THE CULTURAL CONSTRAINTS OF LEGAL TRANSPLANTATION A TEN-YEAR RETROSPECTIVE

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I. Introduction

In my 2009 book, *Legal Accents, Legal Borrowing*, I considered the international transplantation of problem-solving courts from the United States to five other common law countries: England, Scotland, Ireland, Canada, and Australia.[1] Actors in the receiving countries were often conscious of the need to adapt the American-grown court innovation to fit the particularities of their local legal culture. An examination of the processes of legal borrowing, in this particular case study, revealed fascinating and very distinctive legal accents in the six countries.[2] However, given that the international transplantation of problem-solving courts was still in a relatively nascent state, it was difficult to ascertain at the time what the ultimate outcome would produce. Would it result in a fuller homogenization of American legal culture in the importing countries? Some kind of hybridization with perhaps irritating unintended consequences in the receiving legal culture? Or an outright rejection of the transplant?

Though I considered a number of possibilities, in the book's final chapter I cautiously concluded: "Only time will tell whether and to what extent these cultural infiltrations—be they welcomed or regretted—will result in further homogenization or some kind of subtle yet transformative legal irritation."[3] I noted both signs of "resistance," as well as evidence of, "emergent legal irritation and of fuller Americanization in the receiving countries."[4] One reviewer of the book found this "only time will tell" conclusion "al-

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1 James L. Nolan, Jr., Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement (Princeton Univ. Press 2009).

2 The idea of a "legal accent" is derived from Clifford Geertz's reflections on the relationship between law and culture. Geertz observes that law is "a distinctive manner of imagining the real," and that law is local knowledge, "local not just to place, time, class and variety of issue, but as to accent." Clifford Geertz, Local Knowledge: Further Essays in Interpretive Anthropology 123 (1983). *See also*, Nolan, *supra* note 1, at 31.

3 Nolan, *supra* note 1, at 196.

4 *Id.*

most too safe" and wished I had more boldly offered some "predictions on what impact culture will continue to have on these specialty courts in the future . . . ."[5]

It has now been more than a decade since *Legal Accents, Legal Borrowing* was published, thus providing an opportunity to consider more fully the success, or lack thereof, of this first wave of problem-solving court transplants. This article will consider some new information about the fate of problem-solving courts—with a particular focus on courts in the United Kingdom and Ireland—as a means of considering the longer-term impact of this instance of legal borrowing. Usefully informing such a reassessment are the thoughtful ruminations of two French magistrates, who, following an early nineteenth century visit to the United States, offered helpful reflections on the processes of legal borrowing. Before considering the fate of the international transplantation of problem-solving courts, therefore, we will first turn to a much earlier consideration of legal borrowing. In so doing, we discover that in this instance, as in many others, Alexis de Tocqueville evinced an unparalleled capacity for prescient insight.

A. *Lessons from Tocqueville and Beaumont*

Given the success and classic status of *Democracy in America*, many do not remember, or even realize, that Alexis de Tocqueville's official reason for travelling to the United States in 1831 was to study America's penitentiary system. Though it was largely a pretext for making the journey and considering other dimension of American social and political life, Tocqueville and his friend and travelling partner, Gustave de Beaumont, were dutiful in their studies of American prisons. After returning from the United States in 1832, they wrote and submitted to the French government a report on the prospect of a legal transplantation, *On the Penitentiary System in the United States and its Application to France*.[6] Though there was much that they admired about America's prison system, when they reflected on the possible transferability of the model to France, they anticipated a variety of obstacles. In the report, and in letters written from America and from France after

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[5] Alexis Tucker, Book Note, 43 N.Y.U. J. INT'L L. & POL. 211, 247–48 (2010) (reviewing NOLAN, *supra* note 1).

[6] GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, On the Penitentiary System in the United States and its Application to France (1964).

their return, they noted several impediments that they thought would hinder an easy transplantation. They identified both structural (legal and administrative) and cultural obstacles.

Regarding structural factors, they worried about the expense of building and running American-styled prisons and implementing them within France's more centralized governing structure. In the United States ("U.S."), early nineteenth century prisons were developed at the state level and thus with more local energy, initiative, and support. As communicated in the report, "It has appeared to us, that the success of the new prisons in the United States, is principally owing to the system of local administration under the influence of which they have originated."[7] They contrasted this with France, where prisons were "created and entirely governed by a central power . . . ."[8] Importantly, they noted that in the U.S., because the prisons were developed at the local level, they "excited the lively interest of their founders."[9] That is, the local initiatives were characterized by ownership, enthusiasm, and commitment. They feared that in France, if mandated from a central government, "the various bodies [would] never take an interest in that which they [had] not made themselves."[10]

Tocqueville and Beaumont also identified several cultural factors, including silence (a defining feature of the American prisons) as something that would be difficult for the French. "[W]e believe that the law of silence would be infinitely more painful to Frenchmen than to Americans, whose character is taciturn and reflective."[11] They also viewed the French as more insubordinate to the law than Americans. "There is a spirit of obedience to the law, so generally diffused in the United States . . . . On the contrary, there is in France, in the spirit of the mass, an unhappy tendency to violate the law . . . ."[12] They feared, then, that given this tendency toward insubordination, the only remedy to ensure compliance would be whipping, which they also viewed as a practice the French would not abide.[13]

Perhaps the most important cultural obstacle they identified was the influential role of religion in the American prisons. They observed religion infusing the American prison system in a number

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7 *Id.* at 125.
8 *Id.* at 128.
9 *Id.* at 129.
10 *Id.*
11 BEAUMONT & TOCQUEVILLE, *supra* note 6, at 120.
12 *Id.* at 121.
13 *Id.* at 120.

of ways. Religious sentiments motivated the reformers' initiatives to establish the new American penitentiaries in the first place. These sentiments were also evident in the work of the prison chaplains, prison guards, and even the prisoners themselves. As stated in the report:

> [S]ociety in the United States is itself eminently religious—a circumstance which has a great influence upon the direction of penitentiaries. . . . As their religious belief is deeply rooted in their customs, there is not one among all the officers of a prison who is destitute of religious principles. For this reason, they never utter a word which is not in harmony with the sermons of the chaplain. The prisoner in the United States, therefore, breathes in the penitentiary a religious atmosphere, and is more accessible to this influence because his primary education has disposed him for it.[14]

In the U.S., then, religion was seen to pervade the prisons; it was a defining feature of American culture. Tocqueville and Beaumont viewed the situation in France as very different. Following the 1789 Revolution, the French magistrates noted a great deal of hostility toward clergy, in particular, and toward religion, in general. They saw this difference as posing a significant impediment to the transplantation of American penitentiaries. Importing the American prison model without modification, they thought, would be met with "grave difficulties," and they saw religion as "without contradiction [ ] one of the gravest."[15] In fact, they saw it as something that would "injure" the penitentiary system in France.[16]

The trenchant insights offered by Tocqueville and Beaumont—as they imagined the transplantation of America's penitentiary system to France—are instructive to those seeking to make sense of the global transplantation of American-styled problem-solving courts. In observing the borrowing of problem-solving courts, one likewise finds both structural and cultural factors that have inhibited a straightforward transfer. The perceptive account of the two nineteenth-century French visitors to America are helpful in explaining the failure of a full and successful transplantation of twenty-first century problem-solving courts.

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[14] *Id.* at 122.
[15] *Id.* at 120, 123.
[16] *Id.* at 123.

B. *Problem-Solving Courts: Legal and Cultural Differences*

It is not as though those importing American-styled problem-solving courts at the turn of the twenty-first century were indifferent to the sort of concerns raised by Tocqueville and Beaumont. To be sure, those importing problem-solving courts internationally recognized that adjustments to the programs were necessary in order to facilitate a successful transplantation.[17] These self-conscious efforts to indigenize or hybridize problem-solving courts, however, also brought into relief some of the clear differences between the style, structure, and scope of the legal programs in the different countries—differences that significantly influenced the potential success of the legal transfer.

In the United States, most agree that the first problem-solving court was the Miami drug court, launched in 1989. The drug court model then spread quickly and eventually spawned the development of a number of other problem-solving courts, including community courts, domestic violence courts, mental health courts, DUI courts, homeless courts, prostitution courts, and re-entry courts. Today there are approximately 3,000 problem-solving courts in the United States. Although U.S. problem-solving courts vary in important respects, they can generally be characterized by five defining features: 1) close and ongoing judicial monitoring, 2) a multidisciplinary or team approach, 3) a therapeutic or treatment orientation, 4) the altering of traditional roles in the adjudication process, and 5) an emphasis on solving the problems of individual offenders.

About a decade after the initiation of the first problem-solving courts in the United States, international borrowing of this new court program began. In observing the process of transplanting problem-solving courts internationally, I found a pronounced distinction between the legal accents of the American courts and the legal accents in the non-U.S. countries. Specifically, a comparison between problem-solving courts in the United States, England, Ireland, Scotland, Australia, and Canada, revealed a sort of American exceptionalism. That is, in the U.S., the courts were characterized by enthusiasm, boldness, and pragmatism; whereas, in the five other countries, I found a contrasting disposition of moderation, deliberation, and restraint.[18]

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[17] Nolan, *supra* note 1, at 25–26.

[18] *Id.* at 136–56.

With respect to the American version of problem-solving courts, I discovered problem-solving court judges and other advocates to be very enthusiastic about the movement. They were "true believers" who saw problem-solving courts as a panacea, a revolutionary innovation that promised to radically transform or "reinvent" the American criminal justice system.[19] The court innovations were viewed as an exciting and promising alternative to a failing court system whose very legitimacy was viewed as somehow in jeopardy. So enthusiastic were problem-solving court practitioners in the United States that they sometimes came across as salespersons or religious zealots in their promotion of these courts. Importers from the other five countries would sometimes describe Americans as having a sort of "evangelical" spirit in their efforts to spread the good news of problem-solving courts internationally.

Along with this enthusiasm, American problem-solving court judges were also bold in the sense that they were willing to transgress the normal conventions of their judicial role. Many problem-solving court judges had been frustrated with their traditional roles. They felt like "computers on the bench," hampered by mandatory minimum sentence guidelines, and unable to help the troubled individuals repeatedly passing through their courtrooms. Problem-solving courts afforded judges more flexibility and power. As one problem-solving court judge put it, "we are the judges who get to color outside the lines."[20] This kind of judicial boldness was evident both inside and outside the courtroom.

Inside the courtroom, American problem-solving court judges would directly engage the defendants who came before their benches. Thus, the main dialogue in the courtroom was between the client and the judge (instead of between the prosecutor and the defense lawyer) and tended to be personal and expressive in nature. Lawyers played reduced roles and often were not even present during the regular court review sessions. The court sessions were characterized by tearful testimonies, applause, handshakes, hugs between judge and client, and elaborate graduation ceremonies for those who successfully completed the program. Successful compliance with court mandates was often rewarded with prizes, including certificates, tickets to professional sporting events, fresh donuts, coffee mugs, candy, and pens.

American problem-solving court judges were also active outside of the courtroom. They engaged in a range of extracurricu-

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19 *Id.* at 137–39.

20 *Id.* at 141.

lar activities, including lobbying Congress for support, talking to the media, meeting with residence in the local community, coordinating and soliciting help from the various agencies working with the court, contacting clients at their places of work, and even fundraising for their local program. This last activity was one that officials outside of the United States, notably in Ireland, identified as particularly worrying.

Finally, American problem-solving courts were characterized by a distinctive quality of pragmatism. Advocates repeatedly defended the programs (including such practices as coerced treatment) on the grounds of program efficacy. While the actual evidence of program success did not always support such assertions, advocates argued that problem-solving courts worked, were better than "business as usual," and would help to restore confidence in the criminal justice system—a system, they argued, that suffered from a crisis of legitimacy.[21]

In contrast to the American qualities of boldness, enthusiasm, and pragmatism, I found courts in the other countries to be characterized by moderation, deliberation, and restraint. International importers of problem-solving courts were more moderate with respect to how they behaved in the courtroom and could be openly dismissive of the theatrical and demonstrative behavior of American judges. I recall in the early years of my research interviewing British magistrates in one of the first iterations of drug courts in England. They had heard about some of the more theatrical qualities of the American courts and were clearly opposed to such practices as physical contact with clients. In 1999, for example, I spoke with a group of magistrates in West Yorkshire County. One said, "We won't hug." Another added, "[t]hat is where we draw the line." Still another, "I'm not in favor of that." He went on, "[t]hese are really criminals at the end of the day. The decency of

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[21] For a review of the literature on the efficacy of drug courts, see the "Outcomes Studies" section of Richard Boldt & James L. Nolan, Jr., "Drug Courts," *Oxford Bibliographies in Criminology*, ed. Beth M. Huebner (New York: Oxford University Press, 2019). *See also* Joanne Csete, *Drug Courts in the United States: Punishment for 'Patients'?*, *in* RETHINKING DRUG COURTS: INTERNATIONAL EXPERIENCES OF A US POLICY EXPORT 1 (John Collins et al., eds., 2019); JOANNE CSETE & DENISE TOMASINI-JOSHI, DRUG COURTS: EQUIVOCAL EVIDENCE ON A POPULAR INTERVENTION (2015); JENNIFER MURPHY, ILLNESS OR DISEASE?: DRUG COURTS, DRUG TREATMENT, AND THE AMBIGUITY OF ADDICTION 51–52 (Temple University Press, 2015); Rebecca Schleifer, *Drug Courts in the United States: Lessons Learned from the US Experience*, *in* DRUG COURTS IN THE AMERICAS: A REPORT BY THE DRUGS, SECURITY AND DEMOCRACY PROGRAM, 18–37, (Lisa Ferraro Parmelee & Clare McGranahan eds., 2018). For an earlier discussion, *see* JAMES L. NOLAN, JR. REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT 128–32 (Princeton University Press, 2001).

the court must be upheld."[22] I found non-U.S. judges to be more moderate in terms of what they thought and claimed these courts could actually achieve. In the early years of the movement, notably in Australia and Canada, some even used different nomenclature to describe these court, preferring the term "problem-oriented" courts over "problem-solving" courts, viewing the former as "less hubristic" and more "pessimistic" than the latter.[23] Unlike in the United States, legal actors in other countries did not view problem-solving courts as a revolutionary panacea that would resolve deeply entrenched and intractable social problems. Rather, the courts were viewed as one type of program among others that might be worth trying on a limited basis and that might prove helpful for a certain type of defendant. Practitioners in other countries were more moderate in that they commonly embraced a "harm reduction" or "harm minimization" philosophy that stood in contrast to the American emphasis on "total abstinence."[24]

A second feature of the non-U.S. court that I discovered was deliberation. Deliberation refers to the extent to which judges allowed the formation of these courts to take place within the deliberative processes of the other branches of government. In the U.S., problem-solving courts have been primarily a grass-roots movement. Industrious and entrepreneurial judges initiated the courts at the local level, often without any legislative direction or guidance. Outside of the U.S., problem-solving courts were more typically generated in a top-down fashion; the same sort of difference noted by Tocqueville and Beaumont. In both cases, U.S. innovations typically started at the local level, in contrast to the more centralized practices in Europe.

Regarding problem-solving courts, I also found that non-U.S. programs would typically not move forward until there had been

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22 James L. Nolan, Jr., *Separated by an Uncommon Law: Drug Courts in Great Britain and the United States*, *in* DRUG COURTS: IN THEORY AND IN PRACTICE 89, 103 (New York: Aldine de Gruyter, 2002).

23 Arie Freiberg, *Problem-Oriented Courts: Innovative Solutions to Intractable Problems?* 11 J. JUD. ADMIN. 8, 9 n.5 (2001). Australian criminologist John Braithwaite has also used the term "problem-oriented," (John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 246 (2002)), as has Susan Eley in her analysis of the Toronto K Court; she only qualifies this by noting that "problem-solving" is the nomenclature used "in the American literature" (Susan Eley, *Changing Practices: The Specialised Domestic Violence Court Process*, 44 HOW. J. CRIM. JUST. 113 (2005)).

24 *See* James L. Nolan, Jr., *Harm Reduction and the American Difference: Drug Treatment and Problem-Solving Courts in Comparative Perspective*, 13 J. HEALTH CARE L. & POL'Y 31, 31–47 (2010).

legislative approval, the establishment of an investigative working group, a long discussion among relevant parties, the establishment of a pilot scheme, and/or the reevaluation of a program based on the results of a pilot scheme. Instead of boldness, then, problem-solving courts in other countries evinced caution and deliberation—caution about the extent to which judges were willing to act outside of legally defined and legislatively approved limits to their actions and deliberation about whether to start the programs and/or to continue and expand the programs once they had been started.[25]

To provide one example, back in 2000, when I asked a probation officer in Croydon (South London) why they had decided to start their program, her response lacked the missionary, entrepreneurial zeal typical of American drug court advocates. Instead she simply shrugged and explained they had been told by the government to do so. In her words, "We've been basically told to get on with it. Here's the legislation. Here are the Home Office guidelines. Work with it."[26] When I asked a medical doctor from the same program whether she anticipated drug courts would spread in the U.K., she likewise deferred to the wishes of the government: "It will be for the government to decide. Largely we will have to move the way the government wants."[27]

A final legal accent I discovered in non-U.S. problem-solving courts was a clear sense of restraint. Judges exercised restraint in deference to statutory law and legislative authority. They were also more structurally restrained by the peculiarities of their court systems. For example, in England the magistrate system prevents magistrates from having the flexibility and power exercised by judges in the American version of problem-solving courts. In addition to these interpretive and structural forms of restraint, non-U.S. judges also exercised notable personal restraint. They recognized that the more informal and flexible format of problem-solving courts allowed for a courtroom environment in which judges could act in a manner that might violate the traditional protections of individual freedoms and due process rights. In a number of instances, most notably in Scotland and Australia, judges personally chose not to exercise certain powers. Even when they had been given the legal authority to do so, they restrained themselves out of

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25 *See* James L. Nolan, Jr., *The International Problem-Solving Court Movement: An International Comparison* 37 MONASH U. L. REV. 259, 272 (2011).

26 *See* NOLAN, *supra* note 22, at 101.

27 *Id.*

a consideration for protecting due process rights and maintaining the dignity and decorum of the court.[28]

C. *Cultural Limits to Legal Transplantation*

Given these differences, and the advantage of a ten-year retrospective, what has been the long-term outcome of the attempted transplantation of problem-solving courts internationally? In other words, what has happened in the decade since my study of the early years of legal transference? What one discovers, at least in the U.K. and Ireland, is that the differences identified in *Legal Accents, Legal Borrowing* (summarized above) have been salient enough that the legal transplants have been rejected or have functioned as a source of ongoing legal irritation, without making a full and successful transplantation.

One can imagine two metaphors to envision these related outcomes, one horticultural and the other human. With respect to the former, to transfer a plant from one environment to another, it is necessary to prepare and cultivate the soil. The right climate, fertilizer, and level of irrigation must be maintained for the plant to take root and grow. Likewise, with the transplant of a human organ, powerful immunosuppressant drugs are necessary to allow the receiving body to accept the transplanted organ. Without these drugs, the body will reject the foreign organ. Importers themselves have invoked images such as these to make sense of the ultimate outcome of the importation of American-styled problem-solving courts.

1. The Failure of U.K. Drug Courts

An example of what looks like a nearly full rejection of this legal transplant would be the case of drug courts in the United Kingdom ("U.K."). The first drug courts in the U.K. were started in 1999, exactly ten years after the start of the first U.S. drug court in Miami. Inspired by the Miami drug court, two Yorkshire County courts in Wakefield and Pontefract took the name "drugs court." Shortly thereafter the government rolled out a scheme called Drug Treatment and Testing Orders ("DTTO"), also directly inspired by the American drug court model, which these two courts were folded into. In 2005, DTTOs were replaced by a Drug Reha-

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28 *Id.* at 151–56.

bilitation Requirement ("DRR"), as part of a larger community order scheme. Both DTTOs and DRRs were scaled down versions of drug courts, and arguably tailored to fit the particularities of the British criminal justice system, including, the more central role of probation and the significance of the lay magistrate system, which handles most low-level crimes in Britain.

Around the same time as the launching of DRRs, efforts to follow the American model were started in West London and Leeds. The West London court had a single, more interactive district judge presiding over the court, rather than a rotating panel of three lay magistrates. Five years later, in 2009, the government attempted four other such courts, which came to be called Dedicated Drug Courts ("DDCs"). Thus, in England and Wales, drug courts have evolved through a number of iterations, from "drugs courts," to DTTOs to DRRs to DDCs. By 2019, twenty years after their initial introduction, DDCs have ceased to exist in England and Wales. The insights offered by Tocqueville and Beaumont, as well as the strength of the distinctive legal accents identified above, help to explain this outcome. Both structural and cultural factors were among the obstacles that ultimately impeded a successful transplantation of drug courts from the United States to Great Britain.

In an edited volume released in 2019, *Rethinking Drug Courts*, LSE drugs policy historian John Collins, considers the failure of drug courts in the U.K. Collins observes that starting around 2013–14 not only did British drug courts go "into a headlong decline" but also the Liverpool Community Justice Center, modeled directly on the American community court model, the Red Hook Community Justice Center, also collapsed.[29] A few years earlier, a years-long consideration for the establishment of a Scottish community court in Glasgow was also "quietly shelved."[30] Although the Glasgow drug court remains in operation, in 2013 the Fife drug court (the second of Scotland's drug courts) was shut down. Thus, the collapse of problem-solving courts in the U.K. has not been isolated to drug courts in England and Wales.

Collins sees the interpretive framework laid out in *Legal Accents, Legal Borrowing* as providing an analytical basis for under-

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29 JOHN COLLINS, *Explain the Failure of Drug Courts in the United Kingdom*, *in* Rethinking Drug Courts: International Experiences of a US Policy Export 99, 112–13 (John Collins et al., eds., 2019).

30 Lucy Adams, *New-Style Court Plan Scrapped Over Costs: US-Inspired Idea Quietly Shelved,* Herald; Glasgow (Apr. 20, 2009), https://yulib002.mc.yu.edu:2054/docview/333116595?accountid=15178.

standing why drug courts were ultimately abandoned in the U.K.[31] Moreover, like Tocqueville and Beaumont, Collins identifies both structural and cultural factors as among the reasons that the transplantation did not succeed. For example, Collins identifies the lay magistrate system, the strength of probation, and the top down nature of innovation in the United Kingdom as among the structural inhibitors. He also identifies cultural differences, including the greater currency of therapeutic sensibilities in the United States—compared with the higher levels of reserve in the U.K.—as a contributing explanatory variable. Finally, Collins identifies the historically informed differences between styles of treatment (a self-help and total abstinence model in the U.S., compared to a harm reduction and public health model in the U.K.) as another reason the transplantation did not ultimately succeed.[32]

Some have argued that the failure of drug courts in the U.K. resulted from officials borrowing only elements of the U.S. model in a piecemeal fashion, rather than transplanting the American model wholesale. Collins takes a different view, arguing that more comprehensive attempts, such as found in the West London Drug Court, "only exacerbated rather than ameliorated" the fundamental tensions between the two systems.[33] Indeed, such efforts made more evident "the inescapable incongruence between a magistrate system and a therapeutic justice model."[34] These differences, Collins concludes, are simply not ones "that can be overcome without a major adjustment to the criminal justice system in England and Wales."[35]

When I visited the West London drug court in June and July of 2006, the incongruities between the American model and the British system were readily apparent. Arguably the West London drug court, presided over by District Judge Justin Philips, was more like an American drug court than any previous iteration in the U.K. There was even a degree of local level initiative. Judge Philips had

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31 Highlighting arguments set forth in *Legal Accents, Legal Borrowing* concerning the cultural embeddedness of law, Collins writes, "This insight has had major implications for the English experiment with, and the ultimate abandonment of, the 'Dedicated Drug Court.'" *See* Nolan, *supra* note 1. *See also* COLLINS, *supra* note 29, at 100.

32 *See* COLLINS, supra note 29, at 116–19 (Following a review of these various impediments to a simple transfer, Collins asserts, "Although there is frequent rhetorical refrain of adapting drug courts to local needs, the reality is much more complex and the odds of successful implementation are frequently weighted again novel interventions" at 118.).

33 *Id.* at 109.

34 *Id.* at 118.

35 *Id.*

read about the "donut court" in Florida—likely the Fort Lauderdale drug court, where fresh donuts were awarded to clients who successfully complied with program requirements—and was inspired by what he saw. Judge Philips was an enthusiast for the model and interacted with drug court clients in a personal and expressive style. He also tried to make the court more judge-led rather than probation-led, as is more typical in U.K. district or magistrate courts.

Judge Philips would dress down—literally change his clothes—for his drug court sessions. As he explained to a client during one drug court session, "I'm wearing this nasty [yellow, short-sleeve] shirt because it's the color of urine when it's got cocaine in it." Using colloquial language, he encouraged participants to "stay away from mates who are using." During one session, Judge Philips had a somewhat tense discussion with a pregnant woman who was still testing positive for cocaine. He thought she should abort her baby, because, as he put it, "the last thing I want is a baby born addicted." She clearly did not want to terminate the pregnancy and was not convinced her continuing drug use would adversely affect her child. During a later interview, when I noted that the client appeared to want to keep the child, Judge Philips responded, "Yes, but she's got to give it up." His attitude and his instructions to the client are indicative of the expanded power and discretion this kind of court can give to a judge.

It was evident, that Judge Philips's efforts irritated the system. Probation bucked against his demands, and clients were not always comfortable with his personal, interactive, and interventionist style. They seemed surprised when he tried to initiate physical contact. "I've got no problem," Philips told me, "if someone's done well, whether it's a woman or a man, in giving them a hug and a kiss." Some clients, however, did seem uneasy with this behavior, as did others working with the court. During my first visit to the court, a staff worker quietly confided in me that the program "wasn't working." During another visit, a second judge who also presided over the West London drug court, admitted that in British culture, "there is still a lot of reserve," which she viewed as inhibiting the transferability of some of the more therapeutic qualities of the American drug court model.

It is unsurprising, then, that when Judge Philips retired in 2014 there was little effort to keep the DDC going. The lesson to be learned from the closing, as one British commentator observed, is "that in our centralized court system, innovation is not sustainable

on the basis of the enthusiasm of one, vocal judge." Failure to sustain the West London drug court also demonstrates "how resistant some parts of the system are to the specialist court model."[36]

From the beginning of the transplantation process, it was evident there were defining features of the British system and its legal culture that would resist this American-grown legal innovation. To use a horticultural metaphor again, more work would need to be done to prepare the soil, even change the overall climate, for the imported plant to take root and flourish. Collins offers a more mechanical image to explain the same phenomenon: "Although perhaps well-intentioned, the U.K. case tells a story of importing trains to a country with the wrong type of tracks. Ultimately, they will not connect with and run on the national infrastructure."[37] Thus, instead of altering the tracks of Britain's extensive rail system, U.K. officials chose essentially to reject the American-manufactured train instead.

2. Irish Drug Court: A Legal Irritant

If the fate of drug courts and other problem-solving courts in the U.K. can be characterized as a rejection of the American grown legal product, the Irish drug court, to borrow Guenther Teubner's depiction of the effects of legal borrowing, is more aptly characterized as an ongoing "legal irritant."[38] The Dublin drug court's history and implementation usefully illustrate the deliberative quality of non-U.S. legal accents. Although the idea of an Irish drug court was first proposed back in 1997, the program did not become an established feature of the Irish court system in Dublin until 2006.

Irish officials took years to set up their program, during which time they investigated drug courts in other countries, dialogued with the various stakeholders who would participate in the new program, and tested the court through a 5-year pilot scheme. During this process, a consulting American drug court judge gave input to Irish practitioners, urging them to move forward quickly: "The

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36 *Has the West London Drugs Court Closed and Does it Matter?*, Transform Just. (June 10, 2014), http://www.transformjustice.org.uk/has-the-west-london-drugs-court-closed-and-does-it-matter/; *see also What to Learn from the Success of the Family Drug and Alcohol Court*, Transform Just. (Sept. 12, 2014), http://www.transformjustice.org.uk/what-to-learn-from-the-success-of-the-family-and-drug-court/.

37 *See* COLLINS, *supra* note 29, at 100.

38 Gunther Teubner, *Legal Irritants: How Unifying Law Ends up in New Divergences* in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 417–41 (Peter A. Hall & David Soskice eds., 2001); *See also* Nolan, *supra* note 1, at 37–40.

mantra of drug court judges in America is 'JUST DO IT!'" Ultimately, this is advice the Irish would not follow.[39]

Among the features of the American-styled court that have not resonated with the Irish judges is the idea of "therapeutic jurisprudence," a popular legal theory among American problem-solving court judges. It's also a theory that has significant cultural resonance in American society. Just as Tocqueville and Beaumont saw religion as a dominant and influential cultural meaning system in their time, a therapeutic sensibility deeply influences a number of American state institutions, including the criminal justice system, today.[40] It does so in a manner not dissimilar to the salient role religion once played in American life.[41] In my earlier work, I found the Irish had "little sympathy with (or even knowledge of) therapeutic jurisprudence."[42]

This is a point that Irish scholar Shane Butler also found in his more recent exploration of the state of the Irish drug court. A common sentiment among those interviewed in his study was that "the concept of therapeutic jurisprudence had not been explicitly articulated in Ireland."[43] One judge was not even aware of the concept—"'Therapeutic jurisprudence': do they call it that?"—This judge found the very notion problematic, "No, we're not therapists. We don't have the training and it would be foolish of us to take on that role."[44] Not only are American judges much more familiar with Therapeutic Jurisprudence (hereinafter "TJ"), some don't even mind being referred to as a "therapeutic judge."[45] On this point, Butler states that, "unlike the American experience, the Irish drug court was an essentially practical venture with little or no articulation or promotion of the therapeutic jurisprudence concept."[46]

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39 *See* Nolan, *supra* note 1 at 110–11.

40 JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END 77–78 (New York Univ. Press, 1998).

41 PHILIP RIEFF, THE TRIUMPH OF THE THERAPEUTIC 249, 255 (Univ. of Chicago Press, 1966). (Rieff, for example, observes the process by which "pastors of the older dispensation" have been replaced by the psychoanalyst, who has assumed "the role of a 'secular spiritual guide.'" As Rieff puts it, "the professionally religious custodians of the old moral demands are no longer authoritative. . ." Replacing them are the psychiatrists and psychologists of the new therapeutic ethic.)

42 *See* Nolan, *supra* note 1, at 131.

43 Shane Butler, *The Symbolic Politics of the Dublin Drug Court: The Complexities of Policy Transfer*, 20 DRUGS: EDUCATION, PREVENTION AND POLICY 5, 9 (2013).

44 *Id.*

45 NOLAN, *supra* note 21.

46 Butler, *supra* note 43.

Butler's interviews also demonstrate that the top-down nature of the program and its initiation has served as a source of irritation. In other words, though the model was politically popular, in many instances there was little local buy-in by the various stakeholders. One judge, with whom Butler spoke, acknowledged that the attempt was to adopt "the American model hook, line and sinker . . . ."[47] However, there was a sense that the model was enthusiastically and externally hoisted onto a system that was far from fully receptive to it. One senior civil servant, for example, described the court as "something that was badged and promoted as a brave new world, a new start."[48] According to another participant, the Irish judges would have preferred a "beefed up Probation Service" rather than a full-scale drug court. A health worker observed that the judges "didn't need a bloody court – a specialist court." Rather, the judges were "capable of handling these things," within their regular court operations, and didn't need "this very expensive, specialist system."[49]

Based on interviews with various actors in the Dublin drug court, Butler concludes, "the dominant perspective articulated by respondents was that the importation of the drug court model from the USA to Ireland was a political initiative about which they were skeptical."[50] That is, the new court program was viewed as an attempt to adopt a politically popular program—one originating in a particular legal cultural context—that did not easily transfer to the Irish situation and, in fact, exacerbated tensions between various stakeholders in the system. A probation manager observed that in the course of the transplantation, "the underlying issues, including the underlying philosophy, weren't really examined very closely."[51] A psychiatric consultant agreed and further argued that the model had been largely rejected stating that "someone had gone away, seen the concept, transplanted it into the Irish situation, and that the transplant was rejected—due to a lack of immune suppression!"[52]

In Ireland, however, the Dublin drug court has not yet been fully or formally rejected, though it has come very close. Following several poor evaluations of the court, in 2009 the Secretary Gen-

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47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 10.

52 Butler, *supra* note 43, at 10.

eral of the Department of Justice described the Dublin drug court as a "well intentioned experiment that has failed and should now be ended."[53] In spite of this declaration, the court was given another chance. Thus, rather than shutting down, it had, in Collins' words, a "near-death experience."[54] The court arguably persists as an ongoing source of irritation. Or as Butler puts it, "unresolved tensions" continue "to have a negative impact on the ongoing delivery of the drug court model[ ]" in Ireland.[55]

In particular, the system places unwelcome demands on health services and exacerbates tensions between "the health system and the justice system[s]" resulting in "a very difficult relationship, almost to this day . . . ."[56] During my visits to the Dublin drug court in the mid 2000s such tensions were evident. During a pre-court meeting in 2004, for example, the behavior of a female client was discussed. She had evidently gotten pregnant twice and miscarried twice. A nurse in the program was worried the female client would get pregnant again. During a pre-court team meeting, the nurse encouraged the judge to instruct the client to go on birth control in open court. The judge objected. Evincing the sort of personal restraint noted above, the judge stated, "[i]t's not the function of the judge to tell someone to receive contraception . . . I don't think it should be said in court."[57]

In another case, the same judge was encouraged to deduct points from a client who allegedly shoplifted. Again, the judge objected to making such a judgment and imposing such a penalty without affording the client normal due process opportunities. In general, this judge objected to features of the court that allowed him to have information about defendants and make judgments without hearing the defendants. He found such arrangements potentially "patronizing" and in violation of "a sense of natural justice."[58] Thus, as Butler observes, tensions were observable almost from "the start of the Dublin drug court" and "[continue] to plague

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53 John Collins, *The Irish Experience: Policy Transfer from US Drug Court*, *in* RETHINKING DRUG COURTS: INTERNATIONAL EXPERIENCES OF A US POLICY EXPORT 51, 66 (John Collins et al. eds., 2019) (quoting Butler, *supra* note 43, at 7).

54 *Id.* at 65

55 Butler, *supra* note 43, at 10.

56 *Id.*; *See also* Hilda Loughran, et al., *Practice Note: The Irish Drug Treatment Court*, 33 ALCOHOLISM TREATMENT Q. 82, 91 (2015). Loughran, et al., writes of the difficulties in reconciling the demands of "two powerful and influential institutions of the state, health and criminal justice."

57 NOLAN, *supra* note 1, at 131.

58 *Id.*

its ongoing operation."[59] A drug court supervisor recently described the court as, "frustratingly stuck" in its inability to get clients to move through the final stages of the program.[60] Between 2001 and 2009, for example, of the 374 referrals to the program, only 200 entered drug court, and of those 200, only 29 successfully graduated.[61]

In sum, Collins concludes, "[t]wo decades after the Working Group convened to examine the drug court model, and more that 15 years since operations proper began, the DDTC [Dublin Drug Treatment Court] has failed to provide a viable model for Ireland."[62] In other words, as in the U.K., the Irish rail system simply has not been able to take on the new American train. Replacing an entire track system would be prohibitive and unimaginable. Or, as Collins puts it, "[i]t is not currently conceivable that it can be made to work absent revolutionary changes across relevant institutions, accompanied by a significant increase in funding."[63]

II. A Cautionary Tale

The drug courts experience (and problem-solving courts more generally) in the U.K. and Ireland, thus, provide a lesson about the difficulties of legal transplantation. As observed by Tocqueville and Beaumont nearly two centuries ago, both cultural and structural factors must be weighed carefully in contemplating a legal transplant. Without such careful considerations, a forced transplant could cause injury or irritation to the importing system. Collins recommends that officials thinking about the transplantation of problem-solving courts to other countries should heed the sort of warnings offered by Tocqueville and Beaumont and learn from the experience of drug courts in the U.K. Collins states "[t]he lessons of the UK's failed experiments with drug courts, thus far, provide a cautionary tale to other governments embarking on the model. . . . in different legal, cultural and social backgrounds than the US context that birthed it, success is far from guaranteed, or even

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59 Butler, *supra* note 43, at 10.

60 Conor Gallagher, *Drug Treatment Court: A Failed Experiment Imported from the US?*, Irish Times (June 24, 2019), https://www.irishtimes.com/news/ireland/irish-news/drug-treatment-court-a-failed-experiment-imported-from-the-us-1.3934948 (quoting Drug Court Supervisor Tom Ward).

61 Loughran et al., *supra* note 50, at 89; *See also* Butler, *supra* note 43, at 8.

62 Collins, *supra* note 53, at 72.

63 *Id.*

likely."[64] He advises "countries seeking to emulate this model around the world," to consider "key socio-cultural and legal conditions" as "part of the arithmetic."[65]

Problem-solving courts have now entered into a second wave of legal transplantation, expanding to countries in Latin America and the Caribbean. Drug courts, for example, have been implemented in Brazil, Chile, and Mexico. Furthermore, new pilot programs have been initiated in Argentina, Panama, and Costa Rica, among other Latin American countries. Similarly, the Caribbean, Bermuda, Jamaica, and the Cayman Islands have started drug courts, and other countries—such as Trinidad, Barbados, and Tobago—are beginning to test them out.[66] In observing this second wave of problem-solving court borrowing, at least some are paying attention to the cautionary words offered by Collins and others.

In a report published in October 2018—which is largely critical of the U.S. drug courts—authors Rebecca Schleifer, Tania Ramírez, Elizabeth Ward, and Carol Watson Williams, see significant problems with the transfer of drug courts to Latin America and the Caribbean.[67] In their examination of the U.S. drug courts, Shleifer, et al., observe that the U.S. courts are less successful than advertised: "[W]e found that drug courts, as implemented in [the United States], are a costly, cumbersome intervention that has limited, if any, impact on reducing incarceration."[68] John Collins observes much of the same, "[w]e've looked at drugs courts worldwide and found them to be extremely unconvincing . . . . These are paraded as wonderful, life-saving interventions which produce miracles, but the evidence just isn't there."[69]

In addition to questioning the efficiency of drug courts, Shleifer et al., observe that transplanting these programs are "problematic . . . because the very specific social, economic, and political context of Latin America and Caribbean countries immediately complicates the adoption of public policies designed by

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64 Collins, supra note 29, at 119.

65 *Id.* at 99.

66 Teresa García Castro, *Groundbreaking Report Highlights Dangers of Exporting Drug Courts to Latin America and the Caribbean*, ADVOC. FOR HUM. RTS. AM. (Dec. 10, 2018), https://www.wola.org/analysis/dangers-of-exporting-drug-courts/.

67 REBECCA SCHLEIFER ET AL., SOC. SCI. RESEARCH. COUNCIL, DRUG COURTS IN THE AMERICAS: A REPORT BY THE DRUGS, SECURITY AND DEMOCRACY PROGRAM. (Lisa Ferraro Parmelee & Clare McGranahan eds., 2018), https://s3.amazonaws.com/ssrccdn1/crmuploads/new_publication_3/DSD_Drug+Courts_English_online_Final.pdf.

68 *Id.* at 113.

69 Gallagher, *supra* note 60.

other, more developed countries with different legal systems."[70] Consider, for example, the case of Brazil, one of the first Latin American countries to experiment with drug courts, which have typically been called TJ courts in Brazil. Brazilian scholar Luiz Guilherme Mendes de Paiva observes that although Brazil has created a number of these TJ courts, some having been launched in the early 2000s, today "few drug courts remain in place."[71]

As occurred in the U.K. and in Ireland, the failure of a successful transfer is, in part, attributable to significant differences between the American model, from which the courts were borrowed, and the unique qualities of the Brazilian legal culture. De Paiva identifies several important inhibitory factors, including Brazil's civil law (in contrast to common law) orientation, which requires prosecutors to pursue cases that come to their attention. Such prosecutorial requirements limit the scope of cases that can be redirected to TJ courts.

Certain public health laws have also presented problems. In Brazil, it is questionable whether drug treatment, not publicly available to all, can legally be offered as "a judicial bargain," as often occurs with American drug courts.[72] Finally, de Paiva notes the reluctance among Brazilian judges and other legal actors to assign clients to drug court when less cumbersome and less time consuming alternatives are already available through other non-custodial options.[73] In Brazil, those eligible for assignment to drug court would not typically face a custodial sentence, thus, making the program a less attractive option. Given such limitations, drug courts do not represent a plausible antidote to the overincarceration problem in Brazil.[74]

In Brazil, as in other Latin American countries, the lack of available resources for effective treatment is also a major concern.[75] Shleifer et al., even note evidence of "abuse and human rights violations by treatment providers" in some of the importing countries.[76] Teresa García Castro specifically notes problematic treatment practices among some providers, including the "use of

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70 SCHLEIFER ET AL., *supra* note 67, at 3.

71 Luiz Guilherme Mendes de Paiva, *Drug Policy, Therapeutic Jurisprudence and Criminal Justice in Brazil,* in RETHINKING DRUG COURTS INTERNATIONAL EXPERIENCES OF A US POLICY EXPORT 75, 89 (John Collins et al. eds., 2019).

72 *Id.* at 86.

73 *Id.*

74 *Id.* at 84–85.

75 *Id.* at 84; SCHLEIFER ET AL., *supra* note 67, at 4.

76 SCHLEIFER ET AL., *supra* note67, at 3.

techniques that cause severe physical and mental harms, the use of isolation for long periods, abusive treatment, and forced labor without economic remuneration."[77] Additionally, as was the case in England, Ireland, Scotland, Canada, and Australia, there is less sympathy in Latin America and in the Caribbean with the total-abstinence based treatment model promoted in the U.S. courts, while there is greater sympathy with a harm reduction philosophy.[78]

If Brazil is an example of a problem-solving court transplant that did not take, Chilean drug courts are an example of an early Latin American transfer that has, so far, been more successful. The first Chilean drug court was piloted in 2004. Two more pilot programs were started in 2005 and 2006. Plans to roll out drug courts nationally began in 2007 and, as of 2016, there were 29 drug courts operating in ten of Chile's fifteen regions.[79] As has been the case with the international borrowing of problem-solving courts in general, the "United States was a key player in the development and implementation of Chile's drug courts . . . ."[80]

Though the transfer of drug courts to Chile has been more successful than in Brazil, there are still concerns about the "legal basis for the program," as well as the quality and timeliness of treatment.[81] Because of "overcrowding in both public and private centers," treatment for program participants has often been delayed, even to the point that the "conditional suspension of the criminal proceedings" have expired while clients "waited for the treatment."[82] In spite of these limitations, Chilean drug courts have spread and have even been developed for juvenile offenders, such that by 2017 there were 28 juvenile drug court programs in operation.[83]

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77 Castro, *supra* note 66.

78 SCHLEIFER ET AL., *supra* note 67, at 3.

79 Tania Tlacaelelt Ramírez Hernandez, *Drug Courts in Latin America: An Adequate Response*, *in* DRUG COURTS IN THE AMERICAS: A REPORT BY THE DRUG, SECURITY AND DEMOCRACY PROGRAM 38, 39–40 (Lisa Ferraro Parmelee & Clare McGranahan eds., 2018).

80 *Id.* at 40.

81 *Id.* at 42, 46.

82 *Id.* at 46.

83 *Id.* at 40.

III. Conclusion

Given the different outcomes presented in the Brazilian and Chilean drug courts—the earliest experiments with problem-solving courts in Latin America—it is difficult to predict what will be the ultimate outcome of the transplantation (or attempted transplantation) of problem-solving courts to Latin American and Caribbean countries. Again, only time will tell whether the importation of these courts will result in further homogenization, a hybridization that synthesizes elements of the U.S. model with defining features of the importing local legal culture, an ongoing source of legal irritation, or a full rejection of the model. However, it is safe to conclude, heeding the insights of Tocqueville and Beaumont—and observing the lessons from Ireland and the U.K.—that practitioners in the importing countries do well to understand the cultural embeddedness of American-styled problem-solving courts. Given important structural and cultural differences, importers may wish to consider what might be the "injury," to use Tocqueville and Beaumont's term, or the "irritation," to borrow Teubner's, that such an importation might cause.