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PAPER

Disability, sex rights and the scope of sexual exclusion

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ABSTRACT

In response to three papers about sex and disability published in this journal, I offer a critique of existing arguments and a suggestion about how the debate should be reframed going forward. Jacob M. Appel argues that disabled individuals have a right to sex and should receive a special exemption to the general prohibition of prostitution. Ezio Di Nucci and Frej Klem Thomsen separately argue contra Appel that an appeal to sex rights cannot justify such an exemption. I argue that Appel's argument fails, but not (solely) for the reasons Di Nucci and Thomsen propose, as they have missed the most pressing objection to Appel's argument: Appel falsely presumes that we never have good reasons to restrict someone's sexual liberty rights. More importantly, there is a major flaw in the way that all three authors frame their positive accounts. They focus on disability as a proxy for sexual exclusion, when these categories should be pulled apart: some are sexually excluded who are not disabled, while some who are disabled are not sexually excluded. I conclude that it would be less socially harmful and more productive to focus directly on sexual exclusion per se rather than on disability as a proxy for sexual exclusion.

INTRODUCTION

People with disabilities are routinely marginalised or excluded from society in many ways. One of the most persistent forms of exclusion is sexual. Disabled people are often excluded as potential sexual partners—one British poll found that 70% of adults surveyed would not consider having sex with a disabled person[1]—and 'images of disability and sexuality either tend to be absent—disabled people being presented as asexual—or else perverse and hypersexual'.[2 3] In light of this, a series of papers in this journal have addressed sex and disability. Jacob M. Appel[4] appeals to sex rights to argue that 'jurisdictions that prohibit prostitution should carve out narrow exceptions for individuals whose physical or mental disabilities make sexual relationships with non-compensated adults either impossible or highly unlikely', and suggests that sexual surrogacy services 'should be covered by all public health systems and private insurance plans'. Ezio Di Nucci[5] argues that Appel's appeal to rights fails, and proposes that instead of a legal exception to the prohibition of prostitution, 'the sexual interests and needs of the severely disabled be met by charitable non-profit organisations, whose members would voluntarily and freely provide sexual pleasure to the severely disabled'. Building on Di Nucci's criticisms, Frej Klem Thomsen[6] argues contra Appel that an appeal to sex rights cannot justify such an exception. Contra Di Nucci, though, he suggests that there is a 'relatively good case for a legal exception' based on arguments from beneficence and luck egalitarianism, combined with an argument that 'the case for prohibition [of prostitution] is murkier and weaker than its proponents sometimes suggest'.

In this paper, I argue that Appel's argument fails to establish a narrow exemption to the prohibition of prostitution for disabled individuals, but not (solely) for the reasons that Di Nucci and Thomsen propose. Both Di Nucci and Thomsen have missed the most pressing objection to Appel's argument: the argument falsely presumes that we never have good reasons to restrict someone's sexual liberty rights. More importantly, the most serious worry that Thomsen raises against Appel (the 'scope challenge') helps illustrate a major flaw in the way that all three authors frame their positive accounts. In an ableist society, disability is a major source of sexual exclusion. But disability status is neither necessary nor sufficient for being sexually excluded and proposals about how to fulfil the sexual interests of all and only disabled people miss the mark. Instead of focusing narrowly on how to meet the sexual interests or satisfy the sexual rights of disabled individuals, we should investigate whether and how to mitigate the harms of sexual exclusion more generally.

APPEL'S ARGUMENT

Appel[4] argues that 'sexual liberty means the autonomy to make one's own sexual decisions independent of state or society interference'. Unlike many authors writing about sex rights for the disabled, Appel clearly distinguishes between a right to (mere) sexual stimulation and the right to interpersonal 'sexual pleasure that stems from relations between consenting individuals', pleasure of a sort that 'is both greater than and distinct from that achieved through masturbation'. He concludes that 'if any right to sexual pleasure does exist—and this paper is grounded on that premise—then it must be a right to mutual contact, not merely self-stimulation'.

Appel argues for both a negative and a positive right to sex. Di Nucci[5] rightly notes that 'universal positive sexual rights are incompatible with universal negative sexual rights… If everybody has negative sexual rights, then everybody has the right to refuse to fulfil A's sexual needs, but then A has no positive right to sexual pleasure'. Thomsen[6] agrees that a positive right to sexual contact with another person is incompatible with the negative liberty rights of other persons to refuse to engage in sexual contact. However, he argues that Appel's claims depend only on the existence of the less

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controversial negative right, and reconstructs Appel's argument in the following way:

1. Persons have either (1) a negative (will-based) right to sexual liberty, or (2) a negative (interest-based) right to fulfilment of their sexual needs.
2. We have (decisive) reason to not violate rights.
3. Prohibition violates the negative sexual right, by limiting [relevantly disabled] persons' freedom to engage in sexual relations.
4. Ergo, we have (decisive) reason to create a legal exception from prohibition for relevantly disabled persons.

Thomsen notes that it is unclear whether Appel is referring to a will-based right or an interest-based right, and so constructs the argument to apply to either kind of right.[i]

A NEW OBJECTION TO APPEL'S ARGUMENT

Thomsen criticises Appel's argument on three grounds.[ii] However, he does not address what I take to be the argument's most serious flaw: the second premise of Appel's argument as Thomsen has reconstructed it either establishes only a very weak conclusion or is false. Recall that the premise states, 'We have (decisive) reason to not violate rights'. If premise 2 is read as stating that we simply have *a reason* not to violate rights, the argument can establish only that we have *a reason* to create a legal exception for disabled people to purchase sex. And this is a much weaker claim than Appel's conclusion. For reasons are cheap—they can be easily outweighed, and there may be better reasons not to permit such an exemption.

If premise 2 is read as stating that we have *decisive* reason not to violate rights, it is false. Thomsen notes that the second premise is true by definition if 'violating rights' is interpreted as *wrongfully* forbidding someone from exercising their right; of course we have decisive reason not to perform wrong actions. If read in this way, the argument begs the question, as premise 3—which states that the prohibition of prostitution violates the rights of relevantly disabled people—*presupposes* that such prohibition is wrong. Rather, Appel must be presuming that 'violating rights' means *completely preventing someone from exercising a right*. For Appel assumes that hindering people's ability to engage in sex by preventing them from purchasing sex violates their sexual rights; this is true only if a rights violation consists in (completely) hindering the exercise of a right. But interpreted in this way, premise 2 is false, for we do completely restrict people's ability to exercise their liberty rights—including their negative sexual rights—whenever doing so interferes with the rights of others or is otherwise harmful.

For example, we prohibit sex with anyone who does not consent to sex, or who is currently incapable of exercising the right to consent to sex (eg, people who are heavily intoxicated, or who are sleeping or unconscious). This is so even if there are people who are sexually gratified only by having sex with non-consenting partners, and who are therefore unable to pursue fulfilling sexual lives. We also prohibit public masturbation and exhibitionism, as these practices violate our rights not to be unwanted witnesses to sexual acts in public places. Again, this is so even for those who can attain sexual gratification only through such practices. It may be unfortunate for these people that they are unable to attain sexual gratification without violating the rights of others. But they are out of luck; there is no morally acceptable way around this.

We also restrict sexual liberty when the pursuit of sexual fulfilment does not violate anyone else's rights but is harmful in some other way. There are many examples of potential restrictions on sexual liberty for harm-based reasons. So long as at least one of them is compelling, my point will be made. For that reason, I remain neutral about whether each of these is a permissible restriction; I present these merely as possible examples of the phenomena I have in mind, and readers who disagree should replace them with their preferred (real or hypothetical) legitimate restrictions of sexual liberty. For example, many jurisdictions forbid bestiality as a sexual practice. It is plausible that this is not because animals have rights to sexual autonomy that are violated when humans have sex with them without consent—for our laws and social practices governing the breeding of livestock and companion animals presume that animals do not have rights to sexual autonomy—but because bestiality is harmful or cruel to animals.

Many jurisdictions also forbid consensual incest, even though fully consensual incest (eg, without any coercion or serious power differential) plausibly does not violate anyone's rights. One could argue that such restrictions are legitimate if forbidding incest leads to better overall outcomes in the long run than does permitting it (perhaps because incestuous relationships are especially likely to be exploitative, or to do damage to family ties, or to result in children with genetic abnormalities). We also generally forbid necrophilia, and would likely to continue to do so even if we agreed that the deceased no longer have rights to sexual or bodily autonomy, because of harm that might result to the relatives of the deceased person, or out of respect for the dead.

Most relevantly for our present purposes, many argue that prostitution contributes to the oppression of women—or at least to a culture that objectifies and devalues women—and should be prohibited on this basis.[iii] Again, this could be so even if the sale and purchase of sex does not violate anyone's rights. To be clear, I am not myself presuming that commercial sex is always oppressive or objectifying. But there is at least a case to be made that we do not have decisive reason to refrain from restricting people's rights to purchase sex because of the general social harm caused by purchasing sex. If Appel is to establish his conclusion, he must provide an argument that this is not the case.

REFRAMING THE DEBATE

In criticising Appel, Di Nucci notes that 'we must either grant everybody the right to sexual satisfaction, or we must argue that severely disabled people have, in virtue of their increased difficulty to satisfy their sexual interests, a right to sexual services that non-severely

[i] Will theories of rights hold that 'the function of a right is to give its holder control over another's duty'.[10] A will-based right to sexual liberty entails that the rights holder has the sovereign power to control with whom they engage in sexual activity. Interest theories of rights hold that 'the function of a right is to further the right-holder's interests'.[10] An interest-based right to fulfilment of sexual needs entails that it is in the interest of the rights holder to have their sexual needs met.

[ii] Thomsen argues that Appel has simply asserted the existence of a negative right to sexual liberty without arguing for that right (the 'justification challenge'), and that whatever argument might be forthcoming to establish that right will itself do all of the serious normative work, leaving the right to be double-counted (the 'superfluence challenge'). He also raises a 'scope challenge' to Appel's view, which I discuss in Section 4.[6]

[iii] For arguments that prostitution is essentially harmful, see refs 11–13. For arguments that prostitution is contingently harmful in our current society, see refs14 15.

disabled people do not have'.[5] Building on this, Thomsen raises what he calls the 'scope challenge' against Appel, arguing that if 'all persons possess the right [to sexual pleasure] in question', and 'prohibition [of commercial sex] infringes their rights equally', then it is 'hard to see how it could constitute a premise in an argument for a legal exception for disabled persons'.[6]

Thomsen's solution to the scope challenge is to restrict his own argument for an exemption to those who are 'relevantly disabled'. A person counts as relevantly disabled for Thomsen 'if and only if (1) she has sexual needs and desires to exercise her sexuality and (2) she has an anomalous physical or mental condition that, given her social circumstances, sufficiently limits her possibilities of exercising her sexuality, including fulfilling her sexual needs.'[6]

Thomsen is attempting to ensure that his argument does not overgenerate (in the way that he claims Appel's does) by restricting it to only those people who are sexually excluded in virtue of a disability. However, there are two problems with this strategy.

First, Thomsen's definition of 'relevantly disabled' itself overgenerates, and thus is subject to the same scope challenge he raises against Appel's view. 'Relevantly disabled' as Thomsen defines it includes anyone who finds it sufficiently difficult to fulfil their sexual needs due to any anomalous mental or physical condition. Yet we can imagine people who fit this description, but who do not plausibly count as disabled. Consider the following cases:

Uglingess: A desires partnered sex and is unable to find a partner because she is perceived by those around her as exceptionally ugly, and lives in a society in which only attractive people are considered potential sexual partners.

Misogyny: B is a virulently misogynistic heterosexual man who finds it impossible to find a non-compensated sexual partner, because every woman he meets is so repulsed by his sexist remarks.

Unusual fetish: C has a harmless but very unusual sexual fetish. C is sexually gratified only by engaging in that fetish, and is unable to find non-compensated partners who enjoy the same fetish.

A, B and C can each be included in Thomsen's definition of 'relevantly disabled'. A's ugliness is an unusual physical condition that, in her circumstances, hinders her ability to find uncompensated sexual partners. In a society in which most people were not misogynists, B's hatred of women could be considered an anomalous mental condition that, given his circumstances, leads to the same result.[iv] And C's fetish might likewise be considered a non-standard mental condition that prevents C from meeting her sexual needs.[v]

Our folk concept of disability does not usually include ugly, misogynistic, or kinky people. More importantly, (at least some of) the people in these cases (or in other cases like them that we can imagine) do not count as disabled according to various accounts of the nature of disability. Consider first the account presumed by the Americans with Disabilities Act (ADA), according to which a disability is a physical or mental impairment or dysfunction that significantly limits the exercise of one or more major life activities.[vi] A, B and C will count as having disabilities under the ADA definition only on an implausibly expansive account of what counts as an impairment and what is considered a major life activity; A's appearance, B's misogyny, and C's sexual kink do not significantly hinder any of the major life activities recognised by the ADA.

Or consider instead the social model of disability, according to which disability is a relationship between an individual and their social environment, and results entirely from pervasive and harmful discrimination against people with certain mental or physical impairments.[vii] Because sexual kinks are private and not routinely disclosed, it is unlikely that C will be routinely discriminated against because of her unusual fetish. And surely B is not socially disabled and systematically discriminated against in virtue of his misogyny; to the contrary, in some contexts (eg, businesses settings that rely on 'old boys' networks') his misogyny may help him get ahead. And while people like A who are not conventionally attractive are indeed discriminated against, it is not clear that this discrimination is serious or pervasive enough to lead to social disablement.

Finally, consider Elizabeth Barnes' recent solidarity-based account of disability, according to which having a physical disability is simply a way of having a different (but not necessarily bad) kind of body, and consists in being in some bodily state x in context C 'such that the rules for making judgements about solidarity employed by the disability rights movement classify x in context C as among the physical conditions that they are seeking to promote justice for'.[7] This view clearly rules out my three cases, as ugliness, misogyny, and sexual kinks are not part of the disability rights movement.

Second, and more importantly, the fundamental approach that Appel and Thomsen take—that of attempting to remedy the ills of sexual exclusion by carving out a narrow exemption to the prohibition of prostitution for *only* disabled people—is misguided. Raising the scope challenge presupposes that our goal should be developing a policy to alleviate sexual exclusion *insofar as this results from disability*, which requires the ability to sort cases of sexual exclusion into those that stem from disability and those that do not. Above, I argued that the particular sorting method Thomsen proposes is inadequate. But the problem is deeper than this, for the presupposition that we should narrowly seek to alleviate only that sexual exclusion that results from disability is illegitimate.

This is because being disabled is neither necessary nor sufficient for being sexually excluded, and it is the harms of sexual exclusion rather than the any harms of disability per se that proposals like Appel's and Thomsen's seek to remedy. It is not sufficient because there are many people without physical or intellectual disabilities who fail to have their sexual needs met, for a wide variety of reasons. As Don Kulick and Jens Rydström[8] note in an empirical analysis of sex and disability in Sweden and Denmark, 'lots of people, many of whom have no physical or intellectual

[iv] To be clear, I am not suggesting that such a person has any right to have his sexual needs met, but simply noting that he appears to fall under Thomsen's category of 'relevantly disabled'.

[v] Thomsen notes that his proposal faces a 'problem of where exactly to draw the line between persons who are and persons who are not "sufficiently limited" in their ability to exercise their sexuality'; he sets this problem aside, as his 'task at present is merely to investigate the reasons that speak for and against drawing a line at all'.[6] It might be possible to draw a more exact line that rules out cases A, B and C. But even if we were to do so, it would remain problematic to focus on sexual exclusion resulting from disability, for the reasons explained below.

[vi] For legal purposes, the ADA definition also includes the past record of having had such an impairment or the perception by others of having such an impairment. See https://www.ada.gov/pubs/adastatute08.htm#12102.

[vii] For example, see ref16. For a critical discussion of the social model, see ref7.

impairments to speak of at all, are hindered in their search for erotic fulfilment and love by other people's prejudices, their own insecurities, and by their lack of access (because they are the wrong race, age, class, etc) to social arenas where they conceivably might meet an erotic partner'.[viii]

And it is not necessary because many people with physical and/or intellectual disabilities (including of severe sorts) are *not* sexually excluded; they have active and fulfilling sex lives, and have all of their sexual interests met through non-commercial means.[ix] If disabled people who are unable to have their sexual interests met should be specially permitted to purchase sex or to be served by a non-profit organisation, this is not because they are *disabled* per se, but in virtue of their status as *sexually excluded*. In our ableist society, disability is a frequent cause of sexual exclusion. But to narrowly focus on disability status as the feature that grants one a legal exemption or access to non-profits is to conflate the category of disabled people with the category of sexually excluded people. This sends a false—and likely harmful—social message that disability is always a cause of sexual exclusion.

In the words of Mik Scarlet, a broadcaster and disability access consultant, creating special brothels for disabled clients only 'causes issues for the way society thinks about disability… For disabled people, it means they grow up in an atmosphere that makes them believe that they just aren't sexy or potential sexual partners and for the non-disabled community it plays a part in continuing the prejudice around disability.… We should not be fighting to make a world where it's easier for disabled people to pay for sex as they feel they can get it no other way, we should be fighting for a world where disabled people are seen and see themselves as viable sexual partners.'[9]

In conclusion, using disability as a proxy for sexual exclusion sends a false message that all disabled people are sexually excluded, while distracting from any hardships that result essentially and directly from being disabled in an ableist society. Focusing on disability status as a proxy for sexual exclusion both perpetuates negative stereotypes about disability, and is a less fruitful approach than getting to the core of the issue by focusing on sexual exclusion directly. There remain important questions about sexual exclusion that I have not yet addressed—such as whether sexual exclusion is a form of injustice or is merely a harm, what this injustice or harm consists in and what (if anything) should be done by governments or communities to address it. I plan to take up such questions in the future; I urge others to do the same, and to achieve greater conceptual clarity (and avoid unintentional ableism) by carefully pulling apart the categories of 'disabled' and 'sexually excluded'.

[viii]The drastic way in which lack of access to physical and romantic intimacy can affect subjective levels of well-being among a wide range of people can be seen by looking at online discussion forums for people who self-identify as 'love shy' or 'involuntary celibates', defined as having extreme difficulty forming romantic relationships and/or an inability to find a romantic or sexual partner. Most people who identify as love shy or incel do not also identify as disabled. While web forums for these communities are often laced with subtle (or blatant) misogyny, resentment and a problematic sense of entitlement to sex, they are also filled with great sadness, loneliness and pain. For example, see https://www.reddit.com/r/ForeverAlone/.

[ix]For just a few examples, see ref 17.

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