

BOOK REVIEW – SEXUALITY, DISABILITY, AND THE LAW: BEYOND THE LAST FRONTIER?

Michael L Perlin and Alison J Lynch; Palgrave Macmillan,
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Crisp white yachts moored upon a blue sea, verdant green mangroves framing Trinity Inlet in the distance; the sublime vision greeting me each time I glanced away from *'Sexuality, Disability, and the Law: Beyond the Last Frontier?'*¹ to reflect. Squally tropical breezes insisted on playing havoc with the menu, sending the salt shaker skidding across the harbour-side café table at which I was seated, drinking coffee. To reflect means to think carefully and deeply, and I found myself compelled to stop reading and think about the issues raised in this book often. In some ways I felt it was the least I could do. Paradise was my fortunate reality and a kind of Hell was otherwise being exposed on the pages of the text before me. 'Professor Perlin, you are an agent of the devil!' Is there a more hostile environment on Earth than that of the anxious, fearful mind? My own reaction did not include 'praying for [Perlin's] soul,' upon becoming cognisant of what this book was asking me to consider. But I realise now that even thinking, 'it's none of my business, is it?' although honestly well intentioned, might actually be a morally lazy synonym for 'not my problem,' or even worse: 'I don't care.'

Authors Perlin and Lynch are aware that asking questions about the rights to sexual freedom of individuals with mental disabilities, is bound to almost never be met with enthusiastic responses, free from caveats. While understanding that many will find the book confronting, they are admirably resolute and unwavering in their commitment to advocate for 'this cohort of marginalized, misunderstood, trivialised citizens.' Written in an authoritative, yet conversational tone, the academic narrative is interspersed with stories and anecdotes gathered from 40 years of experience. Much of that experience has been in weathering criticism, denouncement and even anger, for daring to pursue the topic. The first two chapters of the book are, perhaps, unsurprisingly then, devoted to exploring and exposing the pervasive factors that adversely affect and influence the way we think about people with mental disabilities. Sanism, pretextuality, heuristics and 'ordinary common sense,' dominate the discussion to such an extent, they argue, that a conceptual sense of the legal rights, especially the legal sexuality rights, of those with mental disabilities is difficult to reach. Sanism is perhaps the most insidious of these cognitive defaults, because it alone has survived, where other forms of prejudice, such as racism and sexism, are popularly banished as socially repugnant.

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¹ Michael L Perlin and Alison J Lynch, *Sexuality, Disability and the Law: Beyond the Last Frontier?* (Palgrave Macmillan, 2016).



Whatever you or I think, (or even want to think), about the sexual lives of others, the law is the prism through which the authors seek to vindicate the rights of the mentally disabled. The third chapter begins with an examination of the constitutional and statutory rights, including a discussion on the case law, to sexual interaction in the United States of America. The ratification by that country of international Human Rights law, specifically, ‘*The Convention on the Rights of Persons with Disabilities*’ both crystallises and catalyses, in the author’s opinion, the recognition of a claim for and protection of, the rights of the ‘world’s largest minority.’ A brief comparative discussion on rights, through the lens of culture and history through to extant laws, serves to uncover and in a way, globally unify this hidden, largely ignored, minority.² The authors expressly reject the opinion that incompetence to make decisions concerning matters of intimacy ought to be presumed. Instead, the focus of the remainder of chapter three is on elucidating broad factors and questions to consider in the assessment of competence. ‘Competence to have sex,’ is an inquiry so plagued by policies rendered incoherent by—‘our sanist and pretextual use of heuristic reasoning and false “ordinary common sense,”’ that the response ‘it’s just too difficult’ has become, perhaps, axiomatic. In summary, allowing personal bias to obscure an inquiry, is simply not good enough, say Perlin and Lynch.

Issues that dominate the social policy discourse are the subject of the fourth chapter. Any social reform agenda must recognise and contend with certain fears. The fear of adverse publicity, the fear of failure and the fear or risk of coercion and litigation. There is the potential for a disconnect to occur between what is literally meant by ‘sex’ and the views of what ‘the public says’ despite what ‘the law says.’ Deeply personal matters of sexual preferences and avoiding creating gender biased or discriminatory policies are highlighted as are matters of reproduction and abortion. Side-effects of medication that affect sexual function ought to be able to be discussed freely and as a distinct issue, rather than the current practice of focussing on how side-effects impact upon medication compliance generally. Other social policy issues include sex education and sex surrogacy. A ‘Model Policy Concerning Sexual Relations among Long-Term Psychiatric Inpatients,’³ developed by Perlin and two of his colleagues, provides a template ‘that incorporates both hospital administration concerns about liability and the necessity of maintaining patient autonomy.’ Perlin and Lynch caution: ‘pretending that patients do not want to engage in sexual activity, or that it does not already happen even with prohibitions against it, is not good policy making.’

The authors recognise that the struggle to have the sexual rights of the mentally disabled recognised, is better understood in the broader historical context of gender, society and sexuality. In chapter five, the authors trace the beginnings of sexual repression in society from the Greek city states; for instance, Plato ‘relegated sexual desire’ because he said that ‘copulation lowered a man to the frenzied passions characteristic of beasts.’⁴ Religious doctrine carried on the tradition of frowning upon sexual activity, condoning it only inside of marriage. Sex was seen as the province of the procreative, young heterosexual couple, a view still reflected in today’s society. Interestingly, earlier in the book, Perlin describes the epiphany-like moment that began his long career in seeking to substantiate and advocate for the sexual rights of the mentally disabled. In 1979 on a routine visit to discuss a class action settlement at

² Perlin and Lynch, above n 1, 39, quoting R Kayess and P French, ‘Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities’ (2008) 8 *Human Rights Law Review* 1–34.

³ D Mossman, ML Perlin and DA Dorfman, ‘Sex On The Wards: Conundra For Clinicians’ (1997) 25 *Journal of the American Academy of Psychiatry and Law* 441,460.

⁴ Perlin and Lynch, above n 1, 129, quoting MS Tepper, ‘Sexuality and Disability: The Missing Discourse of Pleasure’ (2000) 18 *Sexuality and Disability* 283–290.

a psychiatric hospital in New Jersey, he witnessed a young resident couple kissing. Such scenes he realised, ‘thunderstruck,’ were conspicuous by their absence. Many years later, he still wonders if he would have had a similar reaction if the couple had not presented as young and attractive, being unaffected as they were by the then common ravages of tardive dyskinesia.

The final chapter is a discussion of the clear alignment between the advocacy of the sexual rights of those with mental disabilities and the central principles of therapeutic jurisprudence: ‘voice, validation and voluntariness.’ This form of lawyering is ‘part of a growing comprehensive movement in the law toward establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively and respectfully.’ Therapeutic jurisprudence is also committed to providing dignity, a concept the authors maintain is of central importance to the argument of permitting those with mental disabilities their sexual autonomy.

The opinions, fears and concerns of parents with disabled children, children of disabled elderly parents and professional staff charged with the care of the mentally disabled, are not given an active voice in Perlin and Lynch’s book. The authors make clear that this is because, until now, the voices of the mentally disabled have been largely silent. That is not to say the authors ignore the difficult policy terrain that must be confronted. Rather, the objective of this book is on vindicating the rights of the mentally disabled and advocating for their cause. This book is also a broader appeal to all to recognise and effect a change in attitude so that the burden of decision making is shouldered by society and not delegated to take place in a purely medico-legal context. In order to do this, many will have to confront their own, often unconscious, prejudice in order to demand the changes so passionately advocated for in this book.