A testable theory of problem solving courts: Avoiding past empirical and legal failures

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1. Introduction

Some commentators view the proliferation of problem solving courts or specialty courts designed to rehabilitate certain classes of offenders and thereby resolve the underlying problems that led to their court involvement in the first place. Recent years have seen a proliferation of problem solving courts designed to rehabilitate certain classes of offenders and thereby resolve the underlying problems that led to their court involvement in the first place. Some commentators have reacted positively to these courts, considering them an extension of the philosophy and logic of Therapeutic Jurisprudence, but others show concern that the discourse surrounding these specialty courts has not examined their process or outcomes critically enough. This paper examines that criticism from historical and social scientific perspectives. The analysis culminates in a model that describes how offenders are likely to respond to the process as they engage in problem solving court programs and the ways in which those courts might impact subsequent offender conduct. This Therapeutic Jurisprudence model of problem solving courts draws heavily on social cognitive psychology and more specifically on theories of procedural justice, motivation, and anticipated emotion to offer an explanation of how offenders respond to the process as they engage in problem solving court programs. We offer this model as a lens through which social scientists can begin to address the concern that there is not enough critical analysis of the process and outcome of these courts. Applying this model to specialty courts constitutes an important step in critically examining the contribution of problem solving courts.

2. The first problem solving court: Wayward Minor’s Court for Girls

According to Quinn (2009), Judge Anna Moscowitz Kross, one of New York State’s first women judges devoted her career to advancing the use of therapy courts in the 1930s in New York to treat the problems of young “wayward” adolescent girls. In 1936, Judge Kross, a Magistrate Judge in New York who heard misdemeanor cases frequently involving

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sexual nuisance crimes, started the Wayward Minor’s Court for Girls (WMCG) to deal with women between the ages of 16 and 21 charged with sexual misconduct including but not limited to prostitution. The federal Works Progress Administration (WPA) funded and offered support for the experimental court (Quinn, 2009). In the 1930s, the WMCG found jurisdiction under the Wayward Minors’ Act to prosecute young women charged with sexual misconduct and continued to act in that capacity in one form or another until the mid 1960s (Quinn, 2009).

The parallels between today’s problem solving courts and the Wayward Minor’s Court for Girls are striking. Because the WMCG defendants were too old for family court, without the intervention of the WMCG, they would have stood trial in the Adult Criminal Court for Women (Quinn, 2009). Judge Kross launched her experiment as an effort to treat offenders rather than to punish them for their nuisance crimes. The WMCG diverted these cases from criminal court allowing the defendants to represent themselves without counsel. Kross sought to “minimize the strictly legalistic character of the court as a tribunal, while using – individualized and socialized techniques and procedures to provide assistance to the wayward young women before it” (Quinn, 2009, p. 72).

Judge Kross believed that “adjustment” was preferable to “adjudication,” in part, because the stigma that emerged against defendants during the trial process functioned as a barrier to rehabilitation for women who got into trouble specifically for failing to follow the sexual mores of their time. The formal process of adjudication and punishment could only exacerbate the social stigma that already permeated their lives and which made an already difficult rehabilitation process even harder (Kross, 1936). The initial intakes at WMCG were similar to those that one can observe at current day problem solving courts. Volunteers and professionals presented to the judge (and therefore read to the defendant) a detailed summary of all available information including not only the charges, but also an analysis of the social and psychological issues that people of the time believed to be root causes of the behavior that got the young woman into trouble in the first place. At first, this was the only formal hearing at the WMCG (Quinn, 2009). However, to address violations of due process rights, the judges later started completing court forms verifying that a defendant was arraigned, advised of her rights, and had consented to the court’s intervention with regard to a medical examination, shelter, and other social services (Quinn, 2009).

Unlike today’s problem solving courts, which are staffed with teams of trained social workers and attorneys, the WMCG relied heavily on volunteers to gather the detailed information about the defendants before they appeared before the magistrate. The volunteers gathered, “a full social history of the accused; and additional mental and physical health data, including details about the woman’s sexual history” (Quinn, 2009, p. 75). Short on funding, Judge Kross herself personally recruited volunteers to process and assist the women defendants in her court. Based upon this information the court developed individual treatment plans separately for each woman and then proceeded with an even more informal supervision process to check on each woman’s trajectory as she followed the treatment plan with the help of volunteers, medical personal, and community service agencies.

As is the case in modern problem solving courts, the women returned regularly to the WMCG allowing judge Kross to maintain a personal connection with each defendant, monitoring the client’s progress toward her rehabilitation goals, and encouraging each to engage actively in her own treatment. Prior to each conference, the magistrate held a meeting with her staff and with outside community agents who were responsible for assisting in the rehabilitation process. If the defendant was not making adequate progress, the magistrate could (and did) change the individualized treatment plan, perhaps placing the defendant under the supervision of an inpatient or outpatient community agency, which often came about as a sanction against some prohibited behavior. The WMCG relied upon the women’s initial consent to participate in the court, to justify the heightened level of monitoring and to justify the consequences that could result from not following the treatment plan. It was not always clear that the court obtained the consent in a formal way that protected the defendant’s legal rights. At times, it appears as if at least the initial consent was implied rather than explicit.

Judge Kross, a strong advocate for the WMCG often engaged in media campaigns to capture public support. Nonetheless, when the State of New York reorganized its court system in the 1960s it relegated these types of informal procedures to the family courts and removed them from the criminal division entirely (Quinn, 2009). The demise of the WMCG occurred during a time when the U.S. Supreme Court reinforced the individual rights of defendants in criminal courts, which the informal procedures of the WMCG threatened to erode. Among these guarantees were the right to counsel for those who could not afford attorneys (Gideon v. Wainwright, 1963), privacy rights, and the right to remain silent (Mapp v. Ohio, 1961; Miranda v. Arizona, 1966). The practices of Judge Kross’s court could not guarantee that the defendants in her court would enjoy these hard won reforms.

3. Criticisms of the WMCG and modern day problem solving courts

In her analysis of Judge Kross’s movement and the Wayward Minor’s Court for Girls, Quinn (2009) identified a core of set of problems that plagued this first effort at focusing on client problems rather than on the charges that the prosecutors brought against them. First and perhaps foremost, the WMCG did not pay enough attention to the legal rights of the defendants or to the ethical issues that the magistrates needed to negotiate as they planned and monitored individualized treatment plans that they crafted for the women. Inadequate attention to rigorous client legal representation and obtaining informed consent before adjudication were areas in which Judge Kross received a great deal of criticism. Although she ultimately acted to remedy many of these concerns, some might conclude that the judge acted with too little, too late.

Second, the movement evolved without any particular philosophic underpinnings other than a kind of paternalism that targeted the behavior of sexually permissive girls. Rather than offering a justification for early court intervention, continued judicial oversight, and efforts to modify the defendants’ lifestyles, the movement grew out of the well intentioned, but under justified inclinations of Kross to help the women who she perceived to be victims of difficult social and economic conditions. Furthermore, the fact that the WMCG targeted the behavior of young women acting out sexually was too easily interpreted as an effort to simply defend the sexual mores and prohibitions of the time; perhaps, utilizing an overzealous reform movement that invoked the power of the state to further the values of a specific segment of society. Judge Kross would have benefited a great deal from the perspective of Therapeutic Jurisprudence, which modern problem solving court judges and scholars often rely upon as the foundation of their informal methods.

Not only were there legal concerns that challenged the legitimacy of the WMCG, the court of public opinion ultimately turned against the movement. The innovation had no outcome data showing that it was any more effective than more traditional (and less expensive) interventions. While it is true that Judge Kross kept careful statistics concerning the outcomes of individual cases, these data were not always complimentary to the court’s efforts. They did not indicate that the outcomes were worse than the outcomes in Adult Women’s court, but neither did they document that the WMCG was a better solution to the problems of young women who acted out sexually. For example, Quinn (2009) referenced a report written by Clarke in 1952 in which he tracked 264 cases that were arraigned in the WMCG to find that less than half (123) had their cases dismissed at the end of the year. Furthermore, in 1952, 357 girls, 57% of the total 624 girls seen at Girl’s Term Court (a modified version of the WMCG), were ultimately convicted and many of them wound up in state reformatories (Quinn citing Fisher, 1955). To survive in the court of public opinion, judges in
modern problem solving courts need to show that their courts are more effective than the traditional forms of adjudication. While there are data to support this claim, at least for drug courts, many professional commentators including some social scientists claim that these data are less than rigorous.

The messages of some of the professionals (social workers, attorneys, and researchers) that administer and study modern day problem solving courts are not always supportive of the movement’s efforts (See Nolan, 2001; 2002; 2003). However, one advantage that modern day problem solving courts have over the WMCG is that trained professionals administer and study these courts, while the staff and administrators of the WMCG consisted largely of volunteers and amateurs who, though well intentioned, often did not have enough (or any) training in the fields of intervention or social sciences to perform their tasks. The advantage of modern day problem solving courts is that paid professional attorneys, social workers, treatment staff, and social scientists administer them, and study them. An increasing number of sociologists, political scientists, and psychologists carefully track these processes and outcomes using the most rigorous methodology available for use in field settings. While the public’s eye focused only obtusely on the WMCG in the 1930s, today it relies on the tools of the social sciences to monitor much more sharply the efforts of the Department of Justice and similarly seated state institutions as they apply somewhat similar court innovations 75 years later.

Although many of Professor Quinn’s criticisms of modern day problem solving courts look to the past rather than to the future, she is not alone in her criticism of problem solving courts on either legal grounds or empirical grounds. She makes the important and well-taken point that there have not been enough efforts at critical evaluation of these courts. She argues that the movements’ celebrants often drown out the voices of those who do critically address the efforts of this, perhaps, not so new reform movement. Quinn (2009) points out that many of the movements’ supporters are convinced that this is the most innovative effort at criminal justice reform in the history of the United States and they speak with one loud voice, sometimes not leaving room for a more systematic examination of the problem solving court in the twenty-first century. Professor Quinn (2009) cites West Huddleston, the Chief Executive Officer of the National Association of Drug Court Professionals who stated at the group’s 2009 meeting in Anaheim, California, “After twenty years of research and results we can now say that Drug Courts are the most successful justice intervention in our nation’s history…. They are a solution to the vicious cycle of drugs and crime that has ensnared 1.2 million drug-addicted offenders in our criminal justice system. We must put a Drug Court within reach of every American in need” (p. 81). (To read additional commentary: http://www.reuters.com/article/pressRelease/idUS146385+11-Jun-2009+PRN20090611).

We argue that in order to avoid the fate of Judge Kross’s Wayward Minor’s Court for Girls, modern day problem solving courts must embrace a transparency that comes from critical analysis of its process and procedures. This means that problem solving courts should adopt a philosophic perspective that justifies its motives for change, adhere to rigorous legal and ethical standards, employ trained professionals, and invite social scientists from a variety of backgrounds to collect rigorous process and outcome data that objectively examine, describe, and evaluate this alternative form of judicial intervention. Below we offer such an analysis of problem solving courts and a call for a different type of research to focus a clear light on the processes and procedures that drive them to accomplish, or fail to accomplish the goals of their interventions for individual defendants. We take Professor Quinn’s comments seriously and suggest a plan to focus more light on problem solving courts and to study them with a more objective eye. To do so, we approach the problem from the perspective of Therapeutic Jurisprudence. First, we discuss the development of problem solving courts, and the role of Therapeutic Jurisprudence in their evolution. Next, we offer a model of the way judicial intervention influences defendants’ behavior, and finally we suggest a plan for testing the model and thereby focusing some welcome attention on problem solving courts to explain when they work and they might not work.

4. Theoretical analysis of problem solving courts

4.1. Overview

For many who suffer from mental illness or substance abuse, and even for some who are perpetrators of family violence, the criminal justice system has become a dumping ground. They enter as defendants, leave after serving their punishments, and too frequently reenter as repeat offenders (King et al., 2009). In cases in which the social welfare system breaks down and fails in its mission to help and support those with social and psychological dysfunctions, the courts intervene to protect the public and administer justice against those who have broken the criminal code because of their inability to function within the constraints of the law. Because of psychological problems, many of these offenders act out in disruptive ways that do not easily remit to the punishment-orientated interventions of the criminal justice system, which was designed to deter, incapacitate, and rehabilitate acts prohibited by law (Winick & Stefan, 2005). As a result of their dysfunction, these offenders’ difficulties become justice problems that traditional criminal courts try to resolve with techniques that are ill-suited to address the personal and psychological failings of lawbreakers (King et al., 2009). The primary tool used by judges in traditional courts is to invoke sanctions against offenders. However, the effective resolution of these problems would require the courts to supervise treatments and provide support services to address the tenacious psychological and social problems that caused offenders to find themselves in trouble in the first place (Freiberg, 2000). As a result, traditional courts have become revolving doors for people whose criminal behavior arises from psychological and social impairments (King et al., 2009).

Problem solving courts are one response to the revolving door problem. Judges adjudicate the criminal charges in a way that puts in place the services necessary to confront offenders’ underlying psychological and social problems (Berman & Feinblatt, 2005; Winick & Wexler, 2003). Judges in problem solving courts use their authority and oversight to hold offenders accountable for their actions and make them responsible for their own rehabilitation in a way that other community agents lack the authority to do (Berman & Feinblatt, 2005; King et al., 2009; Winick, 2003; Winick & Stefan, 2005; Winick & Wexler, 2003). Judges act as team leaders and form partnerships with community welfare agencies and service providers to address the wider issues that offenders face and in the process combine the role of judicial officer and case manger to motivate the participants to take advantage of the services available for remediation. The process becomes collaborative instead of adversarial so that attorneys, service providers and judges work as an interdisciplinary team seeking a consensus to serve the best interests of the participants and their families. The offenders themselves often take on an active role in their own rehabilitation (Berman & Feinblatt, 2005; King et al., 2009; Winick, 2003; Winick & Stefan, 2005; Winick & Wexler, 2003). While the philosophy of problem solving courts is well-articulated, specific models of how the courts influence offenders remain poorly specified. The current project proposes a motivational model of participant rehabilitation, which takes the perspective of the offender and follows the principles and approaches of Therapeutic Jurisprudence (Winick & Wexler, 2003). First, we discuss the traditional rational actor approach to adjudication and then describe a model more consistent with Therapeutic Jurisprudence.

4.2. Rational actor model

Some problem solving court judges borrow from more traditional courts to rely heavily on specific and general deterrence. Adopting a
deterrence based model, the judges function as compliance monitors ordering the participants to participate in services and evaluating their progress during review hearings in order to ensure public safety and offender obedience. Judges acting in this capacity work in a familiar way not very different from those who rule on the attorney motions during hearings in criminal court. For example, Rempel, Labriola, and Davis (2008) reported that in a Brooklyn Domestic Violence Court, magistrates’ primary activities were to hold review hearings to determine whether offenders were in compliance and therefore could continue to the next hearing without a change in protocol or were not in compliance and were in need of additional sanctions to deter their offending conduct. In both traditional criminal courts and problem solving courts in which judges act as compliance monitors, the law adopts a rational actor model to explain the conduct of substance abusers, mentally ill offenders, and domestic violence perpetuators.

According to this model (Korobkin & Ulen, 1998, 2000) judges can use the law to encourage socially desirable conduct and discourage the undesirable because problem solving court participants weigh the costs and benefits of following the law against those of not following the law. Participants base rational choices on the desire to increase or at least maintain their material, social, and psychological assets at the time of their choices (Hastie & Dawes, 2001). Because the consequences of choices and outcomes are probabilistic and not certain, problem solving court participants act like intuitive statisticians and estimate the expected utility of their outcomes (i.e., the severity of the outcome times the likelihood of the outcome) for each choice, in accordance with the laws of probability theory. Under the rational choice model, the driving force is adaptation so that the solution is to select behaviors with the highest expected utility (Korobkin & Ulen, 2000); those that maximize the likelihood of a positive change in one’s life assets. As Judge Posner stated, “man is a rational maximizer of his ends” (Posner, 1997, p. 24). We argue that the rational maximizer model is incomplete because it leaves no room for offenders’ perceptions of fairness, their motivational styles, or their emotional reactions to hearing case process or outcomes (Wiener, Bornstein, & Voss, 2006).

4.3. Mental health courts

Nowhere is the inadequacy of the rational actor model so clear as in the policies that traditional courts apply to protect the public by incapacitating mentally ill defendants, deterring them from carrying out additional crimes, and deterring others from engaging in similar crimes. Typically, these efforts fall short because defendants with mental health issues do not always act as rational utility maximizers. Conventional trial judges attend to defendants’ psychological deficits to the extent that psychiatric disorders reduce the defendants’ culpability. If mental difficulties do not rise to the level of an affirmative insanity defense, or if they do not result in an “incompetency to proceed” finding, then the only remaining way for the defendants’ mental problems to impact the judgment is as mitigation to justify a reduced punishment. Making the matter more serious are several factors that have increased the likelihood that police will arrest individuals with untreated mental illness who commit minor offenses or acts of domestic violence. These include the tightening of civil commitment criteria, the declining public hospital census, limited access to community services, lack of coordination and continuity of care, and negative public attitudes about people in the community with mental illness who commit nuisance offenses (Winick & Stefan, 2005; Winick, Wiener, Castro, Emmert, & Skowran Georges, 2010-this volume). As a result, people suffering from severe psychiatric symptoms now overcrowd local jails, which lack treatment resources and are intensely stressful, resulting in further decompensation and increased suffering. Moreover, they add to the heavy caseloads of criminal and domestic violence courts, which are designed to address more serious criminal behavior.

One remedy to this increasingly prevalent problem is to divert individuals from jail into treatment through mental health courts (Winick, 2003). Mental health courts are criminal courts with separate dockets for those with mental illness, which divert offenders from the criminal justice system into treatment (Goldkamp & Iorns-Guynn, 2000; King et al., 2009; Redlich, 2005; Redlich, Steadman, Monahan, Robbins, & Petrila, 2006; Steadman, Davidson, & Brown, 2001; Winick & Stefan, 2005). Participants undergo court ordered treatment, take medication, and participate in community-based services. The court praises success in treatment and sanctions lack of compliance. Ultimately, the decision to participate in a mental health court is voluntary so that offenders can choose to defend themselves in a regular criminal court or agree to participate in a mental health court (Redlich et al., 2006).

Rather than seeing the participants’ problems as ones requiring adjudication and punishment, the problem solving court views them as psychiatric disorders and seeks to facilitate needed treatment. Inasmuch as judges see their role as facilitating the rehabilitation and psychological well being of the offenders, this is an application of Therapeutic Jurisprudence, the basic insight of which is that legal rules, legal practices, and the way legal actors (such as judges and lawyers) play their roles impose inevitable consequences on the psychological well being of those affected. Nonetheless, some mental health court judges rely on the rational actor model to control offenders. Redlich et al. (2008) surveyed 90 mental health courts across the United States and found that most did initially require clients to return for review hearings either weekly or monthly but progressively lowered this standard as the clients progressed through the system. Most importantly, almost all of these courts (92%) used jail as a sanction with 57% using it in 5 to 50% of its cases. A regression analysis showed that those mental health courts that were most likely to use jail as a sanction had a larger number of felons as clients and required the offenders to return to court more frequently.

There is a paucity of empirical work on mental health courts. Those studies that do exist are primarily descriptions of specific mental health courts rather than general studies of multiple courts or the effectiveness of their treatments on client outcomes (Schneider, Bloom, & Heerema, 2007). Often, these studies provide only basic program statistics such as the number of defendants processed at different stages in the trial process (Trupin & Richards, 2003). Although the efficacy of mental health courts have not been demonstrated empirically, preliminary outcome data from some courts and anecdotal accounts indicate that these courts are somewhat successful in engaging participants in treatment and reducing recidivism (Boothroyd, Poythress, McGaha, & Petrila, 2003; Cosden, Ellens, Schnell, Yamin-Diouf, & Wolfe, 2003; Redlich, 2005; Trupin & Richards, 2003). Reports appear on state research and funding agency websites rather than in peer-reviewed journals. Perhaps the best-studied mental health court is the Broward County, Florida mental health court, which has been part of a number of descriptive and outcome based studies. Compared to a control group, individuals adjudicated in that mental health court received more treatment for their psychiatric problems. Yet, changes in symptoms were not significantly different between the groups (Boothroyd, 2003; Boothroyd, Calcinsky Mercado, Poythress, Chesty, & Petrila, 2005). The explanation for this puzzling finding was that success in treatment depends, in part, upon the quality of the treatment available in the community. However, Chesty, Boothroyd, Petrila, and Poythress (2003) and Chesty, Poythress, Boothroyd, Mehra, and Petrila (2005) did find low levels of coercion, high levels of perceived fairness, and a slight reduction in recidivism in this Broward County court.

Several research teams have attempted to compare larger numbers of mental health courts on basic descriptive characteristics. For example the Consensus Project Survey (2005) published data from 107 existing mental health courts on eligibility requirements, sentencing options, plea structures and agreements, punishments for failure to comply, and a number of other measures to conclude that there is high variability among the many courts that self classify as mental health courts, making them difficult to study without an organizing structure or principle. Similarly, Steadman and Redlich (2006) completed an in depth study of
7 mental health courts across the United States over a three month period to try to develop a profile that described referrals and case processing procedures, but they were also frustrated in their efforts, finding few organized models or even similarities of approach. They concluded that next steps should identify which offenders seem to do well in mental health courts and why they do well. Without a theory of how and why these courts work and for whom, outcome studies of their effectiveness are nearly impossible. Because these courts rely on Therapeutic Jurisprudence and therefore tailor interventions to the needs of individuals, any model that describes mental health court process must take into account the influence of law on perceptions, judgments, and the health behaviors of mentally ill offenders.

4.4. Drug treatment courts

Lindquist, Krebs, and Lattimore (2006) point out that traditional courts have dealt with drug offenders through the use of a deterrence scheme. Research finds that invocation of sanctions can be effective if anticipation of sanctions is clear and predictable, the actor believes that self-control is achievable so that the sanction is not inevitable, the failure to conform is detectable and punished each and every time it occurs immediately after the transgression, and the punishment is sufficiently severe to redirect the offenders’ conduct (Marlowe & Kirby, 1999). For these reasons, many courts rely on drug testing offenders and applying sanctions for positive tests to reduce drug use and recidivism (Harrell & Roman, 2001). Even problem solving drug courts rely heavily on sanctions to modify offender behavior (National Association of Drug Court Professionals (NADCP), 1997; Cooper & Trotter, 1995; Goldkamp, 1994; Terry, 1999). In a recent qualitative study, Lindquist et al. (2006) interviewed 86 stakeholders from 5 Florida judicial circuits, and found that drug courts were more likely to use sanctions (e.g., jail time and treatment oriented sanctions) than were traditional courts for similar types of offenders. However, drug court judges tailored the sanctions more to the individual needs of the participants.

Drug courts feature ongoing status hearings in front of a judge. Other essential components include offenders completing substance abuse treatment, complying with random drug tests (urine drops), judges increasing negative sanctions for failure to comply with the court’s orders, and judges administering rewards for compliance (National Association of Drug Court Professionals (NADCP), 1997). In pre-plea programs that divert participants from jail, the court drops their charges and expunges the record of those who successfully complete the program and graduate (Marlowe, Festinger, Dougosh, Lee, & Benasutti, 2007; Marlowe, Festinger, Lee, Dougosh, & Benasutti, 2006). Judges hold reoccurring hearings in which they evaluate the clients’ progress to determine whether to apply sanctions or rewards. The first drug court program (still in operation) dates back to Dade County, Florida, in 1989 (National Criminal Justice Reference Service, 2005a,2005b; Nolan, 2001; Roman, Butts, & Rebeck, 2001; Wiseman, 2005). In 2007 (Nored & Carlan, 2008) there were over 1699 drug courts in the United States (Bureau of Justice Assistance, 2007). Early studies of drug courts generally supported their effectiveness. For example, in 1997 the U.S. General Accounting Office (GAO) reported on 20 evaluations of 16 drug courts and concluded that drug courts reduced drug use and criminal behavior among offenders. Further, Belenko (1998) updated the research to summarize 30 evaluations in 24 studies and found that criminal behavior was reduced significantly during the treatment phases. However, Belenko and others (King et al., 2009) complain that the methodology in these studies is not rigorous enough, often lacking random trials and adequate control groups.

These methodological problems continue to plague evaluation studies of drug courts. For example, Spohn, Piper, Martin, and Frenzel (2001) studied a drug court in Omaha Nebraska comparing 3 groups: Douglas County Drug Court participants, felony offenders in Douglas County, and individuals participating in a diversion program started before the Omaha drug court began. Although the researchers did statistically control for seriousness of offense, gender, race/ethnicity, and age, they had no consistent information on prior criminal history so that matching on that factor was not possible. Although the drug court participants were significantly less likely than traditional felony offenders to be rearrested during the follow-up period, the drug court participants were more likely than the earlier diversion participants to be rearrested. While these results like many in the literature are suggestive, it is difficult to reach conclusions without random trials. Most important for the current proposal, without a theory of offender rehabilitation, it is difficult to know what factors to control in quasi-experimental designs as in Spohn et al. (2001).

4.5. Inconclusiveness of theory in problem solving courts

To illustrate the inconclusiveness of theory in the area of problem solving courts, consider a recent program of research in which Marlowe et al. (2003) randomly assigned some offenders to undergo biweekly judicial status hearings, which is a characteristic that the National Association of Drug Court Professionals (NADCP) (1997) considers to be a defining feature of drug courts, and others to undergo monitoring by their case managers. Although, the results showed no overall effect of the judicial hearings on counseling attendance, urine results, self-reported substance use or criminal activity, they did find that the judicial hearings improved the outcome for individuals at higher risk for recidivism, i.e., those diagnosed with anti-social personality (APD) and those who had prior histories of substance abuse treatment. In a follow-up experiment in which Marlowe et al. (2007, 2006) randomly assigned high risk individuals (those with APD and those with prior substance abuse) and low risk individuals to either biweekly judicial hearings or hearings as needed, they found that high risk participants, but not low risk offenders in the biweekly treatment condition, outperformed high risk individuals in the as needed hearing condition on measures of negative urine drops and counseling sessions attended. In another follow-up study, the high risk offenders with biweekly judicial hearings (as compared to high risk offenders in the as needed hearing control group) were more likely to graduate, provided more negative urine tests 6 months after program completion, and reported less use of drugs and alcohol. While these researchers stumbled onto risk factors that did seem to moderate effectiveness of judicial supervision in drug courts, their work points to the importance of developing a model for special problem solving courts to direct future efforts in this area. Without such a model, researchers are destined to continue conducting hunt-and-peck studies, which sometimes find qualified results but which will never explain the reasons for success, and therefore will never allow researchers to understand how problem solving courts succeed or fail. Without a fuller model of problem solving courts, it will be difficult to successfully address critics such as Professor Quinn who opine the absence of an organized understanding of how problem solving courts do or do not influence defendants.

4.6. Domestic violence courts

Domestic violence courts apply drug court philosophy to problems of family violence (Gover, Brank, & MacDonald, 2007; King et al., 2009; Rottmann, 2000, Winick, 2000). Domestic violence court judges lead interdisciplinary teams to protect victims while holding perpetrators accountable for their physical aggression. Judges hold review hearings to evaluate the progress that offenders make toward their goals of rehabilitation relying on sanctions to punish lack of compliance and rewards to reinforce progress (King et al., 2009; Winick, 2000). There is little in the way of evaluative research regarding domestic violence courts so that their effectiveness in comparison to traditional approaches is an open question. However, in one study researchers interviewed 50 defendant and 50 victim participants in the Lexington County Criminal Domestic Violence Court in South Carolina and
observed 30 hearings (Gover et al., 2007). The researchers found that in almost all of the cases the court personnel (sheriff’s investigators, mental health workers, the attorneys, and the judicial officers) worked together to resolve the cases. Free communication between the judge and attorneys was common. Furthermore, both defendants and victims reported positive experiences with the court personnel and although some did not take the opportunity to speak to the judge, court observations showed that they had the opportunity to do so. Thus, at least in one domestic violence court, judges were inclined to make use of a motivational approach rather than a traditional rational actor model to simply increase offender accountability.

Although one quasi-experimental study in Brooklyn N.Y. suggested that Batterer Intervention Programs (BIP) can temporarily reduce re-arrests for offenders in domestic violence cases, a similar study in Broward County Florida found no results between the experimental BIP program offenders and a control group on re-arrests (Jackson et al., 2003). Despite the lack of data evaluating the effectiveness of rehabilitative versus deterrent interventions on reoccurrences of family violence (King et al., 2009), domestic violence courts ostensibly follow a motivational model characteristic of Therapeutic Jurisprudence (Winick, 2000). Therapeutic Jurisprudence suggests that there are basic principles of motivation informed by empirical research that should be the basis for judicial practice in all problem solving courts (Winick & Wexler, 2003). King et al. (2009) argues that these principles of motivation are founded in self-determination, the promotion of procedural justice, and offender compliance. Winick and Wexler used behavioral contracting or contingency management, an application of cognitive behavioral theory and social cognitive theory, to explain the functioning of problem solving courts and to suggest how they can be improved (Winick, 1991; Winick, 2003; Winick & Wexler, 2003). Problem solving courts that endorse a therapeutic jurisprudential approach attempt to improve the mental health and wellbeing of those whose maladaptive behavior brought them to court in the first place (Winick, 2006). Problem solving courts following a therapeutic jurisprudential model apply a psychological lens in the legal context to inspire motivation for treatment and to assure treatment compliance (Winick, 2003; Winick & Wexler, 2003). They view defendants as active processors who can and do adjust their responses to the courtroom according to their perceptions of the fairness of their treatment at the hands of the court, motivation states induced during hearings, and anticipated emotions about future hearings. The role of the judges and other court officers is to create an environment through law and legal process that motivates, encourages, and reinforces offenders to participate in services and to seek positive outcomes.

Applying a motivational interviewing strategy (DiClemente & Prochaska, 1998), judges and other problem solving court officers in these courts empower offenders to take charge of their own conduct. Judges and treatment teams attend carefully to the motivational and emotional structures of offenders rather than relying primarily on utility maximization principles. Offenders examine their own behaviors and confront the discrepancies between their values and their actions. The judges assist offenders to 1) think about their anti-social and unhealthy behaviors, 2) focus attention on choices to engage in anti-social behavior, 3) develop plans to replace unhealthy behaviors with healthy ones and 4) bolster their self-efficacy so that they will be willing to take on treatment goals. As a result, offenders reestablish the links that they have to their more positive motivations and attitudes and to significant others who advocate prosocial choices (Ahmed, Harris, Braithwaite, & Braithwaite, 2001; Johnstone, 2002; Roche, 2003; Sullivan & Tiff, 2001; Von Hirsch, Roberts, Bottoms, Roach, & Schiff, 2003; Weitkamp & Kerner, 2002). Thus, the goal of the problem solving judge is to motivate offenders to engage in treatment and to develop plans to eliminate or reduce unhealthy and anti-social behaviors (e.g., ignoring the rights of others, using substances, assaulting others, wandering, urinating or exposing oneself in public, and approaching others inappropriately) and replace them with healthy behaviors (e.g., attending school or going to work, engaging in positive social exchanges, reconnecting with family and friends, and becoming more self-sufficient).

5. Therapeutic Jurisprudence model of problem solving court

Fig. 1 depicts a therapeutic jurisprudential model that focuses on participants’ reactions to the motivational interviewing approaches that judges rely on in these court hearings. It hypothesizes that two paths describe the manner in which offenders accept (or reject) treatment and engage in (or withdraw) from the rehabilitative process and the court’s orders. The figure labels the first path, #1. This path focuses on offenders’ perceptions of justice and the way those perceptions influence beliefs about the legitimacy of law. According to the group value model (Tyler & Blader, 2003), distributive justice is the recipient’s perception of the fairness of the decision-making outcome and whether it is balanced compared to the inputs of the act. Defendants who find that the sanctions (or rewards) that they receive are commensurate with their conduct believe the adjudication outcome was just. If hearing outcomes are consistent with norms of fairness (equality and equity), offenders experience distributive justice.

On the other hand, procedural justice refers to evaluations of the formal decision-making procedure and whether the process was conducted in an unbiased manner. To the extent to which defendants believe that the process was unbiased and that they had enough voice to influence decision outcomes, they will perceive that the process was procedurally just or fair. Procedural justice research in a number of domains has shown that when people experience procedural justice and to a lesser extent, distributive justice, that they engage with the group, adhere to its norms and respect the group’s demands on their conduct (e.g., Amiot, Terry, & Callan, 2007; Blader, 2007a;b; Fuller et al., 2006; Gleibs, Mummedney, & Noack, 2008; Hakonen & Lipponen, 2008; Mayer, Greenbaum, Kuenzi, & Shteynberg, 2009). In addition, they are more likely to view their choice to participate as voluntary rather than coerced, thereby to gain the psychological value of intrinsic motivation and to avoid negative effects of coercion (Monahan et al., 2005; Winick, 2003). Furthermore, Tyler (2006) has established a link between procedural justice and perceived legitimacy of authority and respect for the law. Thus, to the extent to which problem solving court participants find procedural fairness, they are more likely to engage with authority, accept the demands of the court, and try to follow them.

Organizational psychologists have further divided procedural justice into two components, a procedural factor (i.e., perceptions of the impartiality the decision process itself) and an interactional factor (i.e., perceptions of respect that the decision maker shows for the recipient of the decision). Today, this distinction has been widely adopted by organizational justice researchers (e.g., Bernerth, Armenakis, Field, & Walker, 2007; De Cremer, van Dijkse, & Bos, 2007; Flaherty & Moss, 2007; Forret & Love, 2008; Klendauer & Deller, 2009). Thus, if the problem solving court judges treat defendants with respect and sensitivity and make clear the reasons for decisions, offenders will experience interactional justice or fairness.1 This delineation of the different components of justice is well supported in the literature (Bies & Moag, 1986; Colquitt, 2001; Leventhal, 1980; Shapiro, Buttner, & Barry, 1994; Thibaut & Walker, 1975; Tyler, 1988, 2000, 2003). Furthermore, researchers have shown that perceptions of fairness and especially procedural justice help wrongdoers come to see the law as legitimate, in which case they are more likely to comply with the court’s demands.

1 Some authors (Colquitt, 2001) have further separated interactional justice into two components, interpersonal justice (being treated with dignity and respect) and informational justice (receiving adequate explanations for decisional outcomes. The current work includes items that measure both components separately.)
For example in one study of alternative dispute resolution procedures, which involve processes very similar to those in problem solving courts, (i.e., the Canberra Reintegrative Shaming Experiment) Tyler, Sherman, Strang, Barnes, and Woods (2007) found that increases in procedural justice predicted drunk driving offenders’ belief in the legitimacy of the law as one of the outcomes of restoration conferences. In addition, to the extent that offenders came to believe that significant people in their lives were ashamed of their behavior but they still respected them as individuals, and that their friends and family members were ready to reintegrate the offenders back into the significant others’ own lives, the offenders came to believe in the legitimacy of the law. Finally, the more they regarded the law as legitimate, the less likely they were to re-offend. Similarly, the first path to successful outcomes for problem solving court offenders (See Fig. 1) depends upon fairness and re-integrative shaming. If offenders perceive that the problem solving court is procedurally fair, produced a balanced outcome, resulted in respect for the offenders, and reconnected them to the positive aspects of their lives, they will view the law as legitimate. As a result, they will comply with judicial orders and ultimately choose healthier behaviors.

While no study that we know of has examined the connection between procedural or distributive justice and outcomes in problem solving courts, at least two studies have examined procedural justice perceptions as outcomes among offenders in a mental health court. In a recent study conducted in the Superior Court of the District of Columbia’s Mental Health Diversion Court (DCMHCDC), Wales, Hiday, and Ray (2010) interviewed 80 participants and found participants reported strong positive experiences of procedural justice toward the court and judge after participating in that court’s procedure. Poythress, Petrila, McGaha, and Boothroyd (2002) also reported elevated perceptions of procedural justice among participants in the Broward County Mental Health Court as compared to other defendants in traditional mental health courts.

Fig. 1 shows a second, more direct path (marked with #2) in which the more judges are successful at empowering offenders and reconnecting them to their bases of support, the more these clients show specific motivational strategies to increase healthy behavior, the more they will anticipate positive emotions for succeeding at their rehabilitative work and negative emotions, for failing. From a decision-making point of view, participants in problem solving courts can commit two types of mistakes in responding to judicial orders: errors of omission (i.e., failure to adequately participate in ordered therapeutic services such as individual and/or group therapy) or errors of commission (i.e., engaging in anti-social behaviors that create public health problems such as acting out aggressively, substance abuse, or engaging in nuisance behaviors). An emerging body of social psychological research demonstrates that different types of motivation minimize these errors. Regulatory focus theory research (Camacho, Higgins, & Luger, 2003; Crowe & Higgins, 1997; Higgins, 1998, 2000, 2001, 2002; Higgins, Shah, & Friedman, 1997) shows that while people in a promotion motivational state seek accomplishment and advancement by obtaining matches to desired end states, those in a prevention motivational state seek safety and security by avoiding mismatches to the desired end state. Accordingly, promotion motivation causes people to work diligently to accomplish their goals and avoid errors of omission, while prevention motivation produces vigilant action and avoidance of errors of commission (Higgins, 1997; 1998, 2000, 2002). Furthermore, the effects of regulatory focus result from both situational inducements and activation of individual difference traits (Cesario, Higgins, & Scholer, 2008; Higgins, 1997, 1998, 2001, 2005, 2006; Higgins, Roney, Crowe, & Hymes, 1994; Lee & Aaker, 2004).

Arguably, the most destructive behaviors for offenders are errors of commission leading to more illegal conduct and a cycle of recidivism and re-arrest. Therefore, when clients leave problem solving court with a heightened sense of prevention motivation they are most likely to be successful because they will avoid future anti-social acts. However, errors of omission (failing to participate in ordered therapeutic intervention) are also detrimental; therefore, an increase in promotion focus and engaging in appropriate goal behavior may also increase the likelihood of offender success.

Motivation and anticipated emotion are closely linked to one and other and offer related but separate routes to offender success. In a recent paper, Baumeister, Vohs, DeWall, and Zhang (2007) argued that experienced emotion acts as feedback serving to continually update our records of past successes and failures. Thus, offenders who experience positive emotions or negative emotions after encounters with the courts may come to anticipate the same for future encounters. Furthermore, offenders may come to anticipate positive (or negative) emotions following their own successes (or failures) in achieving the problem solving court requirements. The power of anticipated positive and negative emotions to guide subsequent behavior is strong and empirically supported in many situations (Loewenstein, Weber, Hsee,
& Welch, 2001). Most impressively, Mellers and colleagues (Mellers, 2000; Mellers, Schwartz, Ho, & Ritov, 1997; Mellers, Schwartz, & Ritov, 1999) showed that anticipated pleasure explained choices beyond the logic of the expected utility inherent in the rational actor model in a variety of real world and laboratory contexts (e.g., financial gambles, seeking feedback on test scores, and pregnancy tests). However, these findings are more complicated, because people are inaccurate in forecasting their emotions. This is especially true for problem solving court participants whose emotional instability likely caused the legal violation that triggered court intervention.

Impulsivity (Hsee & Hastie, 2006; Slovic, 2001) causes people to pay more attention to immediate payoffs than to distant outcomes, even when the cost of those outcomes far exceeds the immediate payoffs. As a result, people sometimes show impact bias (Hsee & Hastie, 2006) and inaccuracies in forecasting accurate emotions for outcomes that they will eventually come to experience (Gilbert, Pinel, Wilson, Blumberg, & Wheatley, 1998; Gilbert & Wilson, 2000; Wilson & Gilbert, 2003; 2005). In Gilbert and colleagues’ work, people overestimated the emotional consequences of outcomes of a variety of appetitive choices producing, among other effects, a durability bias, an over-estimate of the length of time that one would experience affect after an outcome. It follows, that participants in problem solving courts may anticipate wrongly the feelings that they will experience when they obtain either positive or negative outcomes following hearings.

Wilson, Wheatley, Meyers, Gilbert, and Assom (2000) coined the term “focalism” to refer to the situation in which people focus too much attention on the future event in question and too little on other events that are likely to co-occur. These authors found strong evidence of a durability effect in college students who over-anticipated experiencing long periods of happiness or unhappiness when their school football team won or lost a weekend game. Problem solving court offenders may also show the effects of focalism because they may not consider the other aspects of their lives that will co-occur with the experience of focal events. For example, offenders may over-estimate the negative emotions associated with attending treatment and counseling sessions because they think about these events in a vacuum without considering the other events in their lives, which may dilute the focal events. They may, as well, over-estimate the positive feelings that will follow successful experiences in court hearings. From this literature and these observations, it follows that regardless of their actual feelings, offenders in problem solving courts will be more likely to comply with court orders and program requirements to the extent that they forecast positive affect (or negative affect) in subsequent court hearings if they follow (or failed to follow) these requirements.

Finally, client demographic, personality, problem solving, psycho-pathology, and devotion to treatment efforts may moderate judicial interventions and the influences of procedural, distributive, and interactional justice, re-integrative shaming, offender motivation, and anticipated emotion. While the central feature of our model concerns the way in which court policy influences offenders’ perceptions of hearing fairness, motivation, and anticipated emotions to promote healthy engagement, offenders’ attributes may facilitate or impede these psychological processes. Fig. 1 represents these client attributes as potential moderators and possibly as mediators.

5.1. Testing the model

We are currently collecting data to conduct an initial test of this social cognitive model, which predicts the impact of the proceedings of problem solving courts on client behavior and case outcomes. The research team is administering surveys and outcome interviews to a sample of participants in several problem solving courts in South Florida, which include drug courts, mental health courts, and domestic violence courts. Rather than treating offenders mechanically through rational actor based policies of deterrence and incapacitation, these courts seek to spark offenders’ understanding of the desirability of treatment and to engage their intrinsic motivations. At the initial hearing, the researchers administer to each defendant a set of trait characteristic surveys including measures of psychiatric symptoms, childhood difficulties, problem solving capabilities, and a demographic sheet. After the last and final hearing, the research team conducts a quality of life interview with each candidate and conducts a case review (from the court records), coding demographic and diagnostic history data, as well as final outcomes. At all hearings (including the initial and final hearings), the team administers measures of procedural justice, re-integrative shaming, legitimacy, anticipated emotion, and motivation. The surveys tap into expectations and actual experiences of justice, emotions, and motivations that result from participating in the hearings. The research team works with each of the offenders answering questions, recording answers, and explaining the instruments and their meanings as necessary. The judges and their research staff in the courts who are part of the study have agreed to provide space for administering and storing survey materials. However, the judges are unaware of which defendants volunteer to be participants in our study. The court staff receives no feedback from our data collections on any of the clients so that our work will have no impact on the process or outcome of any case. At the end of the study, the research team will present a complete set of findings to all of the judges preserving the anonymity of all defendants. Our goal is to test both paths in the model and the role of trait characteristics as moderators of those paths. We will revise the model according to the empirical findings.

6. Therapeutic Jurisprudence, law, and psychology

Therapeutic Jurisprudence, an interdisciplinary approach to understand legal issues through psychological analysis, calls for researchers, mental health workers, lawyers, attorneys, and judges to apply techniques drawn from psychology and social work to motivate offenders and patients to accept rehabilitation and treatment and to pursue it successfully. It provides the theoretical foundation for problem solving courts, in which judges play active roles in the rehabilitation of offenders whose substance abuse, domestic violence, and untreated mental illness leads to unhealthy and socially inappropriate behavior. Individuals who voluntarily opt into these courts enter into a behavioral contract in which they agree to participate in treatment, to be monitored for compliance, and to report to court periodically to discuss their progress. Judges in problem solving courts lead community treatment teams and play an important role motivating participants and directing treatment, and preventative and educational services for offenders. In 2000, the Conference of Chief Justices and the Conference of State Court Administrators, following a joint task force analysis, adopted a resolution approving the growing movement in the direction of problem solving courts, including the use of principles of Therapeutic Jurisprudence in performing their functions. These principles include integration of treatment services with judicial case processing, ongoing judicial intervention, close monitoring of and immediate response to behavior, multidisciplinary involvement, and collaboration with community-based and governmental organizations. A growing body of Therapeutic Jurisprudence scholarship has also addressed how judges in problem solving courts can apply principles of Therapeutic Jurisprudence in their work (Winick, 2003; Winick & Stefan, 2005; Winick & Wexler, 2003).

Absent in the research literature in this area is any model of how participants in problem solving courts react to the judicial officers as problem solving teams and motivational interviewers. This work is the first step in developing a participant based model to explain how problem solving courts influence the behavioral choices of offenders who opt to engage in an alternative dispute resolution arena in which they voluntarily give up some autonomy and control in exchange for the guidance of legal professionals who try to assist them in reversing the problems in their lives that got them in trouble with the law in the first place. Once a successful model is specified and tested, researchers will
be able to study (and experiment) with different types of judicial interventions and styles to learn more about how problem solving courts work and in what ways they influence the psychological states of offenders. This work will go well beyond the simple mechanical push and pull of the rational actor model to help explain the manner in which offenders respond to the demands of the legal system. Future work should take a final model and apply it broadly to other interventions in problem solving courts and traditional courts to learn how judges and do influence outcomes. Additional investigations will include comparisons among offenders with different ethnic backgrounds, nationalities, and cultural viewpoints. The findings of this work will be valuable to both researchers interested in understanding how the law brings about change and for practitioners (judges, lawyers, social workers, and psychologists) who are trying to make the courts work better for people who abuse substances, act out violently against their significant others and who are in need of psychological services to rehabilitate their lives to eliminate anti-social behavior.

7. Another voice in debate

We conclude where we began, with the insightful and important comments of Professor Quinn (2009) who argued very effectively that the problem with the current conversation about problem solving courts in both the academic literature and perhaps more importantly in the policy debate, is that it only tells a small part of the story. The one loud voice that we easily and frequently hear, speaks of these courts as benevolent, effective, and indeed promising alternatives to the traditional criminal court for people with social and psychological problems that give rise to their legal difficulties. Quinn makes it clear that she is interested in hearing other voices, those of people who have looked more critically at these reform innovations. However, she agrees with Herbert Eastman (1995) that the voices should not be purely personal; instead, they should reflect what we know about the social reality of the way in which these courts operate. We agree with Professor Quinn that we need to make room in the conversation for voices that look more critically at these specialized courts and that there is room for voices from the past to contribute to the current debate.

However, the voice that we think has the most to offer is the one that tells the story of how these courts function currently rather than how they started out in the 1930s. We need to know how they currently influence (or fail to influence) defendants, how they currently impact (or fail to impact) the psychological and social problems of defendants, and whether they currently impact psychological processes that are different from the ones that we can observe in traditional criminal courts. The answers to these questions require a model of how modern problem solving court judges, attorneys, and teams influence perceptions of justice, motivate offenders, and how they influence the emotional reactions of defendants. Developing such a model and testing it is consistent with the approach that scholars of Therapeutic Jurisprudence would offer. The contribution of the current paper is that it makes use of tested theories in social cognitive psychology to construct such a model. We are currently collecting data to test it and hope to continue in the future. In the end, the interdisciplinary effort that combines different areas of work (here law, social psychology, and clinical psychology) offers the best solution to applied problems. There is no better vehicle for conducting this work than the framework offered through Therapeutic Jurisprudence.