RECONFIGURING CRIME CONTROL AND CRIMINAL JUSTICE: GOVERNMENTALITY AND PROBLEM-SOLVING COURTS

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Introduction

Problem-solving courts or special therapeutic courts have proliferated in the last decade. They have emerged across a number of countries such as Australia, Canada, the United Kingdom and the United States.[1] Courts falling under the rubric of problem-solving courts include community courts, drug courts, and mental health courts. Though they vary by case type, they share a number of common elements including the application of judicial authority and the threat of criminal sanctions to compel a defendant's compliance with treatment or a psychosocial intervention over a period of time. Rooted in the principles of therapeutic jurisprudence, a philosophy concerned with producing therapeutic effects for individuals involved in the legal process, these courts link accused to treatment and then supervise this connection to promote treatment compliance. By participating in treatment, accused may forego criminal processing or sentencing or may be accorded a reduction in criminal sanctions. It is expected that treatment engagement will reduce criminal behaviours and the likelihood of future interactions with the criminal justice system.[2]

This article utilizes the concept of governmentality as conceived by Foucault and subsequently developed by others to consider the significance of these courts as emerging practices which define crime control policy and the administration of criminal justice. Governmentality refers to the point of contact between institutional technologies of regulation by state and non-state actors aimed

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[1] John Petrila, "An Introduction to Special Jurisdiction Courts" (2003) 26 Int'l J. L. & Psychiatry 3.

[2] Henry J. Steadman, Susan Davidson & Collie Brown, "Mental Health Courts: Their Promise and Unanswered Questions" (2001) 52 Psychiatric Services 457; Nancy Wolff, "Courting the Court: Courts as Agents for Treatment and Justice" in William H. Fisher, ed., *Community-Based Intervention for Criminal Offenders with Severe Mental Illness*, vol. 12 (New York: Elsevier Science, 2003) at 143.

at adjusting the conduct of individuals or populations and techniques of self-regulation through which individuals bring themselves into line with socially accepted aspirations and identities. In the following pages, the concept of governmentality will be employed to track how the regulation of crime has been re-problematized and the governance of criminal justice newly rationalized with the emergence of problem-solving courts. The governmentality analytic will also be employed to examine the emergence of the new technologies of governance utilized by these courts and to consider their significance for the policy areas of crime control and criminal justice. It is suggested that the proliferation of these courts provides evidence of the ascendance of an economic rationality behind the governance of crime and criminal justice. Further, these courts represent a significant permeation of the discourses of human service disciplines into the discourse of criminal justice. Taken together these changes signal a significant alteration in the substance and nature of criminal justice and in the governance of crime.

Problem-solving Courts, Therapeutic Jurisprudence and Crime Control

Problem-solving courts, also known as treatment courts, vary in their organization by jurisdiction, by the type of problem they seek to address and by the type of offender they serve. However, most share five common characteristics: (1) the court concerns itself with a broadened range of non-legal problems such as the psychosocial and treatment needs of accused; (2) the court makes use of its authority to solve these non-legal problems; (3) the court takes into consideration and endeavours to influence outcomes that go beyond the application of the law; (4) the court attempts to advance greater collaboration between state and non-state entities to attain common aims; and (5) the court employs judicial authority to motivate accused to accept treatment and to monitor their adherence to treatment.[3]

Many of these specialty courts are based on the principles of therapeutic jurisprudence, which is an interdisciplinary approach to the application of law. Specifically, therapeutic jurisprudence is concerned with reducing the anti-therapeutic effects of legal rules and procedures, and increasing their therapeutic potential. Though therapeutic jurisprudence and problem-solving courts developed separately from one another,[4] they share similar aims and can be seen to have a symbiotic power/knowledge relationship.[5] Principles of therapeutic jurisprudence inform the operation of problem-solving courts by providing insights from psychology and the behavioural sciences to reshape judicial practices and thereby

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[3] Petrila, *supra* note 1.

[4] Bruce J. Winick, "Therapeutic Jurisprudence and Problem Solving Courts" (2003) 30 Fordham Urb. L. J. 1055.

[5] Foucault argues that "power and knowledge directly imply one another, that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.": Michel Foucault, *Discipline and Punish: The Birth of the Prison* 2d ed., trans. by Alan Sheridan (New York: Vintage, 1995) at 27. That is, various forms of knowledge are used in the service of power and operate as instruments of discipline while the exercise of power itself produces knowledge.

increase offender compliance with treatment. In turn, problem-solving courts provide "rich and fascinating laboratories to generate and refine therapeutic jurisprudence approaches."[6] Continued application of these techniques of persuasion serves to increase knowledge of how therapeutic principles may best be applied within a court context to alter the conduct of accused.

Proponents of problem-solving courts argue that such courts introduce efficiency into the adjudication of certain types of cases.[7] These courts are increasingly viewed as a key component of crime control policy in a number of jurisdictions.[8] Treatment courts are expected to reduce criminal behaviours and the likelihood of future interactions with the criminal justice system, reduce the backlog of cases the courts will have to try, and open up jail and prison space by dealing with special-needs offenders in the community. The question of whether these problem-solving courts are efficacious has been the focus of many academic investigations[9]; however, the purpose of this article is to reflect upon the implications of this judicial innovation for social control policy and the governance of criminal justice. To address this issue, this article draws on the concept of governmentality brought forth by Foucault and further developed and applied by others.

The Evolution of Governmentality: Rationalities and Technologies

Foucault's work on governmentality and that of subsequent writers offers a useful framework for the analysis of crime control policy and the governance of criminal justice.[10] Within a Foucauldian framework, government is broadly conceptualized as any action whose purpose is to influence, shape or regulate the conduct of an individual or of populations.[11] Government is not limited to the actions of the state but rather includes entities operating outside the institutions of the state such as schools, families, and the medical and helping professions.[12] Further, governmental

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[6] Winick, *supra* note 4 at 1081.

[7] Petrila, *supra* note 1.

[8] *Ibid.*

[9] See *e.g.* Denise C. Gottfredson & M. Lyn Exum, "The Baltimore City Drug Treatment Court: One Year Results from a Randomized Study" (2002) 39 Journal of Research in Crime and Delinquency 337; Shelley Johnson Listwan *et al.*, "The Effect of Drug Court Progamming on Recidivism: The Cincinnati Experience" (2003) 49 Crime and Delinquency 389; Norman G. Poythress *et al.*, "Perceived Coercion and Procedural Justice in the Broward Mental Health Court" (2002) 25 Int'l J. L. & Psychiatry 517; Eric Trupin & Henry Richards, "Seattle's Mental Health Courts: Early Indicators of Effectiveness" (2003) 26 Int'l J. L. & Psychiatry 33; Duren Banks & Denise C. Gottfredson, "The Effects of Drug Treatment and Supervision on Time to Rearrest Among Drug Treatment Court Participants" (2003) 33 Journal of Drug Issues 385.

[10] David Garland, "'Governmentality' and the Problem of Crime: Foucault, Criminology, Sociology" (1997) 1 Theoretical Criminology 173.

[11] Michel Foucault, "Governmentality" (1979) 6 Ideology and Consciousness 5.

[12] Judith Bessant, Richard Hil, & Rob Watts, *'Discovering' Risk: Social Research and Policy Making*, vol. 18 (New York: Peter Lang, 2003).

power is both objectifying and subjectifying. That is, the study of governmentality focuses on the relations between institutional modes of regulation by state and non-state actors and also on modes of self-regulation by which individuals work on themselves to shape their own subjectivity or social identity.[13] Governmental power is used to shape individuals by aligning their choices with the objectives of governing authorities.[14]

Miller and Rose further developed the concept of governmentality.[15] They focused their attention on two fields of analysis. The first concerns governmental rationalities, which are modes of reasoning that underlie particular governmental practices and supply them with their objectives, targets for regulation, and justification. The second concerns governmental technologies, which are the complex of knowledges, procedures, actors, and techniques through which rationalities are translated into the realized effects of governmental ambitions.

Other theorists suggest that the analysis of governmentality includes the study of discourses and changes in their character.[16] Systems of governance function through discourse. Discourses impose a particular structure of reality on our minds by defining our concepts and thereby limiting or shaping how we view forms of human behaviour and how we respond to these forms of behaviour.[17] They also constitute subjectivities by defining roles and obligations among different categories of people.[18] Further, discourse acts as the conceptual glue holding together a particular constellation of knowledges, procedures, actors and techniques that operate to regulate the actions and decisions of individuals.

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[13] Within a Foucauldian context, subjectivity refers to identity that is socially ascribed. Discourses, or systems of thought which are linguistically formed, produce subject positions or subjectivities. The concept of subjectivities is similar to the notion of roles (but determined by language rather than expectations or norms) that individuals are located in (locate themselves in). These subject positions then drive individual's perceptions, intentions and acts. See Mats Alvesson, *Postmodernism and Social Research* (Philadelphia: Open University Press, 2002); Michel Foucault, "The Subject and Power" in Hubert L. Dreyfus & Paul Rabinow, eds., *Michel Foucault: Beyond Structuralism and Hermeneutics,* 2nd ed. (Chicago: Chicago University Press, 1982) 208; Michel Foucault, "Technologies of the Self" in Paul Rabinow, ed., *Ethics: Subjectivity and Truth,* vol. 1 (New York: The New Press, 1997) 223 [Foucault, "Technologies of Self"].

[14] Garland, *supra* note 10 at 175

[15] Peter Miller & Nikolas Rose, "Governing Economic Life" (1990) 19 Economy and Society 1.

[16] Eamonn Carrabine, "Discourse, Governmentality and Translation: Towards a Social Theory of Imprisonment" (2000) 4 Theoretical Criminology 309; Nigel Parton, "Reconfiguring Child Welfare Practices: Risk, Advanced Liberalism and Government of Freedom" in Adrienne S. Chambon, Allan Irving & Laura Epstein, eds., *Reading Foucault for Social Work* (New York: Columbia University Press, 1999) at 101.

[17] See Michel Foucault, *The Archaeology of Knowledge*, trans. by A. M. Sheridan Smith (New York: Pantheon, 1972); M. Alvesson, *supra* note 13; Adrienne S. Chambon, "Foucault's Approach: Making the Familiar Visible" in Adrienne S. Chambon, Allan Irving & Laura Epstein, eds., *Reading Foucault for Social Work* (New York: Columbia University Press, 1999) at 51.

[18] Parton, *supra* note 16.

Foucault's work on governmentality and that of subsequent writers offers a useful framework for the analysis of crime control policy and the governance of criminal justice.[19] The concept of governmentality will be used to trace how the governance of crime has been problematized and the governance of criminal justice newly rationalized with the emergence of problem-solving courts. The concept will also be used to explore the significance to these policy areas of the emergence of new technologies of governance, signified by the growth of problem-solving courts across a number of jurisdictions.

Emerging Rationalities of Crime Control and Crime Justice

Criminal courts have traditionally operated as mechanisms of dispute resolution between the state and individuals concerning allegations of criminal wrongdoing. Though a branch of the state, the courts function as neutral arbiters resolving issues of historical fact or overseeing juries engaged in the adjudicatory process.[20] Conventional judicial reasoning is individualistic and retrospective in its orientation.[21] It assumes that injuries occur because some individual is the author of a wrongful or negligent act, assigns blame *post hoc* and then dispenses individual justice.[22] Conventional criminal justice may also be said to be founded on a bureaucratic rationality as it aims to achieve fairness, impartiality and uniformity in the application of rules and procedures. Further, the law is applied in accordance with the principles of due process, which dictate the procedures the state must follow before it can lawfully impose sanctions. Both rationalities serve to circumscribe the role of the court and the power of the state.

By comparison, problem-solving courts have emerged to address a variety of human problems that are believed responsible for individuals coming in conflict with the law. According to Winick, "[p]roblem solving courts are less involved with the adjudication of historic issues of fact than with functioning as psychosocial agencies that attempt to rehabilitate an offender."[23] Problem-solving courts focus on the accused's potential for recidivism instead of on his or her particular crime. The aim of these courts, then, is not to ascertain guilt or innocence but to treat individuals in order to prevent future transgressions. Further, it is not only the individual who is to benefit from the therapeutic intervention of the court:

> Problem solving courts applying principles of therapeutic jurisprudence, can become an important force for dealing with a number of the most vexing social and psychological problems that affect our communities.... [T]hey can do much to transform law

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[19] Garland, *supra* note 10

[20] Winick, *supra* note 4.

[21] Garland, *supra* note 10.

[22] *Ibid.* at 181.

[23] Winick, *supra* note 4 at 1066.

> into an instrument of healing for both the individual and the community.[24]

Thus, in contrast to conventional courts, problem-solving courts are forward-looking, predictive and therapeutically-oriented to both individuals and communities.

Problem-solving courts also rest on a rationality that is both utilitarian and economic. Problem-solving courts were developed in response to complaints about the cost of overcrowded jails, the expense and burden of increasing court caseloads, and the "revolving door" phenomenon of repeat offenders.[25] To remedy these ailments, legal practitioners and policymakers implemented specialty courts. They argued that the need for legal innovation was heightened "by the failure of traditional institutions (i.e. church, family, the medical profession, the social welfare services) to handle a growing number of social problems."[26] Problem-solving courts were intended to save money by eliminating the need for expensive trials, opening up space in jails and prisons by diverting accused to treatment, and further cutting costs over the long run by reducing recidivism and promoting pro-social behaviours such as obtaining employment.[27] Thus, the emergence of problem-solving courts presupposes a new way of thinking about criminal justice. The focus of attention is switched from individuals to aggregates, from individual cases to population flows, and from individualized justice to the effective administration of resources.[28]

Arguably, the adoption of problem-solving courts based on therapeutic and economic rationalities provides a source of legitimation by which the state can justify expansion into areas of governance historically limited to non-state actors such as doctors, social workers, philanthropists, families and churches. As a corollary, problem-solving courts blur the demarcation between public and private and between the "state" and "civil society".

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[24] *Ibid.* at 1090.

[25] Natasha Bakht, *Problem Solving Courts as Agents of Change,* online: International Association of Drug Treatment Courts <www.iadtc.law.ecu.edu.au/pdfs/Problem%20Solving%20Courts%20Paper%20final%20ppr.pdf>; Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends* (Paper presented as part of "Problem-Solving Courts: An International Perspective," a pre-conference workshop of the Psychology and Law International, Interdisciplinary Conference, Edinburgh, Scotland, July 2003), online: National Center for State Courts <http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf>; James L. Nolan Jr., "Redefining Criminal Courts: Problem-Solving and the Meaning of Justice" (2003) 40 Am. Crim. L. R. 1541 [Nolan, "Redefining Criminal Courts"] .

[26] Nolan, *ibid.* at 1541.

[27] Candace McCoy, "The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts" (2003) 40 Am. Crim. L. R. 1513; James L. Nolan Jr., *Reinventing Justice: The American Drug Court Movement.* (Princeton, NJ: Princeton University Press, 2001); Nolan, "Redefining Criminal Courts", *supra* note 25.

[28] See Garland, *supra* note 10, for a lucid analysis of the emergence of a systems-management orientation in the field of criminal justice, which emphasizes resource allocation and coordination and focuses upon population flows rather than the dispensation of individual justice.

An equally significant shift has occurred in the technologies used by criminal courts as embodied in the apparatus of problem-solving courts. The following section will outline the substance of these changes by juxtaposing technologies employed in the administration of criminal justice by conventional courts with those employed by therapeutic courts.

Emerging Technologies of Crime Control and Criminal Justice

Before examining the technologies embodied in conventional courts and problem-solving courts, it is necessary to reiterate the importance of discourse in any analysis of technologies of governance. Discourses reflect and set limits on what can be said, known or done. Each includes: (1) its own determinate realm of objects of inquiry, (2) its own principles of internal ordering, (3) its own specific distribution of roles or subjectivities for different categories of individuals located within its limits, and (4) its own procedures for the extraction and organization of information necessary for regulating conduct.[29] This conceptualization of the relevant aspects of discourse will serve as a framework for the analysis of the governmental technologies operating within the traditional criminal justice system and those operating within the context of problem-solving courts.

1) Objects of Inquiry

The principal object of inquiry in the discourse of traditional criminal justice is the criminal offence. The criminal justice system seeks to establish the truth of a crime, to determine its author and to apply a legal sanction. Criminal offences are generally conceptualized as consisting of two elements: the *actus reus* or prohibited act and the *mens rea* or guilty mind.[30] To obtain a conviction for a crime, it must be proven that a person did the prohibited act and also that the person had the requisite state of mind.[31] Crimes or offences are objects defined by statute. Only an act defined by law as an infraction can result in a sanction by the state. In addition to defining prohibited actions, statutes identify the nature of the punishment to be imposed.

By comparison, the focus of the judicial process in problem-solving courts shifts to identifying and solving a variety of human problems that are presumed responsible for bringing the accused in conflict with the law.[32] Problem-solving courts seek to identify and deal with an accused's underlying behavioural,

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[29] Michel Foucault, "Politics and the Study of Discourse" (1978) 3 Ideology and Consciousness 7; N. Fraser, "Modern Power: Empirical Insights and Normative Confusion" in Peter Burke, ed., *Critical essays on Michel Foucault* (Brookfield, Vermont: Scholar Press, 1992) at 217.

[30] B. Casey, "Guilty in Fact--Not Guilty in Law" in Joel E. Pink & David Perrier eds., *From Crime to Punishment: An Introduction to the Criminal Law System,* 2nd ed., (Scarborough, Ont.: Thomson Canada, 1992) 87; Elaine J. Vayda & Mary T. Saterfield, *Law for Social Workers: A Canadian Guide*, 3rd ed. (Scarborough, ON.: Thomson Canada, 1997).

[31] Malcolm Faulk, *Basic Forensic Psychiatry* (Markham, Ont.: Blackwell Scientific Publications, 1994).

[32] Winick, *supra* note 4.

psychological and psychiatric difficulties or disorders through the provision of treatment and rehabilitative services in order to prevent recidivism. Once the nature and degree of the problem has been identified, the court determines how to ensure the individual complies with the requirements of treatment. Consequently, problem-solving courts have engendered a shift from verdict to diagnosis as the determinant of an accused's fate. In addition, the focus has shifted from the misdeeds of an accused to his or her potential for future transgressions. By bringing increasingly to the fore not the criminal act but the person as a potential source of future acts, one gives the state privilege over an individual based on what he or she may become rather than on what he or she has done.

2) Principles of Ordering

In addition to having a specific object of inquiry, the discourse of conventional criminal justice operates through the existence of specific principles of ordering. These principles can be found by examining the way in which the criminal justice system operates to achieve truth. Within the conventional criminal justice process, attainment of truth is predicated on the principle of adversity. Parties assume antagonistic positions in debating the guilt or innocence of an accused before an independent and neutral arbiter in the course of a trial. Truth, then, is a partisan matter and not some ontological entity awaiting discovery. At the heart of the criminal justice process is a power/knowledge mechanism.[33] Truth or knowledge is a product of relations of power. Competing interpretations of reality are used as strategies in a contest between two adversaries in the trial process. The attainment of truth is also predicated on the utilization of a rigorous process of deduction involving the formulaic application of relatively static and clearly articulated principles to the circumstances of a particular case. That is, in rendering a verdict, a court refers to a body of law which functions as a standard or reference point for making decisions of guilt or innocence. This corpus of law is embodied in statutes and in judicial precedent. Finally, the discourse of criminal justice is also shaped by certain presumptions that underlie procedural operations. A key presumption in the discourse of criminal justice is that persons are presumed rational and capable of making choices and consequently are responsible for those choices. Thus, notions of rationality and agency are bound with the notion of responsibility.

The discourse of therapeutic justice has substantially different organizing principles. In contrast to conventional courts, the problem-solving courtroom is viewed as a critical arena for the therapeutic process and as such a supportive, encouraging and cooperative style of interaction among the various actors exists.[34]

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[33] According to Foucault, knowledge is created through struggle, through a will to power. He argues that knowledge production involves a "selecting out" process, among the many competing readings or interpretations of the world available at any given moment. That is, the ascendance of one representation of reality entails the marginalization of competing interpretations. See Michel Foucault, "The Will to Knowledge" in Paul Rabinow, ed., *Ethics: Subjectivity and Truth* (New York: The New Press, 1997) at 11; Rudy Visker, *Michel Foucault: Genealogy as Critique*, trans. by Chris Turner (London: Verso, 1995).

[34] Winick, *supra* note 4.

Development of knowledge about the offender, his or her specific needs and the mechanism by which these needs can be met occurs through a collaborative, problem-solving style of engagement. Further, problem-solving courts utilize an inductive model of reasoning used by medical professionals to diagnose disorders. The inductive or linear best-fit approach involves collecting information and then applying the data to different models until one category or cluster of categories is found that best explains the pattern of symptoms or behaviours displayed.[35] In addition, rather than rely on statute or judicial precedent, decisions are rooted in empirical research and psychological forms of knowledge.

Another change effected by problem-solving courts is the normalization of the law. Whereas criminal justice traditionally operates by defining subjects according to statutes, problem-solving courts implicitly operate through the characterization of individuals in relation to one another. For example, judgments about mentally ill or substance-abusing accused persons are made in reference to measures of "the average" and to ideas of what is normal in a given population rather than to absolute standards of right or wrong.[36] The object of problem-solving courts is to treat individuals with behavioural, psychological or psychiatric difficulties or disorders in order to reduce their potential for criminal acts. In assessing and treating accused persons, the court and treatment providers look not at the alleged criminal conduct *per se* but at the symptoms that the individuals display. The assessment and treatment of symptoms is based on differentiating individuals according to what is normal. Thus, implicitly it is non-conformity that becomes the object of intervention by the court, rather than prohibited deeds.

Finally, within problem-solving courts, behaviour once considered delinquent is now apt to be defined in terms of pathology. With the pathologization of human behaviour, the notion of guilt is made extraneous. Consequently, a defining feature of criminal justice is diminished. Opponents of problem-solving courts argue that the focus on the social and psychological determinants of behaviour also serves to diminish the concepts of human agency and individual responsibility that traditionally have served to legitimize the imposition of criminal sanctions. They suggest that without free will there can be no responsibility; without responsibility there can be no guilt; and without guilt there cannot be justification for punishment.[37]

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[35] Richard Rogers & Daniel W. Shuman, *Conducting Insanity Evaluations*, 2d ed. (New York: Guildford Press, 2000); Patricia A. Ross, "Values and Objectivity in Psychiatric Nosology" in John Z. Sadler, ed., *Descriptions and Prescriptions: Values, Mental Disorders and DSMs.* (Baltimore: The John Hopkins University Press 2002) at 45.

[36] Ross, *ibid.*

[37] Morris B. Hoffman, "A Neo-Retributionist Concurs with Professor Nolan" (2003) 40 Am. Crim. L. R. 1567.

3) Subjectivities

Discourses not only organize systems of knowledge, they also constitute social identities.[38] Clusters of practices within a discourse and the logic underlying those practices shape the range of actions possible for categories of people, thus shaping behaviour and ways of being. Persons entering the realm of criminal justice are redefined in legal terms and assigned prescribed roles.[39] One of the key subjectivities within this discourse is that of the judge. The judge in criminal judicial proceedings is granted institutional licence to make particular knowledge claims. First, in the course of a trial, the judge makes rulings on trial procedures and on the admissibility of the evidence. Such decisions may contribute to the determination of the guilt or innocence of the accused.[40] Second, in criminal proceedings where the judge sits alone, the judge is also given licence to make knowledge claims about all questions of fact. The judge determines what facts have been proven and if the requisite degree of proof has been met to establish the guilt of the accused. When a judge sits with a jury, it remains the judge who determines issues of law but the jury determines what factors have been proven. In either case, judges do not participate in the presentation of evidence. Judges are expected to be independent of the contest and impartial toward both prosecution and accused. The role of the judge is further circumscribed by the requirement that judges be governed by relevant case law when rendering decisions and punishment.

The subjectivity of the accused is also shaped by procedural mechanisms operating within the discourse of criminal justice. Through either an admission of the facts alleged by the prosecutor or a finding of guilt after a trial, the "accused" or "defendant" is transformed into the "offender". The creation of the offender justifies penal intervention—that is, the imposition of sanctions against the accused. A conviction gives the state the right to incarcerate the offender, place the offender under surveillance through probation, restrict the offender's movements or associations with others, enforce the performance of community service and/or require the offender to attend specific forms of counselling.

Problem-solving courts have effected a change in the subjectivities of persons located in the discourse of conventional criminal justice. Unlike judges functioning in conventional courts, judges in problem-solving courts consciously view themselves as therapeutic agents playing a therapeutic function. In performing this function the judge is required to be "sensitive to the psychological mechanisms of transference and counter-transference, and how these mechanisms can affect

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[38] Michel Foucault, "Introduction" in Paul Rabinow, ed., *The Foucault Reader* (New York: Pantheon, 1984) at 1.

[39] Vayda & Saterfield, *supra* note 30.

[40] Casey, *supra* note 30.

communication in the judge-offender interaction."[41] Judges are to "induce positive transference and avoid negative transference" and should "be sensitive to the possibility of counter-transference on their own part, which can interfere with their ability to develop rapport with the individual, tainting their interactions with the offender."[42] A judge presiding over a problem-solving court cannot simply order the individual to recognize the existence of the problem and to obtain treatment. Rather, the judge must help the individual come to realize the nature of the problem and help the individual "to identify and build upon her own strengths and use them effectively in a collaborative effort of solving the problem."[43]

The subjectivity of the individual before the problem-solving court transforms from that of an accused or defendant to that of a patient or client. As such the individual is expected to participate in his or her treatment:

> To succeed, treatment or rehabilitation will require a degree of intrinsic motivation on the part of the individual. If she participates in the program only because of extrinsic motivation, then it will be less likely that she will internalize the program goals and genuinely change her attitude and behavior. The individual should be afforded a choice not only in deciding whether to elect to participate in a problem solving court, but also in the design of the rehabilitative plan.... The individual's choice concerning the various issues that arise in the design of the treatment plan can be empowering and can influence the likelihood of success.[44]

4) Techniques of Knowledge Formation and Power

The discourse of conventional criminal justice employs specific instruments of knowledge formation and power. The principle techniques for generating knowledge are the direct examination and the cross-examination. The purpose of the direct examination is to elicit from the witness all the relevant facts in support of the party calling the witness. The type of evidence that may be adduced is limited by rules of

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[41] Winick, *supra* note 4 at 1069. In therapy, the process of transference has to do with a patient experiencing the therapist as an important person from the patient's past. Patients transfer characteristics of others with whom they have had a significant relationship onto the therapist and then respond to the therapist as to those others. Properly handled, transference is fertile ground for learning in psychotherapy. Counter-transference is similar to transference, except it happens to the therapist rather than the patient. Thoughts, feelings and wishes, originating from previous significant relationships in the therapist's past, may be projected on the patient. Constant vigilance on the therapist's part is required to be conscious of counter-transference reactions as they may be a hindrance to interviewing and to the psychotherapeutic process. See Glen O. Gabbard, *Psychodynamic Psychiatry in Clinical Practice*, 3rd ed. (American Psychiatric Press, 2000); Rita Sommers-Flanagan & John Sommers-Flanagan, *Clinical Interviewing* 2nd ed. (Toronto: John Wiley & Sons, 1999).

[42] *Ibid.* at 1070.

[43] *Ibid.* at 1067-68.

[44] *Ibid.* at 1073.

relevance and admissibility, and by decisions of the judge on the application of the law. Once the direct examination is completed, opposing counsel is permitted to cross-examine the witness. The purpose of cross-examination is to weaken or destroy the effect of the evidence given by the witness during direct examination and to elicit information favourable to the cross-examining party.[45] The creation of particular forms of knowledge, such as evidence of the guilt of an accused, creates the foundation for the application of sovereign power through the mechanism of sentencing.

By comparison, problem-solving courts use a variety of technologies to produce information. Instead of the direct and cross-examination, members of the court's clinical team use the clinical interview to collect information which facilitates the formulation of an opinion about the accused's suitability for admission to the problem-solving court, and to make judgments about the nature of the accused's problem and the appropriate remedy.

The reliance upon the clinical interview may be seen to represent a shift of emphasis rather than of kind in the techniques of knowledge formation used by the court. A conventional court may use information obtained during clinical interviews to assist on specific questions of capacity or criminal responsibility, or to tailor an appropriate sentence.[46] However, clinical information is not routinely collected and when collected is typically limited to addressing specific psycholegal issues. Moreover, the persons providing clinical information to the courts are subject to direct examination and cross-examination. This shift in emphasis in the importance of the clinical interview, as the key technology of knowledge creation within the court, is significant. The clinical interview incorporates a broader range of phenomena within its field of vision than does the direct examination or cross-examination. For example, during a psychiatric interview, an accused is routinely subjected to observation and to an interrogation about mood, proclivities, flow of thought, content of thought, attitude, behaviour (including activity level, mannerisms, facial expression, cleanliness, eye contact and tone of voice), past medical history (including onset, sequence, severity, duration and frequency of symptoms), family history (including the accused's own childhood years) and personal, social and vocational history (including interests, sexual orientation, marital status, number of jobs, and reasons for leaving employment).[47] Unlike the lawyer in a court proceeding, the court treatment professional has no restrictions on the breadth or concentration of his or her field of vision. The examiner is to be

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[45] Earl Levy, *Examination of Witnesses in Criminal Cases*, 4th ed. (Scarborough, ON: Carswell, 1999).

[46] With regard to sentencing, some provinces have mental health legislation which enables the court to order a psychiatric evaluation of an accused or offender (e.g. Ontario). This legislation is on occasion applied to assist a court to render a sentence.

[47] James R. Morrison, *The First Interview: Revised for DSM-IV* (New York: Guildford Press, 1995); Paula T. Trzepacz & Robert W. Baker, *The Psychiatric Mental Status Examination* (New York: Oxford University Press, 1993); Mark Zimmerman, *Interview Guide for Evaluating DSM-IV Psychiatric Disorders and the Mental Status Examination* (East Greenwich, RI: Psych Products Press, 1994).

exhaustive in accumulating or creating knowledge before rendering a diagnosis and an opinion about the suitability of an individual for a specific form of treatment or for admission to the problem-solving court. Thus, the clinical interview expands the area normally investigated by the criminal justice system.

Aspects of the clinical interview are also utilized by the judge. Winick notes:

> Problem solving court judges also need to learn to read the individual's non-verbal forms of communication to interpret her underlying feelings. Non-verbal forms of communication such as facial expressions, body language, and tone of voice can be important clues for understanding both the individual's emotions in the context of the sensitive judge-offender conversation, and how judges should respond to them.[48]

The clinical interview is often combined with forms of surveillance and with rewards and sanctions to induce compliance with treatment. The court maintains close monitoring and supervision of the treatment process by having the individual report to court regularly with his or her treatment providers so that the judge may receive feedback on the accused's treatment progress. Alternatively, the court's treatment staff will liaise with community treatment providers regarding the accused's compliance and progress and will provide a report to the judge.[49] Random urinalysis tests for drugs and, in some jurisdictions, random searches of the accused's home are used to ensure the accused is not using illicit substances.

In addition to techniques of observation to generate knowledge about the accused and to encourage compliance, other techniques are used to motivate individuals to recognize problems and to undergo change. These techniques engender the creation of self-knowledge. Specifically, techniques of motivational interviewing, developed for use by clinicians to help motivate individuals to deal with drug problems, are used by court treatment staff or the judge to "get the individual to recognize the existence of a problem", to "create motivation for change", to "elicit the individual's underlying goals and objectives" and "to foster self-efficacy in the individual" necessary for change.[50] In addition, a behavioural psychology technique known as behavioural contracting is used to help the individual examine different aspects of his or her life, to identify goals for change, and to induce compliance with treatment or a rehabilitative program.[51] Treatment providers and the individual enter into an explicit and formal contract, which sets forth specific goals. Contract terms provide for a combination of agreed-upon

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[48] Winick, *supra* note 4 at 1071.

[49] Nolan, *supra* note 25.

[50] Winick, *supra* note 4 at 1080-81.

[51] *Ibid.* at 1084.

rewards or positive reinforcements for success and aversive conditioners for failure. Involving the individual in the formulation of goals and reinforcements is intended to increase motivation.

Thus, problem-solving courts engender a point of contact between institutional methods of regulation and modalities of self-regulation. Foucault referred to the former as technologies of power, "which determine the conduct of individuals and submit them to certain ends or domination" and referred to the latter as technologies of self, "which permit individuals to effect with the help of others, a certain number of operations on their own bodies and souls, thoughts, conduct and way of being so as to transform themselves in order to attain a certain state of happiness, purity...."[52] The nexus of these two technologies of regulation is what Foucault referred to as governmentality.[53] According to Foucault, these two forms of regulation operate in constant interaction. Individuals before problem-solving courts are taught to become responsible subjects by techniques of self that assume an alignment between the self-interest of the individual and the governing interests of the authorities. Offenders are thus governed, and learn to govern themselves, in ways that emphasize individual agency and autonomy. Thus a form of regulation is engendered in which the offender is enlisted in the process of his or her own control. Techniques of surveillance such as intermittent supervision, reporting to the court and drug-testing are used, as well as alliances with other sources of social control (such as community workers and counsellors), to try to build a situation conducive to self-control and the practice of "responsibilized autonomy".[54]

Conclusion: Emerging Trajectories of Crime Control and Criminal Justice

The usefulness of the concept of governmentality is that it allows us to examine crime control and criminal justice as fields of power relations and subjectifications, and draws attention to the effect of new knowledges and technologies upon the relations between governmental actors as well as between governmental actors and the governed.[55] The concept of governmentality also provides a useful framework to anatomize social policy programmes, and to explain the nature of these programmes and also the impact they have on the problematized fields that they govern. Such an analysis is at once microscopic and macroscopic in its field of vision.

If we apply the idea of rationalities to think about the emergence of problem-solving courts as a policy initiative in the field of crime control and criminal justice, it seems plausible to suggest that the governance of crime has come to be problematized in a new way, largely in reaction to high recidivism rates among specific populations and to the failure of conventional criminal justice controls and

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[52] Foucault, "Technologies of Self" *supra* note 13 at 225.

[53] *Ibid.*

[54] Garland, *supra* note 10 at 180.

[55] *Ibid.* at 188.

traditional non-state institutions of governance. Crime is problematized as the product of behavioural, psychological and psychiatric difficulties and social problems rather than as the product of deviancy or delinquency. It also seems plausible that the emergence of problem-solving courts signals the expansion of a new rationality for the governance of crime control and criminal justice. Described in very broad terms, the new governmental style embodied in problem-solving courts is organized around utilitarian and economic forms of reasoning, rather than the legal-bureaucratic forms that predominated previously. The development of problem-solving courts may portend the emergence of strategies of crime control that focus increasingly upon efficiencies of population flows rather than on the administration of individualized justice whatever its cost. What may also be emerging is a source of legitimation by which state actors may expand into areas of governance traditionally limited to non-state actors. Further, the application of a therapeutic form of legitimation justifies a broader application of techniques of governance utilized by the human service disciplines (such as psychiatry, psychology, and social work) for the purposes of the state.

The emergence of problem-solving courts signals the permeation of forms of knowledge and mechanisms of social regulation associated with the human service disciplines into the adjudicative process. This permeation has effected a number of profound changes in the governance of crime control and in the substance and nature of criminal justice. First, the emergence of these courts signals the privileging of treatment over punishment as the preferred disposition and makes the concept of guilt largely subordinate to that of diagnosis. Second, the emergence of these courts grants the state authority over an accused on the basis of the accused's psychological makeup rather than solely on the basis of past criminal conduct. Third, through these courts, non-conformity rather than past criminal transgressions becomes the basis of criminal sanctions. Fourth, these courts expand the judiciary's purview over the personal lives of accused.

A final striking feature of the crime-control practices embodied in the problem-solving courts pertains to the manner in which individuals relate to governmental actors: as autonomous subjects rather than coerced objects. Their subjectivity is given shape by their active involvement with the power that governs them and by which they govern themselves. For most of the twentieth century, the objects of crime control have been the delinquent and the legal subject.[56] In this capacity they were acted upon by the state. Techniques used by the problem-solving court stress the accused's responsibility for his or her problems and well-being. This is not merely a reconsideration of the earlier punitive modality, which presupposes rationality and free will. To the contrary, instead of assuming that the individual is naturally capable of responsible, self-directed action and moral agency, these courts treat lack of responsibility as a problem to be corrected by procedures that earnestly seek to subjectify the individual and to make him or her responsible. This is done through techniques that employ the accused as an agent in his or her own

[56] Garland, *supra* note 10.

rehabilitation and regulation, rather than as an objectivized offender upon whom therapeutic solutions are imposed.

These courts represent an innovative approach to criminal cases that conventional courts have had difficulty addressing, and they denote the earnest efforts of policy makers, jurists and human service providers to deal with these difficulties and to prevent future criminal behaviour. Viewed through the conceptual lens of the construct of governmentality, the emerging rationalities and technologies of governance embodied in these courts suggest a developing reconfiguration of the policy field of crime control and may be seen to signal the emergence of a paradigm shift within the governance of criminal justice.