`Doing Good with a Vengeance': : A Critical Assessment of the Practices, Effects and Implications of Drug Treatment Courts in North America

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What is This?
‘Doing good with a vengeance’:
A critical assessment of the practices, effects and implications of drug treatment courts in North America

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Abstract

‘Drug treatment courts’ (DTCs) are a new institution in North American criminal justice for dealing with drug offenders. There are currently two DTC pilot trials in implementation in Canada. Based on a ‘therapeutic jurisprudence’ approach, DTCs claim to rehabilitate rather than punish drug-addicted offenders, and thus to reduce drug use, recidivism and social cost. Given the current enthusiasm about DTCs, this article provides a critique of DTCs’ rationale, practices and implications from evaluative, social and legal perspectives. It focuses on the Canadian experience where possible. The analysis examines: the limitations of the evidence and methods behind the claims of DTCs’ effectiveness; the ontological and practical challenges of the proposed ‘bridging’ of punishment and treatment; the legal and penological implications of ‘therapeutic jurisprudence’ practices; as well as potential explanations for DTCs’ rise in popularity despite the limited evidence for their positive impact. The article concludes with reflections on the implications of DTCs for the government of drug use as deviance in contemporary social contexts, as well as for political efforts towards less punitive drug control. DTCs may reinforce the hegemony of punitive drug use control—partly by
coopting treatment strategies—and thus fundamentally protect the legitimacy of prohibition politics.

Key Words

Canada • coerced treatment • drug treatment courts • drug use • punishment

Thus it appears . . . that in begrudgingly offering medical care, the law stands at the bedside of the addict as a fumbling nurse with healing balm in one hand, and a primitive tomahawk in the other, unable to decide whether to attack the disease or punish its owner for having acquired it.

(A.M. Turano quoted in Lindesmith, 1940: 207)

Introduction

It has been recently declared that a ‘fundamental paradigm shift’ (Goldkamp, 2000: 924) has occurred in the way North American courts are dealing with drug offenders, through the introduction of so-called ‘drug treatment courts’ (DTCs). The phenomenon of DTCs first started emerging in the USA in the early 1990s, where there are now approximately 600 DTCs in operation (Hora et al., 1999; James and Sawka, 2000). Canada is now home to two experimental DTCs as well (in Vancouver and Toronto; see Anderson, 2001, La Prairie et al., 2002).

In simple terms, the rationale for the establishment of DTCs in the USA has been that traditional ways of dealing with drug offenders—primarily criminal justice interventions in the form of punishment—have been unsuccessful to a significant degree. It has been observed that, in fact, the criminal justice system has become a ‘revolving door for drug-using offenders’ (Longshore et al., 2001: 7). In conjunction with rapidly rising numbers of drug offenders over the past two decades, this situation has led to the phenomenon of ‘jail overcrowding’ and the explosion of related public expenditures. In light of persistent impressions of addiction being a disease in need of therapeutic interventions rather than punishment, a new approach was needed to ‘break the cycle of drugs and crime’ (Hora et al., 1999: 468; see also Bean, 1996).

The central ideological concept behind DTCs is that of ‘therapeutic jurisprudence’ (Wexler and Winick, 1991; Hora et al., 1999) or, in less friendly terms, ‘rehabilitative punishment’ (Boldt, 1998). This concept is based on the notion that drug-addicted offenders are ‘sick’, and thus the law’s and the criminal justice system’s main function is required as that of a ‘therapeutic agent’ of change (Chiodo, 2002: 57; see also Casey and Rottman, 2000). Instead of aiming for punishment as its central end, therapeutic jurisprudence purports to use the law to ‘solve problems’
(Gebelein, 2000). In other words, ‘therapeutic jurisprudence’ sets out to utilize the coercive potentials of the law in conjunction with methods of rehabilitation and treatment to facilitate and achieve therapeutic outcomes with offenders. Therefore, the law is used to both promote ‘the psychological and physical well-being of people it affects’ (Hora et al., 1999: 443) as well as to keep the ‘offender on the right track’ (Chiodo, 2002: 71). DTC proponents have translated this into an approach of ‘helping drug offenders escape from the revolving door lifestyle of drug abuse and incarceration’ in order to become ‘healed and reformed’ (Chiodo, 2002: 100; see also Goldkamp, 2000).

The DTC ‘movement’ in North America (Bean, 1996) has produced a wealth of largely supportive and enthusiastic literature, underscoring the popular nature of the ‘DTC innovation’ (Barton, 1999; Hora et al., 1999; Anderson, 2001). This literature furthermore features claims that DTCs are ‘successful’ as measured by their key objectives, i.e. reduction in the use of illegal substances, recidivism rates of offenders, as well as cost-savings (Bean, 1996; James and Sawka, 2000). DTCs are widely perceived as a ‘win–win’ situation for everyone involved, in that they claim to make great ‘impact on the lives of drug addicted...offenders, while simultaneously increasing the safety of communities and reducing the costs associated with lengthy incarcerations’ (Chiodo, 2002: 68). This self-assured perspective on the benefits of DTC has even led to assertions that the ‘critical questions’ about DTCs have shifted from assessing the basic ‘appropriateness and desirability’ of these institutions to how to ‘implement and operate them’ within the larger framework of the criminal justice system (Goldkamp, 2000: 928).

Yet, within this wave of enthusiasm about the ‘innovation’ of DTCs, a few voices—pointedly dismissed by DTC proponents as ‘skeptics, and there still are some’ (Goldkamp, 2000: 926)—have urged for a cautious assessment of the effects and implications of DTCs from various angles (Hoffman, 2000; Anderson, 2001; Boyd, 2001). The purpose of this article is to contribute to a more thorough and comprehensive assessment of the practices, effects and implications of DTCs. It will do so specifically by providing a critical examination of the rationale, evaluation methods and evidence, and the social, legal and political dynamics of DTCs. This will be done by synthesizing some of the significant reviews and assessments on specific aspects of DTCs, as well as related contemporary crime control phenomena that have been made by key North American and international scholars. This examination will be conducted from within the specific Canadian setting and will focus on the relatively new phenomenon of DTCs in Canada where possible. This is, in part, because there are some distinct differences between the Canadian and American context of DTCs that are worthwhile mentioning, and also because critical socio-legal scholarship focusing on Canada plays a rather negligible role in the international literature.
The rationale for DTCs

The effects of aggressively expanding punitive drug enforcement starting in the 1980s has been cited as one of the main rationales for the vigorous emergence of DTCs in the USA (Hora et al., 1999; Hoffman, 2000). The enforcement-centred ‘War on Drugs’ has sent large populations of drug offenders into the criminal justice system, and has led to an unprecedented increase in the number of offenders receiving long imprisonment sentences. This, in part, was fuelled by the establishment of ‘mandatory minimum sentences’ for drug offences. In the USA, there are over 1 million arrests for drug offences each year; over 500,000 individuals are in prisons or jails at any given moment for such offences and approximately 100,000 individuals go to prison or jail for drug offences per year (Tonry, 1998; Hora et al., 1999; Sentencing Project, 2002). Consequently, the proportion of drug law violators among federal prisoners in the USA increased from 25 per cent to 60 per cent over the past two decades (Sentencing Project, 2002). In that period, the average length of an imprisonment sentence for drug law violators in the USA rose from 55 months to 80 months, with many such offenders serving maximum prison sentences, and contributing to a situation of ‘jail overcrowding’ (Goldkamp, 2000: 943; see also Belenko, 1998). These figures inform the US-based rationale for DTCs as an urgently needed and promising tool to reduce the public expenditures for drug offenders serving long imprisonment sentences.

But does such a scenario and subsequent rationale for the establishment of DTCs hold in Canada as well? Canadian criminal justice statistics may suggest a rather different picture. First, it has become a popular fact to cite that the majority of offenders within criminal justice systems in Canada ‘have problems with substance abuse’ (Chiodo, 2002: 56; La Praire et al., 2002). However, these data remain vague on the nature of this ‘abuse’, and the causal relationship of this alleged ‘substance abuse’ with the specific offences that brought these offenders into the criminal justice system.

When one looks at the specific offence categories from which DTCs select their subjects (individuals charged with a drug offence involving cocaine or opiates), the Canadian sentencing picture indeed also looks very different from that of the USA. Through the 1990s, the rate of all drug offences was rather stable at around 60–65,000 offences a year. The number of recorded offences for narcotics like heroin or cocaine in Canada—cannabis offenders are not targeted by the DTC—have actually decreased (Tremblay, 1999). In 1996/7, only 13 per cent of offenders charged with a drug possession offence under the Controlled Drugs and Substances Act (CDSA) received a prison sentence. The median length of sentence for those receiving a prison sentence ranged from 30–60 days. Of those offenders charged with drug trafficking or importation, approximately two-thirds received an imprisonment sentence; the median sentence in these cases was four months (Tremblay, 1999). Many of the more severe offenders in the latter category, however, would not even be eligible for
diversion to DTC under current practices. It also needs to be considered that the length of sentences reported reflects ‘paper dispositions’; the actual length of sentence served in most cases ends up being considerably shorter. Moreover, there is no indication that the overall proportion of drug offenders in Canadian correctional facilities has substantially increased over the past decade. A snapshot of Canadian corrections trends has suggested that 9 per cent of inmates were drug offenders (Tremblay, 1999). It has furthermore been observed that there ‘has been a decrease . . . in the use of carceral sentences for drug offences’ in Canadian jurisdictions, i.e. Ontario, since 1996 (La Prairie et al., 2002: 1534).

Overall, the data presented may suggest that in Canada, DTCs appear to be a ‘solution’ to a supposed ‘increase’ of drug offenders in the correctional system that is not clearly supported by statistical evidence. While it cannot be dismissed that there are numerous drug offenders in the Canadian criminal justice system, there is no indication that prisons or jails are flooded with drug offenders or that ‘judges have continued to impose stiff sentences’ and that ‘imprisonment remains the sentence of choice’ (Chiodo, 2002: 61–2) for drug offenders as appears to be the case in the USA. These circumstances beg the question of ‘why DTCs in Canada?’. They, furthermore, must be taken into consideration when comparing the alleged system benefits of DTCs, specifically with respect to the criminal justice system (CJS) and other public expenditures (i.e. cost savings) in Canada.

The effectiveness of DTCs: what do we really know?

Throughout the rather large DTC literature, there is a strong sense of enthusiasm and conviction about DTCs’ ability to deliver on their ambitious promises of successfully treating drug offenders and subsequently keeping them from recidivating (Bean, 1996; Hora et al., 1999; Anderson, 2001). For example a Canadian commentator professed that DTCs ‘will continue to be a beneficial alternative to “regular” courts’, as they have been ‘increasing the safety of communities and reducing the costs associated with lengthy incarcerations’ (Chiodo, 2002: 68, 100).

However, a closer look at the existing DTC evaluation research literature suggests that, first, there is very limited evidence documenting DTCs’ superior effectiveness or cost-effectiveness over traditional interventions. Illustratively, a methodologically sophisticated evaluation study of a DTC in Arizona conducted by RAND concluded that participation in DTC ‘does not appear to have translated into meaningful reductions in drug use or recidivism’ (Deschenes in Hora et al., 1999: 530). Second, a considerable proportion of DTC evaluation studies are characterized by considerable methodological problems, posing fundamental questions with regards to the scientific validity of the data and findings generated. These circumstances have initiated one commentator to go as far as to suggest
that the overall evidence on DTCs’ effectiveness is ‘breathtakingly weak’ (Hoffman, 2000: 1497).

The key issues illustrating the state of limited effectiveness or research quality in DTC evaluations are the following:

1. **Limited programme retention**: Reviews of a few dozen evaluation studies conducted in the USA suggest that DTCs manage to retain around 40 per cent to 60 per cent of eligible offenders in DTC programmes for at least one year (Belenko, 1998; James and Sawka, 2000; Covington, 2001). This is a key indicator of limitations in the effectiveness of DTCs, especially when assuming that any positive intervention outcomes are linked to participation in the intervention. In practice, this means that about half of offenders selected into DTC diversion do not positively respond to the intervention or are expelled because they have violated explicit programme rules or conditions (these outcomes function as effectiveness indicators, i.e. drug use or criminal recidivism).

2. **No proper controls**: While numerous DTC evaluation studies operate with ‘control groups’, the meaningfulness of the operationalization of these controls is questionable. It is common practice to compare the behaviour and outcomes of DTC ‘experimental subjects’ to drug offenders who are either ineligible for DTC programmes (i.e. due to high risk status for drug use or crime or lengthy criminal records), or are premature drop-outs of DTC programmes (often due to expulsion for rule violations). When considering the fact that most DTC programmes very carefully select the ‘most treatable’ or lowest risk offenders (by so-called ‘skimming’ practices, see Goldkamp, 2000: 935; Shichor and Sechrest, 2001), it becomes evident that such comparisons introduce considerable dynamics of ‘self-selection bias’ (Covington, 2001: 374). These practices of comparing ‘not so bad apples’ with ‘very bad apples’ thus tend to lead to a strong skewing of evaluations by design in favour of the experimental intervention (DTCs). The standard methodological remedy to avoid any such fundamental self-selection biases would be to conduct randomized controlled trials (RCT). However, only a couple of randomized studies on DTCs have been conducted, and their results remain inconclusive for the overall empirical picture (Hora et al., 1999; Hoffman, 2000).

3. **No proper follow-up**: The overwhelming proportion of DTC studies limit their evaluation follow-ups to subjects (a) who started participation in the programme after being offered participation; (b) who successfully remained in the programme until the end of the evaluation period (thus not leaving or being expelled for non-response or non-compliance with programme rules); and (c) while under the supervision of the criminal justice system, and not into the post-intervention phase (see Belenko, 1998; Covington, 2001: 374). These selective evaluation practices, generally, limit the empirical focus of DTC evaluations to the selective pool of subjects who remain inside the DTC intervention. These retained subjects are—by default—complying with programme rules and thus effectiveness indicators (i.e.
court and treatment attendance, no major drug or crime relapse problems, etc.). Considering that DTC interventions lose approximately half of their subjects in the first year of programme participation (see point 1), this again introduces a substantial bias of self-selection into these evaluation practices in favour of the experimental intervention (which is quite common in the addiction treatment field generally, see Fischer et al., 2000). Only properly conducted ‘intent-to-treat’ study designs (following and drawing data from all subjects, including eventual drop-outs, who were offered participation in the intervention) would address this empirical follow-up problem.

4 No systematic cost impact studies: The ‘cost savings’ argument is central in propelling the prevalent enthusiasm about the DTC phenomenon, and ambitious projections have been made about the fiscal benefit potentials of DTCs (see National Association of Drug Court Professionals, 1999; James and Sawka, 2000). However, no empirically founded statements or conclusions can be made on the questions of cost–benefits or cost-effectiveness of DTCs because to date ‘no systematic analysis exists to determine whether drug courts generate cost-savings’ (Covington, 2001: 375; see also Hoffman, 2000: 1480).

The (ongoing) evaluation of the Toronto DTC can probably serve as a helpful illustration of some of the above-cited problems. Although the benefits and value of the Toronto DTC have been asserted in a rather definitive tone, claiming that it ‘reduces the high costs associated with imprisonment, it reduces drug use’ (Chiodo, 2002: 100), its evaluation is burdened with methodological challenges as well as ambiguous outcome indicators (see Anderson, 2001). In addition, these claims are made in the peculiar context of the evaluation study being pending and far from completion (see La Prairie et al., 2002). However, interim data would probably serve to suggest considerable limitations in the DTC’s effectiveness. About halfway (18 months) through the study, the Toronto DTC has lost over half (54%) of its original participants due to programme drop-out or expulsion (Gliksman and Newton-Taylor, 2001). The pilot study furthermore struggles with fundamental issues of self-selection. Its control group is made up of offenders who were either deemed ineligible for, or have dropped out of the DTC programme (La Prairie et al., 2002), and thus constitute higher risk offenders who are either more likely to break or who have factually broken programme success indicators. Furthermore, potential clients are not only carefully selected in terms of their offence history but also first put on a four to six-week ‘monitoring period’ in the DTC (assessing the ‘offender’s motivation and commitment’) before a final decision on formal admission is made (Chiodo, 2002: 73; see also La Prairie et al., 2002).

Moreover, it has been claimed that ‘the cost savings of the [Toronto] DTC have thus far been significant’ (Chiodo, 2002: 76). It is outlined that the cost of one offender/year in the DTC programme is ‘approximately $3,000–$5,000’; these figures are contrasted with the ‘cost of sending the
same offender to prison [being] approximately $42,000 to $48,000 per year’ (Chiodo, 2002: 76). It is, again, not clear where definitive DTC cost data would come from, since the evaluation (including its cost component) is incomplete. Nevertheless, the cited cost comparisons serve as a helpful illustration for the perspectives employed by DTC advocates to back their cause. First, the above cost estimation for the DTC operations appears to be a gross underestimation since it likely neglects to take into account overhead costs of the numerous (and very expensive!) professionals and public institutions involved (i.e. judge, prosecutor, treatment providers employed by hospitals). Second, projecting the costs of one full year of incarceration as the cost comparator in the Toronto DTC is an unfounded assumption since (a) these imprisonment costs are calculated in a much more comprehensive fashion (i.e. including staff, capital and overhead costs; compare Wall et al., 2001), and (b) it is, in the Canadian context, unreasonable to assume that any drug offender eligible for DTC would serve an imprisonment sentence of more than three to four months and thus incur incarceration costs anywhere close to the figures cited (see also ‘The rationale for DTCs’ earlier).

DTCs: ontological issues

In terms of their predominant ‘narrative’, DTCs fit many recent innovations in the criminal justice system proposing that ‘collaboration’, ‘integration’ and ‘partnerships’ between different institutions and realms of professional expertise will provide for more responsive and effective solutions to problems of crime. For example, many diversion programmes or the highly popular concept of ‘community policing’ are anchored in such rhetorical strategies (see Fischer, 2001; Fischer et al., 2002b). The DTC concept itself professes to meaningfully ‘bridge’ (La Prairie et al., 2002) and integrate the two ideological and institutional sectors of ‘criminal justice’ and ‘treatment’ that have—in largely juxtaposed constellations—dominated the problem arena of ‘addiction’ through the past century (Musto, 1987; Giffen et al., 1991). For example, it is proposed that the DTC concept ‘incorporates a mixture of values towards a decided shift towards treatment and restoration’ and that it ‘seeks to resolve apparently contradictory aims of the typically punitive justice process and the more supportive treatment process’ through a ‘shared value system’ (Goldkamp, 2000: 930ff.). While these suggested efforts of ‘integrating’ and ‘harmonizing’ the professional approaches of justice and treatment may seem desirable in the rather desperate problem arena of drug addiction, the key (and predominantly un-asked) question is whether this is feasible, compatible and sensible in concrete practice. In fact, these ideological ‘mixtures’ (Goldkamp, 2000) may lead to rather paradoxical features within DTCs, especially with respect to the projected identity of the offender/patient. On the one hand, DTCs are premised on the ‘basic understanding’ that the
drug offender is a ‘sick’ individual suffering from the condition of ‘sub-
stance abuse [which] is a chronic, propensive and relapsing disorder’
requiring a lengthy ‘recovery process’ and ‘help’ (Chiodo, 2002: 68;
compare Hora et al., 1999). On the other hand, the construct is located in
a criminal court, centrally builds on ‘coercion’, ‘deterrent and desert values’
(Goldkamp, 2000: 930) as well as the need for ‘specific deterrent effects of
sanctions by delivering swift, certain and increasingly severe penalties’
(Shichor and Sechrest, 2001).

While, for some, the DTC concept ideology seems to symbolize a sort of
‘magical solution’, others have suggested that the principles and practices
of justice/punishment, and treatment rehabilitation are ‘diametrical and
irreconcilable’ (Hoffman, 2000: 1475). The ontological framework of
‘crime’ and ‘disease’, applied to the problem of drug addiction, makes for
fundamentally different assumptions, practices and goals (Boldt, 1998).
Simply speaking, the former perspective assumes a free-will concept of the
offender whose choices can be swayed by the threat or delivery of
punishment, while the latter perspective acknowledges that the individual’s
behaviour is primarily influenced by a deterministic or pathological state
requiring therapeutic intervention. These perspectives are not only funda-
mentally different, but contradictory and exclusionary in many of their
assumptions and principles. For example, these different perspectives stand
opposed with regards to the subject’s voluntary, participatory and consen-
sual involvement in the treatment and related key decisions, as well as the
relationship between subject and the provider of punishment versus treat-
ment (see Hoffman, 2000). So while the DTC rhetoric sends enthusiastic
signals of ‘partnership’, ‘integration’ and ‘joining forces’ between punitive
and rehabilitation approaches as the promising solution to addiction
problems, the actual meaningfulness of jointly applying the figurative
‘tomahawk’ and the ‘healing balm’ (Turano in Lindesmith, 1940) to the
offender, in principle and practice, remains an open question.

Yet, from a more socio-cultural perspective, the offender/patient, as
construed within the rhetoric and practices of DTCs, reflects an interesting
mix of past and present imageries of deviance related to crime and
addiction. The DTC context and practices represent many aspects of 19th-
century temperance ideology of addiction (Levine, 1979; Blackwell, 1988).
While the offender’s drug addiction may be considered as a disease where
‘relapse is an anticipated part of the recovery process’ (Bentley in Chiodo,
2002: 85; see also NIDA, 1999), it is strongly implied that the ‘chronic
disorder’ can successfully be overcome by sufficient moral and personal
strength, discipline and willpower. Encouraging these virtues in the addict
offender—under the umbrella of the claimed moral neutrality of treatment
and a professed new ‘ethic of care’ in therapeutic jurisprudence—towards
appropriate ‘individual self-determination’ and thus the successful ‘victory’
over the state of addiction, then, is the function of the DTC (Casey and
Rottman, 2000: 451ff.; see also Boldt, 1998; Valverde, 1998). As such, the
DTC framework in its own particular way resembles the idea of the 19th-
century asylum, in which addiction and mental illness were seen as expressions of moral weakness, and therefore curable by a vigorous regime of discipline and moral correction (Foucault, 1973; Levine, 1979).

On the other hand, the DTC’s approach and conceptualization of the offender seems also influenced by characteristics of post-welfarist crime control ideology. Victims’ and economic perspectives have increasingly shaped neo-liberal crime discourses in the late 1980s (see Roach, 1999; Garland, 2001). On a political level, the core rationale for DTCs is anchored in both a ‘victims’ (i.e. society as the ‘victim’ of abundant drug crime and related public expenditures) as well as an ‘economical’ (i.e. DTC as a cost-savings strategy) rationale. Furthermore, DTC practices put a strong emphasis on the construct of the offender as a ‘responsibilized’ and ‘accountable’ agent who is given privileged ‘opportunities’ for rehabilitation through the DTC, and yet who is actively in charge of working towards and accomplishing the expected rehabilitative goals and standards of good citizenship. These themes are also central to the imagery of neo-liberal or post-welfarist crime control (see O’Malley, 1997; Rose, 2000; Garland, 2001). Taken together, such imageries expectations of the offender in the DTC setting can be understood as a late modern synthesis of past and present perspectives on crime and addiction, characterizing the DTC as a 21st-century version of a ‘neo-temperance asylum’ for drug addiction.

DTCs: penological and social control implications

Advocates of DTC centrally profess a strong ‘disaffection for the heavily punitive aims’ of traditional responses to drug offenders, and subsequently a ‘shift from punishment to helping’ (Goldkamp, 2000: 925). A closer look at the practices of DTC programmes suggests that, perhaps, the occurrence of incarceration of offenders may be reduced. However, what has replaced traditional carceral punishment is a multi-faceted regime of disciplinary and behavioural correction tools under the ‘therapeutic jurisprudence’ umbrella, providing a new scope, reach and quality of penological or disciplinary control over the offender (compare Hora et al., 1999; Casey and Rottman, 2000). The various tools of ‘therapeutic jurisprudence’ are categorically framed in constructive and positive ‘helping’ terms, and are largely silencing connotations of negative power or punishment (see Melossi, 1990). However, in practice these tools are imposed on the offender in rather coercive ways and deeply penetrate a multiplicity of aspects of the offender’s personal life and existence—far beyond the specific concern of ‘lawful conduct’ or the original drug offence—towards a morally informed ‘good person’ (see Zola, 1972 for early observations on such effects of the ‘medicalization’ of deviance). Goldkamp (2000) describes the target for this all-inclusive social and behavioural correction—so-called ‘positive lifestyle change’ (La Prairie et al., 2002: 1539)—in that DTCs reach ‘beyond the necessary basic concerns for public safety to include health, substance
abuse, lifestyle improvement, employment, parenting, and other objectives, designed to improve the lives of participants and to eliminate the need for drugs or crime’ (Goldkamp, 2000: 950).

This means in practice, for example, in the Toronto DTC, that an offender is required, on a daily to weekly basis: to attend addiction treatment; to attend counselling sessions; to attend and report to the DTC; and to provide randomly assigned urine-tests screening for drug use (see Chiodo, 2002; La Prairie et al., 2002; see also Wolf and Colyer, 2001). Furthermore, subjects are typically required to improve their housing and engage in education, and obtain employment. Then, many offenders are subject to forms of social punishment, in the form of so-called ‘boundaries’ as part of their bail conditions, banning them from access to certain parts of the city or contact with persons considered part of the ‘drug scene’. All these measures come in the name of assistance to the ‘offender in ameliorating these other aspects of life’ (Chiodo, 2002: 86), yet are imposed by the coercive powers of the court and leave no room for individual choice or resistance. Compliance on all of these matters is controlled through a toolbox of ‘incentives and disincentives’. Violations of any of the above conditions can be ‘sanctioned’ with the removal of treatment privileges or an increase in the severity of bail conditions, the imposition of community service orders or short-term (‘shock’) imprisonment or overall expulsion from the DTC programme. Good compliance is rewarded through a reduction of court attendance requirements or praise from the DTC team (La Prairie et al., 2002; compare Boldt, 1998; Hora et al., 1999).

A key mechanism in the all-around ‘lifestyle’ correction or holistic ‘disciplining’ of the DTC offender is a correspondingly comprehensive and pervasive system of behaviour surveillance and correction. Urine tests, weekly court appearances and comprehensive ‘performance updates’ from treatment counsellors and probation staff, as well as regular performance reports by the offender themselves to the court function as a panopticon-like ‘gaze’ into the subject’s everyday life, triggering the described corrective interventions where norm-breaking occurs. In sum, while traditional or explicit forms of punishment may have disappeared as the primary form of intervention, the DTC presents an instructive illustration of a dispersed, yet comprehensive and pervasive regime of behavioural ‘discipline’ acting upon the offender from many sides. As Hunt and Wickham have described, disciplinary technologies de-emphasize the singular ‘privilege of the law’ for control, yet govern the individual by an intricate scheme of ‘interventions to correct deviations and to secure compliance and conformity’; the enforcement of compliance occurs through the ongoing ‘repetition of normative requirements [. . . and thus] discipline results in the securing of normalization by embedding a pattern of norms disseminated throughout daily life and secured through surveillance’ (Hunt and Wickham, 1994: 49ff.; see also Hunt, 1993). As such, the DTC may be viewed as a microcosm of late modern governmentality, in which singular expressions
of punishment have been replaced with a dispersed regime of disciplinary tools and technology (Foucault, 1977; Melossi, 1990; O’Malley, 1999).

Yet, on the other hand, traditional tools of punishment have not disappeared from the DTC’s ‘correctional’ regime. Rather, punishment has been renamed into constructive terminologies like ‘motivational sanctions’, or ‘powerful incentives for ensuring compliance’ (Chiodo, 2002: 86; compare Boldt, 1998). In practice, these so-called ‘motivational incentives’ for the offender may include ‘admonishment, warning, increased attendance, . . ., revocation of bail or termination from the program’ (La Prairie et al., 2002: 1538; see also Harrell et al., 2000). Specifically, the ‘revocation of bail’ tool is regularly used for punishing offenders’ breach of one of the many DTC conditions and practically means temporal imprisonment (usually for an interim period of a few days to a week). Many DTC clients receive multiple such ‘motivational sanctions’ of imprisonment while in the DTC programme. This, then, can lead to the fact that a DTC participant ‘may experience more jail . . . than he or she would have had the case been adjudicated in the normal fashion’ (Goldkamp, 2000: 953).

In light of the starkly emphasized ‘powerful helping’ instead of punitive orientation, the following may then be a perplexing assessment of the real effects of DTCs by a vigorous DTC proponent herself: there, it is professed that DTCs are not the easier alternative, but rather the more punitive . . . [in that] such programs [are] more intense, more difficult to complete, more onerous and far more intrusive on liberty than a [conventional] term of imprisonment. There is a greater amount of supervision, required programming and mandatory testing involved than would be expected of an offender in prison.

(Chiodo, 2002: 83; compare Boldt, 1998)

DTCs: legal and process considerations

Although DTCs are formally set in a court of law and within the principles of justice, they are claimed to have ‘transformed the substance of proceedings and the role of the judge and other court actors in a dramatic fashion’ (Goldkamp, 2000: 950). These transformations in the name of ‘therapeutic jurisprudence’, however, may carry the de-emphasized yet fundamental implications of ‘compromising deep-seated legal values’ (Hoffman, 2000) including fundamental principles and safeguards of justice and individual rights (see also Boyd, 2001).

The framing of DTCs as ‘hands-on judiciary’ or ‘individualized justice’ (Goldkamp, 2000) means, first of all, drastic changes in the position and functioning of the judge. Within the operations of DTC, the judge becomes a priori and explicitly removed from the—in practice admittedly idealistic—role of the ‘quiet, rational arbiters of the truth-finding process’ in the adversarial setting (Hoffman, 2000: 1533). Rather than being the facilitator of the adversarial forces of justice, the ‘activist judge’ in DTCs—
which are often named after ‘their’ judges—actively presides over and directs the goal-oriented enterprise of the DTC working towards the reformation of the offender. The judge is seen as operating as the chief authority over the DTC ‘team . . . committed to helping’ rather than finding justice for the drug offender. S/he directs both the institutional players of the criminal justice and the treatment system which are now working ‘on the same side’ for the cause of ‘rehabilitating’ or ‘healing’ the offender (Chiodo, 2002: 91; compare Boldt, 1998; Hora et al., 1999).

In exercising the role of the ‘activist judge’ with a focus on the ends of the reformatory project of DTC rather than the means or processes of justice, the judge assumes roles and powers traditionally held by and confined to separate authorities in the criminal justice system. S/he exercises an enormous yet ‘potentially ungovernable’ realm of discretion in applying the multitude of ‘individualized justice’ tools and sanctions targeted at individual offenders, usually in the absence of guidelines and within an environment of informality (Boldt, 1998: 1245). In addition, the judge plays the role of a morally invested force of ‘correction’ rather than an enforcer of justice, thereby instrumentalizing actors within and outside of the criminal justice system who are usually protected from such influence through the norms of the separation of powers.

It has also been declared as a valuable feature of DTC programmes that within their process, ‘formal adversarial rules generally do not apply’ but often are suspended (Goldkamp, 2000: 952). One of the key procedural aspects where this becomes relevant is the role of the defence council. Originally placed to safeguard the defendant’s legal rights and interests within the norms of due process (appearing to be quite necessary in the informalized and discretionary process environment of DTCs), the defence council is considered a member of the ‘DTC team’ (Chiodo, 2002). Rather than acting as the adversarial protector of the defendant’s best legal interests, defence council’s main function has shifted to broker and communicate authoritative decisions, conditions or sanctions from the DTC to the defendant with the main objective of ensuring adherence and compliance. In Boldt’s words, council becomes ‘part of a treatment team working with others to ensure that outcomes, viewed from the perspective of the institutional players and not the individual defendant, are in the defendant’s best interests’ (1998: 1245).

Finally, the DTC’s circumstances of being a ‘therapeutic rather than a legal process’ presents other substantial challenges to aspects of ‘due process’ and constitutional rights as they relate to the defendant (see Hoffman, 2000; Boyd, 2001). While DTCs are located in a court of law using highly concentrated judicial powers, participation in such ‘diversion programmes’ is possible only after the defendant enters a ‘guilty plea’ to the original offence. These circumstances challenge the legal principle of the ‘presumption of innocence’ of the offender who is becoming subject to the long and intrusive ‘treatment’ of the DTC programme from the onset (Boldt, 1998). This kind of challenge to individual rights and due process
has been pointed out as being problematic for other forms of diversion programmes framed as ‘non-punitive’ justice alternatives for offenders (Fischer et al., 2002b). In this context, one may also want to consider the potential consequences of this guilty plea requirement for the many offenders who withdraw or are expelled from the DTC due to breach of conditions or non-compliance, and are ‘returning to regular court’ (La Prairie et al., 2002: 1539) for sentencing, which is often presided over by the DTC judge him/herself.

A further challenge to ‘presumption of innocence’ principles in DTCs may be constituted by rules requiring the offender’s ‘honesty’ and proactive reporting of violations of conditions (i.e. drug use, failure to provide urine samples or absence from treatment sessions) before they are inevitably revealed by treatment reports in order to avoid ‘sanctions’ (see La Prairie et al., in press). DTCs may also affect a defendant’s constitutional right to a speedy trial and a certain disposition. In DTCs, the defendant is practically on judicial probation until s/he either successfully graduates from the DTC programme (usually not before a minimum period of two years), or withdraws or is expelled from the programme. Until such time, both the possibilities of an unforeseeable duration of judicial sanctions (i.e. jail time, community service orders, bail conditions, etc.) while in the DTC programme and, in the case of drop-out, the re-admission to regular court with uncertain judicial outcomes exist as a distinct form of ‘double jeopardy’.

Under the purportedly benevolent veil of ‘helping’ and ‘rehabilitating’ drug offenders, DTC offenders have no choice but to surrender most fundamental principles and safeguards of justice meant for their own protection. As the founding judge of the Toronto DTC aptly summed it up: ‘[Offenders in DTC] lose their Charter rights, they lose their right to speedy sentencing, speedy trial; they basically give up all the legal rights as we know it’ (Bentley quoted in Boyd, 2001).

Implications and discussion

Proponents have emphasized that DTCs both represent a departure from punishment and an orientation towards rehabilitation, as well as a meaningful integration of ‘justice’ and ‘treatment’ principles in the context of a more effective response to addicted offenders (Casey and Rottman, 2000; Goldkamp, 2000; Chiodo, 2002). While the rhetoric and symbolism of DTCs may suggest these dynamics, a key argument of this article is that in reality, DTCs may represent and facilitate to reinforce a given hegemony of punishment over therapeutic values and practices.

On what grounds are these conclusions proposed? First off, in this context, it is important to note that DTC is a court run by a judge, and not a hospital or treatment programme run by a doctor or a counsellor. While the ‘DTC team’ is comprised of people and institutions from the justice and health sectors (see Chiodo, 2002: 85), DTCs are first and foremost directed
by a judge, who is trained and bound by the values and rules of law and justice, and not treatment. Goldkamp (2000) instructively illustrates this issue of hegemony of justice over treatment as facilitated by the question of where ‘power’ is located within DTCs. He suggests that DTCs were ‘invented to reinvent a justice role similar to the one formerly played by probation services’ and other post-conviction interventions concerned with the rehabilitation of the offender, ‘but this time entrusted to the power, authority, symbolism and centrality of the criminal court judge and intervening at an earlier stage’ (Goldkamp, 2000: 934).

For the much emphasized therapeutic aspects of DTCs, these are largely restricted ‘by the boundaries imposed by the criminal process’ as they are set and enforced by the judge and impressed upon the other participants in the DTC operations. Thus ‘treatment in DTCs] differs notably from substance abuse treatment that might be provided to addicted citizens in civilian contexts outside of the justice system’ (Goldkamp, 2000: 930). These ‘differences’, authoritatively determined by the judge, of course, can be both fundamental and critical with regards to DTC operations, for example with regards to decisions of whether a breach of a condition by the offender (i.e. drug use, or non-attendance of counselling) should be responded to with a punitive ‘sanction’ (i.e. ‘shock imprisonment’ or expulsion from programme) or a more therapeutic response. The final decision power over these questions is unilaterally held by the judge, and in most cases conceived of and exercised in favour of such principles of justice as deterrence or punishment (see Fischer et al. 2002a; La Prairie et al., 2002). Therefore, in the competition between the approaches of punishment and rehabilitation, the ‘rehabilitative ideal is ordinarily outmatched in the struggle’ (Boldt, 1998: 1244). Furthermore, since the boundaries imposed on treatment practically leave very little room for sovereign decisions on what is ‘best’ for the patient, and more or less all treatment components—especially in the case of ‘non-compliance’—are tied to punitive ends, treatment in the DTC arrangement is being instrumentalized for the superior goals of punishment.

With these proposed dynamics of facilitating hegemony of traditional forces of ‘crime control’ over reform ideas emphasizing more individualistic, social or rehabilitative approaches at their core, the DTC model is no novelty in Canadian criminal justice. A number of recent socio-legal studies have documented how, CJS initiatives towards ‘due process’, or specific concepts like ‘community policing’, or diversion programmes for small-scale offenders have been dominated by the hegemonic practices of ‘crime control’ oriented justice, and in the long run have been interpreted as reinforcing these traditional forces (compare Ericson and Baranek, 1982; O’Malley, 1997; Roach, 1999; Fischer, 2001; Fischer et al., 2002b).

In light of the century-old North American tension regarding whether addiction constitutes ‘crime’ or ‘disease’, requiring ‘punishment’ or ‘treatment’ (see Musto, 1987; Giffen et al., 1991), the phenomenon of addiction treatment innovation being subordinated by forces of punishment does not
come as a novelty either. There have been a number of illustrative instances in Canada where ideas of ‘treatment’ have attempted to challenge the ideological and institutional dominance or ‘ownership’ (Christie, 1977; Gusfield, 1989) of law enforcement over the social problem of addiction. However, these challenges of reform have either been squashed altogether, or systematically subordinated to the overall predominance of legal control over the phenomenon of addiction. Illustrations of this include: the repeated initiatives for narcotics prescription clinics for opiate addicts in Canada in the 1940s (which never passed the vigorous influence of law enforcement on government decision-making committees); the subordination of methadone maintenance treatment to rigorous legal regulations driven by law enforcement interests in the 1970s (almost eliminating this treatment modality in its entirety); and the proposed ‘mandatory treatment’ clause in the 1961 revisions to the Narcotic Control Act (NCA) as the outcome of a vocally emerging ‘treatment movement’ in the addictions field calling for ‘treatment’ instead of ‘punishment’ for addict offenders (but only resulting in the possible provision of court-coerced and indefinite treatment embedded in criminal punishment and within correctional settings) (Giffen et al., 1991; Fischer, 1999, 2000).

In the context of the above-raised doubts about both the meaningfulness and effectiveness of DTCs, the inevitable question emerges of why, then, are we witnessing at all the vigorously popular emergence of the DTC phenomenon, especially in the Canadian setting? One proposition here shall be that the crucial answer to this question may not lie in the empirical, scientific or professional spectrum. Rather, the answer may have to be found from a political perspective, in that the DTC’s role may best be understood as that of a ‘political strategy’. As so many innovations in the difficult arena of state power in general, or social or justice policy specifically, DTCs build on and exude enormous symbolic and political currency. Their main symbolic message may be to suggest that we are doing something new, innovative, co-operative, constructive to deal with the complex and costly problem of addiction—a problem arena in which past public policy approaches have largely failed on many counts. Especially over the past two decades, prohibition-based addiction policy has consumed billions of dollars, witnessed more widely available and cheaper drugs, rising mortality and morbidity levels among addicts and a huge societal cost burden, and subsequently has come under considerable criticism from many ends (see Schechter et al., 1999; Fischer, 1999; Fischer et al., 2000; Wall et al., 2001). On these grounds, it may be the case that DTCs’ main function may be to shore up legitimacy for the prohibition-anchored addiction policy by symbolically signalling features of ‘innovation’, ‘progress’ and ‘treatment’ while protecting and reinforcing old practices and institutional structures of punishment.

It may also be this proposed main function of DTCs as a ‘political strategy’ that may explain the Canadian Justice Minister’s declaration that ‘DTCs will be established, over the next three years, in all major Canadian
cities across the country [following] the success of the Toronto DTC’ (Centre for Addiction and Mental Health, 2001: 2; see also Boyd, 2001). This declaration of ‘success’ and definitive DTC programme establishment comes about two years before the (federally funded) Toronto DTC pilot evaluation has been completed (see La Prairie et al., 2002), and thus seems to underline the priority of political over scientific or evidence-based policy interests.

Conclusion

In this article, a critical assessment of the recently popular North American phenomenon of DTCs was provided from empirical, social, legal and political perspectives, with specific reference to the Canadian context where possible. The assessment has suggested that the empirical grounds and rationale for the necessity of DTCs as a tool to reduce lengthy imprisonment sentences for drug offenders in Canada is questionable. In terms of existing evidence for their effectiveness, the large quantity of existing DTC research is burdened both by methodological shortcomings and a lack of evidence for the superior ability of DTCs to meet their proclaimed objectives. DTCs also appear to stand on ambiguous grounds when it comes to the conception of the offender, as well as the parameters of the ‘treatment’ they provide. Both of these frameworks oscillate between assumptions of crime and punishment on the one hand, and disease and treatment on the other hand. It is, furthermore, suggested that DTCs may be replacing traditional forms of (carceral) punishment with a dispersed yet comprehensive regime of therapeutic techniques of behaviour surveillance and discipline. These tools of ‘therapeutic jurisprudence’ reach far beyond the specific concerns of drug crime, and are grounded in a silent yet comprehensive moral code defining proper lifestyle with regards to drug use. Many of these interventions located in the realm of seemingly a-political therapy are subordinated and linked to, principles and practices of punishment. It is also proposed that under the umbrella of ‘rehabilitation’, DTCs explicitly suspend safeguards of ‘due process’ or individual rights originally established for the protection of offenders from the extensive powers of the law. These constellations bring the defendant in the DTC in a position of ‘double jeopardy’, in that s/he is subject to a pervasive and demanding regime of treatment and punishment, yet without providing either one’s principal protections or safeguards. Finally, it has been discussed that the observed parameters and practices of DTCs may serve to reinforce the hegemony of punishment over treatment in addiction control, and that DTCs may be perhaps best understood as a political strategy shielding prohibitionist addiction control from accelerating challenges of legitimacy.

In many ways, DTCs serve as a formidable illustration of features of the government of late modern state and society, and drug use specifically. They
are, on the one hand, testimony to the increasing erosion of traditional law and punishment as a means of the social control of deviance, and the shift towards governmental networks and technologies comprised of state and non-state actors (see Melossi, 1990; O’Malley, 1999; Rose, 2000). In part, this also reflects an increasing shift in the ‘medicalization’ of many forms of deviance, and the increasing (but not necessarily exclusive) role of medical professions in governing and controlling deviant behaviour (Zola, 1972; Conrad and Schneider, 1980). DTCs also provide an exemplary illustration of the increased relevance of the comprehensive regulation and surveillance of holistic behaviour or ‘lifestyle’ as the main target of disciplinary practices that are emerging from such legal/medical/social networks of control (Zola, 1972; Hunt and Wickham, 1994). Furthermore, it is becoming evident that the alleged ‘positive’ or ‘value neutral’ nature of late modern ideas like ‘diversion’ in the general justice field, or ‘harm reduction’ in the addictions field, represent powerful new codes or agendas of morality, which are only rarely grasped or analysed (see Mugford, 1993; O’Malley, 1999; Bunton, 2001 for exceptionally critical examinations of ‘harm reduction’ as a socio-political strategy).

From an active social justice, or law and policy reform point of view, DTCs may be considered institutions of questionable purpose or value. Boldt (1998) suggests that if DTCs operate on the basis of the rationale that drug addicts should get treatment rather than punishment, the addition of treatment to punishment may be the wrong solution. Rather, the question ought to be asked of why drug offenders are in the criminal justice system rather than in treatment in the first place? The answer to this question appears to lie in the socio-racially and enforcement driven genesis and evolution of drug control laws (see Musto, 1987; Giffen et al., 1991), and would require a fundamental revision of the relevance and resources attributed to drug treatment versus enforcement in public law and policy. This is, however, where, according to Neil Boyd (2001), DTCs’ second political danger potential may rest. With their symbolism that fluctuates between ‘health’ and ‘crime’, or ‘treatment’ and ‘punishment’ rhetoric, DTCs obscure the fact that ‘punishment’ is the persistent and predominant mode of addiction control. Thus, they help to blur the grounds for a call for true and fundamental drug policy reform, aiming to change the conditions—i.e. drug control laws—that bring drug users into the criminal justice rather than the treatment system in the first place. On that basis, it seems that DTCs may appear as a quick step forward, but may truly constitute a further reinforcement of the way things have stood all along.

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