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## Overview

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# OVERVIEW

*Daniel W. Shuman\**

**T**HIS symposium consists of four articles based on speeches presented on January 5, 1992, in San Antonio, Texas at the Association of American Law Schools' Law and Mental Disability Section Program entitled Psychological Jurisprudence: Another Perspective. The program was organized to reflect a major shift in the direction of mental disability law scholarship. These four articles, significant in their own right, collectively illustrate the major approaches of a new generation of mental disability law scholarship.

A major thrust of the past generation of mental disability law scholarship, that began in the late 1960's and ended in the early 1990's was an attempt to use law doctrinally to change the practices of mental health professionals.<sup>1</sup> Borrowing heavily from constitutional criminal procedure, mental disability law scholarship sought, for example, to persuade courts to require mental health professionals to warn people in commitment proceedings of the consequences of forensic interviews and to limit the range of treatments unilaterally available to mental health professionals.<sup>2</sup> Mental disability law scholarship has largely abandoned this pedantry, in part, because it succeeded and there is now a greater infusion of procedural safeguards in the treatment of the mentally disabled; in part, because the political mood of the country has changed and there is now a more conservative judiciary that is less responsive to these arguments; and, in part, because the intellectual ground upon which these issues rest is well plowed.<sup>3</sup> The loss of interest in the constitutional criminal procedure analogue doctrinal scholarship has left a vacuum. What is left for mental disability law scholars to say, and is it something to which anyone should bother to listen?

The new generation of mental disability law scholarship has not rejected the insights or achievements of the earlier generation of scholarship. Rather, it has recast the issues based on a number of new perspectives. Instead of focusing predominantly on the doctrinal use of law to change the way mental-health professionals practice, the new generation of mental-disability

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1. David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, in BEHAVIORAL SCIENCES AND THE LAW (forthcoming 1992).

2. See, e.g., Bruce J. Ennis, *Civil Liberties and Mental Illness*, 7 CRIM. L. BULL. 101 (1971).

3. David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research*, 45 U. MIAMI L. REV. 979 (1991).

law scholarship has broadened its focus to include the use of research by mental-health professionals to suggest changes in the way the legal system goes about its business in dealing with the mentally disabled as well as the non-mentally disabled. This changed focus may reflect the sagacity of a generation of mental-disability law scholars who have learned that real change begins from within.

One guidepost for this new generation of scholarship using psychological research to address the way the legal system goes about its business is Tom R. Tyler's article, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearing*.<sup>4</sup> Tyler applies a body of research, which examines people's psychological responses to the judicial process, to civil commitment proceedings. Curiously, this research has not been applied to procedures involving people suspected of suffering from psychological problems. This body of research, led by the work of Tyler and his fellow researcher E. Allan Lind,<sup>5</sup> focuses on people's subjective reactions to the proceedings, rather than the ability of these proceedings to reach objectively accurate outcomes. This research has shown that people are less influenced by their perception of the fairness of the outcome of a judicial proceeding than they are by their perception of the fairness of the process by which that decision is reached.<sup>6</sup> The most important elements of this evaluation of procedural fairness are participation, dignity, and trust.

There are at least two reasons why it is useful to examine psychological responses to the fairness of civil commitment proceedings. First, the legal model of civil commitment proceedings has been challenged as anti-therapeutic by those advocating a medical model.<sup>7</sup> The research on psychological responses to the judicial process offers empirically-based insights about the validity of the anti-therapeutic critique of the legal model of civil commitment proceedings and other "rotting with your rights on"<sup>8</sup> critiques of procedural safeguards for the mentally disabled. Second, there is a body of research that suggests that voluntary hospitalization is more effective than involuntary hospitalization in treating mental health problems.<sup>9</sup> Does that differential efficacy reflect the therapeutic impact of participating in the hospitalization decision? Are people committed in proceedings that incorporate participatory fairness more likely than those committed in proceedings that do not incorporate that fairness to be treated as effectively as those who are voluntarily hospitalized? Tyler's article applies this body of research to civil commitment proceedings to offer insights to these important questions that

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4. 46 SMU L. REV. 433 (1992).

5. E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

6. Tyler, *supra* note 4, at 437.

7. See David B. Wexler et al., *Special Project, The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 69 n.223 (1971) (summarizing the views of the critics).

8. Thomas Gutheil, *In Search of True Freedom: Drug Refusal, Involuntary Medication and "Rotting with Your Rights On"*, 137 AM. J. PSYCHIATRY 327 (1980).

9. See Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 409 n.4 (1992).

have largely been ignored by mental disability scholarship<sup>10</sup> and to suggest a research agenda for a new generation of mental disability law scholarship. In contrast to the constitutionally driven doctrinal focus on procedure that typified the earlier generation of mental disability law scholarship, Tyler points the way for a new generation of mental disability law scholarship that includes an empirically driven therapeutic focus on procedure.

While Tom Tyler's article examines psychological research on subjective responses to decisionmaking, Donald Bersoff's article, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law*,<sup>11</sup> examines psychological research on the objective accuracy of decisionmaking. An irony of the past generation of mental disability law scholarship is that it has often been interdisciplinary in name only.<sup>12</sup> At virtually the same time as the United States Supreme Court decided a series of cases that resulted in judicial deference on mental health issues in favor of mental health professionals,<sup>13</sup> social and cognitive psychologists were conducting extensive research on both lay and professional decisionmaking.<sup>14</sup> The past generation of mental disability law scholarship barely scratched the surface of that research by social and cognitive psychologists,<sup>15</sup> although the courts were then proceeding on uninformed assumptions addressed by this research.

Bersoff explains that this body of research reveals a common pattern of erroneous decisionmaking strategies. These include availability, errors affected by the ease of recalling events, representativeness, errors affected by inappropriate grouping or attribution of events, and anchoring, errors affected by initial impressions that color subsequently obtained information. Mental health professionals are not immune to these simplifying errors, often called heuristics, and are often more vulnerable because of overconfidence. Bersoff explains that the intuitive judgment that mental health professionals are more accurate than legal decisionmakers on mental health issues involving the rights of the mentally disabled is not supported by psychological research. Utilizing the legal system's articulated criterion of objective accuracy in adjudication, Bersoff points the way for a new generation of mental disability law scholarship. He reveals what these heuristics por-

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10. See John J. Ensminger & Thomas O. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 J. PSYCHIATRY & LAW 5 (1978) (challenging, singularly, the anti-therapeutic critique on its own terms and suggesting that the hearing might actually have therapeutic potential).

11. 46 SMU L. REV. 329 (1992).

12. "Ironically, mental health law—one of the most potentially interdisciplinary of legal fields—has been a notorious interdisciplinary underachiever." DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* x (1991).

13. Tyler, *supra* note 4 at 465-66.

14. *Id.* at 465.

15. The one area of social and cognitive psychology research that did find its way into mental disability law scholarship was that bearing on the prediction of future dangerousness by mental health professionals. E.g., Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974); Joseph M. Livermore et al., *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75 (1968).

tend for achieving accuracy by deferring to mental health professionals and explaining the larger role of these heuristics across the spectrum of legal decisionmaking.

Another feature of the past generation of mental disability law scholarship was its penchant for inbreeding. Too often mental disability law scholars took from and spoke to other mental disability law scholars, excluding other insights or audiences. In an article entitled, *On "Sanism"*,<sup>16</sup> Michael Perlin signals a change in that direction for a new generation of mental disability law scholarship. Perlin draws on insights from Critical Legal Studies, Critical Race Theory, and Feminist Legal Theory to attack stereotypes about the mentally disabled that have infused our legal culture and places these stereotypes in a larger cultural context. Perlin explains how these stereotypes are typical of and as pernicious as other categorical "isms" that affect sex, race, ethnicity, and sexual orientation. Stereotypes result from simplified decision-making strategies, like those discussed by Bersoff, and silence individual voices. In addition, the story told by Perlin reveals an age-old attempt to separate us from them, the mentally disabled. This effort derives from an effort to avoid confrontation of an underlying fear that, unlike race, sex, or ethnicity, which are stable characteristics, mental disability is not stable and can affect any one of us. In his article, Perlin explains the development of these sanist practices and their unexamined infusion into the legal culture and offers suggestions for change. These suggestions include a challenging agenda for the new generation of mental disability law scholarship that examines and confronts sanist behaviors in the courts, the legislatures, and the academy. Perlin also reveals that this agenda shares common ground with and speaks to a larger audience than those who have traditionally been concerned with the mentally disabled.

Another irony of the past generation of mental disability law scholarship is that, despite its purported interaction with mental health professionals and concern for the rights of the mentally disabled, the therapeutic potential of the law was not a core concern. As another example of mental disability law scholarship using information learned from mental health professionals to suggest changes in the way the legal system goes about its business, Daniel Shuman's article, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*,<sup>17</sup> uses the new scholarship of therapeutic jurisprudence<sup>18</sup> to examine the therapeutic potential of tort law's objective standard of care. Shuman argues for a change in tort law's objective standard of care to encourage people to assume responsibility for their behavior and to seek care for mental or emotional problems that may increase the risk of accidental injury.

Therapeutic jurisprudence is a mode of legal analysis emanating from the

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16. 46 SMU L. REV. 373 (1992).

17. 46 SMU L. REV. 409 (1992).

18. DAVID B. WEXLER & BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (1991); DAVID B. WEXLER, *THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT* vii (1990).

writings of David Wexler and Bruce Winick that focuses on the law's therapeutic potential. Because tort law is concerned with deterrence of unsafe conduct as well as restoration of the injured, it shares a common agenda with therapeutic jurisprudence. Drawing on research that points to the role of transient situational stress as a significant contributing factor in accidents, Shuman reveals how the objective standard of care fails to encourage and may actually discourage both the mentally ill and the walking wounded, those whose minor mental or emotional problems and greater numbers may account for a large portion of accidents, from seeking care that may reduce the risk of injury. Shuman's article illustrates the broad reach of therapeutic jurisprudence, an important part of the new generation of mental disability law scholarship, beyond what has typically been viewed as mental disability law scholarship.

The agenda of the past generation of mental disability law scholarship was specific and result-oriented. It sought to require safeguards for confinement of the mentally disabled equivalent to safeguards required for criminal defendants. Its impact was, consequentially, relatively easy to measure. The agenda of the new generation of mental disability law scholarship is less specific or result-oriented. Rather than targeting particular rights for the mentally disabled, it seeks to achieve a broad-ranging, genuinely interdisciplinary examination of the way that the legal system goes about its business and its therapeutic consequences. Its impact will, consequentially, be more difficult to measure. Whatever legal historians may ultimately conclude about its impact, however, the new generation of mental disability law scholarship has transformed the debate, and it will be difficult to avoid the questions it has posed.

