

## **BOOK REVIEWS**

Edited by Stephan Kinsella\*

**JAMES L. NOLAN, JR. *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT*. PRINCETON, N.J.: PRINCETON UNIVERSITY PRESS, 2001. Pp. 264.**

The first court-directed drug treatment program, or drug court, was created in Dade County, Florida, in 1989 as an experimental diversionary alternative to criminal sanctions. Within a dozen years, the model had been adopted, with various modifications, in approximately 800 jurisdictions. The book's stated purpose is to understand this drug court

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 process of criminal adjudication and on social and legal understandings of justice. (p. 13)

Indeed, the rapid spread of drug courts is quite remarkable,<sup>1</sup> stimulating a number of interesting questions. Beyond asking why this new approach to drug policy has been widely implemented as quickly as it

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<sup>1</sup>Rapid diffusion of a new court-based institution is certainly not unprecedented in American criminal justice history. Consider the spread of juvenile courts, which started in Chicago in 1899, and were found in all but three states by 1920, subsequently disappearing in the 1970s and 1980s. See Nolan, *Reinventing Justice*, pp. 171–76.

Nolan goes to great length trying to suggest that while drug courts are similar to these juvenile courts, they still are fundamentally new and different. In fact, however, it appears that there are policy cycles or institutional cycles, rather than the smooth, continuous policy evolutions that Nolan sets up as a straw man. Thus, the link is probably stronger than Nolan prefers to admit.

has, for instance, we might ask if drug courts effectively achieve their objectives, if those objectives are appropriate, and what impacts and implications are likely to follow from this development? Nolan answers some of these questions, although often unsatisfactorily, while intentionally ignoring others.

### AN OVERVIEW OF THE BOOK

Consider Nolan's explanation for government policies toward drug markets and drug consumption in general, from Chapter 2. His discussion focuses on "different systems of moral understanding" which he suggests have "informed social responses to drug use in varying ways over time" (p. 14). He considers the religious tenets against drug use, what he calls the "therapeutic paradigm," and the utilitarian orientation of Americans. However, Nolan's story of competing moralities driving the evolution of drug policy misses the mark. An examination of competing interests does a much better job explaining historical developments in drug policy.<sup>2</sup> While some advocates of drug policy hold strong "moral" beliefs that are used to "justify" the policy they advocate, it does not follow that these moral beliefs of the time are the key factors that explain the policies which do evolve. For one thing, what people believe to be "moral" often is a rationalization of self-interested behavior that reduces decision-making and psychic costs, and moral rhetoric becomes the common political language even though the underlying reasons for policy are the interests of politically powerful individuals and groups.<sup>3</sup>

Nolan turns to the evolution of drug courts themselves in Chapter 3, contending that they can be seen as part of a general movement toward treatment as a replacement for punishment; for instance, he cites the earlier "Treatment Alternatives to Street Crime" (TASC) programs that started in 1972 (p. 44). Those directly involved with the programs think drug courts are great because they believe that they are actually accomplishing good things, such as ending drug use and reducing recidivism rates (a claimed result that is now being questioned). Some

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<sup>2</sup>See, for instance, Mark Thornton, *The Economics of Prohibition* (Salt Lake City: University of Utah Press, 1991); and David W. Rasmussen and Bruce L. Benson, *The Economic Anatomy of a Drug War: Criminal Justice in the Commons* (Lanham, Md.: Rowman and Littlefield, 1994).

<sup>3</sup>Bruce L. Benson, "Endogenous Morality," (paper presented at the Austrian Scholars Conference, Auburn, Ala., March 2002).

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stress that these courts are also punitive: “a therapeutic sensibility can actually translate into very tough, harsh, intrusive forms of legal social control” because the judge can invoke the coercive powers of the criminal justice system to “encourage” acceptance of treatment. In other words, Nolan sees the drug courts in the same light as he sees drug policy itself, as being legitimized from various moral perspectives including retribution, utilitarian objectives (e.g., deterrence, rehabilitation), and therapy.

However, I see it from the interest-group perspective, where the key interest groups include judges (who readily admit that they get much more utility from their work in drug courts than from the trials and sentencing processes that they are generally involved in) and those who want to keep drug policy in the criminal justice system rather than, say, in public health (e.g., non-coerced treatment) or education, or in the hands of private individuals. Note in this context that, while Shakespeare may be correct in suggesting that “all the world is a stage,” the “dramaturgical model for interpreting social life” that is adopted in Chapter 3 (on “Therapeutic Theater”) really adds very little to our understanding of drug courts (or most anything else). Most of what is important in this chapter could be explained by considering the incentive and constraints facing the “actors” in the process, including the transactions costs associated with monitoring and measuring bureaucratic activities.<sup>4</sup>

Nolan explains, in Chapter 4, that the drug court movement actually is an example of judicial activism that has come to dominate so many constitutional courts during the twentieth century, if not earlier. For those who believe that limited constitutional governments can be maintained, the popularity of drug courts among judges should be very disturbing. The common law tradition presumably is one of judicial restraint. Rather than legislating, judges are suppose to discover the relevant law by looking at precedent, at statutes, or at the constitution. Increasingly, however, judges are becoming legislators—un-elected and largely unconstrained by even the imperfect constraints facing legislators who must compete for election and reelection. And the drug court

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<sup>4</sup>See, for example, Albert Breton and Ronald Wintrobe, *The Logic of Bureaucratic Control* (Cambridge: Cambridge University Press, 1982); and for an application of the Breton-Wintrobe analysis to drug policy analysis, see Bruce L. Benson, David W. Rasmussen, and David L. Sollars, “Police Bureaucrats, Their Incentives, and the War on Drugs,” *Public Choice* 83 (April 1995), pp. 21–45.

movement demonstrates that the increased activism that characterizes state and federal supreme and appellate judges—who have interpreted out of existence many of the constitutional constraints that used to be accepted—is spreading to the trial court level:

Like the romantic Supreme Court judges, the drug court judges have jettisoned traditional adjudicative restraints, finding them “too confining, boring, unrewarding, [and] insufficiently responsive to social problems.” (p. 94)

Drug court judges are simultaneously legislating, judging, and executing law within their jurisdictions. Nolan reports that one judge contended that it is “okay to be inconsistent,” another indicated that “you just cannot have absolute rules,” and another stressed that “As long as whatever you do is designed to get them off drugs and put them back out on the street in a position where they can fight using drugs, whatever you do to accomplish that is fine”; such views are widespread among drug court judges (p. 103).

Nolan does not raise such criticisms, although in the last page of the chapter, he does cite one individual who stated, “I find the notion that judges need excitement to be a very frightening one. . . . If the need for excitement is what drives changes such as these, what will they do next” (p. 110). What they are likely to do next is extend the drug court model to other crimes. Indeed, as Nolan explains in Chapter 6, this is already occurring.<sup>5</sup> Drug court advocates see drug crimes as “diseases” driven by “low self esteem,” and while Nolan recognizes that this assumption is of “questionable validity” (p. 139), it is motivating an expanded scope for therapeutic approaches to crime, as many drug courts are now “treating” non-drug (e.g., property, violent) criminals as well, alleging that they are also driven by low self-esteem.

The reduced emphasis on “guilt” that comes with this approach also fits into a general trend that has developed in the United States, but which Nolan does not recognize. Criminals are seen by many who “study” crime as products of their environment with no control over their actions. This “excuse-making industry,” to use Bidinotto’s term, has had the effect of undermining individual responsibility and creating

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<sup>5</sup>I shall not discuss chap. 5 on “Drug Court Storytelling,” since it is more in line with chap. 3 than chap. 4, although chaps. 3 and 5 provide an interesting description of drug court process, if one does not get too turned off by the theater metaphor.

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an environment that fosters and even excuses crime,<sup>6</sup> as criminals cite such arguments to rationalize their behavior. Almost every criminal now claims to be a victim, free of blame for their actions. Advocates of “therapeutic justice” described in the last two chapters of Nolan’s book appear to be part of Bidinotto’s “industry.”

In Chapter 7, Nolan discusses the concepts that have dominated the philosophical debate about justice (retribution, utilitarian objectives like rehabilitation and deterrence) and how these concepts appear to have interacted in the criminal justice system. Again, the emphasis on philosophy rather than interests may be misplaced, but in this case, that is less of a problem because his objective is to contrast the traditional concepts of justice with what he sees as an alternative paradigm: “therapeutic justice.” Chapter 8 describes this paradigm. The contention is that treatment is “just” so criminal justice policies (indeed, laws in general) should be evaluated with regard to their therapeutic and anti-therapeutic qualities (p. 185). Therefore, when critics raise arguments based on other concepts of justice, the response is that the argument is “meaningless” because justice is about treatment, not retribution, deterrence, or whatever the critic sees as important (p. 208).<sup>7</sup>

### A LIBERTARIAN ALTERNATIVE

Drug courts keep the criminal justice system directly involved in drug policy. In fact, the approach provides a new justification for criminalization of drug sales and use. However, judges who have correctly recognized the system’s massive failure and decided to develop drug courts could be advocating decriminalization or legalization in order to get the criminal justice system out of the drug control business. In fact, that is precisely what some judges have chosen to do.<sup>8</sup> This is the libertarian view, of course. Individuals should be free to do as they please, given that others are not harmed, even if their actions cause substantial harm to themselves.

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<sup>6</sup>Robert J. Bidinotto, ed., *Criminal Justice? The Legal System vs. Individual Responsibility* (Irvington-on-Hudson, N.Y.: Foundation for Economic Education, 1994).

<sup>7</sup>I must admit that I frequently scribbled “BS” in the margins of this chapter.

<sup>8</sup>See for example, James P. Gray, *Why Our Drug Laws Have Failed and What We Can Do about It: A Judicial Indictment of the War on Drugs* (Philadelphia: Temple University Press, 2001).

Advocates of prohibition policies generally contend, from a utilitarian perspective, that harms are imposed on others. Such claims are examined elsewhere and most are rejected, but even though some spill-over harms arise, prohibition policies are not warranted from a utilitarian perspective because their implementation imposes greater costs than those caused by drug consumption.<sup>9</sup> The abject failure of the drug war and alcohol prohibition before it should make such policies unattractive even to those who have adopted the “therapeutic perspective” and advocate saving drug consumers from themselves; there are alternatives, after all, such as privately produced information dissemination or treatment.

Police interest, not the “public interest,” seems to be at the root of the drug war.<sup>10</sup> Thus, whether drug policy is examined from a utilitarian perspective of “efficiency” or from a libertarian perspective emphasizing individual freedom, a prohibitionist policy cannot be justified,<sup>11</sup> whether that policy involves punishment or therapy imposed through a drug court.

### **CONCLUSIONS: SHOULD JUSTICE BE THERAPEUTIC, RETRIBUTIVE, UTILITARIAN, OR RESTORATIVE?**

Nolan differentiates between “therapeutic justice,” retributive justice, and various utilitarian objectives of criminal justice (e.g., deterrence, rehabilitation), essentially advocating the first. From a libertarian perspective, of course, individuals should not impose costs on victims, and when they do so, they should be held responsible: justice demands that action is taken to “reflect those negative consequences of harm and injury back onto the criminal.”<sup>12</sup> Retributive justice suggests that when

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<sup>9</sup>See for example, Jeffrey A. Miron and Jeffrey Zweibel, “The Economic Case Against Drug Prohibition,” *Journal of Economic Perspectives* 9 (Fall 1995), pp. 175–92; Thornton, *The Economics of Prohibition*; Rasmussen and Benson, *The Economic Anatomy of a Drug War*; and Steven Wisotsky, “A Society of Suspects: The War on Drugs and Civil Liberties,” *Cato Policy Analysis*, no. 180 (Washington, D.C.: Cato Institute, 1992).

<sup>10</sup>Alfred Lindesmith, *The Addict and the Law* (New York: Vintage Press, 1965); Rasmussen and Benson, *The Economic Anatomy of a Drug War*, pp. 127–32; and Benson, Rasmussen, and Sollars, “Police Bureaucrats, Their Incentives, and the War on Drugs.”

<sup>11</sup>Thornton, *The Economics of Prohibition*.

<sup>12</sup>Bidinotto, *Criminal Justice?* p. 194.

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an individual violates another individual's rights, the costs should be reflected back onto the criminal, but doing so through publicly-imposed punishment also "reflects negative consequences" onto taxpayers, and, more significantly, fails to reflect the negative consequences off the victim. In fact, victims suffer the costs of the crime itself along with additional costs that arise due to cooperation with police and prosecutors.<sup>13</sup> Thus, restitution should be a fundamental right as part of the "structure of liberty."<sup>14</sup>

Rothbard derived the right to restitution from the right to punish (i.e., retribution), which in turn derives from the right to self-defense, and he contends that the fundamental right of the victim is to exact proportional punishment, so restitution arises only if the victim is willing to accept payment in lieu of punishment.<sup>15</sup> Every restitution-based system that has existed probably evolved from a situation such as the one Rothbard envisioned. However, individuals also found that unilateral exactions of punishment were either very risky or impossible because of differences in the victim and offender's relative capacities for violence. Thus, reciprocal mutual support groups evolved to voluntarily assist members' pursuit of justice.<sup>16</sup> Under these circumstances, legal issues no longer involved just the victim and the offender, and since violent retribution can be quite costly to others in such groups, rules evolved which reordered the primacy of rights to punish and to receive restitution. By voluntary agreement, victims could not exact physical punishment unless and until the offender refused to pay fair restitution.<sup>17</sup>

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<sup>13</sup>For a discussion of such costs, see Benson, *To Serve and Protect*, pp. 50–72.

<sup>14</sup>Randy E. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Clarendon Press, 1998), pp. 156–60.

<sup>15</sup>Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982), pp. 85–95.

<sup>16</sup>For primitive law examples, see Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Policy Studies, 1990), pp. 11–21. For a discussion of such developments in medieval England, see Benson, *Enterprise of Law*, pp. 21–30; and Benson, *To Serve and Protect*, pp. 198–205. Regarding medieval Iceland, see David Friedman, "Private Creation and Enforcement of Law: A Historical Case," *Journal of Legal Studies* 8 (March 1979), pp. 399–415. For medieval Ireland, see Joseph R. Peden, "Property Rights in Celtic Irish Law," *Journal of Libertarian Studies* 1 (1977), pp. 81–95.

<sup>17</sup>Benson, *To Serve and Protect*, p. 238.

In a restitution-based system, crime (perhaps more appropriately called intentional tort) should involve only intentional, non-consensual acts entailing the initiation of force, fraud, or coercion against another person, since only those acts justify pursuit of restitution. Thus, criminal law would not be able to victimize individuals who voluntarily consume drugs while imposing no cost on others, even if the alleged purpose of the criminal justice system's efforts is to provide therapy to the "criminal."<sup>18</sup> Drug courts would not exist if the purpose of law was to restore victims rather than to punish people who commit acts that politically powerful groups dislike.

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<sup>18</sup>For rights-based justifications for restitution, see Rothbard, *Ethics of Liberty*, pp. 85–95; Barnett, *The Structure of Liberty*, pp. 156–60; and Benson, *To Serve and Protect*, pp. 227–59. Even if such justifications are rejected in favor of utilitarian objectives, a focus on restitution should not necessarily be rejected. On this, see Benson, *To Serve and Protect*, pp. 260–318. Liberty, justice, and efficiency (including deterrence and rehabilitation) are complementary objectives if they are pursued through establishment of victims' rights to restitution.