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NEW DIRECTIONS IN THERAPEUTIC JURISPRUDENCE: BREAKING THE BOUNDS OF CONVENTIONAL MENTAL HEALTH LAW SCHOLARSHIP

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MAKING THE WORLD A BETTER PLACE THROUGH TORT LAW?: THROUGH THE THERAPEUTIC LOOKING GLASS

Daniel W. Shuman *

I. Introduction

While discussion of many fields of law of interest to lawyers does not occupy a central role in the popular media or public debate, that is not so for tort law. Tort law was a frequent topic in the last presidential election and is a subject about which many members of the lay public have strong feelings. William Prosser's observation that tort law is social engineering aptly explains why it touches a cultural nerve.[1] From automobile accident and professional malpractice litigation to sexual abuse or harassment and defamation, tort law transcends class, culture, and region to affect virtually every segment of society. It shapes the way we relate to each other both in public and in private. Increasingly, the tort reform debate has become highly politicized, with few new insights. What is needed to move the tort reform debate forward is a new set of insights. Therapeutic jurisprudence is one approach that may offer those new insights.

The insights therapeutic jurisprudence offers to tort law depends upon what is meant by therapeutic jurisprudence. David Wexler and Bruce Winick, whose writings have defined therapeutic jurisprudence, describe it as an interdisciplinary, empirical examination of the role of the law as a therapeutic agent.[2] It seeks

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[1] WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS § 3, at 15 (4th ed. 1971).

[2] David B. Wexler & Bruce J. Winick, *Introduction* to ESSAYS IN THERAPEUTIC JURISPRUDENCE at xi (David B. Wexler & Bruce J. Winick eds., 1991).

to focus on the therapeutic consequences of legal decisionmaking, illuminated by empirical scrutiny.[3] The resulting scrutiny is not intended to exalt these therapeutic consequences above others, rather it is to ensure that they are not neglected. "The premise that a rule or practice is antitherapeutic, like the premise that a rule is inefficient, does not support the conclusion that the rule should be changed in the absence of an agreed-upon (although perhaps unarticulated) normative major premise."[4]

To describe therapeutic jurisprudence as interdisciplinary and empirical is helpful, yet that characterization does not distinguish it from other jurisprudential schools that have extensively examined tort law including law and economics. What is seemingly distinctive about therapeutic jurisprudence, as its moniker implies, is its therapeutic concern. Yet, in answering one question, this distinctive therapeutic concern raises another, for it is given to at least two meanings that each suggests a different focus; it may be concerned with specific health related outcomes or it may be a metaphor for generally good results. Therapeutic jurisprudence scholarship to date has focused on the former, specific mental health related outcomes, that overlap with the intellectual turf of traditional mental health law scholarship. This focus has implications for the impact of therapeutic jurisprudence on tort law, which has its own therapeutic agenda, and on the broader corpus of legal thought.

II. The Coincidental Goals of Therapeutic Jurisprudence and Tort Law

The focus of therapeutic jurisprudence on the overlap with traditional mental health law scholarship is, in some large part, linguistic.[5] In the dictionary and in common parlance,[6] the word

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[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, JAMES B. WHITE, HERACLES BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 40-44 (1985) (explaining that the rhetoric of law is a language).

[6] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2372 (1981) (defining therapeutic as "[o]f or relating to the treatment of disease or disorders by remedial agents or methods").

therapeutic conjures up a curative result that implies a beneficial health related outcome in the particular way that an efficacious mental health therapy may achieve a beneficial result. Animated by this emblem, therapeutic jurisprudence appears to be concerned with specific therapeutic consequences of legal rules, i.e., examining the consequences to patient mental health that result from legal rules that recognize the right of patients to receive treatment or the right of patients to refuse treatment.[7]

This focus on a specific mental health therapeutic good is convenient and understandable. The intellectual turf is familiar for mental health law scholars and it offers the opportunity for an interdisciplinary, empirical perspective. It looks to empirical research from the perspective of mental health professionals to gain their insights about what legal rule is most likely to result in a therapeutic outcome. Empirical research is, at least in theory, viable to ascertain the therapeutic impact of a given legal rule.

Several examples of this specific mental health therapeutic jurisprudence agenda illustrate familiar mental health law issues readily recast as therapeutic jurisprudence. Debate over civil commitment criteria has involved discussion of the importance of voluntary and involuntary patient status. Therapeutic jurisprudence focuses the debate on the individual and systemic benefits of patient status. What are the therapeutic consequences of a legal rule that encourages voluntary rather than involuntary psychiatric hospitalization; do voluntary patients experience better outcomes from hospitalization than involuntary patients?[8] Debate over civil commitment procedure has focused on the historical vacillation

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[7] *See* Bruce J. Winick, *Competency to Consent to Voluntary Hospitalization: A Therapeutic Jurisprudence Analysis of* Zinermon v. Burch, 14 INT'L J.L. & PSYCHIATRY 169, 172 n.18 (1991); *see also* David B. Wexler, *Health Care Compliance Principles and the Insanity Acquittee Conditional Release Process*, 27 CRIM. L. BULL. 18, 19 n.5 (1991).

[8] *See* Mary L. Durham & John Q. LaFond, *A Search for the Missing Premise of Involuntary Therapeutic Commitment: Effective Treatment of the Mentally Ill*, 40 RUTGERS L. REV. 303, 356 (1988); Winick, *supra* note 7, at 192-99. *See generally* Susan Reed & Dan Lewis, *The Negotiation of Voluntary Admission in Chicago's State Mental Hospitals*, 18 J. PSYCHIATRY & L. 137 (1990) (exploring the consequences of Illinois' Mental Health Code which discourages the involuntary commitment of mental health patients).

between the legal and the medical model. Therapeutic jurisprudence focuses the debate on the benefits of the process. What are the therapeutic consequences of a legal rule that requires adversarial involuntary hospitalization proceedings; do involuntary patients committed in adversarial legal proceedings experience better outcomes from hospitalization than involuntary patients committed in nonadversarial proceedings?[9] Plea bargaining has dominated the criminal justice system and its impact on offenders, particularly sex offenders is an important concern. Therapeutic jurisprudence focuses the debate on the consequences of this process. What are the therapeutic consequences of a legal rule that requires sex offenders to acknowledge their abusive behavior in plea bargains; do defendants who have acknowledged their abusive conduct in plea bargains have better outcomes than those who plead without acknowledging their abusive conduct?[10] These examples of therapeutic jurisprudence analysis of specific health related outcomes view the subject matter of traditional mental health law scholarship through a therapeutic lens.

A therapeutic jurisprudence agenda including a broader metaphorical therapeutic good is simultaneously more promising and more problematic than a narrow specific therapeutic focus. Just as racist and sexist attitudes built on myth and misinformation have engendered fear and intolerance, so sanist attitudes about mentally ill persons have isolated them in the popular and legal cultures.[11] If therapeutic jurisprudence includes a broader agenda of beneficial outcomes, it promises to expand therapeutic jurisprudence beyond a scholarship addressed to a population most choose to ignore.

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[9] *See generally* John J. Ensminger & Thomas D. Ligouri, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, 6 J. PSYCHIATRY & L. 5, 5-7 (1978) (expressing the belief that the present adversarial commitment process can have an antitherapeutic effect on the patient's mental health); Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 445 (1992) (concluding that the judicial commitment procedures should be responsive to both the quality of the decisions made and to the psychological consequences of the procedures).

[10] Jeffrey A. Klotz et al., *Cognitive Restructuring Through Law: A Therapeutic Jurisprudence Approach to Sex Offenders and the Plea Process*, 15 U. PUGET SOUND L. REV. 579, 584 (1992).

[11] Michael L. Perlin, *On "Sanism"*, 46 SMU L. REV. 373, 343-345 (1992).

Yet, a broader agenda of beneficial outcomes is more problematic for numerous reasons. If therapeutic jurisprudence describes legal analysis that seeks a good or beneficial outcome, then it looses a distinctive appeal. Applied outside the sphere of traditional mental health law, the interdisciplinary, empirical focus of therapeutic jurisprudence may be dismissed as the proverbial old wine in a new bottle—reconstructed legal realism. Defining the goals of therapeutic jurisprudence in broader, metaphorical terms makes the empirical analysis of the therapeutic consequences of legal rules exceedingly difficult. For example, while it is one thing to measure the impact of a legal rule on patients keeping therapy appointments, it is quite another to measure the impact of a legal rule on people taking greater responsibility for their decisions.

Tort law, in particular, is fertile ground to explore this dilemma. The goals of tort law have been articulated in numerous ways that share two common, conjunctive elements—deterrence and compensation.[12] These goals are manifest in the requirements for recovery. To recover in tort, plaintiffs must establish both liability and damages. Standing alone, neither deterrence nor compensation is sufficient to trigger tort sanctions.

Deterrence in tort law focuses on defendants and seeks to reduce injury. Plaintiffs are not compensated merely because they are injured by the defendant's conduct, they must also establish the defendant's liability. A finding of liability is a determination that the defendant's conduct fell below the level of care that society expects and proximately caused the plaintiff's injuries. Tort law attempts specific and general deterrence, through its message of tort sanctions, to decrease the level of injury in society.

Compensation in tort law focuses on plaintiffs and seeks to restore the injured. Plaintiffs are not compensated merely because the defendant's conduct is in need of deterrence, they must also establish the plaintiff's injury. Compensation, in an effort to make the plaintiff whole, is a rough translation of injury to dollars. Tort law seeks, through its award of damages, to restore the injured.

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[12] *See* David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 666 (1985); Richard J. Pierce, Jr., *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 917 n.1 (1985); George Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 5 (1987).

Tort law has a natural affinity for therapeutic jurisprudence. Tort law need not be recast to advance a therapeutic dimension; it posits a therapeutic agenda of its own. Tort law's agenda for both deterrence and compensation are therapeutically driven—injury avoidance and restoration of the injured.

III. The Unexamined Premise: Why Tort Law Benefits From the Therapeutic Looking Glass

Although tort law posits a therapeutic agenda of its own, it may nonetheless be a beneficiary of therapeutic jurisprudence's interdisciplinary, empirical looking glass. Tort law's interdisciplinary focus is often lacking or myopic. In tort law, for the past twenty-five years, interdisciplinary scholarship has meant law and economics,[13] which is troubling not only for its myopia, but also for its behavioral assumptions that have yet to be validated.[14] Tort law's insights have often lacked empirical support or have been contrary to existing empirical evidence. "Much discussion of the tort litigation system consists of conclusory assertions, unsupported by evidence."[15]

Underlying the deterrence theory of tort law is the assumption "that the imposition of liability substantially affects how categories of

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[13] *See* William M. Landes & Richard Posner, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987). *See generally* GUIDO CALABRISI, THE COST OF ACCIDENTS (1970) (explaining the theoretic foundation of accident law); R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (analyzing flaws in the law and economics theory of tort law).

[14] "Most 'law and economics' treatments . . . incorporate unvalidated behavioral assumptions, such as rational utility maximization or a continuous Bayesian refinement of subjective probability estimates, that are amenable to mathematical formulations but may not correspond to real behavior in many settings." Howard A. Latin, *Problem Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 677 n.2 (1985); *see* Herbert A. Simon, *The Behavioral and Social Sciences*, 209 SCIENCE 72, 74-77 (1980) (summarizing the empirical research that people do not act in ways suggested by these economic theorists).

[15] *See* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1155-56 (1992) (little formal, systematic data about civil justice system exists and frequently debates about the tort system do not even attempt to gather the limited data that does exist).

actors respond to the risks they create or confront."[16] This approach to tort law is based upon a model of people as rational self-maximizing decisionmakers. The deterrence goal of tort law rejects a normative explanation for behavior, in which tort law plays an informative rather than a coercive role. Tort law assumes, without inquiry into the literature of psychiatry or psychology, that people are aware of the potential of tort sanctions and consequentially choose safer behavior to avoid these sanctions.[17]

In the face of a blistering attack on the deterrent capacity of fault-based tort law and the ensuing discussion of alternative deterrence mechanisms,[18] therapeutic jurisprudence offers new light, rather than more heat to that debate. What is the relationship between tort law and human behavior generally and therapeutic behavior specifically?[19] How should tort law best be structured to shape human behavior to achieve a therapeutic good? Therapeutic jurisprudence offers to add new insights to a debate that has become mired in partisan rhetoric.

Critics have focused on inefficiency and inconsistency in tort compensation to argue for alternate compensation mechanisms. The critics have noted that the fault-based tort system fails by not compensating those injured by defendants who are not at fault; fails by not compensating those injured by defendants who lack assets or insurance; fails by not compensating those with minimal injuries that make prosecution economically unfeasible for plaintiff's lawyers; fails by not compensating when the responsible defendant cannot be identified; fails by undercompensation of major loss and overcompensation of minor loss;[20] and, fails by expending a large

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[16] Latin, *supra* note 14, at 677.

[17] Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 KAN. L. REV. 115, 131-32 (1993).

[18] *See, e.g.*, Symposium, *Alternative Compensation Schemes and Tort Theory*, 73 CAL. L. REV. 548, 549 (1985) (stating that as a result of the debate in the 1960's through the 1970's, new mechanisms were proposed which were based upon the principle of broadening social responsibility instead of the highly individualistic fault-based tort law).

[19] *See* Daniel W. Shuman, *Therapeutic Jurisprudence and Tort Law: A Limited Subjective Standard of Care*, 46 SMU L. REV. 409, 409-12 (1992).

[20] Saks, *supra* note 15, at 1220.

percentage of compensation dollars on lawyers fees and other externalities.[21]

What is most troubling about this criticism is not its validity, but instead that it obscures a core question presented by a compensation system that links recovery to proof of fault—how does fault-based tort compensation affect the injured?[22] Is there a cogent reason to link compensation to proof of fault? Is fault based compensation therapeutic or anti-therapeutic for claimants? Changing compensation systems may entail more than changing the amount of compensation or the method of payment. Adoption of a no-fault system may shape the restorative process independent of changes in the amount of dollars paid.[23] Even within the context of fault-based compensation, the decision to cap payment for non-economic loss[24] or to permit court-ordered periodic payments,[25] for example, may not only shape the amount of payment, but also how it affects the restorative process. Yet, the debate about compensation generally

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[21] In auto accident litigation, for example, for every dollar expended $.52 goes to the plaintiff, $.24 for plaintiff's legal expenses, $.13 for defendant's legal expenses, and $.13 to other miscellaneous costs. DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 27 (1987). *See* JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS & COMPENSATION PAID IN TORT LITIGATION at vi (1986) (estimating that slightly less than half of the $29 to $36 billion cost of tort litigation in 1985 compensated injury victims).

[22] In negligence and intentional torts, fault based liability is explicit. Although fault is purportedly not a consideration in strict products liability, under a different label, it plays a major role in these determinations. Plaintiffs in strict products liability cases must still prove that the product was defective. The test for defective products operates much like the test for negligence. *See* James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 488-498 (1990). Thus, even with the presence of strict liability, it is accurate to characterize tort law in the United States as a fault based liability system.

[23] *See, e.g.*, JEFFREY O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO FAULT INSURANCE 95-105 (stating the three key aspects that guarantee the success of a no-fault system: 1) eliminate the endless and expensive arguing over who was at fault in the accident; 2) pay only out-of-pocket loss and not payments for pain and suffering; and 3) deal with one's own insurance company instead of a hostile stranger).

[24] *See* STEPHEN J. CARROLL, ASSESSING THE EFFECTS OF TORT REFORMS (1987); Neil K. Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 31-38 (1990).

[25] *See* Roger C. Henderson, *Designing A Responsible Periodic-Payment System for Tort Awards: Arizona Enacts A Prototype*, 32 ARIZ. L. REV. 21, 31-38 (1990).

focuses on valuation of injury[26] and seldom entails rigorous examination of how tort compensation affects the restorative process.

Tort law is not unique among fields of law in its penchant for making assumptions about its impact on human behavior without empirical support.[27] What is particularly troubling about these uninformed hunches in tort law, however, is that tort law often involves an accommodation of competing legitimate interests. Tort law often presents questions not of good versus bad, but rather between relative goods. Therapeutic jurisprudence offers the potential of a more careful accommodation of these competing interests.

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[26] *See* Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908, 911 (1989); *see also* Ellen Smith Pryor, *The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation*, 79 VA. L. REV. 91, 125-136 (1993) (discussing the importance of the distinction between pecuniary and non-pecuniary losses); Ted R. Miller, *Willingness to Pay Comes of Age: Will the System Survive?*, 83 NW. U. L. REV. 876, 898 (1989) (discussing the development of a schedule that would indicate impairment compensation according to injury).

[27] *See* Alexander Tanford, *The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology*, 66 IND. L. J. 137, 142-43 (1990) (discussing the Court's reluctance to use psychological research in issues involving juror behavior and trial procedure).

IV. Deterrence Through the Therapeutic Looking Glass

A. Specific Therapeutic Good Within the Context of Mental Health Law

The mental health law scholarship addressed to tort law issues that began in the late 1960's and ended in the late 1980's sought to use the law to change the practice of mental health professionals. The agenda for mental health law tort scholars included a now familiar litany of duty to warn or protect, negligent release, and informed consent issues. That scholarship subsided, in part because it achieved its goals, in part because a conservative mood swept the country, and in part because the intellectual turf was well plowed.[28] That the end of that generation of scholarship was closely followed by therapeutic jurisprudence scholarship is hardly coincidental. A number of mental health law scholars turned to therapeutic jurisprudence because there was little left to say of the earlier generation of mental health law scholarship, or few still willing to listen, and because therapeutic jurisprudence captured a thoughtful, transcendent perspective of that earlier generation of scholarship not allied with a particular political agenda.

Rather than using the insights of analogue scholarship in the courts to arm wrestle mental health professionals, therapeutic jurisprudence critically plumbed mental health research to examine the therapeutic consequences of legal rules.[29] Since many mental health law scholars turned to therapeutic jurisprudence as traditional mental health law scholarship waned, it is not surprising that their therapeutic looking glass often focused upon the same issues and relationships that had been the subject of the earlier generation of mental health law. One topic that has been a favorite subject of therapeutic jurisprudence scholarship is the therapist-patient relationship.

While rights-oriented tort scholarship dominated traditional mental health law scholarship seeking to define the legal boundaries

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[28] Daniel W. Shuman, *Overview*, 46 SMU L. REV. 323, 323 (1992) (overview of Symposium, *Psychological Jurisprudence: Another Perspective*).

[29] *See* David B. Wexler, *Therapeutic Jurisprudence and Changing Conceptions of Legal Scholarship*, 11 BEHAVIORAL SCI. & L. 17, 20 (1993).

of the therapist-patient relationship,[30] therapeutic jurisprudence scholarship has given voice to some early calls for an empirical perspective.[31] Consider some examples within the context of mental health law, of a new generation of interdisciplinary, empirical scholarship focusing on the ways in which injury reducing therapeutic behavior might be shaped by tort rules.

The Supreme Court of California's decision in *Tarasoff v. Regents of University of California*[32] addressing the duties of therapists treating patients who pose serious risks to third persons has dominated the tort law agenda for mental health scholars, but most of that scholarship has devolved into a polemic. Accepting *Tarasoff's* holding that the therapist owes a duty to protect or warn endangered third persons as a part of the legal landscape within which therapist-patient relations exist, Robert Schopp has examined the empirical research on the dynamics of the therapist-patient relationship to suggest a way in which *Tarasoff* might best be therapeutically accommodated. Schopp proposes articulating a "crystallized trigger"[33] for that duty to third persons that permits a therapist to put the patient's interest first, absent "specific threats against identifiable victims."[34] Schopp's approach seeks to shape *Tarasoff* to advance complimentary injury-reducing, therapy outcome related therapeutic goals.

Child abuse reporting laws have proliferated over the past twenty years based on the assumption that reporting is therapeutic and

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[30] *See* John G. Fleming & Bruce Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025, 1026-31 (1974).

[31] DANIEL W. SHUMAN & MYRON F. WEINER, THE PSYCHOTHERAPIST-PATIENT PRIVILEGE: A CRITICAL EXAMINATION 145 (1987); *see* David Wexler, *Patient, Therapist, and Third Parties: The Victimological Virtues of Tarasoff*, 2 INT'L J. L. & PSYCHIATRY 1, 1-2 (1979).

[32] 551 P.2d 334, 340 (Cal. 1976).

[33] Robert F. Schopp, *The Psychotherapist's Duty to Protect the Public: The Appropriate Standard and the Foundation in Legal Theory and Empirical Premises*, 70 NEB. L. REV. 327, 355 (1991).

[34] *Id. See generally* Michael L. Perlin, *Tarasoff and the Dilemma of the Dangerous Patient: New Directions for the 1990's*, 16 LAW & PSYCHOL. REV. 29 (1992) (articulating the impact of the *Tarasoff* case).

invariably reduces the risk of injury to children.[35] Based largely on anecdotes, therapists have often argued that they should be excepted from this requirement to advance their own therapeutic agenda to reduce abuse by treating abusers without the negative consequences to the relationship they contend are engendered by mandatory reporting.[36] Murray Levine and his colleagues have conducted empirical studies of these competing claims to explore the consequences of mandatory child abuse reporting laws on the conduct of psychotherapy.[37] Levine's research explores the therapist's anti-therapeutic claims about the consequences of a law that seeks to reduce injury to children and informs the debate over changes in mandatory reporting laws.

Although much of the focus of therapeutic jurisprudence in the field of tort law has centered on the therapist-patient relationship, there is no reason to so limit its reach. Consider an example of some of the unique insights that therapeutic jurisprudence may have for a broader range of tort/mental health law questions. One growing area in tort litigation is child sexual abuse claims.[38] Although some of these claims are brought against institutions such as schools or day care centers which have assets or insurance to satisfy a judgment, many are not. A critical issue in many of these cases seeking substantial damages against defendants who lack the personal capacity to satisfy a large judgment, is the availability of homeowners insurance policies to satisfy a judgment for acts of abuse.[39] Courts

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[35] Daniel W. Shuman, *The Duty of the State to Rescue the Vulnerable in the United States*, *in* THE DUTY TO RESCUE 131 (Michael A. Menlowe & Alexander McCall Smith eds., 1993).

[36] Murray A. Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 713 (1993) (this issue); Murray A. Levine et al., Informing Psychotherapy Clients of the Mandate to Report Suspected Child Maltreatment (APLS San Diego, March 14, 1992); Holly Watson & Murray A. Levine, *Psychotherapy and Mandatory Reporting of Child Abuse*, 59 AM. J. ORTHOPSYCHIATRY 246 (1989).

[37] Watson & Levine, *supra* note 36.

[38] LEONARD KARP & CHERYL L. KARP, DOMESTIC TORTS: FAMILY VIOLENCE, CONFLICT AND SEXUAL ABUSE § 4 (1989).

[39] *See* Christine Cleary, Comment, *Litigating Incest Torts Under Homeowners's Insurance Policies*, 18 GOLDEN GATE U. L. REV. 539, 540 (1988); *see also* Janet K. Colonri & Delinda R. Johnson, *Coverage for Parents' Sexual Abuse*, 34 FOR THE DEF. 2,4 (March 1992).

now resolve this question by resort to the policy language and general principles of insurance contract interpretation. Given the ambiguous language of most of these policies, therapeutic jurisprudence offers relevant insights to inform policy determinations. Is a particular legal rule interpreting coverage for acts of abuse associated with an increase or decrease in the incidence of abusive behavior? What is the impact, if any, on the deterrent effect of tort sanctions of a rule that expands coverage or limits exclusionary language and permits the abuser/homeowner to pass along the loss? Given our understanding of abuse, is it reasonable to expect contingent consequences to affect abusive behavior?[40] Similar questions may be raised regarding claims for spousal abuse and transmitting sexual diseases.

These queries only scratch the surface of what may be learned about the specific therapeutic aspects of the deterrent effect of tort law viewed through the looking glass of therapeutic jurisprudence. The lessons to be learned have relevance not only for tort law's effect on mentally ill persons. The role of the standard of care in shaping the behavior of people with and without mental illness is ripe for therapeutic jurisprudence examination.[41]

In exploring these issues, therapeutic jurisprudence scholars would be well advised to avoid the elitism that has often colored examination of the therapist-patient relationship from the perspective of the professional, rather than the client.[42] To consider the therapeutic consequences, the interests of both must be taken into account. Murray Levine's work is a good example of a non-

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[40] Richard I. Lanyon, *Theories of Sexual Offending*, *in* CLINICAL APPROACHES TO SEX OFFENDERS AND THEIR VICTIMS 37-39 (Clive R. Hollin & Kevin Howells eds., 1991).

[41] Shuman, *supra* note 19, at 417-419.

[42] There is a developing body of legal scholarship on the impact of tort liability on those who treat the mentally ill. Ironically, the therapeutic consequences of tort liability on the mentally ill has escaped direct scrutiny. This approach sends an implicit message that reinforces a model of learned helplessness for mentally ill persons. It teaches that the locus of control for mentally ill persons is external rather than internal. To address the problems of the clients each profession is intended to serve, the legal profession focuses on the problems of the mental health profession, without directly addressing the client/patient's interests. The appropriate inquiry ought to consider the therapeutic consequences of tort liability on the mentally ill.
Shuman, *supra* note 19, at 412.

hierarchical approach that gives voice to patient as well as therapist concerns.

B. General Therapeutic Good Without the Context of Mental Health Law

It makes sense that initial forays in therapeutic jurisprudence took place "within core content areas of mental health law."[43] But, if therapeutic jurisprudence is not to become as inbred as its predecessor, it must speak to a larger audience about a broader range of issues. The risk in so doing, however, is that it may lose its focus or unique niche. The risk of not so doing, however, is that its unique insights will not be perceived widely.

Using therapeutic jurisprudence as a metaphor to examine the deterrent impact of tort law beyond the boundaries of mental health law reveals a host of issues as broad as tort law itself. Noting but a few provides a sense of the potential for therapeutic jurisprudence scholarship on the deterrence of tort law generally.

An overarching issue for a therapeutic jurisprudence analysis of the general good that may result from the deterrent effect of tort law is an interdisciplinary, empirical examination of how tort law shapes behavior. I began that examination in an article entitled *The Psychology of Deterrence of Tort Law*.[44] That examination questions the efficacy of the deterrent capacity of tort law as presently structured, and points to numerous issues that may benefit from a therapeutic jurisprudence analysis to improve tort law's deterrent capacity.[45]

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[43] Wexler & Winick, *supra* note 2, at x.

[44] Shuman, *supra* note 17, at 117.

[45] The organic and biological theories reveal the limited capacity of tort law to deter unsafe behavior. The psychodynamic psychological theories prove too much and threaten to weaken deterrence by excusing responsibility for much behavior that is now viewed as tortious. Cognitive psychology reveals that our decisionmaking is systematically flawed, and that faulty information processing is the norm. Thus, the risk of tort sanctions is not likely to induce safer behavior in appropriate cases. Rather, cognitive psychology reveals that we are likely to overestimate tort risks and avoid desirable activity, or underestimate tort risks and behave unsafely. The behaviorists' insight suggests that the tort system's use of delayed punishment rather than immediate

Although the architects of tort law have never explicitly addressed what theory of human behavior underlies their assumption that tort sanctions are likely to deter unsafe behavior, behavior modification or its variant, social learning theory seems the closest fit.[46] Although these theories differ in some regards, they share the premise that to shape behavior its consequences should be known and certain. This premise has important implications for a therapeutic examination of deterrence in tort law. Consider several examples that illustrate the potential of therapeutic jurisprudence to enhance the deterrent capacity of tort law.

Ninety to ninety-five percent of all civil cases are settled without trial.[47] Trials are idiosyncratic; they occur when cases fall outside understood normative patterns. And, tort law has generally permitted parties to settle in secret.[48] Thus, the largest, most valid body of tort data about societal expectations is not required, or even allowed to be publicly available. Permitting secret settlement agreements limits what is known about the tort consequences of behavior. The impact on deterrence of the secrecy of settlement agreements is a subject that may benefit from a therapeutic jurisprudence analysis.

The importance of certainty of tort sanctions for deterrence of undesirable behavior is an important lesson to be learned from an examination of the psychology of deterrence. Although Oliver W.

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positive reinforcement is not an effective means of shaping desirable behavior. Social learning theory holds potential, but unless better communication of tort law occurs and the percentage of meritorious tort cases brought is increased so that tort sanctions are observable with greater regularity in the case of tortious behavior, this theory suggests that the tort system is likely to increase rather than decrease the frequency of undesirable behavior. *Id.* at 165-66.

[46] The tort system posits a negative reinforcement structure; people are sanctioned for unsafe behavior but not sanctioned for safe behavior. Because behaviorist theory maintains that attempts to influence behavior should involve positive rewards or reinforcement rather than negative rewards or contingent punishments, an attempt to explain the psychological underpinning of tort deterrence necessarily focuses on social learning theory that proposes that punishment, as well as positive reinforcement, can be effective in changing behavior. Shuman, *supra* note 17, at 157.

[47] David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983).

[48] *See* Brian T. Fitzgerald, Note, *Sealed v. Unsealed: A Public Court System Going Secretly Private*, 6 J. L. & POL. 381, 381-84 (1990).

Holmes, Jr. argued for crystallizing jury findings into fixed tort law rules,[49] tort law has rejected this approach, preferring instead case by case determinations. Recent attempts at federal product liability rules have breathed new life into this debate.[50] The impact of crystallized tort law standards[51] on the deterrent effect of tort law is another subject that would benefit from a therapeutic jurisprudence analysis.

In addition to therapeutic jurisprudence's general insights for tort law's deterrence mechanism, it also has insights for areas of tort law previously unexamined by mental health scholars. One area of tort law not often addressed by mental health law scholars is product liability law, a subject teeming with issues for therapeutic jurisprudence analysis. One set of interdisciplinary, empirically grounded mental health insights that is particularly relevant to product liability law is attribution theory. Attribution theory explains behavior as a function of people's perception and understanding of events.[52] Learned helplessness occurs when people attribute success or failure to events outside themselves. A therapeutic jurisprudence analysis might consider, for example, the insights attribution theory has for the deterrent consequences of a product liability rule that places the responsibility on the manufacturer for foreseeable product misuse.[53] Do tort rules that hold product manufacturers liable for consumer misuse send a message of learned helplessness that results in people taking less responsibility for their actions? Attribution theory might also be a useful approach to examine the impact on drinking and driving of innkeeper and guest-host liability rules that hold servers of alcoholic beverages liable for automobile accidents cause by their intoxicated patron/guests.[54]

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[49] OLIVER W. HOLMES, JR., THE COMMON LAW 127-29 (1881).

[50] Linda Lipsen, *The Evolution of Products Liability as a Federal Policy Issue*, *in* TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE 247 (Peter H. Schuck ed., 1991).

[51] *See* Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1484-85 (1992).

[52] Harold H. Kelly & John L. Michela, *Attribution Theory and Research*, 31 ANN. REV. PSYCHOL. 457, 489 (1980).

[53] *See* Green v. Sterling Extruder Corp., 471 A.2d 15, 18 (N.J. 1984).

[54] *See* Largo Corp. v. Crespin, 727 P.2d 1098 (Colo. 1986) (discussing innkeeper liability); Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984) (discussing host liability).

V. Compensation Through the Therapeutic Looking Glass

A. Specific Therapeutic Good Within the Context of Mental Health Law

The subject of a specific therapeutic good through tort compensation necessarily includes the ability to diagnose and value mental injury. Although not typically associated or identified with therapeutic jurisprudence, there is a body of research that has examined the ability to diagnose and value legally relevant mental injury.[55] What is most troubling about this scholarship is that it has often failed to reach legal decisionmakers who continue to rely on myth and stereotype in fashioning rules that govern mental injury.[56] The challenge of therapeutic jurisprudence is to communicate this research to legal policymakers to encourage informed decisions about the therapeutic consequences of rules for compensation for mental injury, not based on myths or stereotypes.

B. General Therapeutic Good Without the Context of Mental Health Law

Therapeutic jurisprudence analysis of a general good in tort compensation without the context of mental health law involves compensation questions that transcend diagnosis or valuation of mental injury. An important and generally ignored question in the evolution of systems of compensation that separate payment of compensation and the responsibility for causing injury, is the impact of fault based tort compensation on restoration. Do plaintiffs who receive compensation from defendants after a determination of fault experience a beneficial restorative effect that is different than claimants who receive equivalent dollar compensation through first

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[55] *See* TOM GRISSO, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS at vi (1986); Richard Rogers & James L. Cavanaugh, *"Nothing But the Truth . . . A Reexamination of Malingering"*, 11 J. PSYCHIATRY & L. 443, 443-47 (1983).

[56] Perlin, *supra* note 11, at 400-01.

party insurance or a no-fault statutory compensation system?[57] If so, what is the nature of this benefit? Do plaintiffs experience a sense of empowerment from exposing the wrong or asserting power over the injurer through the judicial system? Do plaintiffs experience an opportunity to vent resentment?[58] Do plaintiffs experience a sense of vindication from societal condemnation of the defendant?[59] Do plaintiffs experience a sense of altruism based upon a belief that the lawsuit has prevented this injury from happening to others?[60] How does the experience of plaintiffs who receive tort compensation compare with the experience of victims whose assailants are successfully prosecuted under the criminal law?

Are there anti-therapeutic consequences to tort compensation? Does tort litigation encourage claimants to delay their restoration? Do plaintiffs use tort litigation to displace or avoid addressing important personal issues? What are the therapeutic consequences of tort litigation for plaintiffs who settle privately, lose, or think that they have been undercompensated?

If there is a beneficial restorative difference, is it experienced by all plaintiffs compensated by the tort system or just those who are victims of abuse of power or breach of fiduciary relationships such as child sexual abuse or therapist-patient sex?[61] What of such claims brought against third parties whose wrongful conduct was failure to protect the victim from the assailant? What of automobile accidents, which are the accidental injuries most likely to result in a tort claim,[62] but which lack an abuse of power or breach of fiduciary relationship?

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[57] Daniel W. Shuman, The Psychology of Compensation in Tort Law 3 (Oct. 23, 1993) (unpublished manuscript, on file with author).

[58] Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855, 867 (1953).

[59] *See generally* Renee L. Binder et al., *Is Money a Cure? Follow-up of Litigants in England*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 151, 154-55 (1991) (plaintiff "accomplished what [she] wanted" when there was a television show about her accident which alerted the public to the company that rented her the chainsaw involved in her accident).

[60] *Id.*

[61] Bruce Feldthusen, *Sexual Battery as Therapeutic Jurisprudence*, 25 OTTOWA L. REV. (forthcoming 1994).

[62] DEBORAH R. HENSLER ET AL, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 175 (1991).

What of claims where the parties may never meet, even at the time of the accident, as for example in product liability claims? How will this benefit, if any, change where the victim and the injurer share a sense of community?

The effect of fault-based compensation on the restoration of the injured has not been the subject of rigorous study. The closest area of research contains the relatively few studies that examine the impact of the termination of the litigation on claimants' psychological symptoms, i.e., secondary gain.[63] The few studies that do exist arrive at opposite conclusions. While some find a dramatic improvement in symptoms following the litigation, others find that significant symptoms continue after the termination of the litigation.[64]

Although the studies differ on the impact of termination of the litigation, they consistently show an association of the reduction of post-accident psychopathology with "a shorter time between accident and settlement, a longer time after [the] settlement of the lawsuit, and having less severe symptomatology after the accident."[65] The time between accident and resolution of the claim is within the control of tort law, thus therapeutic jurisprudence provides support for expeditious resolution of claims. This corresponds with the importance of celerity emphasized by behavior theorists to modify the behavior of injurers.[66]

The one unambiguous conclusion from this research speaks more to delay in tort compensation than anything inherent in joining compensation with fault. It fails to examine what psychological role fault determinations play for plaintiffs' restoration. If plaintiffs dramatically improve after their tort claims are resolved, that improvement is consistent with both secondary gain and tort compensation having a beneficial restorative impact. If plaintiffs dramatically improve following the receipt of tort compensation it may be because the anti-therapeutic effect of the litigation has ended or because the therapeutic effect of the litigation has occurred. Ascertaining the difference sharpens the issue for tort reform—one interpretation points in the direction of reducing the role of tort law,

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[63] Binder, *supra* note 59, at 154.

[64] *Id.* at 152.

[65] *Id.*

[66] Shuman, *supra* note 17, at 152-53.

the other in the direction of expanding it. This facet of the tort system calls out for a more thoughtful examination and therapeutic jurisprudence has much to offer to this discourse.

VI. Conclusion

It is not necessary to reconcile therapeutic jurisprudence and tort law. They are already reconciled. Therapeutic jurisprudence and tort law share a common agenda, although academics and practitioners are only just becoming aware of this commonality. To the extent that this awareness now exists it is in the overlap of tort law and traditional mental health law scholarship. Yet the promise of therapeutic jurisprudence is not likely to be fulfilled unless it breaks the chains of traditional mental health law scholarship and enters the mainstream of jurisprudential analysis.