

# Chapter 1

## Social Psychology and Problem-Solving Courts: Judicial Roles and Decision Making

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### Observations from a Mental Health Drug Court

On a mid-October morning, multiple defendants, their families, observers, social workers, treatment providers, attorneys, the judge, and all the other members of the judge's treatment team packed the mental health drug courtroom. There was a steady stream of offenders entering the courtroom and then leaving after appearing before the judge and the treatment team. During each hearing, an offender made an individual appearance before the judge, often without counsel. The offenders answered any questions that the judge asked and sometimes took the opportunity to directly address the court with his or her own questions, comments, or problems that resulted from participating in the treatment program. Some of the offenders, the ones with new cases or the ones that were not adhering satisfactorily to their treatment plans, arrived at court early (e.g., 8:30 a.m.) and had to stay until their hearings as late as 1:00 or 2:00 in the afternoon. Others arrived shortly before their hearings, answered a few questions, and then were dismissed with a new hearing date, which could have been as soon as the very next week or as late as 3 months down the road. All that depended upon how well the problem-solving court client was doing in treatment and whether the offender was in compliance with the conditions of the agreement between the client and the judge.

Consider Mr. Jones, an offender whom the state had charged with breaking and entering after the police found him in a local drug store at 3:00 in the morning, attempting to steal two boxes of cookies and several candy bars. Jones was not working, he was hungry, and he was wandering the streets of the city depressed and confused about where he was and where he was going. At the time of his apprehension, Jones was high on crystal methamphetamine (meth). The police found him wandering in the drug store mumbling to himself, crying, and trying to open one of the packages of cookies as he tried to exit the store. Prior to his arrest, Jones

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had been in and out of psychiatric treatment for episodes of clinical depression. When offered the choice between facing charges in the traditional criminal justice system or participating in the mental health drug court, Jones decided to take part in the problem-solving court program and accepted the stated goals of stopping his illegal use of meth and seeking treatment for his mental health problems. He agreed to regularly attend meetings of a 12-step program near his home (Jones lived with his older brother), provide urine samples upon the Court's request to prove that he had not used illegal substances, participate in rehabilitative therapy, and take his prescribed depression medication. In exchange, the court offered to drop the charges against Jones when he graduated from mental health court and established that he was capable (with supervision) of engaging in a substance-free and crime-free lifestyle.

Jones arrived at court at 11:30 for his 12:00 p.m. hearing. Sitting at the state's bench were several attorneys along with representatives from the treatment center he attended, his 12-step program, and the court laboratory responsible for testing his urine drops. One of the assistant state attorneys selected Mr. Jones' file and called out his name. The attorney pulled out several manila folders bound together with rubber bands and paper clips and began to rifle through the materials in preparation to ask questions of the offender and to answer any questions that the judge or other members of the judicial team might ask. At the same time, a case manager standing across the other side of the bench, opened her box of files and pulled out a smaller set of folders summarizing the offender's behavior in his treatment program. As the judge called Mr. Jones' name, the offender walked slowly and deliberately to a podium in the middle of the courtroom, which stood between the state and defense's tables facing the bench. Jones appeared somewhat nervous despite the fact that he had appeared many times before in the preceding 9 months of his participation in the problem-solving court. The judge greeted Mr. Jones and asked how things were going for him. Jones said that he was feeling much better and that he was looking forward to starting a program to complete his GED. Answering additional questions from the judge, he said that he had been clean now for the last 6 months and that he had not missed any of his treatment sessions or 12-step program meetings since his last appearance. The judge asked if Jones was taking his medication and he answered that he was, but the medicines made him dizzy sometimes and took away his appetite. After conferring with the case manager, the judge directed the social worker to make an appointment for Mr. Jones with the psychiatrist to see if there was something that could be done to offset the side effects of the medication. The state's attorney commented that Jones needed to stay on the medication because he had made an agreement to do so with the Court.

Next, the judge turned to the case manager to check on the accuracy of Mr. Jones' statements. The case manager confirmed that Jones was indeed drug free for more than 6 months with a long series of negative urine drops. Furthermore, the laboratory reported that he was taking his medications regularly. Jones had attended enough of the 12-step meetings to be in compliance with his treatment program, but he had missed a few meetings in the last several weeks. Still, Jones' therapist had submitted positive reports stating that the offender was making a solid effort to adhere to this treatment plan and that he was cooperative in therapy and working consistently on

the ongoing issues that seemed to trigger his depression episodes. The judge listened intently, but was very aware of the state's attorney signaling that he should start preparing for the next hearing. The judge's caseload was large and required that the hearings keep moving on so that the next defendant would also have his time in front of the judge. The judge looked up at the defendant speaking at the podium and congratulated him for doing so well and making good progress. He warned him not to miss his 12-step program because that was partly why he was able to stay sober and able to stay with his treatment program. The judge told Jones because he was doing so well he would not have to report back to court for an additional 6 weeks. The bailiff looked to the calendar, announced the next hearing for Jones, and handed him a slip of paper with the court date and time. The judge smiled at the offender and asked the rest of the people in the courtroom to join him in applauding Jones for his success. As Jones left the podium, he received loud applause and congratulations for his success.

The first author of this chapter has spent many hours observing problem-solving courts in multiple jurisdictions. The observations that I made of Mr. Jones in mental health drug court are not unique, but instead summarize the typical court hearing appearance when an offender complies with the court treatment plan. The positive reception that Jones received in court is contingent upon successful adherence to the treatment plan and the offender returning negative urine drops. For those defendants who slip back into their sanctioned conduct, those who test positive for substances, those who fail to come to treatment, and those who engage in further nuisance and/or illegal behavior the experience may not be as positive. It is likely to include further sanctioning such as closer monitoring (i.e., shorter times between hearings), harsh lectures during the hearings, additional urine drops, and even being detained in jail for short periods of time. In fact, for defendants who continually fail to comply with their treatment agreements the judge may decide to return their cases back to the regular docket of the criminal court. However, for those who are in compliance the problem-solving court, the experience can be pleasant, motivating, encouraging, and even something to which they look forward. In 2012, problem-solving courts include drug courts, domestic violence courts, unified family courts, mental health courts, veterans courts, and even youth courts. Problem-solving courts exist throughout the United States and some have grown up in other common law countries including Canada, England, Australia, and New Zealand. The purpose of this book is to examine the phenomenon of problem-solving courts through the lenses of law, philosophy, social science, and clinical treatment. We focus on the questions: "What is a problem solving court and how is it different from a traditional criminal court?"

## **The Revolving Door Problem**

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. This extends to veterans who find themselves to function in a stateside culture after having spent months and even years at war in the Middle East theatre. After the courts adjudicate these offenders and they serve their punishments they frequently

recidivate and return to the criminal courts with new charges (King 2009). Many offenders display difficulty to treat psychological problems that cause them to act out in disruptive ways, which the criminal justice system cannot effectively address with its punishment-oriented interventions. Indeed, the traditional tools of the criminal justice system are limited to efforts at deterrence, incapacitation, and to a lesser extent punitive rehabilitation, and such techniques do not treat the underlying psychological and social problems that are at the root of many types of maladaptive behavior (Winick and Stefan 2005). Deterrence and incapacitation techniques are ill suited to address the personal and psychological failings of lawbreakers who suffer from underlying social and psychological dysfunction (King 2009). As a result, traditional courts have become revolving doors for people whose criminal behavior arises from psychological and social impairments (King 2009). Problem-solving courts are one response to the revolving door problem.

Problem-solving court judges require offenders to complete services that force the offenders to confront their underlying psychological and social problems (Berman and Feinblatt 2005; Winick and Wexler 2003). Acting with the authority of the state, judges in problem-solving courts have the ability to hold offenders accountable for their actions and make them responsible for their own rehabilitation in a way that other community agents lack the influence to do (Berman and Feinblatt 2005; King 2009; Winick and Stefan 2005). Judges in problem-solving courts go well beyond the metaphor of umpires calling balls and strikes in favor of a team model in which the judge acts similar to the captain of the team.

Judges act as team leaders and form partnerships with community welfare agencies and service providers to address the wider issues that offenders face. In fact, problem-solving judges act as much like case managers as they do as judicial officers. The key component that differentiates them from traditional criminal court judges is that they try to motivate participants to take advantage of the services available for remediation. The process in problem-solving courts is collaborative instead of adversarial, in that attorneys, service providers, and judges work as an interdisciplinary team to develop a treatment plan to serve the interests of the participants and their families. The offenders take active roles in their own rehabilitations (Berman and Feinblatt 2005; King 2009). While the philosophy of problem-solving courts is well-articulated, specific models of how the courts influence offenders remain poorly specified. The current book includes a series of papers that examine the role of court processes in a model of participant rehabilitation that attempts to enable offenders to take control of their own rehabilitation in accordance with the tenets of therapeutic jurisprudence (Winick and Wexler 2003). First, we discuss the traditional rational actor approach to adjudication and then describe a decision-making model more consistent with the philosophies of therapeutic jurisprudence.

## **Rational Actor Model**

Traditional criminal law adopts a rational actor model to explain the conduct of offenders (Korobkin and Ulen 1998, 2000). It assumes that people weigh the costs and benefits of following, or not following the law and based upon the outcome of

that calculus deliberately choose a course of action. Therefore, judges in traditional criminal courts rely on punishment to discourage undesirable behavior because they adhere to the rational choice model in which all people assess their material, social, and psychological assets at the time of their choice and act to increase or at least maintain those assets (Hastie and Dawes 2001). Under the rational choice model, the driving force is adaptation so that actors select behaviors with the highest expected utility (Korobkin and Ulen 2000), those that maximize the likelihood of a positive change in one's life assets. Rational actors avoid behaviors that lead to a decrease in their assets and therefore will not engage in behaviors that lead to jail time or fines. Furthermore, by a process of general deterrence others who become aware of the law will avoid those same undesirable behaviors because they too wish to avoid the loss of their own life assets. We argue that the rational utility maximizer model is incomplete for understanding the choice behavior of offenders and potential offenders because it leaves no room for offenders' perceptions of fairness, motivational styles, or emotional reactions to courtroom process or hearing outcomes (Wiener et al. 2006).

To be sure, judges in problem-solving courts do adopt some of the elements of a deterrence-based theory, when they function as compliance monitors ordering offenders to participate in services and then evaluating their progress during review hearings in order to foster public safety and offender obedience. Judges acting in this capacity adopt many of the same techniques, as do their brethren in traditional criminal courts. However, those in traditional courts act only to rule on the attorney motions and in doing so assure that the trial process is consistent with that the rules of procedure and rules of evidence that are controlling within the jurisdiction within which they serve. As an example of how problem-solving court judges use deterrence-based techniques to promote rehabilitation, Rempel et al. (2008) reported on a Brooklyn Domestic Violence Court in which magistrates primarily held review hearings to determine whether offenders were in compliance and therefore could continue to the next hearing without a change in protocol. In that court, judges added additional sanctions when offenders engaged in undesirable and illegal conduct. However, even in the domestic violence and drug courts where judges hold clients to unbending standards of conduct, they still leave room for program participants to "fall off the wagon" and even expect them to deviate from purely rational choice patterns. That is, they expect setbacks, plan for them, and try to shape the behavior of offenders very much similar to behavior management health care providers would do, albeit often without the training of such health care providers.

Nowhere is the inadequacy of the rational actor model as clear as in the policies that traditional courts apply to mentally ill defendants, trying to deter offenders from carrying out additional crimes, and trying to deter others through example from engaging in similar crimes. Typically, these efforts fall short because defendants with mental health issues are often not rational utility maximizers, in part, because they do not recognize the same life assets as do people without mental illnesses, and partly because they do not weigh costs and benefits in the same way as others do. As a result, court-enforced punishment is unlikely to rehabilitate or even deter people with mental illnesses. Instead, those with debilitating mental illnesses frequently recidivate, return to court and overcrowd local jails and regional prisons. Furthermore,

mentally ill inmates face jails and prisons which lack treatment resources and are intensely stressful, resulting in further decompensation and increased suffering.

One remedy to the problem of “revolving door” inmates has been to divert individuals from jail into treatment through problem-solving courts (Winick 2003), which are criminal or family courts with separate dockets for those with psychological or social problems. These courts divert offenders from the criminal justice system into treatment (Goldkamp and Irons-Guynn 2000; King 2009; Redlich 2005; Redlich et al. 2006; Steadman et al. 2001). Participants undergo court-ordered treatment, take medication, and participate in community-based services. The court praises success in treatment and sanctions lack of compliance. Participation in mental health courts and other problem-solving courts is voluntary so that offenders can choose to defend themselves in regular criminal court or agree to participate in the drug, mental health, or other treatment regimen (Redlich et al. 2006).

Inasmuch as judges in problem-solving courts facilitate 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 (Winick 2006). Therapeutic jurisprudence is less a theory of human behavior and more a philosophy of nonretributive justice in which the goal is to empower offenders, offer them a way to take control of their own treatment, and help them to make judgments that are rational in the way that the criminal law defines rational choice.

King (2009) argues that principles of motivation are founded in self-determination, the promotion of procedural justice, and offender compliance. Therapeutic jurisprudence-based problem-solving courts inspire motivation and assure treatment compliance by viewing defendants as active processors who adjust their responses to the courtroom according to their perceptions of the fairness of their treatment at the hands of the court, their motivation states induced during hearings, and their anticipated emotions about future hearings (Wiener et al. 2010). Court officers try to create an environment through law and legal process that motivates and encourages offenders to participate in services and to seek positive outcomes, and reinforces offenders for doing so (Winick 2006).

## **The Psychological Model of Legal Decision Making**

### ***Problem-Solving Court Offenders***

Wiener et al. (2010) posited a social cognitive model that helps explain how offenders’ judgment and decision-making processes deviate from those of a purely rational decision maker. Our model endorses a therapeutic jurisprudence philosophy to understand how problem-solving courts empower clients to take responsibility for their own rehabilitation. We have reproduced the model in Fig. 1.1. It shows how

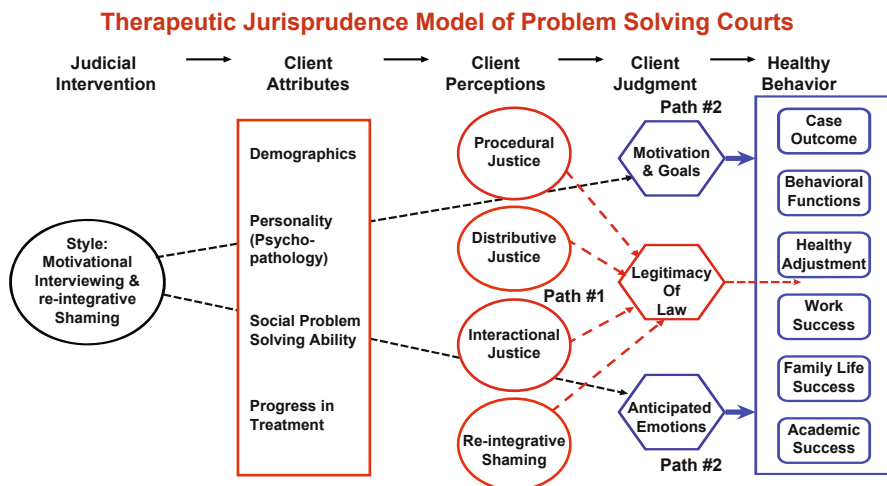


Fig. 1.1 Therapeutic jurisprudence model of problem-solving courts

judicial intervention may or may not produce healthy choices and positive outcomes for problem-solving court offenders.

Figure 1.1 depicts two paths that describe the judgment process of offenders as they choose either to follow the courts orders or to disregard the judge (Wiener et al. 2010). The first path relies heavily on the offenders’ sense of justice, fair play, and ultimately the legitimacy of the law. Based upon Tyler and Blader’s (2003) group value theory, we hypothesize that when defendants believe that the punishments (or rewards) that they receive are commensurate with their conduct, they conclude that the adjudication outcome was just and therefore the law is legitimate. In other words, if hearing outcomes are consistent with norms of fairness (equality and equity), offenders experience distributive justice and are more likely to follow the court’s orders because they perceive the decision outcome to be fair and balanced relative to their own misconduct.

Along the same path (#1)(Wiener et al. 2010) refer to multiple determinants of procedural justice, which rise from offender evaluations of the formal decision-making procedure and whether the process was unbiased. To the extent to which defendants believe that the process was unbiased and the court encouraged them to voice their views in order to influence decision outcomes, the existing research suggests that the offenders will have found the process to be procedurally just or fair (Wiener et al. 2010). Prior research shows that when people experience procedural justice and to a lesser extent, distributive justice, they are more likely to engage in a positive way with the larger defining group (in this case, law-abiding society), adhere to its norms, and respect the society’s constraints on their conduct (e.g., Amiot et al. 2007; Blader 2007a, b; Fuller et al. 2006; Gleibs et al. 2008; Hakonen and Lipponen 2008; Mayer et al. 2009).

Monahan et al. (2005) have shown that perceptions of procedural justice lead to perceptions of voluntary choice to participate in programs rather than coercion and thereby help offenders to gain a sense of intrinsic motivation and avoid the negative effects of coercion. Furthermore, Tyler's (2006) work established a link between procedural justice and perceived legitimacy of authority and respect for the law. Thus, problem-solving court participants who find court procedures fair are more likely to engage with authority in a healthy way and voluntarily accept the demands of the court. Following recent work in organizational psychology (e.g., Bernerth et al. 2007; De Cremer et al. 2007; Flaherty and Moss 2007; Forret and Love 2008; Klendauer and Deller 2009), our model further divides procedural justice into 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). The literature supports strongly this delineation of the different components of justice (Bies and Moag 1986; Colquitt 2001; Leventhal 1980; Shapiro et al. 1994; Thibaut and Walker 1975; Tyler 1988, 2000, 2003).

Poythress et al. (2002) showed that problem-solving court participants report experiencing high levels of procedural fairness. They administered a measure of procedural justice to defendants in the Broward County Mental Health Court and to a sample of defendants in a criminal court in another Florida jurisdiction and found that participants in the mental health court were more satisfied with the proceedings. The authors explained their findings with the observation that the participants in the problem-solving court thought that they had a greater opportunity to explain their own personal situations. They felt that the judge was more interested in them, treated them with greater respect, and more fairly. Wales et al. (2010) found similar procedural justice results in their study of participants in the District of Columbia's Mental Health Diversion Court.

Finally, research has shown that perceptions of procedural justice helped drunk driver offenders to see the law as legitimate. In a study of alternative dispute resolution procedures (i.e., the Canberra Reintegrative Shaming Experiment), Tyler et al. (2007) demonstrated that increases in procedural justice predicted offenders' belief in the legitimacy of the law. In addition, when friends and relatives in the offenders' lives respected them as individuals and were ready to reintegrate the offenders back into the significant others' own lives, the offenders came to believe in the legitimacy of the law, especially when their friends and family were ashamed of the offenders' conduct. Furthermore, those offenders who regarded the law as legitimate were less likely to drive under the influence as shown in follow-up data. In summary, we expect that if offenders perceive that a problem-solving court is procedurally fair, it 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 and comply with judicial orders. That is they do not comply with the law out of a fear of certain and swift punishment, but rather out of a respect for the legitimacy of the law.

The second path in Fig. 1.1 is more direct than the first in that it bypasses a consideration of the legitimacy of the law, operating directly out of the characteristics of offenders' motivational and emotional states (Wiener et al. 2010). Accordingly,



offenders who show motivational strategies to increase healthy behavior or who, in a closely linked manner, anticipate positive emotions for succeeding at their rehabilitative work and negative emotions for failing, are more likely to adhere to the judges' orders. More specifically, Wiener et al. (2010) argued that problem-solving court participants can commit two types of decision errors: errors of omission (i.e., failure to participate in ordered therapeutic services such as individual and/or group therapy) or errors of commission (i.e., engaging in antisocial behaviors such as acting out aggressively, substance abuse, or engaging in nuisance behaviors). The research literature in social psychology shows that these two that different types of motivation strategies minimize these errors.

According to Higgins and colleagues' regulatory focus theory research (Higgins 1997, 1998, 2000, 2001, 2002; Camacho et al. 2003; Crowe and Higgins 1997; Higgins et al. 1997), people in a promotion motivational state seek accomplishment and advancement by obtaining matches to desired end states. At the same time, those in a prevention motivational state seek safety and security by avoiding mismatches to the desired end state. High promotion motivation results in people working diligently to accomplish their goals and avoid errors of omission, while prevention motivation increases vigilant action and avoidance of errors of commission (Higgins 1997, 1998, 2000, 2002). Recently, Cesario et al. (2008) showed that promotion and prevention motivation arise from both situational inducements and activation of individual difference traits (see also, Higgins 1997, 1998, 2001, 2005, 2006; Higgins et al. 1994; Lee and Aaker 2004). Arguably, the most serious decision errors that offenders in problem-solving courts can make are errors of commission leading to more illegal conduct and a cycle of recidivism and rearrest. It follows that clients with heightened prevention motivation are most likely to be successful because they will avoid future antisocial acts. However, errors of omission (failing to participate in ordered therapeutic intervention) are also detrimental so that the most successful offenders will also be high in promotion focus, and so as a result are more likely to diligently engage in appropriate goal behavior and follow the courts rehabilitation plan.

Recent work in social psychology suggests that anticipated emotion acts similarly to motivation and may offer a separate route that could explain offender decision making. According to Baumeister et al. (2007), experienced emotion acts as feedback serving to continually update our records of past successes and failures. The proposition that the future anticipation of positive and negative emotion can gain the power to regulate subsequent behavior enjoys empirical support in the literature tested in a variety of situations (Loewenstein et al. 2001). Perhaps most importantly for the distinction we make between the rational actor model and our view, Mellers and colleagues (Mellers 2000; Mellers et al. 1997, 1999) demonstrated that anticipated pleasure explained choices beyond the expected utility inherent in the rational actor model. They showed this in a series of studies that examined decision making in both real world and laboratory contexts (e.g., financial gambles, test scores, and pregnancy tests).

The jump from the Baumeister et al. (2007) feedback model and the accompanying research literature in anticipated emotion to our prediction that offenders who experience positive or negative emotions after court hearings may anticipate the same

for future encounters is a short and logical one. However, we go one step further and predict that offenders who anticipate positive (or negative) emotions following their own successes (or failures) in achieving the problem-solving court requirements are most likely to comply with future judicial orders. Thus, the challenge for the problem-solving court judges is to instill the appropriate type of anticipated affect in the clients who come before them.

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 contributed to the legal violation that triggered court intervention in the first place. The affective forecasting literature suggests that people are generally impulsive (Hsee and Hastie 2006; Slovic 2001) paying more attention to immediate payoffs than to distant outcomes. This is true even when the costs of distant outcomes are greater than the benefits in the immediate payoffs, even when the cost of those outcomes far exceeds the immediate payoffs. As a result, people are inaccurate in predicting the actual emotions that they will eventually experience after both successful and unsuccessful outcomes (Gilbert et al. 1998; Gilbert and Wilson 2000; Wilson and Gilbert 2003, 2005). For example, 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 overestimation of the length of time that one would experience affect after an outcome. Yet, despite the fact 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, it may be the anticipation of positive or negative emotion and not the actual experienced motivation that determines their likelihood of compliance decisions.

Problem-solving clients likely demonstrate what Wilson et al. (2000) called "fo-calism" referring to the situation in which people focus too much attention on a future outcome and ignore the other events that occur in their lives simultaneously. In Wilson et al.'s (2000) research, college students overanticipated long periods of happiness or unhappiness when their school football team won or lost a weekend game. Similarly, offenders in problem-solving courts might overestimate the positive (negative) feelings that will follow successful (unsuccessful) experiences in court hearings. Our model suggests that regardless of their actual emotions, offenders 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.

Of course, client demographic, personality, problem-solving ability, psychopathology, and devotion to treatment efforts may moderate and mediate judicial interventions and the influences of procedural, distributive, and interactional justice, re-integrative shaming, offender motivation, and anticipated emotion. Figure 1.1 represents these client attributes as potential moderators and possibly as mediators. In its totality, Fig. 1.1 represents a decision-making process that includes some aspects of the rational actor approach, but goes beyond that to consider a fuller psychological model of judgment and decision making that is more consistent with the therapeutic jurisprudence approach.

## *Judicial Officers*

Under a therapeutic jurisprudence model, problem-solving court judges acknowledge that decision-making processes may not always be purely rational. They endorse a psychological rather than an economic model of human decision making and indeed such a model applies not only to the judgments and decisions of offenders, but also to the judgments and decisions of the judicial officers themselves. That is, the judges' views of offenders as "quasi-" rational and even irrational decision makers demands that they behave differently toward offenders than does a purely rational model of decision making. The quasirational or irrational model requires judges to act to empower clients to make the best choices for themselves, their families, and their communities. For this reason, problem-solving court judges take advantage of the authority that the state imbues them with, even when not acting in the traditional role of judicial officers. Traditional social workers and case managers act with the authority of an agency, which connects only indirectly to the state through a Department of Health and Human Services. For case managers to act with the authority of law, they must work through the courts to obtain the state power that judges bring automatically. Because they wield the authority of the state, judges have the potential to be more effective than are traditional case managers in holding offenders accountable for their own rehabilitation. Equally important, judges have the power to order the services that will assist offenders to address the wider issues that they must confront in order to move forward in resolving the underlying problems that they face (Berman and Feinblatt 2005; King 2009; Winick and Stefan 2005). In assisting offenders to overcome the barriers to a healthy lifestyle, these judges seek out the cooperation of community service providers. They act as team leaders collaborating with community welfare agencies and service providers to address offenders' problems and as such take on some of the traditional roles of case managers. As a result, the process becomes more cooperative than adversarial so that the various actors (attorneys, service providers, and judges) work as a team to meet the best interests of the participants and their families (Berman and Feinblatt 2005; King 2009).

Michael King in his recently published bench book (2009) rejects the term problem-solving courts in favor of "solution focused judging." According to King, rehabilitation is not simply the absence of a negative event—offending—rather it focuses on bringing about a positive outcome, "the ability to lead a happy, constructive and law abiding life in the community" (King 2009, p. 5). King argues that to be successful problem-focused judges must use court process to help bring about a solution to the participants' problems. The goal of the judge ought to be to use court process to empower program participants to determine the essential requirements that they need to lead a happy, constructive, and law-abiding life. To do so the judge should assist the offenders to identify the problems which affect their ability to lead such a life and to facilitate them in developing and implementing solutions to their problems. Respecting the autonomy of the clients, in effect, seeing them as quasirational actors who deviate from simple utility maximization, the judges consider the program participants' needs and wishes, ultimately leading them to provide ongoing support for the clients when at all possible.

## **Taxonomy of Problem-Solving Courts: Judicial Role and Decision-Making Models**

### ***Agency of the Judicial Role***

Next we return to the question that began our discussion, “What is a problem solving court and how is it different from a traditional criminal court?” The discussion in the previous sections describes two fundamental dimensions of problem-solving courts, which differentiate them from traditional criminal and civil courtrooms. The first dimension is one of agency and refers specifically to the role of trial court judges. We can think of the trial court judge’s role on a continuum with opposite poles labeled as arbitrator and facilitator. The arbitrator judge acts similar to an umpire in a baseball game, objectively calling balls and strikes serving as the final arbitrator of the rules of evidence, trial process, and choice of law. The judge communicates primarily with the attorneys acting as does a referee in a boxing match, making sure that the adversarial opponents follow the accepted rules of procedure. The judge speaks sparingly to the defendants and when speaking the judge represents the authority of the state indifferent to the interests of either the side of the dispute. The judge’s decisions pertain only to issues of law and administration of a “fair” trial. If the trier of fact finds the defendant guilty in a criminal trial, only then does the trial judge abandon the arbitrator role during a sentencing hearing to apply the law and sentencing guidelines to assign a punishment. However, even here, the trial judge will apply the law within tight constraints as the legislature intended.

The facilitator judge serves as a case manager or team leader forming partnerships with service providers, the state’s attorney, the defense attorney and other court staff in order to understand and find solutions for the underlying social and psychological problems that contributed to the offender’s conflict with the law. The goal of the judicial team is to assign the offenders to services that will effectively ameliorate their personal problems, motivate them to engage fully in the services, and to monitor the clients making sure that they do not backslide and once again violate the law. To accomplish this task, judges create therapeutic environments in their courtrooms that relax rules of procedure and evidence, enabling the judicial team to consider the perspective of the offenders as troubled clients. These judges reject many of the elements of the adversarial approach in favor of one in which all parties work toward a common goal—solving the psychosocial problems of the defendants.

### ***Decision-Making Model***

The second dimension concerns the model of decision making that the court adopts for understanding the way offenders decide whether to obey or disobey the law. Once again, we can think of the judge’s role on a continuum with opposite poles, this time labeled as “economic or rational actor model” and “psychological model”. The

economic model views people as cost minimizers and benefit maximizers; therefore, trial judges rely heavily on punishment to deter illegal behavior both from the current offender and from others who come to expect swift and certain punishment for their misdeeds. The courts assume that offenders adapt to their circumstances and select behaviors with the greatest benefits and fewest costs. Punishment tips the balance against illegal conduct by increasing the costs relative to the benefits. Furthermore, by a process of general deterrence other potential defendants will avoid illegal behaviors because they wish to avoid the punishments that the courts can and do hand down.

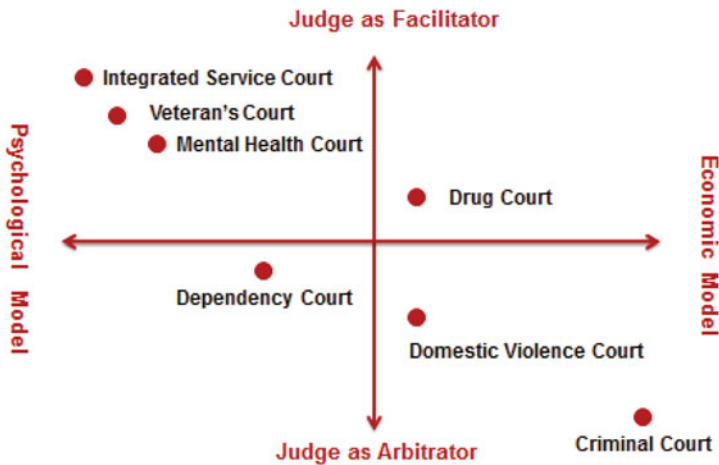
The psychological decision-making model acknowledges that the rational actor model is incomplete because it leaves no room for offenders' perceptions of fairness, motivational styles, or emotional reactions to hearing processes or outcomes (Wiener et al. 2006). The psychological model sees offenders as more complex than simple utility maximizers. It considers the offenders' views of the legitimacy of law, their motivations for following the law, personal dispositions that arise from the offenders' social circumstances, psychological characteristics of the offenders, and the offenders' emotional reactions to the events that occurred before, during, and after their arrests. The psychological model assumes that offenders who take responsibility for their own treatment will be more likely to comply with the judge's orders and will be successful in their rehabilitation process. Wiener et al. (2010) describe one social cognitive model that suggests two paths: a procedural justice to legitimacy path and an emotion and motivational path that can moderate rational choice to predict healthy choice outcomes for clients in problem-solving courts. Other models that endorse a therapeutic jurisprudence philosophy are certainly possible.

A qualifying note about these two dimensions, decision-making model and judicial agency, is in order. The descriptions that we offer represent the endpoints for these two dimensions so that judges in all courtrooms likely fall somewhere between the two endpoints on each dimension endorsing some but perhaps not all the properties of one endpoint of the other. For example, in drug courts, domestic violence problem-solving courts, and in some mental health courts, the judges do take on a more adversarial role approach. They carefully monitor offender conduct throughout the problem-solving court program, admonish clients who backslide, and even sanction some with jail time if they violate the law (e.g., continuing to use illegal drugs, fail to adhere to court orders in domestic violence cases, or refuse to attend treatment activities). Similarly, in dependency courts, domestic violence courts, and unified family courts, the judge may serve some of the arbitrator and the facilitator functions to both help treat offenders and their families while, at the same time, adjudicating the legal issues in the case.

Figure 1.2 displays the two dimensions and shows seven examples of problem-solving courts which vary according to judge's agency role and decision-making Model. The bottom right quadrant, where the judge acts as an arbitrator and the court assumes an economic (rational model) include as the defining exemplary, traditional criminal courts. Falling closer the center of both dimensions are domestic violence courts that have jurisdiction over civil and criminal matters in domestic violence cases where the goal is to hold the offender accountable for his or her actions, treat the violent offender, and offer services to the victims of the violence. Moving up the

vertical access (i.e., judge as facilitator with an economic decision-making model) locates drug courts in which the judge acts more in a facilitator role, but still relies heavily on drug use testing, punishment, and deterrence to prevent offenders from engaging in further substance abuse. The lower left quadrant (i.e., judge as arbitrator with a psychological decision-making model) lists dependency court or sometimes family court, which serve to adjudicate abuse and neglect cases. Here the judge assumes some of the traditional role as an arbitrator, ruling on motions, hearing motions, and deciding on issues of law, but does so with an eye toward treatment of the family to promote the best interests of the child. Judges in dependency courts typically give the family the benefit of the doubt and assume that with the correct services, the family will work to change problem behaviors to either retain or regain custody of their child or children. Not everyone considers dependency courts to be problem-solving courts because they, unlike integrated service courts, still operate primarily on an adversarial model, but with relaxed rules of evidence and procedure. However, dependency courts were the starting point for modifications that led to the true problem-solving court structure. Finally, in the upper left hand quadrant (i.e., judge as facilitator assuming a psychological decision-making model) are mental health courts, veterans' courts, and integrated service courts (i.e., courts that combine services offered in dependency courts, mental health courts, and drug courts). In our model, these courts represents the purest of the problem-solving courts because the judge acts as a case manager who uses the power of the state to empower clients to solve their psychosocial problems by making use of a partnership between the court treatment team and service providers in the community. The judge leads the problem-solving team, which works to motivate the clients to participate in services and work toward rehabilitation. The courts rely less on punishment and deterrence and more on fostering procedural and distributive justice, client motivation, and client emotional reactions. The judge uses a more complex model of offender decision making, one similar to our social cognitive model (Wiener et al. 2010).

The chapters in this book generally assume that problem-solving courts are ones in which judges act primarily as facilitators and team leaders, assume clients make complex decisions that go well beyond simple utility maximization, and therefore they consider client perceptions of fairness, client motivations, and client emotions in dealing with offenders' psychosocial problems. The first part of this book that follows this introductory discussion includes three chapters that focus on the lower right hand corner of Fig. 1.2 treating dependency courts as the jumping-off point for problem-solving courts. Chapter 2, "The Marriage of Science and Law in Child Welfare Cases" authored by Judge Cindy S. Lederman sets the stage with the observation that in child welfare cases, dependency court judges make decisions that include clinical components, but always within a developmental context. Lederman argues that to make those decisions, judges must have access to the most accurate and up-to-date findings in the science of child development. In Chap. 3, "Exploring the Value-Added of Specialized Problem Solving Courts for Dependency Cases" Sophie Gawtowski, Shirley Dobbin, and Alicia Summers show how dependency courts are the foundational model for problem-solving courts and highlight the importance of practice guidelines for judges in these courts. They demonstrate this with data that



**Fig. 1.2** Seven examples of problem-solving courts that vary according to Judge's Agency Role and Decision Making Model

compare the functioning of three different dependency courts in Utah, each using a different type of problem-solving court model. To round out this part, Victoria Weisz (Chap. 4) more critically examines the roles of methodology, data interpretation, and dependency courts' need for timely and accurate research data in a chapter entitled, "Dependency Courts and Science."

The second part focuses on the lower left hand corner of Fig. 1.2 with an in-depth analysis of domestic violence courts. In Chap. 5, "Unified Family Courts: An Interdisciplinary Framework and A Problem solving Approach" Barbara Babb discusses the need for problem-solving courts to help perpetrators and victims cope with the complicated issues of modern families including incidents of domestic violence that too frequently result in conflict with the law. Professor Babb shows how therapeutic jurisprudence is a blueprint for unified family courts and how that model helps judges in those courts respond effectively to problems related to domestic violence. Chapter 6, "Domestic Violence Courts: The Case of Lady Justice Meets the Serpents of the Caduceus" authored by Nancy Wolff first describes the need for domestic violence courts and then goes on to discuss the functions that they serve. She summarizes the courts' attempt to integrate the prosecution, punishment, and deterrence of batterers; rehabilitation of batterers; and protection of victims through the use of protective orders. She explains that part of the value of domestic violence courts is the efficiency of being able to expedite, simplify, and unify the way in which the court responds to domestic violence by addressing both the criminal and civil issues that courts must consider to prosecute the batterer and protect the victim. Rounding out Part II, is a chapter entitled "Gender Issues in Problem-Solving Courts" in which Anna Shavers examines the role of therapeutic jurisprudence as an approach to address the problems of domestic violence in the problem-solving court milieu, especially, as it affects both men and women in a chapter entitled, "Gender Issues in Problem-Solving Courts."



The third part in this book focuses on the upper left hand corner of Fig. 1.2 with three chapters that examine in detail the need for mental health courts, the way that they function, their effectiveness, and the special concerns that they generate. In Chap. 8, “Mental Health Courts May Work, But Does It Matter If They Do?” John Petrila describes mental health courts as nonadversarial forums that work toward meeting the social and treatment needs of mentally ill clients who get into trouble with the law. He goes on to argue that emerging data suggest that mental health courts are effective at improving public safety and better access to treatment, but that finding does not silence other substantive and procedural issues that we need to consider before concluding that these problem-solving courts are worth retaining in the justice system. The rest of the chapter takes on some of these substantive and procedural issues and makes recommendations on how to make the best use of mental health courts. In Chap. 9, “The Past, Present, and Future of Mental Health Courts” Alison Redlich summarizes ten essential elements of mental health courts organized into three global areas: planning and sustainability, precourt enrollment considerations, and in-court considerations. She evaluates the existing research in each of these areas highlighting what we know and what we still need to find out and the uses that analysis to begin to plot the future of mental health courts in the justice system. Rounding out this part is a chapter by Robert Schopp entitled, “Mental Health Courts: Competence, Responsibility, and Proportionality,” in which he argues that to be successful mental health courts must reduce recidivism while not undermining any of the important values in the relevant criminal law. He goes on to catalogue the relevant values in the criminal law that might be incompatible with mental health courts and suggests that certain types of psychological impairments might be amenable to treatment in mental health courts without violating the values embodied in the criminal law. He concludes his analysis by showing when these courts might be consistent with legal values and when they might not be.

The fourth part in this book includes two chapters that examine problem solving in a broader perspective. Chapter 11, “The Evolution of Problem-Solving Courts in Australia and New Zealand: A Trans-Tasman Comparative Perspective” coauthored by Elizabeth Richardson, Katey Thom, and Brian McKenna compares existing problem-solving courts in Australia and developing ones in New Zealand with those in the United States. They describe the cultural and structural differences among these countries that contribute to the differences in how these courts function in each jurisdiction. First, the authors argue that the courts in Australia and those developing in New Zealand look more circumspect on the innovative judicial practices that have grown up in problem-solving courts in the United States. The authors discuss the difference between what King (2009) and King (2010) call “solution focused” courts and the function of problem-solving courts in the United States suggesting that these courts should not solve problems for people, but instead they should create opportunities for people to undergo treatment or therapy to address their own problems. This chapter presents an overview of the problem-solving courts currently operating in Australia and New Zealand and it then concentrates on the critical role of collaboration between the legal, health, and welfare sectors in these courts. Chapter 12 is a posthumous work that the late Bruce Winick mostly completed before his



premature death. Professors Winick with David Wexler are the founders of the therapeutic jurisprudence school of thought. In his chapter, Professor Winick describes therapeutic jurisprudence as the underlying philosophical foundation for problem-solving courts. He shows how this plays out in drug courts, mental health courts, and domestic violence courts. This chapter includes some additional comments applying Professor Winick's comments to newly emerging veterans' courts. We are honored to have Bruce's final work in our book.

Finally, this book finishes with Eve Brank's discussion of the contribution of the chapters in this book to the state of the field for problem-solving courts. She examines the intended and unintended consequences of problem-solving courts with a particular focus on the unintended consequences because of the current disconnect between legal training and the needs of problem-solving courts. Brank outlines possible solutions to prepare the legal academy for courts that have a therapeutic jurisprudence foundation. In summary, this collection of chapters takes a different look at problem-solving courts, integrating legal and social scientific analysis with focal point of a philosophic lens. Problem-solving courts emerged out of the tenets of therapeutic jurisprudence as the late Bruce Winick wrote so eloquently in his contribution to this book. We hope that this book takes the next step and sharpens some of the important insights of therapeutic jurisprudence in the context of this new innovative merging of social science and law.

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