Why Ethical Sex Demands [the category of] Nonconsensual Sex

Abstract: Recent philosophical and social conversations around sexual consent focus mainly on two aspects of consent. One consideration is the necessary condition that consent must be present for a sex act to be sex and not rape. The other consideration involves the conditions that are sufficient for consent to be valid. However, it is our contention that these necessary and sufficient conditions are an oversimplification of the social, legal, moral, and interpersonal aspects of sexual experience. In this paper we explore and defend the controversial category of “nonconsensual sex.” We argue that rape and nonconsensual sex are not equivalent. Although nonconsensual sex is morally problematic, it should be distinguished from both rape and fully consensual sex. Accepting the possibility of this category allows us to interrogate the gap between the legal and political objectives of defining and prosecuting rape, and the moral objective of cultivating ethical sexual relationships between individuals.

Recent philosophical and social conversations around sexual consent focus mainly on two aspects of consent. One consideration is the necessary condition that consent must be present for a sex act to be sex and not rape. The other consideration involves the conditions that are sufficient for consent to be valid. However, it is our contention that these necessary and sufficient conditions oversimplify the social, legal, moral, and interpersonal aspects of sexual experience. Our aim in this paper is to explore and defend the controversial category of “nonconsensual sex.” Accepting the possibility of this category allows us to interrogate the gap between the legal and political objectives of defining and prosecuting rape, and begin to construct a view of ethically ideal sex.

We argue that rape and nonconsensual sex are not equivalent, and that institutional responses to rape and sexual assault ought to recognize and address the (albeit problematic) category of nonconsensual sex. We contend that although nonconsensual sex ought not to be

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1 Tom Dougherty provides a helpful formulation of this idea: “consent is a necessary, but not sufficient, condition for sex being permissible.” Dougherty, Tom. “Fickle Consent.” Philosophical Studies. 167 (2014): 25-40, (36). Furthermore, we note that consent is a complex concept, the definition of which is related to topics such as autonomy, capacity, intent and understanding. We take a similar approach to permissible sex that Joel Feinberg takes to fetal personhood: there is a point at which it occurs, but where this point falls is morally and empirically debatable. Feinberg, Joel. Harm to Others. New York: Oxford University Press, 1984, 96.
legally confused with rape, it is still morally problematic, and should thus be distinguished from fully consensual sex. We then sketch a framework through which institutions should address a range of sexual activity that reflects lived sexual experience. This analysis is in part a response to second-wave feminist and hetero-normative views of rape and sexual assault, which we claim fail to account for the non-binary nature of sex and consent. Our approach is sex-and-desire positive, and focuses on the mutuality of sex without assumptions regarding the sex, gender, sexual orientation or sexual preferences of the persons engaging in potential sex acts.\(^2\)

I. The Spectrum of Consent

Over the past five to ten years, the term “nonconsensual sex” has replaced “rape” in many university policies regarding sexual assault.\(^3\) Backlash against these policy changes has pushed some universities to reform in the other direction, adopting procedures for deciding complaints of sexual misconduct that include an affirmative consent requirement.\(^4\) Much of the discussion around how to respond to and prevent sexual violence now assumes that consent is necessary for a morally permissible sexual encounter, and then attempts to determine what constitutes sufficient consent.\(^5\) Kelly Oliver, for instance, argues that the “term nonconsensual sex is an oxymoron,” because the term “sex” implies consent, and “[w]ithout it, sexual activity is not sex but violence.”\(^6\)

\(^2\) We note that this includes assumptions about the sex or gender identification of both perpetrators and victims of sexual violence.


\(^6\) Oliver, “There Is No Such Thing as Nonconsensual Sex.”
Oliver and others who argue that sex and rape are binary terms claim that use of the term ‘non-consensual sex’ serves only to “downgrade[] sexual assault and rape from a criminal offense to a breach of contract.”

We agree that the term “nonconsensual sex” should not be used in lieu of the term “rape.” But we disagree that all nonconsensual sex is necessarily violence. We understand the space between rape and fully consensual sex to be spectrum of subcategories, which vary in matters of degree regarding capacity, autonomy, intentionality, intelligibility and social expectations. We now consider the principal distinctions between fully consensual sex, rape, and nonconsensual sex in turn.

Fully consensual sex is morally ideal. These sex acts\(^8\) involve consent, which we see as involving both the autonomy and mental capacity to provide consent, and behaviors that reflect the expression of this consent.\(^9\) But the contractual model of consent, which is the focus of most of the literature about permissible sex, is not sufficient for what we see as morally ideal sex. Rather, “fully consensual sex” should include the conveyance of desire for sexual activity, in addition to meeting the bare minimum threshold of consent. Simply saying “yes” to sex only meets the consent requirement. Both the consent and desire conditions must be met in order to qualify as fully

\(^7\) Oliver, “Party Rape, Nonconsensual Sex, and Affirmative Consent Policies.”
\(^8\) For the purposes of this paper, we use the term “sex acts” to refer to the specific acts listed (below) in the U.S. Justice Department legal definition of rape. We acknowledge that this leaves out a host of other behaviors that we would also consider the term “sex acts” to include in practice. However, in order to limit the scope of our moral inquiry, in this analysis we adopt the narrow view of sex as defined in the legal definition of rape.
\(^9\) The medical ethics literature on informed consent provides an imperfect but useful set of criteria for fully autonomous consent in sexual encounters. Medical informed consent requires: competence (capacity for rational decisions and ability to communicate choice); disclosure (of information related to what one is consenting to) on the part of the other participants; understanding of what one is consenting; voluntariness; and the expression of consent itself. See Beauchamp, Tom L. and J. Childress. *Principles of Biomedical Ethics, Seventh Edition.* New York: Oxford University Press, 2013.
consensual sex. Such encounters involve mutual recognition of the other party or parties, not just a contractual agreement.

At the other end of the spectrum stands rape. The U.S. Justice Department defines rape as “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”\textsuperscript{10} This seems apt for a legal definition. The epistemic limitations of evidence preclude legal categorizations relying on subjective mental states and behaviors. But from a moral standpoint, we are better able to assess subjective aspects of a sexual encounter. The legal definition assumes the existence of a victim (and thus a perpetrator, as well).\textsuperscript{11}

Yet we argue that acts of rape are violence, not sex. This does not mean that rape should have a force requirement, as is still the case in many legal jurisdictions around the U.S. Rather, acts of rape are ones in which a perpetrator (or multiple perpetrators) and a victim can be identified. And when perpetrators and victims can be identified, it is clear that we are talking about an encounter that is a different kind of encounter than sex. The physical acts involved in rape may appear similar to sex acts.\textsuperscript{12} These acts are not empirically easy to categorize and distinguish from what we argue is nonconsensual sex. We do not construct a precise definition of rape here, nor do we claim that rape is something “you know when you see it.” We argue that it exists, it is violence,


\textsuperscript{11} We are purposefully using the language of perpetrator and victim to distinguish between the two key roles that are present in instances of rape, but we understand that many victims elect to identify as “survivors” rather than “victims” of sexual assault. However, for our purposes, we are underscoring the fact of victimization as crucial to the legal and moral determination of “rape” whether or not one ever identifies as a survivor in light of this experience.

\textsuperscript{12} Similar acts of “penetration… of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person” occur, yet “sex” is not taking place during rape. Violence is not sex.
but it is not as easily defined (for moral purposes) as “penetration without the consent of the victim.”

While we take the distinction between rape and sex to be a difference in kind, we understand consent, or lack thereof, to reflect differences of degree. Accordingly, we reject the claim that nonconsensual sex is necessarily rape, as these two categories of acts are, as aforementioned, differences in kind. However, the differences in degree when it comes to the extent of or capacity for consent, are part of the morally murky, yet aptly descriptive category of nonconsensual sex.

To be clear, we use the term “nonconsensual sex” as a separate category to capture morally murky sex acts, but also to distinguish between sex acts and rape. Performing sex-like acts on a sleeping person, for instance, is often categorized as “nonconsensual sex” because the sleeping person is “unable to consent.” We argue that this is rape. The sleeping person is incapable of giving consent. Unless the instigator is also asleep, we have a clear perpetrator with intent to proceed with a sex act without the other party’s consent (or at least extreme recklessness), and a clear victim.

The term “rape” would certainly apply to situations where one party has given a clear and intentional statement of non-consent, or where one party gives consent while fully cognizant of (or while recklessly ignoring) the fact that the other party is not in a position to knowingly consent or engage in sexual contact. But there are other instances in which a person is legally incapable of giving consent that we might not so easily categorize as rape, such as in a situation in which a person is legally intoxicated, but is still able to exercise sexual autonomy through the articulation of their choice to have sex with another person.13

13 In the medical ethics literature, capacity is taken to be situational: so although one may have restricted capacity in certain areas of their life, they are not incapacitated from making all decisions. For example, a person with dementia may not be able to make decisions about her long-term financial investments but could make an immediate decision regarding whether she wanted to consume or refuse food in a
II. The Category of Nonconsensual Sex

The category of nonconsensual sex, that we argue exists between rape and fully consensual sex, involves certain situations in which consent is not present or is compromised by an external influence, yet in which there is an absence of clear perpetrator and victim roles. Nonconsensual sex is an experientially accurate term for describing a number of frequent sex acts between persons, often – though not always – due to intoxication, that do not meet a standard of fully consensual sex, but where there is no intent (by either party) to engage in a crime or perpetrate a harm.\(^\text{14}\)

This might include sexual encounters between intoxicated college students in which neither party is capable of giving legally recognizable consent, but both parties have expressed their intentions to proceed with an encounter (an example we build on below). Or it might include a sexual encounter between two people in a committed, long-term relationship, where one party instigates a sexual encounter and the other party, tired and not particularly interested in proceeding but willing to do so, participates without giving explicit consent and without expressing desire.

Neither of these situations are instances of fully consensual sex. But nor are they situations with a perpetrator and a victim. They are common situations that we need to be able to capture with our terminology, in part so that we can identify what aspects of these encounters could be changed to transform them into morally desirable, fully consensual sex. Because the difference between these encounters and fully consensual sex involves a difference in degree of consent, it is coherent to think of morphing the encounters into fully consensual sex. With instances of rape, which is different in kind from fully consensual sex, such an undertaking is incoherent.

\(^{14}\) And in which neither party perceives themselves to be a victim.
We take the performance of sex acts while one or both parties is under the influence of alcohol as our prime example, through a case study of sex acts under the influence of alcohol on university campuses in the United States, and the administrative responses universities have implemented to respond to these activities. In the next two sections, we explore the ways in which these responses are problematic.

III. A Theoretical Mistake: Equivocation

There are two main problems with the failure to recognize the category of nonconsensual sex in institutional, political and legal responses to sexual assault and rape on university campuses. The first problem is theoretical, which we address in this section, and we turn to the practical problems in the next section. We use a hypothetical, rather familiar case study of sex acts that occur under the influence of alcohol on university campuses in the United States in order to illustrate these problems.\(^{15}\) We imagine a case of two persons both over the age of majority, who are under the influence of alcohol and nonetheless decide to engage in sex acts with each other.\(^{16}\) We consider how university policies handle such encounters as cases of “nonconsensual sex” and how such institutions limit sexual encounters to a binary categorization of either rape or consensual sex, when the term “nonconsensual sex” is used as a stand-in for the term “rape” and is furthermore used to describe all sexual encounters in which affirmative consent\(^{17}\) is not present.

\(^{15}\) This is not the only place that nonconsensual sex occurs, but we take it up due to the prevalence of the practice, as well as the moral and legal responsibility an administration has to handle acts of sexual violence perpetrated against or by its students.

\(^{16}\) Though it could be the case that more than two persons are engaged in sexual acts together, that not all college students are over the age of majority, or that they may be under the influence of a combination of legal or illegal drugs and alcohol.

\(^{17}\) Some universities are moving in the direction of codifying “affirmative consent” standards, which require an affirmative expression of one’s willingness to engage in sexual activity, either through verbal or nonverbal communication, and California and New York state legislatures have passed laws that in each case define the requirements of affirmative consent and require affirmative consent to be the standard of practice on both state and private university campuses (California Senate Bill No. 967 adding section 67386 to the Education Code, signed into law on September 28, 2014, and New York Bill No. S5965, revised on June 14, 2015 and signed into law).
We challenge the nature of the equivocation that occurs when nonconsensual sex is used as a stand-in for rape in institutional responses to sexual assault. As we noted in the previous section, many others have criticized the use of the term “nonconsensual sex” as a stand-in for the term “rape.” These criticisms often center on the claim that university administrations have shifted away from the use of the term rape because it is “violent and powerful, and does justice to the violation that victims experience.”

Universities are not tasked with determining criminal guilt or innocence, and so their investigations involve a lower burden of proof than criminal courts. Thus, some administrations have chosen to use a less explosive, non-legal term to refer to sexual misconduct, ostensibly in order to protect themselves and/or their students from legal consequences. Critics claim this diminishes acts that should be seen as crimes.

We agree with recent critiques that rape should not be termed “nonconsensual sex” in legal or administrative processes as an attempt to protect accused perpetrators or universities, or as an attempt to pursue administrative, but not legal, recourse in responding to such accusations of assault. However, our criticism of the equivocation by institutions is due not to the incoherence of the very category of nonconsensual sex (as has also been argued) but rather due to the difference in kind between nonconsensual sex and rape. Many of the examples given by critics of the use of the term “nonconsensual sex” involve scenarios in which the term “nonconsensual sex” has been misapplied. We agree that what appears to be a “sex act” that occurs when one party is unconscious, and cannot say yes or no to the sexual activity, is in fact rape. This is a different kind of activity from fully consensual sex. But as previously outlined, there are sexual encounters that

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18 Gordon, “‘Nonconsensual Sex’: How Colleges Rebranded Rape.”
19 See Oliver, Hunting Girls; “Party Rape, Nonconsensual Sex, and Affirmative Consent Policies” and “There Is No Such Thing as ‘Nonconsensual Sex.’ It’s Violence.”
are not fully consensual, are comprised of the same physical acts as those in the instance of rape, yet they are not carried out by parties fulfilling perpetrator and victim roles.

Equivocating the terms “rape” and “nonconsensual sex” precludes any analysis of capacity, autonomy, intentionality, intelligibility and social expectations that could distinguish between morally better and worse sexual encounters, and clarify when a sexual encounter is not sex, but violence. It presumes that not only in cases of rape, but in any situation that doesn’t meet the standard for fully consensual sex, participants are either victims or perpetrators. This is not accurate, either with respect to terminology or with respect to the lived experience of individuals.

IV. A Practical Problem: Equivocation Harms

Not only do institutions rest on a theoretical mistake when they equivocate between nonconsensual sex and rape, but they also contribute to a particular set of harms. First, the elision between these two distinct concepts results in institutional failures to successfully identify and pursue instances of rape. If every instance in which there is not affirmative consent from two (or all\(^{20}\)) parties is classified as violence, the difference between crimes of rape and situations where equally drunk college students decided to engage in sexual activity disappears. And if these two scenarios are to be treated the same way, it seems that either both of these cases will be treated as crimes, or neither situation will be treated very seriously. Rape ought to be treated, both legally and morally, like it is wrong, dangerous, and seriously damaging to victims of sexual violence.

Furthermore, when an institution equates nonconsensual sex with rape, it fosters a culture in which some sex acts are improperly portrayed as encounters between victims and attackers. If the scenario of sex acts between mutually intoxicated college students is designated a crime, we have parties to a sexual encounter who must be classified as either victim or attacker. All other

\(^{20}\) Allowing for the possibility of sex acts to be engaged in by more than two parties at a time.
things being equal, any such identification will be arbitrary. If only one party is male, he is more likely to be labeled as the attacker due to social norms. If only one party is female, she is more likely to be labeled as a victim due to social norms. These labels (and the labels that might be randomly assigned in same-sex sexual encounters of a similar sort) are both unfair and harmful. Individuals should not be told to reimagine a sexual encounter as violence when neither party sees the encounter in these terms. There might be scenarios in which a perpetrator of sexual violence needs to come to terms with his or her culpability, or a victim needs to come to terms with having been victimized. But it is hard to imagine a scenario in which a party to a sexual encounter should be told to reimagine himself or herself as a victim, when that was not that person’s experience.\footnote{And the person did experience the encounter – unlike a case in which the person was unconscious and therefore had no awareness or experience of the encounter.}

Following along these lines, we can see how equivocation between nonconsensual sex and rape tends to presume certain heterosexual and gender norms, namely that sex is occurring between men and women, and that men are pursuing sex with women who may or may not be permitting men to have sex with them. The presumption of a victim and a perpetrator maps directly onto this view. While we acknowledge the morally murky nature of nonconsensual sex, we support constructions of rape, consent, and non-consent that are inclusive and understand sex to be an inter-subjective experience for persons of all gender and sex identities. Binary interpretations of sex and violence and of the parties participating in a sexual encounter fail to allow the space for these constructions.

V. Filling the Gap

Responses to the administrative equivocation between “rape” and “nonconsensual sex” include calls for a “consent-based” understanding of permissible sexual encounters, which are
manifested on college campuses and in broader social and legal reform movements. But this “consent-based” regime seems to us to fail in its stated aims of promoting sexual agency. For instance, Tuerkheimer notes that “in April 2014, the First Report of the White House Task Force to Protect Students From Sexual Assault reiterated: ‘[I]f she doesn’t consent—or can’t consent—it’s a crime.’” While well-intentioned, this statement reveals at least two assumptions that have been made about sex acts on college campuses. First, a sexual encounter (an act of rape or otherwise) is assumed to involve a female victim. This presumption of female victimhood does not align with a goal of promoting the sexual agency of female college students. And second, the absence of consent (or the legal preclusion of an attempt at consent from serving as consent) automatically vaults the act into the realm of rape, regardless of other circumstances surrounding the encounter. We have argued that this should not be the case.

We argue that institutions should engage in thoughtful changes to accurately categorize sexual misconduct, on college campuses or otherwise. But ceasing to use the term ‘nonconsensual sex’ does not suffice. Instead, institutions must begin by discontinuing the practice of equivocating between rape and nonconsensual sex. And there are further social and cultural changes that will need to happen in order to promote sexual relationships that feature more fully consensual sex acts and fewer nonconsensual sex acts. We contend that the institutional equivocation is both inaccurate and potentially increases the harms that could be caused by this category of sex act, and institutional changes which acknowledge these harms are essential. Yet the gap between nonconsensual sex and fully consensual sex will be bridged through social and cultural transformation, not through artless institutional policies.

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22 See Tuerkheimer, “Rape On and Off Campus.”
23 Ibid., pp. 8-9.
Bibliography


