her for all the help she had been to her and to everyone else in the program.

The judge then began the court calendar. She started with successful drug court clients. Among them was the recent GED graduate, who although he had not used drugs for several months had come up positive for marijuana on his most recent urinalysis test. The judge and this client talked at length about the incident trying to make sense of what triggered the use. According to the client, he had been given a bag of marijuana from a friend for his birthday. The judge mused, “Funny, my friends don’t give me marijuana for my birthday.” She discussed with the client the problem with having friends who do such things.

Later during the proceedings, another client came before the bench. “Hi dear,” he said to the judge. Visibly irritated with the greeting, Judge Hora retorted, “That will be ‘judge dear’ for you, or how about just ‘judge.’” Later another client who had been doing well in the program said, “I’m proud of myself.” “You should be proud of yourself” the judge responded. “We are proud of you. You are doing well.” To others Judge Hora said things like, “You can get what you want, you deserve it.” To others, “I want you to become NORPs—normal, ordinary, responsible people.” Throughout the afternoon Judge Hora offered similar

admonishments, compliments, and entreaties in her unusual judicial role of directly helping clients in their recovery efforts.

On the other side of the country, in Washington, D.C., a similar court operates under the judicial watch of Judge Stephanie Duncan-Peters. Unlike Judge Hora, who in traditional style sits behind the bench, Judge Duncan-Peters with microphone in hand roams the courtroom like a daytime talk show host. At one drug court session held in the winter of 1996, Judge Duncan-Peters initiated the proceedings with a discussion of two movies the drug court clients had recently seen as part of the drug court treatment program. Of the two movies, the one of greatest interest to the participants was *White Man's Birth*. The mostly African American participants reflected on some of the racial issues raised by the movie; they discussed the problems with racism and the importance of justice and equality. One client talked about the foolishness of acting on impulse. Another discussed the impressionability of children and recognized that using drugs in front of children problematically communicates to them that such behavior is somehow acceptable.

Judge Duncan-Peters customarily conducts talks like this at the beginning of her drug court sessions. She has found movies to be a useful tool in the treatment process. "So I think that's kind of good," she later explained to me of the practice. "It gets them thinking and discussing other things. Obviously they need to talk about their own problems and what leads to them, but I also think it's good to have distractions in life. I've found that if there are periods of your life when you are unhappy, sometimes going out to see an interesting movie or going out with a friend and talking about something else, or going to the gym to work out, these kinds of things can help you through a bad day." This judge, therefore, does not want to focus only on individual problems and strategies for solving them; in addition, she wants to give clients, through watching movies and other activities, the "ability to see something else that might challenge their minds and distract them in a positive way from their problems."

After discussing the movies, Judge Duncan-Peters then called up individual clients who were on the drug court calendar. One client summoned, a Mr. Taylor, was moving to a higher level in the treatment program that day. Drug court programs typically have several levels of treatment through which clients progress as they successfully comply with the treatment regimen. The following exchange transpired between Judge Duncan-Peters and this advancing client.

DUNCAN-PETERS: How are you doing today Mr. Taylor?

TAYLOR: All right.

- DUNCAN-PETERS: And you are moving up to level three, having survived level two. So, how are you feeling?
- TAYLOR: Feeling good.
- DUNCAN-PETERS: Feeling good? How come?
- TAYLOR: I'm moving.
- DUNCAN-PETERS: You're moving up. Moving up in the world. Moving up and out of the program. Keep on going. And that gives you a good feeling, right? Well, you got some words of advice for these other folks that are trying to move up to where you are?
- TAYLOR: Stay focused.
- DUNCAN-PETERS: Stay focused. Yep. How long have you had a problem with drugs?
- TAYLOR: Not long.
- DUNCAN-PETERS: Not too long. Not too long. Think you are going to be able to make it a permanent good-bye to these drugs?
- TAYLOR: Yeah, as long as I got these court dates. [Laughter in audience]
- DUNCAN-PETERS: Even if you don't have them, do you think you are going to be able to stay off of them even if you don't have the court building, and you don't have to come back to court except for good reasons?
- TAYLOR: I ain't coming back.
- DUNCAN-PETERS: No way, huh. Well, here is your mug, and here is your certificate. Congratulations.

At this point everyone in the courtroom applauded. These kind of exchanges with clients are typical in Judge Duncan-Peters's drug court. Later in the session another client, a Mr. Stevens, was called forward and had the following discussion with the judge.

- DUNCAN-PETERS: Where is Mr. Stevens? Mr. Stevens is moving right along too. Right?
- STEVENS: Yep.
- DUNCAN-PETERS: How come? How come it is going so great?
- STEVENS: I made a choice.
- DUNCAN-PETERS: You made a choice. Why did you do that? Why did you make that choice? What helped you to make up your mind to do it?
- STEVENS: There had to be a better way than the way I was doing it.
- DUNCAN-PETERS: What was wrong with the way you were living? What didn't you like about it?
- STEVENS: It was wild.

- DUNCAN-PETERS: It was wild, like too dangerous? Is that what you mean by wild?
- STEVENS: Dangerous.
- DUNCAN-PETERS: Too dangerous, for you personally, like a bad roller coaster ride. So, what do you think? Is this new life boring?
- STEVENS: No, not at all.
- DUNCAN-PETERS: Not at all. What do you like about the new life?
- STEVENS: I like it better than the old.
- DUNCAN-PETERS: Even though the old one was wild, the wild was kind of not a good wild. You like this way.
- STEVENS: I love it.
- DUNCAN-PETERS: You love it. Well, we're glad that you love it. We're very proud of you. In addition to your certificate, you're getting your pen which says, "I made it to level four, almost out the door." How about that? Anybody in the program that you are helping out a little bit, do you think?
- STEVENS: Trying to help everybody if I can.
- DUNCAN-PETERS: Trying to help everybody if you can. Well, hopefully you are helping them, because I think that it is interesting for them to hear what you feel about having given up this old style, and starting a new one.

Mr. Stevens was also applauded by everyone in the crowded courtroom for his efforts. The judge proceeded through the court calendar and had similar exchanges with other clients. To those who were doing well and graduating to higher levels of treatment, she offered certificates, mugs, pens, and words of encouragement.

Judge Stanley Goldstein presided over the Miami, Florida, drug court from its inception in 1989 until his retirement in 1999. A crusty prosecutor and street cop, Goldstein would mix tough talk with words of encouragement in discussions with his clients. Between exchanges, he offered commentary, even short sermons, about the harms of drug use, the efficacy and basic focus of the drug court program, and his personal concern for the clients' success in drug court. During a January 1995 court session, for example, he explained: "This is a two part program. First is to get you off drugs. Second is to teach you how to live in this world. The first lesson you learn is you follow the rules." Later during the same session he offered the following.

Let me tell you guys something. I told almost everyone of you when you came in here, there ain't no other way. Any other way out of here and you lose. You

stay being a junky: you lose, I win. You die: I win, you lose. You burn your brain out: you lose, I win. Forget about it. You hate me, want to get even with me? Quit using drugs, and get yourself a good job. Then you get even with me. I love you. I want everyone here to beat me into the ground with goodness.

A female defendant stood before Judge Goldstein. "You looked in the mirror lately?" he asked her. "Yeah," the client responded with a smile. "Nice, huh?" Goldstein continued. Again, the client smiled and answered, "Yeah." "Keep it up baby," Goldstein offered before calling up another client. To another participant who had not been doing so well he implored, "When are you going to stop using cocaine? I can't stop it for you. Nobody can stop it for you. You have worked hard enough to get yourself into Phase III. You're getting pretty close to graduation, and you got to go out and use cocaine. Are you a little baby? Do I have to treat you like a little baby. Huh? Say no more. I will see you back here in sixty days." To another who had also had a recent failure in the program, Goldstein exhorted, "Any problem you got, you come to me. I'm your Daddy. . . . You're a little baby. Hey little baby boy. There is only one way to stop and that is to stop. And it is going to hurt. It is going to hurt a lot of ways. You got three options: You can die. You can go insane. You can quit. Knock it off. Knock it off."

To a client holding a young child Goldstein instructed, "Stop thinking about yourself all the time. You're going to make that kid a junky by going out and having a good time for a couple hours. You're dirty every day and you're killing your baby." Another client who stood before Goldstein was accompanied by her mother and asked the judge if she could graduate from the program early. Goldstein explained, "The deal was one year. The statute says one year. . . . Okay? You look beautiful. You looked like hell when I first saw you. Your gorgeous." Then to the mother standing beside the client, "What did I tell you? Didn't I tell you I'd give you a new daughter? Right out of the factory." To another client who unexpectedly came into contact with drugs, Goldstein warned, "What do you do at a party and someone lights up? Get the hell out of there. If you're in a car and someone lights up? Get the hell out of there."

During the court session Goldstein reflected on his experience in the drug court program and on his previous experience in a regular criminal court. "I used to sit up here and try cases. And I had big jury trials, with murderers, and with robbers, and all of this crap. And I put people away for seventy years and seventy-five years." During those years in a regular criminal court, Goldstein explained, he found his work profoundly unsatisfying. "It never made me feel like I did anything. . . . I was taking one jackass off the street, that was all." With the drug court, contrastingly, "I walk out of this program almost everyday and feel like I

have accomplished something. If I save one guy a day I'm happy. It took me awhile to realize that you can't save everybody. Some of them just ain't got it. . . . Some people I praise. Some people I try to insult. Some people, I'll try anything, anything that might work."

These examples provide just a glimpse into the unique character of the American drug court model. The chapters that follow consider in more detail the various qualities and consequences of this new form of criminal adjudication. Such an examination aims not only to explicate the defining features of the drug court movement and the reasons behind its widespread proliferation but to make sense of its effects, both practical and theoretical, on legal and public understandings of justice.

A Note on Method

The findings reported in this book are based upon ethnographic observation of drug courts throughout the United States. In the four-year period between August 1994 and August 1998, I visited twenty-one different drug courts in a total of eleven different states and the District of Columbia. The drug courts I visited varied by region. Seven were in the Northeast, six on the West Coast, five in the Mid Atlantic region (i.e., Maryland, Delaware, Virginia, and the District of Columbia), and three in the South. The courts also varied with respect to the size of the locations in which they were situated. Twelve of the courts were in large urban areas; five were in rural regions; three were in midsize cities of around 100,000 residents; and one was in an outlying suburban area of a Northeastern city. The courts also varied with respect to how long they had been in existence, varying from first generation drug courts to courts that were still in the planning stages. Eleven of the courts I visited had been in existence for more than one year; eight had been in existence for less than a year; and two were still in the planning stages.

At each of the drug courts, I conducted a face-to-face open-ended interview with the judge. I also had occasion to interview three other judges whose drug courts I did not visit. In all, I formally interviewed twenty-four different drug court judges. At the drug court locations, national drug court conferences, and mentoring court programs I attended, I also formally interviewed or had informal discussions with dozens of other drug court officials, including district attorneys, public defenders, treatment counselors, private attorneys, program coordinators, evaluators, and acupuncturists. I also, on occasion, had informal conversations with drug court clients.

At each court I visited, in addition to interviewing the judge, I talked with other drug court officials, and if allowed, visited one of the outside-of-the-court treatment sites serving the drug court. The treatment modalities that I observed included acupuncture sessions, Alcoholics/Narcotics Anonymous meetings, group counseling sessions, and a probationary/treatment introductory meeting. At five of the courts I was invited to sit in on the preliminary meetings preceding the drug court session. At these meetings the judge and other drug court officials discussed each of the clients who would be appearing in the drug court that day.

In addition to visiting individual courts I also attended three national drug court conferences; one in Portland, Oregon, in December 1995; one in Washington, D.C., in May 1996; and another in Washington, D.C., in June 1998.¹¹ At the conferences, I attended lectures and panel discussions featuring key players in the drug court movement; I interviewed drug court officials; and collected valuable written materials from drug courts throughout the country. I also attended two training or mentoring court programs. Mentoring courts are drug courts that have been in operation for several years and have been designated as locations where emerging courts can visit and receive training in the operation of a drug court. I attended a training session in Louisville, Kentucky, in April 1996, and another in Rochester, New York, in June 1997. There were representatives from five courts at the Louisville program, and representatives from twelve courts at Rochester.

Finally I participated in the planning stages of a local drug court (near where I lived at the time) over a period of approximately four months. Officials had heard about my research from another court in the state and invited me to be on their planning board. We made a deal of sorts. They would allow me to sit in on their planning meetings, some of which I was allowed to tape-record, and they could draw upon the "expertise" I had acquired from having visited other courts around the country. My contribution was limited basically to a short presentation at one meeting, where I briefly described the features and structure of four other courts I had recently visited. On occasion they would ask me a question about how other courts operated, but for the most part I remained a very quiet observer.

With the exception of drug court client/defendants, all drug court officials and drug court sites identified in the book are actual names and places. I provide pseudonyms for any drug court client whose behavior is discussed or whose words are quoted in this book, the only exception being names cited in already public sources (e.g., justice department reports or newspaper descriptions of individual drug courts).¹²

I should note that, by in large, I found the people in this movement to be courteous, welcoming, and accessible. I also found drug court move-

ment activists to be earnest, committed, and sacrificially generous in the amount of time and energy they devoted to the drug courts. I imagine that some may be disappointed by what they find in this book. It is not a celebration of the movement, but neither is it a policy oriented debunking of the movement. Rather it seeks to place the phenomenon in a broader socio-historical context, and it attempts to bring to the surface what might be some of the unintended consequences of the drug court movement as it relates to practical and theoretical understandings of justice. In any respect, I am very grateful for the level of access I was afforded by a group of hardworking and dedicated people, and hope that, even if not satisfied with the sociological focus of the analysis, drug court officials will find my treatment of their words and of the broader movement to be fair and even handed.

Forecast

Again, the book is not a policy statement, though it may have certain policy implications. Any program alternative to the drug court, however, is not given specific articulation. Furthermore, while the book touches upon issues of efficacy in certain contexts, the project is not an analysis of the utility of the drug courts, which has been the focus of most academic investigations of the drug court movement to date. A question about whether the drug courts work is certainly a valid question in its rightful place, but it is not the inquiry pursued here, nor is it, I would argue, the more important question to ask of the movement.

Rather, the book seeks to understand the movement against the backdrop of the history of the social control of drugs in the United States and to understand the consequences of this judicial innovation on the processes of criminal adjudication and on social and legal understandings of justice. Toward this end, chapter 1 begins with a review of the various legal responses to drug use during the twentieth century leading up to the years just prior to the drug court movement. Chapter 2 considers in some detail the initiation and expansion of the drug court movement by examining the structural and cultural causes of the movement, an analysis which reveals limitations in the conventional political categories typically used to make sense of phenomenon like the drug court. Chapter 3 investigates the unique features of the drug court theater, that is, the radically redefined roles of the various actors in the courtroom drama and the subsequent tensions sometimes created by these new roles.

The next three chapters consider some of the intended and unintended consequences of the drug court model. Chapter 4 evaluates the extent to which the drug court, particularly as it concerns the new role of the judge,

departs from the American common law tradition. Chapter 5 analyzes the centrality of storytelling to the drug court drama and considers the extent to which the poignancy of a “good story” becomes an increasingly plausible criteria for evaluating the success of judicial programs. Chapter 6 assesses the manner in which a growing number of criminal behaviors (not just drug offenses) have, in the context of the drug court, been redefined in pathological terms, thus making increasingly obsolete—both philosophically and practically—the legal salience of “guilt.”

Finally, the last two chapters specifically focus on the meaning of justice. Chapter 7 situates the drug court within a broader discussion of philosophical and cultural understandings of the goals of punishment, moving from the retributivist theories of Kant and Hegel in the early modern period to the “rehabilitative” ideal of the first part of the twentieth century. Chapter 8 investigates the manner in which the drug court’s quintessential embodiment of therapeutic jurisprudence theory represents a significant break from previous understandings of the purposes of punishment and criminal adjudication. Taken together, the unique qualities and consequences of the drug court movement portend to redefine the very meaning of justice.

The new form of legal social control represented in the drug court movement is not perceived today as “cruel and unusual” as Uriah Levy’s disciplinary practices were in his time. The absence of protest, however, says as much about American culture and its understandings of punishment and justice as did the hostile reaction to Levy’s actions. At an earlier moment in American history, one could imagine a very different reaction to the drug court movement. Today, however, the widespread popularity of the drug court movement suggests that its defining philosophy and forms are consistent with the dominant sensibilities of American culture, a theme to which we will return in the pages ahead.