

**“Some Things are Too Hot to Touch”: Competency,
the Right to Sexual Autonomy, and the Roles of Lawyers
and Expert Witnesses**

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Thesis:

Almost 25 years ago, one of the co-authors (MLP) said this:

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.¹

We believe that this observation is still salient, and that it characterizes the views, not only of society in general, but of most lawyers and mental health professionals. The idea that persons with mental disabilities have the same right as all others to sexual autonomy – to a free and individualized sexual life with the same options (to have sex, to not have sex; to have sex monogamously, to have sex polygamously; to masturbate, to not masturbate; to have heterosexual sex, to have

¹Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?* 20 NYU REV. L. & SOC'L CHANGE 517, 537 (1993-94).

homosexual sex) as all others have -- is still “beyond the last frontier” for most of society.²

In this presentation, the authors (two attorneys and a forensic neuropsychologist) will discuss how we globally ignore the law and the science about competency determinations when it comes to matters involving this population, and how our failure to take this seriously – a failure that is steeped in sanism and false “ordinary common sense” – violates every precept of therapeutic jurisprudence and constitutional law.³ We will discuss the obligations on lawyers (to vigorously represent these clients in court and administrative proceedings,⁴ and to respond forthrightly to those who ask ““how can you argue that your client has a right to sexual interaction?”⁵) and on expert witnesses (who must put aside their own personal feelings – if they interfere – and assess individuals as objectively in

² See generally, MICHAEL L. PERLIN & ALISON J. LYNCH, *SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER?* (Palgrave Macmillan) (2016)

³ See e.g., Michael L. Perlin & Alison J. Lynch, “*All His Sexless Patients*”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257 (2014).

⁴ See Michael L. Perlin & Naomi Weinstein, “*Said I, `But You Have No Choice*”: *Why a Lawyer Must Ethically Honor a Client’s Decision about Mental Health Treatment Even if It Is Not What S/he Would Have Chosen*, 15 CARDOZO PUBLIC L., POL’Y & ETHICS J. 73 (2016/2017)

⁵ *Id.* at 75; see also, Michael L. Perlin, Heather Ellis Cucolo & Alison J. Lynch, *Sex, Sexuality, Sexual Offending and the Rights of Persons with Mental Disabilities*, 6 LAWS Article 20 (2017).

this context as they would on questions of criminal incompetency or on civil competencies involving matters such as ability to enter into contracts).

We will conclude by offering recommendations for best practices in this complex and challenging area of law and social policy.

References

Jerrod Brown et al, *Autism Spectrum Disorder and Sexually Inappropriate Behaviors: An Introduction for Caregivers and Professionals*, 1 J. SPECIAL POPULATIONS 1 (2017).

Leigh Ann Davis, *People with Intellectual Disability & Sexual Offenses*, accessible at <https://www.thearc.org/document.doc?id=3658>

Andreas Dimopoulos, *Let's Misbehave: Intellectual Disability and Capacity to Consent to Sex* 1 (Sept. 1, 2012) (unpublished paper presented to Society of Legal Scholars), accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332259.

Suzanne Doyle, *The Notion of Consent to Sexual Activity for Persons with Mental Disabilities*, 31 LIVERPOOL L. REV. 111 (2010).

Michael Gill, *Sex Can Wait, Masturbate: The Politics of Masturbation*, 15 SEXUALITIES 472 (2012).

Hans Hellemans et al, *Sexual Behavior in High-Functioning Male Adolescents and Young Adults with Autism Spectrum Disorder*, 37 J. AUTISM & DEVEL. DISORDERS 260 (2007).

Glynis H. Murphy & Ali O'Callaghan. *Capacity of Adults with Intellectual Disabilities to Consent to Sexual Relationships*, 34 PSYCHOLOGICAL MED. 1347 (2004).

Michael L. Perlin, "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).

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

Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517 (1994).

Michael L. Perlin, Heather Ellis Cucolo & Alison J. Lynch, *A TJ Approach to Mental Disability Rights Research*, in THE METHOD AND PRACTICE OF THERAPEUTIC JURISPRUDENCE ((Nigel Stobbs, Michel Vols & Lorana Bartels eds. 2018) (forthcoming) (Carolina Academic Press).

Michael L. Perlin, Heather Ellis Cucolo & Alison J. Lynch, *Sex, Sexuality, Sexual Offending and the Rights of Persons with Mental Disabilities*, 6 LAWS 20 (2017).

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

Michael L. Perlin & Alison J. Lynch, *How Teaching about Therapeutic Jurisprudence Can Be a Tool of Social Justice, and Lead Law Students to Personally and Socially Rewarding Careers: Sexuality and Disability as a Case Example*, 16 NEVADA L.J. 209 (2015).

Michael L. Perlin & Alison J. Lynch, *“Mr. Bad Example”: Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299 (2016).

MICHAEL L. PERLIN & ALISON J. LYNCH, *SEXUALITY, DISABILITY AND THE LAW: BEYOND THE LAST FRONTIER?* (2016) (Palgrave Macmillan).

Michael L. Perlin & Valerie R. McClain, *“Where Souls Are Forgotten”: Cultural Competencies, Forensic Evaluations and International Human Rights*, 15 PSYCHOL., PUB. POL’Y & L 257 (2009).

Eric R. Wright, Heather A. McCabe & Harold E. Koorman. *Institutional Capacity to Respond to the Ethical Challenges of Patient Sexual Expression in State Psychiatric Hospitals in the United States*, 7 J. ETHICS MENTAL HEALTH 1, 2 (2012)

Learning objectives

- Attendees will understand the relationship between mental disability and legal competency or incompetency.
- Attendees will be able to describe the contradictory ways the general public (including lawyers and mental health professionals) characterize the right of persons with mental disabilities to sexual autonomy.
- Attendees will be able to show how therapeutic jurisprudence can be a significant tool in the ways that lawyers and forensic witnesses represent and work with persons with mental disabilities.
- Attendees will be able to explain how it is necessary to understand the multiple textures of “sanism” in analyzing any issue involving sexual autonomy and mental disability.