

# **Sexuality, Shame, Disability and Therapeutic Jurisprudence**

Prof. Michael L. Perlin

Director, International Mental Disability Law Reform Project

Director, Online Mental Disability Law Program

New York Law School

185 West Broadway

New York, NY 10013

212-431-2183

[michael.perlin@nyls.edu](mailto:michael.perlin@nyls.edu)

Paper shared at the 2014 Workshop on Transforming Humiliation and Violent Conflict,  
Columbia University, New York City, December 4-5, 2014.

In the past decade, there has been an extraordinary turnaround in the way society thinks about gay marriage. What seemed to be unlikely-in-our-lifetimes relatively recently, is now commonplace in many jurisdictions, and more are joining the parade every day. But there has been almost no progress whatsoever on another issue that involves intimacy and personal relationships and sex -- that of the right of persons with mental disabilities (especially institutionalized persons) to voluntary sexual interaction. We simultaneously project two conflicting stereotypes: one of infantilization (denying the reality that institutionalized persons with disabilities may retain the same sort of sexual urges, desires, and needs the rest of us have and generally upon which the rest of us act) and, paradoxically, one of demonization (expressing fear of their hypersexuality and the correlative need of protections and limitations to best stop them from acting on these primitive urges).

I have been writing and speaking about this topic for twenty years, and whereas there are now others who brave the derision and anger that regularly comes my way ("You are an agent of the devil, Professor Perlin!", one audience member charged, at a lecture I gave at the Florida Mental Health Institute), in the courts, in the legislatures, and in the courts of public opinions there has been, sadly, little change. Through my career, one thing has been clear.

*Nothing* has ever touched as raw of a nerve as a discussion about whether persons with mental disabilities have a right to voluntary sexual interaction, especially when such individuals are institutionalized

Our current attitudes and policies demean, shame and humiliate persons with disabilities on an ongoing basis. By focusing on their alleged "differentness," we deny their basic humanity and their shared physical, emotional, and spiritual needs. By asserting that theirs is a primitive morality, we allow ourselves to censor their feelings and their actions. By denying their ability to show love and affection, we justify this disparate treatment.

For the last two years, I have focused on this in my writing, working in tandem with Alison J. Lynch, Esq., my former research assistant and currently a disability rights lawyer in NYC. We hope that our in-progress book brings some new attention to this area that will take away some of the shame and humiliation that is now omnipresent, and will make it more likely that this population will be able to to enjoy the same rights, freedoms and privileges that the rest of us take for granted.

My presentation will discuss this, and will frame the issue by considering it in the context of therapeutic jurisprudence (TJ). One of the central principles of TJ is a commitment to dignity, and Professor Amy Ronner describes the "three Vs" that are central to TJ as voice, validation, and voluntariness. The question before us is this: are persons with mental disabilities given such autonomy in their sexual decisionmaking, that allows Professor Ronner's "3 V's" to be complied with?

First, we need to contextualize this discussion in the context of what I call "sanism." Sanism, as those of you who have heard me speak before know, is an irrational prejudice of the same quality and character as other irrational prejudices that cause and are reflected in prevailing social attitudes of racism, sexism, homophobia, and ethnic bigotry – that permeates all aspects of mental disability law and affects all participants in the mental disability law system: litigants, fact finders, counsel, and expert and lay witnesses. Consider my earlier conclusion:

Society tends to infantilize the sexual urges, desires, and needs of the mentally disabled. Alternatively, they are regarded as possessing an animalistic hypersexuality, which warrants the imposition of special protections and limitations on their sexual behavior to stop them from acting on these "primitive" urges. By focusing on alleged "differentness," we deny their basic humanity and their shared physical, emotional, and spiritual needs. By asserting that theirs is a primitive morality, we allow ourselves to censor their feelings and their actions. By denying their ability to show love and affection, we justify this disparate treatment.

This observation may best explain the difficulty so many of us have in dealing with the question of the sexual autonomy of persons with disabilities, and explains why policymakers are often unable to approach such issues thoughtfully, even-handedly, and with clear heads.

So, what about therapeutic jurisprudence? Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives" and focuses on the law's influence on emotional life and psychological well-being. It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness." The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyers' roles can or should be reshaped to enhance their therapeutic potential, while refraining from subordination of due process principles. There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: the law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns." As I have written

elsewhere, “an inquiry into therapeutic outcomes does not mean that therapeutic concerns ‘trump’ civil rights and civil liberties.” In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as “a sea-change in ethical thinking about the role of law... a movement towards a more distinctly relational approach to the practice of law... which emphasises psychological wellness over adversarial triumphalism.” That is, TJ supports an ethic of care.

One of the central principles of TJ is a commitment to dignity. Professor Amy Ronner describes the “three Vs” as voice, validation, and voluntariness, arguing:

What “the three Vs” commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant’s story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronouncement that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions.

Again, the The question to be addressed here is this: given the way we deny the sexuality rights of persons with disabilities, is it remotely possible that Professor Ronner’s vision – of voice, voluntariness and validation – will be fulfilled? In a thoughtful analysis of the

underlying issues, Professor Julie Tennille has listed multiple benefits of a “communicative climate” for consumers with regard to sexuality issues. Janine Benedet and Isabel Grant have also used a therapeutic jurisprudential filter in weighing these issues. Both commentators have considered how to define “capacity to consent” and “engage in sexual activities,” and how to ensure that such definitions remain person-centered and allow for a “situational approach” to each case. They write: “incapacity can and should be defined situationally – in a functional manner that maximizes [a person’s] sexual self-determination.” However, Benedet and Grant’s thoughtful analysis and emphasis on the individual and his or her self-determination – two concepts linked with dignity – have not been greatly expanded upon in case law or legislation so as to give life to the therapeutic jurisprudential lens that they employ to view these issues of sexuality.

Twenty years ago, I wrote the following about sexuality issues in the domestic context, and I believe that little has changed in the intervening two decades:

We must also question the therapeutic or antitherapeutic implications of official hospital policies that control the place, manner, and frequency with which such individuals can have sexual interactions. We must consider the implications of these policies on ward life and their implications for patients' post-hospital lives. These questions are difficult ones, but we must ask them nonetheless if we wish to formulate a thoughtful, comprehensive response to the wide range of questions this subject raises.

If institutionalized persons with mental disabilities are granted the same sexual autonomy that the rest of us have, the former population will be given a voice. If persons with

mental disabilities are allowed voluntary sexual interaction, that, by definition, provides the sort of participatory experience that leads to a sense of voluntariness within a therapeutic jurisprudence framework. And together, the grant of sexual autonomy and the concomitant right to voluntary sexual interaction help increase the self-validation of those in question.

So, what are my conclusions/recommendations?

First, sexual issues must be seen as multi-textured, and the meaning of “sex” must be carefully defined.

Second, we ignore cultural attitudes at our own risk.

Third, many of the critical issues – behavioural, legal, social, and political – remained unanswered, in large part because of the taboos that surround this entire area of law, policy, and social inquiry. This all remains very under-discussed because we are still so astonishingly uncomfortable thinking about the questions at hand. We desire to close our eyes to the reality that persons with mental disabilities are sexual beings, and close our minds to the fact that their sexuality may be much more like “ours” than it is different.

ours” than it is different.

Fourth, developments in international human rights law, especially the ratification of the UN Convention on the Rights of Persons with Disabilities – finally – forces us to reconsider how myopic we continue to be about these issues, and realize that sexuality rights are rights that must be enforced.

Fifth, application of a therapeutic jurisprudence lens to this question forces us to confront how the core principles of TJ are regularly disregarded in our social responses to these

issues, and that the three V's articulated by Professor Ronner are rarely, if ever, honored.

Sixth, the use of the TJ filter – in the context of the articulated principles of international human rights law – offers us a means of approaching these questions in a new and, potentially, socially redemptive way, and in a way that, optimally, erases sanist attitudes.

I believe that such an approach will optimally privilege autonomy, promotes dignity, and value psychological health. It is the least we can do.

### **References (all by the author)**

*“All His Sexless Patients”: Persons with Mental Disabilities and the Competence to Have Sex* (with Alison J. Lynch, Esq. ), 89 WASH. L. REV. 257 (2014).

*“Love is Just a Four-Letter Word”: Sexuality, International Human Rights and Therapeutic Jurisprudence* (with Alison J. Lynch, Esq.), 1 CANAD. J. COMPAR & CONTEMP. L. . – (2014) (in press)

*“Everybody Is Making Love/Or Else Expecting Rain”: Considering the Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals and in Asia*, 83 U. WASH. L. REV. 481 (2008)

*“Limited in Sex, They Dare”: Attitudes Toward Issues of Patient Sexuality*, 26 AMER. J. FORENS. PSYCHIATRY 25 (2005)

*Sex on the Wards: Conundra for Clinicians* (with Douglas Mossman, M.D. and Deborah A. Dorfman, J.D.), 25 J. AM. ACAD. PSYCHIATRY & L. 441 (1997)

*“Make Promises by the Hour”: Sex, Drugs, the ADA, and Psychiatric Hospitalization*, 46 DEPAUL L. REV. 947 (1997)

*Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?* 20 NYU REV. L. & SOC'L CHANGE 517 (1993-94)

*Sexual Activity Among Psychiatric Inpatients: International Perspectives*, 4 J. FORENS. PSYCHIATRY 109 (1993) (with Andrew Payne, M.D. et al)