Unjust Sex vs Rape

Ann J. Cahill
7 November 2018

Feminists have long criticized the adequacy of consent in defining non-coercive heterosexual sex. In order to comprehend the grey area between unwilling yet consensual sex, and outright sexual assault and rape, the concept of ‘unjust sex’ is increasingly used. As Ann J. Cahill argues, unjust sex is sex that a woman is pressured into having, but in which her agency still plays a role.

In this article, I return to a philosophical conundrum that has troubled feminist theory since the topic of sexual violence has been taken seriously, what I call the problem of the ‘heteronormative sexual continuum.’ Briefly, this problem raises the question of how sexual assault and hegemonic, heteronormative sexual interactions are conceptually and politically related. Here I continue my response to the work of Nicola Gavey, who has argued for the existence of a ‘grey area’ of sexual interactions that are ethically questionable without rising to the category of sexual assault, but did not explicitly articulate either what these two categories share or what distinguishes them from each other (Gavey 2005). I will begin by summarizing Gavey’s position, after which I will refer briefly to my attempt to articulate the common ground between instances of sexual assault and examples of sexual interactions in the ‘grey area.’ Finally, I will take up my central task: providing a theoretical account of how the two categories differ. The distinction, I argue, can be found in the role that the victim’s agency plays in the interaction, and both the fact of that distinction – that we are capable of providing a philosophical account of the difference between sexual interactions that fall into the grey area and those that constitute sexual assault – and its particular content are crucial for the development of a tenable feminist sexual ethics.

Two (related) caveats are in order. First, in this discussion, I am particularly interested (as is Gavey) in the social and political phenomenon that is hegemonic heterosexuality. Therefore, I am not attempting to analyze sexuality or sexual violence in all of their myriad forms. Moreover, I am particularly concerned here with sexual violence perpetrated by cis-men against cis-women in the context of some sort of pre-existing relationship (which may be fairly temporary, or may be ongoing). Obviously, not all sexual violence takes this form, but the limitation of my concerns here explains the gendered nature of the examples that I will utilize; and precisely because I am interested in hegemonic heterosex (which on the whole is not marked by a sensitivity to either the cis/trans distinction or the multiplicity of sexual orientation), I will use ‘women’ to refer...
to heterosexual cis-women and ‘men’ to refer to heterosexual cis-men. Further analysis
would be needed to determine if the insights developed in this analysis would illuminate,
for example, sexual violence perpetrated by women against men, by cis-identified people
against trans-identified people, by adults against children of any gender, and so on.

Second, the following discussion intersects with some previous scholarship in sexual
ethics, but addresses related questions in some distinct ways. I’m thinking in particular
here of Sarah Conly’s work on seduction, which aims to distinguish certain forms of
sexual pressure from ethically problematic examples of coercion and rape. Although I
very much share Conly’s stated desire to develop more nuanced approaches to sexual
ethics that account for sexual wrongs that do not amount to sexual violence (Conly 2004,
121), I agree with Scott Anderson that Conly’s approach is flawed insofar as it does not
take into account the structural inequalities that play such a large role in all aspects of
sexual interactions (Anderson 2005). Moreover, Conly’s approach is resolutely
contractual, and frames sexual negotiations as occurring between two self-contained,
autonomous individuals, each of whom carries a set of rights and responsibilities derived
from the kind of relationship they inhabit with each other; such a model does not take
into account how the actions, intentions, behaviors, and so on of the persons involved
play a role in shaping the other’s sexual subjectivity. In a word, Conly’s sexual ethics is
overly individualistic. In the discussion that follows, I take up sexual interactions as
occurring within (although not entirely determined by) a social and political framework
that is marked by the kind of sexual and gender inequality that makes sexual violence
both possible and common, and as having the potential (indeed, the likelihood) of
affecting the subjectivity of the persons involved.

Gavey’s sexual scaffolding

In Just Sex? Gavey argues that my claim in Rethinking Rape that women can generally
tell the difference between rape and instances of noncoercive heterosexual sex (a claim
that I use primarily to critique Catharine MacKinnon’s theory of sexual violence) is
unfounded (Cahill 2001). She claims that there exists a category of sexual interactions
that inhabit a grey area between sexual violence and ethical sex, and that in describing
these interactions, women often indicate that although there seemed to be something
wrong, or at least not quite right, about them, they did not seem to be instantiations of
sexual violence. Such interactions include:

situations in which a man applied pressure that fell short of actual or threatened
physical force, but which the woman felt unable to resist, as well as encounters
where a man was rough and brutish, and the woman described letting sex happen
because she felt unable to stop it. They also include stories of situations where a
male partner was not directly coercive at all, but where the woman nevertheless
found herself going along with sex that was neither desired nor enjoyed because
she did not feel it was her right to stop it or because she did not know how to
refuse. All of these accounts in different ways point to a complex grey area
between what we might think of as mutually consenting sex, on the one hand, and
rape or sexual coercion on the other. (Gavey 2005, 136)
In recounting these experiences (taken from interviews conducted with self-identified heterosexual women), Gavey’s point is not to claim that perhaps the women were deluding themselves about what had really happened; that is, she is not arguing that the women who were telling these stories actually had been the victims of sexual violence, but had simply failed to recognize that fact. Rather, Gavey seeks to maintain the experienced ambiguity of these cases by refusing to categorize them as either ‘just sex’ (in the double meaning of sex that is ethical, and sex that is mere sex) or sexual violence. For Gavey, a hallmark of contemporary hegemonic heterosexuality is precisely this lack of an immediately apparent, easily perceivable bright line between experiences of clearly ethical heterosex and heterosex that constitutes sexual assault. Hence, from Gavey’s perspective, my claim that women could, on the whole and fairly easily, distinguish between the two is not only empirically false, but in fact misses something important about the structure of contemporary heterosex.

In responding to Gavey’s critique, which I generally find convincing, I note that her analysis of these examples of unjust sex bears a distinct resemblance to MacKinnon’s theory (MacKinnon 1989), precisely insofar as it seeks to highlight the relationship between sexual violence and heteronormative sex, a relationship that Gavey describes by way of the metaphor of scaffolding. For Gavey, these troubling experiences in the ethical grey area, precisely by virtue of their ubiquity and normalization, shore up the structures of a rape culture. ‘The convergence of a male sexual drive discourse and a have-hold discourse provides ample room for this kind of unjust sex to take place. Within the terms of the male sex drive discourse, men are sexually needy creatures and, within the terms of the have-hold discourse, women know that they need to give men sex in order to retain the relationship they desire’ (Gavey 2005, 139). The terms ‘sexual drive discourse’ and ‘have-hold discourse’ resonate with MacKinnon’s emphasis upon a constructed heterosexuality that not only associates maleness with aggression and femaleness with passivity, but that frames female heterosexuality as having meaning only in relation to male desires and aims. ‘Women’s sexuality is, socially, a thing to be stolen, sold, bought, bartered, or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property. To be property would be an improvement’ (MacKinnon 1989, 172).

Both Gavey and MacKinnon are identifying structural aspects of hegemonic heterosex that serve to make sexual assault more likely, and more likely to be condoned. Where some approaches to sexual assault emphasize that its use of violence, coercion, or force in fact distinguishes it from actual, real, or ‘normal’ sex, [1] Gavey and MacKinnon demonstrate that such a distinction lets hegemonic heterosex off the hook prematurely.

Yet there are crucial differences between the approaches that Gavey and MacKinnon take. For MacKinnon, it is the background structures of sexual inequality that justify, at the very least, a hermeneutics of suspicion with regard to the ethics of heterosexual interactions themselves. To appeal to heterosexual women’s consent with regard to heterosexual interactions in order to render those interactions ethical is, for MacKinnon, a ludicrous proposition, one that assumes precisely the degree of freedom and equality that patriarchy makes impossible. Moreover, the consent model denies the ways in which patriarchy constructs feminine heterosexuality in specific ways, functioning as a coercive force that does not so much act against heterosexual women’s desires but rather shapes them so that they function contrary to those women’s well-being, equality, and freedom.
Hence MacKinnon’s emphasis on the structural ways in which hegemonic, normalized heterosex and sexual assault both deny women’s agency and freedom. [2]

Although MacKinnon has vociferously denied that her theory of sexual violence entails the claim that all heterosexual sex under current patriarchal conditions is rape, one cannot find in her work a detailed, compelling articulation of how any given heterosexual interaction could sufficiently escape the pernicious effects of patriarchal structures. [3] Indeed, MacKinnon makes no attempt to distinguish sexual assault from other forms of heterosex. Gavey, by contrast, explicitly refuses to collapse instances of unjust sex into the category of sexual violence:

These everyday taken-for-granted normative forms of heterosexuality work as a cultural scaffolding for rape. This is not to say that these normative forms of sex are rape or that they are the same as rape. And it is certainly not to say that all, or much, of everyday sex between men and women is rape-like. Even the most gender-stereotypically conformist patterns of sex might have nothing in common – for the particular woman and particular man involved – with the experience of rape. (Gavey 2005, 2)

Here Gavey clarifies that though the instances that she’s concerned with may be difficult at first to clearly distinguish from sexual assault, they are not identical with sexual assault, and that in fact the two phenomena must be distinguished from each other. Gavey’s ability to claim a distinction between normative heterosex and rape, as I’ve argued elsewhere (Cahill 2014) is the result of her more nuanced approach to power and identity, an approach that rejects the (sometimes implicit, sometimes explicit) determinism of MacKinnon’s theory in favor of a more dynamic interplay between oppression and agency. Indeed, Gavey’s metaphor of scaffolding is insightful here: where for MacKinnon, patriarchy is a background force that constructs (and therefore precedes) sexual identity, practices, and norms, Gavey views sexual inequality as being co-constructed with all elements of sexual being. The scaffolding that is hegemonic heterosex is distinct from the building that is rape culture, but its construction involves a degree of simultaneity with the construction of the building. Moreover, the building and the scaffolding mirror and shape each other; and because (unlike most examples of literal architecture), the construction is never complete, the scaffolding is never dismantled. And given Gavey’s more fluid theory of power, I would argue that she understands patriarchy not as a force that dictates, in a totalitarian way, the shape and strength of the edifices, but rather as a set of relations that both imbues and emanates from their construction. In other words, Gavey allows for the possibility of practicing heterosex in a way that renders it a less effective scaffolding force, perhaps one that even threatens the edifice it surrounds – a possibility that MacKinnon’s theory cannot sufficiently account for.

And yet metaphors can accomplish only so much. Although she uses the term ‘unjust sex’ only once (Gavey 2005, 139), there is little doubt that Gavey finds the examples she is exploring ethically problematic; her concern is to name these sorts of interactions as unjust, and to initiate an exploration of how these sorts of unjust acts assist (both conceptually and in terms of lived experience) a cultural tolerance of sexual violence. For Gavey, then, acts that occur within this grey area are both different from and related to
acts of violence. Beyond providing the metaphor of scaffolding, Gavey does not explicate the precise ways in which examples of unjust sex overlap ethically with examples of sexual assault. I attempt to do just that in my previous article by claiming that both instances involve a disregard for women’s sexual desires (Cahill 2014). More specifically, I argue that the ethical quality of sexual interactions cannot be determined by whether sexual desire on the parts of both parties was present or absent; instead, what matters is whether any desire that may be in play had the capacity to affect, in a meaningful way, the quality and nature of the interaction. In other words, recognizing the relevance of the desires of one’s sexual partner is a crucial element to ethical sexual interactions, and that recognition is lacking in both the examples that Gavey takes up and in clear-cut cases of sexual violence and rape.

If that argument is successful, I will have solved half of the puzzle that Gavey’s analysis presents by articulating the similarity between instances of unjust sex and instances of sexual violence. But what precisely distinguishes the two? After all, if Gavey’s approach to sexual violence manages to sustain the systemic aspect of MacKinnon’s theory while avoiding its mistake of totalization (as I argue it does), then it must be able to distinguish between the two phenomena. What makes the cases of unjust sex that Gavey describes different from sexual assault and rape? This is the second half of the puzzle that I hope to address here.

**Sexual interactions in the grey area**

Before doing so, it may be helpful to attempt to distinguish these two classes of experiences a bit more clearly. Some examples of sexual interactions that inhabit this grey area include cases where women felt significant pressure to have sex with a partner; where women felt that among the options that existed (including increased or continued tension with that partner), sex was the least bad option; and where women felt that acquiescing to their partner’s sexual requests or demands was the easiest and/or quickest way to achieving one of their own needs or desires (sleep, for example). Other examples included women feeling disempowered when it came to insisting on barrier methods of birth control. Gavey often describes these examples as instances of women conceding to having sexual interactions despite not really wanting those interactions (although she is also careful to note, albeit somewhat parenthetically, that she is not saying that the presence of desire is what is necessary to make those interactions ethical). These examples are experienced by the women who narrate them as quite normal, or at least hardly remarkable: by and large, they are seen as common features of the heterosexual landscape, experiences that most heterosexual women have had, sometimes frequently.

One could argue that in categorizing such experiences as ‘unjust sex’ rather than rape or sexual assault, Gavey has perhaps missed the mark. After all, perhaps the heterosexual women who had these experiences simply misrecognized or mis-described such experiences. Such misrecognition could have a variety of causes, including a lack of conceptual frameworks capable of identifying sexual coercion and force, or a deep and understandable desire not to identify as the victim of sexual violence. Yet I hold that Gavey is correct to accept the interviewees’ representations of these experiences as distinct from sexual assault, for at least three reasons.
First, it seems important to recognize that the interviewees repeatedly described their experiences as ambiguous. That is, the ambiguity of their experiences – the ways in which, from the perspectives of the women who experienced them, they seemed to fit into neither the category of clearly ethical, consensual sex or that of clearly unethical, nonconsensual sex – is central and persistent. To attempt to resolve such ambiguity prematurely would risk missing something important about heterosex as currently experienced by heterosexual women. In other words, the ambiguity that these narratives represent is itself meaningful, and given that that ambiguity indicates that there might be similarities and differences between the two phenomena, it is reasonable to explore both lines of questioning. [4]

Second, there is no philosophical consensus on precisely what defines an example of rape or sexual assault, and so there is no clear theoretical standard by which one could judge the interviewees’ interpretation of their experience as either accurate or inaccurate (see Reitan 2001). Moreover, it is no coincidence that the body of feminist philosophical literature on rape and sexual violence has moved away from definitional questions in favor of attempting to get at what Louise du Toit calls ‘the meaning of rape’ (du Toit 2009, 1). This, I would argue, is a positive development, as such definitional attempts are philosophically misguided. To corral the multiple ways in which sexual violence is experienced into all-encompassing definitions is inevitably to fail to illuminate the complex and varied meanings of sexual violence, and the attempt is more likely to perpetuate rather than undermine the interlocking systems of inequality and injustice that result in acts of sexual violence. As an intersubjective, embodied, lived, social, and political phenomenon, sexual violence resists easy categorization.

My argument here does not, however, mean that it is impossible to categorize any particular interaction as one of sexual violence. What I aim to emphasize is that the very act of categorization needs to be recognized as a social and world-constituting act, one that ought not to be understood as an objective practice that either succeeds (by correctly aligning an experience with a definition) or fails (by mismatching an experience with a definition). To identify a particular experience as an instantiation of sexual violence (or not) doesn’t just reflect the world as it is (or reflect it inaccurately); it creates new possibilities, and forecloses others. Crucially, the process of identification is a social one, involving not only other individuals, but also ways of having and interpreting experience that are both collectively developed and profoundly political. Finally, such an act of identification should not be seen as a unified, self-contained, temporally defined act. Although naming a particular experience as an act of sexual violence is often a transformative experience for survivors, it is part of an ongoing process of meaning-making that is often quite lengthy.

One final reason to accept Gavey’s representation of the grey area of unjust sexual interactions has to do with their location in the social imaginary. Importantly, the types of interactions that are described in these interviews are described as quite common and to be expected; in other words, they are heavily normalized as typical features of heterosex. Such normalization does not, in and of itself, indicate that these interactions do not constitute sexual violence; after all, it is not difficult to come up with forms of sexual assault that have been normalized to such an extent that they do not appear or are experienced as (by either perpetrators or victims) sexual violence. Marital rape is just one obvious example. However, the fact that these interactions are constructed in the
social imaginary as part and parcel of normalized heterosex, while at least some forms of sexual assault are constructed in the social imaginary as aberrant and worthy of social condemnation, indicates that the different phenomena may not only function differently in terms of their social and political meanings, but also may carry distinct ethical meanings to the women who experience them. To ascribe philosophical salience to their different levels of normalization is not to accept one as ethical and one as not (remember, Gavey explicitly recognizes the unethical nature of these interactions, while simultaneously seeking to both connect them with and distinguish them from sexual assault). It is, however, to take seriously the possibility that the two phenomena may be ethically distinguishable from each other, even if they also share some ethical characteristics.

Where’s the line?

We have established, then, that it is reasonable to ask the question of what distinguishes heterosexual interactions in the grey area from interactions that constitute sexual assault. It remains to be determined precisely what does distinguish one from the other. One of the characteristics of the grey-area interactions that seems relevant is that they are marked by hesitation, reluctance, or an ambivalent kind of unwillingness (where, for example, the woman might be unwilling to have sex, but be very willing to obtain the benefits that will result from having sex). [5]

One might wonder, then, if unjust sex is sex that occurs despite the fact that the woman is somewhat less than willing, whereas sexual assault is sex that happens (to echo Susan Brownmiller’s foundational work on the topic [Brownmiller 1975]) explicitly against the will of another.

That distinction is not quite precise enough, however, as it does not account for cases of sexual violence where the survivor is either incapable of having or expressing their will (because they are unconscious; see Heyes 2016) or where their expression of their will does not meet the standard of consent (because they are significantly incapacitated by, say, drugs or alcohol). So let us say that sexual assault entails a sexual interaction where one person (the assailant) either overrides the stated will of another (the victim) or exploits a situation wherein the victim’s will is inoperative (in some cases, of course, the assailant has ensured that the victim’s will would be rendered inoperable; this is the pattern of behavior that has been described by the many women who have accused Bill Cosby of sexual assault). Such cases, Gavey’s work implies, would be clearly experienced by heterosexual women as rape, ought to be recognized as rape by the culture at large, and ought to engender clear moral outrage. [6] Cases of unjust sex, on the other hand, seem to be marked by the presence of an ambivalent or split will on the part of the woman.

The relevance of the will may tempt us to refer back to the old standard of consent in order to provide an ethical distinction between unjust sex and sexual assault; in the grey area, one could perhaps say, consent of a sort was given, even if reluctantly, whereas in the clear-cut cases of rape, it was not. But Gavey’s analysis indicates a hesitation to rely on consent in this way (Gavey 2005, 139), and for good reason. First, there is the extensive feminist literature on the failure of consent to provide a reliable standard by which to judge the ethical quality of sexual interactions. As Carole Pateman (1988), I,
and others have argued, consent theory with regard to sexual ethics not only tends to reinscribe a normative heterosexuality (where the male actors are consistently constructed as the instigators, the proffering parties, whereas the female actors are consistently constructed as those in the position to accept or reject an offer), but it also places the heaviest ethical burden on those individuals who are most likely to be disadvantaged by surrounding political structures and norms (see Cahill 2001 for a more extensive critique of consent theory vis-a-vis sexual violence).

In addition to this point, however, is the fact that, as Gavey points out, cases within the grey area did not always seem to allow for the effectiveness of women’s lack of consent. That is, women often felt that the situation they were in did not allow for them to do anything but consent. To frame the ethical distinction as between the presence or absence of consent would miss (as such a framework often does) the crucial question of uptake, that is, of whether the interaction was marked by a recognition of the efficacy of consent or its lack. Indeed, what is striking about some of the interactions that Gavey explores is that consent is quite persistently sought after, thus indicating that the woman’s consent matters very much to the male partner. Traditional consent theory would imply that as long as the consent wasn’t the result of coercion – and here Gavey and I are particularly interested in examples where a clearly unethical level of coercion was not present – then the seeking of consent could hardly be ethically problematic. But if the granting of consent is experienced as the only response that will be taken up as effective and meaningful, and if that situation seems ethically problematic, then the ethical standard of the presence of consent once again reveals itself as wanting.

So if consent will not do the work of distinguishing between these two, what will? I’d like to forward the idea that what distinguishes these cases from each other is the different way in which a woman’s sexual agency is deployed. To be clear, I am not arguing that cases of unjust sex that do not constitute sexual violence involve sexual agency on the part of the victim, whereas cases of sexual violence do not. In both cases, I hold, sexual agency plays an important role, but a different role in each case.

When it comes to relations among specific human beings, I understand sexual agency as the ability to contribute meaningfully to the quality of the sexual interaction in question. To have sexual agency is to be recognized and effective as an active element in the creation of an intersubjective interaction; it is, in an Irigarayan sense, to be recognized as sexually distinct from the other, such that the interaction is marked by that difference. A robustly intersubjective sexual interaction is imbued with each person’s sexual agency, while at the same time it constructs that sexual agency (not from scratch, of course; but the interaction makes a contribution, whether slight or substantial, to the ongoing becoming of that agency). A sexual subject does not merely have sexual agency prior to any given sexual interaction, as a kind of freestanding capacity or resource; rather, both the existence and the quality of that sexual agency emanates from sexual (and other) interactions.

I am not, therefore, conceptualizing sexual agency as a kind of utter sexual autonomy, in the sense of an individualized ability to act in the world free from the influence of others. For me, agency in general is both deeply embodied (and thus profoundly affected by bodily interactions with other subjects, specific environments, objects, and discourses of inequality) and fundamentally, not peripherally, intersubjective. Agency, then, always

\[7\]
occurs in the context of overlapping relationships with a wide range of entities, ranging from individual beings (human, other-than-human, sentient, and non-sentient) to communities to social and political discourses to biosystems.

Moreover, sexual agency is not an all or nothing affair, as the following analysis will demonstrate. One might be involved in a sexual relationship that recognizes a certain degree of one’s sexual agency, but in a limited way; or a particular relationship may entail an inconsistent pattern of recognition. Nor is sexual agency affected only by individual relationships; patterns of inequality accord varying degrees of sexual agency to different individuals. For example, the prevalence of various forms of sexual street harassment demonstrate the social norm that male-bodied persons do and ought to have a disproportionate right to impose a sexual interaction upon female-bodied persons. The invasive questions about genitalia imposed upon trans-identified people by cis-identified people; the failure of sexual education to represent and honor a wide scope of sexual practices and desires; the sexual policing of physically and cognitively disabled persons: all these social phenomena are implicated in the unjust allocation and recognition of sexual agency along familiar axes of inequality.

How, then, can this particular notion of embodied, intersubjective sexual agency illuminate the distinction between cases of unjust sex that do not constitute sexual assault, and those that do? In cases of unjust sex, where the woman is pressured, but perhaps not coerced, into having sex, her sexual agency is, in a sense, in play. Whether we understand her contribution as consent, or acquiescence, or opting to give in to what seems either inevitable or the lesser of one or more evils, still, she is making a contribution to the interaction. Her sexual partner is seeking from her something (again, consent or acquiescence or something else) that only a sexual subject can provide, and that will have a qualitative effect on the interaction that will ensue (after all, if the consent didn’t matter, it wouldn’t be sought after so persistently). In this way, the situation does recognize and continue to construct her as a sexual agent, as someone whose contribution to the interaction matters significantly.

But the fact that the contribution matters, that it is seen as something important enough to pursue, is not enough to establish the ethical nature of the interaction, even if it is sufficient to render the interaction outside the scope of sexual assault. The nature of that contribution, the way in which it matters, is also crucial, and here I would argue that agency is in play in a particular way: that is, the woman’s agency is deployed only so that it can be used against her. Or, to be more precise, the woman’s agency can be deployed only to facilitate a specific sexual interaction whose content (that is, the particular acts that will make up the interaction) is predetermined and remains largely unmarked by the specific quality of the woman’s sexual subjectivity. Her sexual agency is employed in a weak way, as a mere accreditation of the sexual interaction that is being offered to her. Because her agency is merely providing a kind of ethical cover to the interaction being offered, the interaction itself does not enhance either her sexual agency (that is, it does not empower her to become more knowledgeable or forthright about her sexual needs, desires, and interests in the context of this particular relationship) nor, most likely, does it broaden her sexual subjectivity by creating more possibilities. In this sense, the interaction most likely does not contribute positively to her sexual becoming or flourishing. Thus, her sexual agency is hijacked, used not to forward her interests, but in fact to undermine them, particularly those interests that are related to her always-
This hijacking can occur in multiple ways. First, the sexual agency that is recognized is carefully and significantly limited in scope. As mentioned above, many of the women Gavey interviewed indicated that the only viable way their agency could be exercised was by conceding to the partner’s demands. In such situations, women know that only a concession will be taken at face value – unquestioned, accepted, validated. Anything other than a concession will be taken as a stance that is, at best, subject to questioning and persuasion that borders on coercion. In the kinds of interactions that the women describe, the concession itself would be an unlikely candidate for further negotiation or debate – anything more than a cursory ‘are you sure?’ would seem out of place. The discrepancy between how the initial hesitation or refusal is received and how the eventual concession is received is evidence that what is sought is not the exercise of agency itself (in whatever form that might take) but only one very particular exercise of agency.

In another form of limiting of agency, as much of the critique of consent theory has established, the woman’s agency in this situation takes the form only of responding to the offer, request, or demand of the other. So not only is there only one viable, safe response to that offer, request, or demand, but anything other than a response would seem at the very least odd, and possibly incoherent. Suggesting some other activity, either sexual or nonsexual, could be perceived as just as problematic as withholding consent. In fact, it might be taken up only as withholding consent – the only meaning that has traction is in relation to the offer on the table. (Note that if such a suggestion were taken seriously, and viewed as an appropriate action to take, then I don’t think we’re in the grey area of unethical sexual interactions anymore; in that case, the woman’s sexual agency is fully recognized.)

What is ethically concerning in this truncation of the woman’s sexual agency is not only that the agency is so limited in scope, but that the force that is limiting that agency is the man’s purported right to have a disproportionate say in the nature of the sexual interaction that is being considered. Rather than a robustly intersubjective exchange, where the sexual agencies of both parties are dynamically interacting, here the relevance of the woman’s sexual agency is wholly (or at least to a problematic degree) determined by the specific sexual actions, desires, and interests of the man in question. Rather than being understood or recognized as ontologically distinct, in an Irigarayan way, the woman’s sexual agency is seen as reducible to the man’s sexual agency in an ethically unacceptable, determined way. There are many social and individual forces that truncate or limit agency in perfectly acceptable ways, but here, the woman’s sexual agency is truncated unethically, in that her agency is precluded from having a sufficiently efficacious influence on the particular interaction. Her agency is in play, but, in a certain way, it matters fairly little.

In another way, however, that appeal to agency matters quite a bit. For though its scope of influence, as I have just argued, is truncated in problematic ways (perhaps, rather than saying that it matters very little, we should say that it can do very little), the fact that the appeal is made is crucial. The implication that the woman’s agency does matter (as evidenced by how persistently it is sought) serves to mask the ways in which that agency is truncated or stultified. That is, the appeal to agency actually helps to mystify the power
dynamics that are in play. Although I disagree with much of Rae Langton’s analysis of objectification, she is insightful on this point:

Affirming someone’s autonomy can sometimes be a way of denying their autonomy. This has an air of paradox, but makes good sense once we are alert to the ways in which a false attribution of autonomy can be the enemy of autonomy. An affirmation that someone is acting autonomously, when they are not, will assist and hide the violation of autonomy. *Deep Throat* affirmed the autonomy of its star Linda Marchiano – the appearance of choice, willingness, and enthusiasm was crucial for the film’s success. But at the same time, it denied her autonomy, since (according to her testimony) it took rape, threats, and beatings to make her do it. The appearance of choice – the attribution of autonomy – was crucial to the destruction of choice – the violation of autonomy. (Langton 2009, 14)

Here, it could be argued (and I would probably agree with such a critique) that Langton has too simplistic a notion of autonomy, such that it either is or is not at work, rather than seeing autonomy or agency as occurring along a continuum of restriction and freedom. But I do not think one has to subscribe to such a model of agency in order to perceive how acting as if full agency were in play can be a powerful way of undermining actual agency. [8]

If sexual interactions that take place in this ethical grey area involve a deployment of agency in this way, what about sexual assault? Here, I want to argue that sexual assault involves not a deployment of agency but rather an overcoming of that agency, or a denial of it, or a dismantling of it. Rather than utilizing the truncated form of the person’s sexual agency to validate the interaction that ensues, as occurs in the grey area, the perpetrator works to nullify the victim’s sexual agency, to make it entirely ineffective with regard to the interaction.

This is not to say, by the way, that the agency of the rape victim has no meaning to the act or to the assailant: in fact, its overcoming or dismantling is central to the meaning of sexual assault. As I describe above, agency of all sorts is grounded in and emanates from relations with others. The intersubjectivity of agency entails a corresponding vulnerability, such that relations with others of all sorts can also serve to limit agency in both subtle and acute ways. In an act of sexual violence, one person’s sexual agency is actively negated such that the sexual act – what happens, and when, and how – remains unaffected by one person’s desires, preferences, and interests. Yet even here, when intersubjectivity seems to be so threatened by the tyranny of the one, the agency of the victim has a role to play. After all, the victim must have an agency to be overcome in order for the act to be sexually violent. The perpetrator cannot be sexually violent, cannot have the experience of having sexually violated another person, unless the victim is, in fact, a sexual agent. Although the victim’s sexual agency is utterly ineffective in relation to the particular sexual act, its very ineffectiveness – the fact that it has been, and must be, overcome, whether by chemicals or force or coercion – is replete with meaning.

**Agency and feminist sexual ethics**

In this article, I have argued that the distinction between sexual acts that fall into an
ethical grey area and those that constitute sexual violence can be understood in the different roles that the woman’s sexual agency plays in each of the cases. In the former instances, women’s sexual agency is actively sought, but its efficacy is severely limited in a variety of ways, all of which refer back to the instigator’s sexual preferences, interests, and needs, thus resulting in a weak, stunted form of intersubjectivity that does not sufficiently recognize or further women’s sexual agency. In contrast, acts of sexual violence serve not to use the consent of the target, but to overcome, overwhelm, or otherwise nullify the victim’s sexual agency. It would be a mistake, how-ever, to claim that the sexual agency of the victim is rendered meaningless by this overcoming; instead, that very overcoming is a central element to the phenomenon of sexual violence.

Understanding in more detail the role of the woman’s sexual agency in these different cases helps clarify to an even greater extent how the ‘grey area’ cases serve as scaffolding for the norms of a rape culture. After all, using a woman’s agency against her in the ways I’ve delineated above, especially if those ways are viewed as appropriate and normal, may well predispose a person either to attempt to override that agency entirely or to view such an overriding of agency as not that bad. And, as I’ve described elsewhere (Cahill 2014), both sets of phenomena are marked by an all too easy, and all too culturally dominant, failure to recognize women’s sexual agency as efficacious, ethically necessary, and valuable. This common feature is the mirroring between the scaffolding and the building under construction, the parallelism that allows both to support each other. Indeed, that symmetry between the grey-area cases and instances of sexual assault accounts for the ambiguity with which women describe the former.

In this discussion, I have attempted to flesh out Gavey’s claim that examples of unjust sex are not identical to rape. However, note that I have not attempted to argue that instances of rape are clearly and always more harmful to individuals than instances of unjust sex that happen in the grey area. Not only would such a conclusion demand more space than this current article allows, but it also participates in the unfortunate tendency to hierarchize harms, of which I am generally wary. Different bodily experiences have different meanings to and for different individuals, and for good reason, and it would be a mistake to underestimate the long-term harms to autonomy and self-determination that can emanate from having one’s agency used against one’s own wishes. That we can distinguish unjust sex from sexual assault does not mean that it is not a significantly harmful social phenomenon.

Nor have I addressed here any potential legal ramifications of this ethical analysis, which again are beyond the scope of the current discussion. The fact that acts in the grey area can be distinguished from acts of sexual violence does not automatically entail that they should not be illegal (although I would have significant concerns about whether the current US justice system has the necessary conceptual and bureaucratic tools to address such cases). My focus here has been on the ethical qualities and meanings of these interactions, not their potential legal meanings. Along those lines, this analysis demonstrates how sexual interactions that do not constitute sexual assault may nevertheless entail significant ethical flaws, an insight that counteracts a tendency common among those of us who work on issues of sexual violence to assume that sexual interactions are only unethical if they entail sexual violence, or that sexual violence is the most common form of unethical sexual behavior. In addition, this analysis illuminates in more careful detail how the sexual scaffolding of unjust sex, including acts that are
normalized in hegemonic heterosex, is indeed implicated in the construction of a culture that perpetuates high rates of sexual violence.

Yet it does so without calling into question, as I argue MacKinnon’s approach does, the very possibility and existence of heterosexual female sexual agency itself, which I hold to be crucial to a viable feminist sexual ethics. As I was working on this article, a valued colleague asked me, ‘And why do we care about agency?’ It was a good question, asked in good faith. Although I hold firmly that we need philosophical accounts of agency that are far more imbued with understandings of embodiment, structural inequality, and relationality than the traditional models provide, nevertheless I also hold that a feminist sexual politics (and ethics) must be able to account for the possibility of meaningful sexual action not determined by systematic injustice. Without such a possibility, there is little left to fight for, and sexuality itself risks being constructed as wholly colonized by those systems of injustice, a totalization that is both philosophically untenable (power, I would argue, simply doesn’t work in such a fashion) and politically undesirable. Persons of all genders, functioning under all manner of systematic injustices, nevertheless sometimes find ways of doing sexuality that enhances their flourishing as human beings, and feminist theory must be a vehicle by which that positive resistance, that creative opposition, can be conceptualized and thus rendered ever more imaginable.

I would like to thank Laurie Shrage for her enormously helpful suggestions on an earlier draft of this article.

References


**Footnotes**

1. See, for example, Brownmiller. For a more contemporary and less academic take on the ‘it’s rape, not sex’ approach, see Chemaly 2015.

2. See Cahill 2001 for a more extensive critique of MacKinnon’s analysis of sexual violence.

3. MacKinnon has repeatedly, and correctly, refuted the charge that she claimed that ‘all sex is rape.’ Indeed, no such sentence can be found in her writings, and the *New York Times Book Review* was compelled to write a lengthy retraction to an essay that included the misattribution of such a claim to her (New York Times Book Review Editors 2006). However, much of the philosophical criticism of MacKinnon on this point does not rest on the existence of such an explicit claim, but rather on an analysis of the assumptions and implications of her theory.

4. One could argue that my central goal in this article, to articulate the difference between these cases and instances of rape, itself may too quickly resolve the ambiguity with which the women describe their experiences. However, as long as that distinction can account for the relationship between acts in the grey area and acts of sexual assault, and as long as the commonality between the two phenomena is also established (as I have done elsewhere), the analysis should be able to account for that ambiguity.

5. In order for these interactions to remain grounded squarely in the grey area of unjust sex, it is important that the benefits that the woman might seek from sex are not so central to her well-being or others to constitute a clear-cut case of coercion. That is, the woman who has to choose between sleeping with her boss or losing her job is clearly the target of sexual violence; the woman who has to choose between sleeping with her boyfriend or tolerating his subsequent emotional distance may be being treated unethically, but is not clearly the target of sexual violence.

6. Whether even such clear-cut cases of rape do engender clear moral outrage is another
matter; part of the insidiousness of rape culture, after all, is that it both assumes the wrongness of at least certain forms of sexual violence while simultaneously failing to recognize other forms, or underestimating the harms of all of its forms.

7. The intersubjective model of sexual interaction I am espousing here bears some resemblance to Thomas Nagel’s description of the ‘reflexive mutual recognition’ that, according to his argument, distinguishes non-pervasive sex from pervasive sex (Nagel 1969). The differences between my analysis and Nagel’s are many, however. For one, Nagel’s use of the concept of perversion entails a naturalness to sexual interactions that I find untenable. In addition, Nagel’s analysis is undergirded with an assumption that most heterosex is, almost by definition, non-pervasive; his philosophical task, then, is to draw a line between the normal and the non-normal, with the normal being assumed to be acceptable. My analysis takes as a grounding assumption that given the persistence of sex and gender inequality, and the significant role that sexuality has played in constructing and perpetrating that inequality, much of heterosex is in fact problematic. My philosophical task, then, includes illuminating the ethical problems in what passes for perfectly acceptable and commonplace sexual interactions. Finally, of course, Nagel explicitly denies that his distinction between pervasive and non-pervasive sex has any ethical implications at all, whereas I am precisely concerned with the ethical evaluation of a variety of sexual actions and behaviors.

8. Careful readers will note that I understand Langton’s references to ‘autonomy’ to be roughly similar to my references to ‘agency.’ Although the two terms have importantly different philosophical meanings and connotations, in this case I think they are being used in sufficiently similar ways to justify the connections I am drawing here.