What is the Difference between Sex and Sexual Violation?
A Theoretically and Empirically Informed Inquiry

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This paper discusses my recently completed doctoral research which explored the question *What is the difference between sex and sexual violation?* This question is both conceptual and normative because these are ‘thick ethical concepts’\(^1\) which are laden with value and meaning. In order to develop a normative framework for classifying activity as either sex or sexual violation, I conducted qualitative interviews and focus groups with lay people, police officers and support workers to inform my normative reflections on the issue. This brief paper focuses on one example taken from a lay person interview to demonstrate how I used empirical data to help me reflect on different ways of formulating the boundary between sex and sexual violation, and how this informed the conclusions I ultimately came to.

The following quote is taken from a telephone interview with a lay person respondent, referring to an experience she had within the context of an abusive relationship:

“If I didn’t fuck him the way I did, he’d have ended up hitting me and hurting me.”

This quote refers to an incident in which the respondent’s partner came home “in a foul mood”; she “knew he was going to hit me”, so she instigated sexual activity with him in an attempt to diffuse his anger and manage the situation. She explained, further, that:

“Although I instigated the sex on the one day... although I wasn’t physically being raped in that I was tied down, mentally and psychologically and emotionally I was ‘cause I had no other choice. It was do that or get beaten up.”

The respondent’s description of this incident thus demonstrates some of the key problems with using consent to distinguish sex from sexual violation (as is currently the case in the criminal law of England and Wales, as well as numerous other jurisdictions), particularly in the context of abusive relationships.

First, it was the respondent who instigated the sexual activity. She was emphatic about this point and went on to say that “even though he was inside me... I was fucking him.” Therefore, while her act is clearly one of desperation, is not motivated by desire or willingness to engage in sex with her partner, and is characterised by her

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as “rape”, it is difficult to frame it as “non-consensual”. It would seem particularly difficult to convince a jury that someone actively instigating sex in the way this respondent describes is not consenting and is therefore being raped.

Second, although her partner was in “a foul mood” and she knew he was going to hit her, he did not actually threaten to hit her on that occasion. Consent standards tend to focus on discrete moments and obscure any background context of coercion and abuse. For example, in England and Wales under the Sexual Offences Act 2003 if the complainant is caused to fear that violence will be used against her/him “at the time of the relevant act or immediately before it began”, this raises a presumption that the sexual activity was non-consensual and that the defendant ought to have known it was non-consensual.\(^2\) No such presumption is raised if the complainant’s fear of violence stems from interactions with the defendant at any time before the moments directly preceding the sexual activity. This places victims who are threatened with violence immediately prior to being raped on a different legal footing to those whose sexual activity is negotiated against a backdrop of coercion and control within the confines of an abusive relationship; yet both situations may be equally constraining in terms of a person’s freedom to make autonomous decisions about the terms on which they engage in sexual activity.

As an alternative to consent I explored “negotiation” as a possible standard with which to distinguish sex from sexual violation. This has been proposed by Michelle Anderson\(^3\) and further explored by Sharon Cowan.\(^4\) Anderson proposes a Negotiation Model as follows:

“[T]he law should define “rape” as engaging in an act of sexual penetration with another person when the actor fails to negotiate the penetration with the partner before it occurs. The law should define “negotiation” as an open discussion in which partners come to a free and autonomous agreement about the act of penetration. Negotiations would have to be verbal unless the partners had established a context in which they could reliably read one another’s nonverbal behaviour to indicate free and autonomous agreement. Force, coercion, or misrepresentations by the actor would be evidence of a failure to negotiate.”\(^5\)

Thus, Anderson’s negotiation model only applies to penetrative sexual activity, it requires a verbal agreement to engage in such activity unless the partners are able

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\(^2\) Sexual Offences Act 2003 s. 75(2)(a)
\(^5\) Anderson (2005) p. 1407
to reliably read each other’s body language, and that agreement must be reached free of force, coercion or misrepresentations.

Anderson’s model addresses several of the well-documented problems with consent standards. It emphasises mutuality and reciprocity rather than the asymmetry often associated with consent, whereby one person sets the terms and the other can either accept or reject them. In a criminal context, consent standards encourage considerable scrutiny of the complainant at trial as questions such as “what was the complainant thinking?” and “did the complainant’s actions imply that that s/he was consenting?” are at the crux of the issue. By contrast, Anderson’s negotiation standard places the spotlight back on the defendant: “What did s/he say before the sexual activity took place?” “What did the defendant do to facilitate or to restrict a free and open discussion taking place?” Anderson’s model also frames agreements to engage in sexual activity as processes taking place in specific contexts – through her references to “open discussion” and the possibility of force or coercion undermining that process. This is different to the ‘snapshot moments’\(^6\) envisaged under a consent standard.

Despite these advantages of Anderson’s model, however, it does not address all of the problems with the situation described by the interviewee quoted above, and potentially creates some new ones. The interviewee instigated the sexual activity without obtaining prior verbal agreement from her partner, so, while a consent model may not recognise her as a victim, Anderson’s negotiation model would class her as a perpetrator of sexual violation. In addition, by claiming that “Force [or] coercion... would be evidence of a failure to negotiate”\(^7\) rather than constitutive of a failure to negotiate she undermines her definition of negotiation as “free and autonomous agreement”\(^8\) by implying that negotiation could lead to a valid agreement even where force or coercion is present. In doing so I believe she overlooks the importance of coercive contexts as being central to the wrong of sexual violation in situations such as the one described above. At a broader level, I also believe that Anderson’s exception for couples who are able to read each other’s nonverbal behaviour reaffirms the hierarchy whereby sexual violation occurring within relationships is harder to criminalise than the stereotypical stranger rape scenario.\(^9\)

In light of these issues I propose that ‘freedom to negotiate’ should be used as the standard with which to distinguish sex from sexual violation, rather than consent or

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\(^6\) Cowan (2007)
\(^7\) Anderson (2005) p. 1407, my emphasis.
\(^8\) Ibid., p. 1407
negotiation. Such a standard foregrounds the context in which a sexual encounter is ‘negotiated’ or takes place, rather than the form or content of that negotiation. As such, it creates space for victims to articulate on their own terms the ways in which their sexual autonomy was constrained.

I am currently in the process of developing this idea into a more concrete law reform proposal. This involves careful consideration of the kinds of factors that would restrict freedom to negotiate. As noted above, the Sexual Offences Act 2003 lists several circumstances which would give rise to a presumption that the complainant did not consent, including use of violence or threats and involuntary intoxication of the complainant. Under the proposed new framework, such factors would doubtless still have a role to play, and would potentially be expanded to include voluntary intoxication of the complainant (where this significantly restricts her/his freedom to negotiate with the defendant), and the use of violence or threats at times other than immediately prior to the sexual activity taking place.

A key respect in which my proposal differs from the current legal model then, is that it would take into account the broader context in which the sexual activity takes place, not just the moments immediately prior to the sexual activity. However, in recent legal history, broadening the temporal lens of the inquiry in sexual offence cases has not always proved favourable for complainants. For example, despite restrictions, sexual history evidence is often used to discredit the complainant’s testimony in rape trials, and marital rape exemptions in both the UK and the US looked back to the marriage ceremony to find evidence of consent, prioritising this over the complainant’s protestations at the time sexual activity actually took place. Thus, sexual offences laws based on a freedom to negotiate standard and accompanying rules of evidence would need to be carefully crafted to ensure that irrelevant evidence is not allowed to enter the inquiry.

I would also look to include elements of ‘coercive control’ such as isolation from friends and family, micro-surveillance and intimidation of the complainant by their partner. Other issues such as poverty or financial dependence on one’s partner, a large age gap between the parties, one party suffering from a relevant mental disorder or the relationship being of a type that has a built in inequality of power such as a teacher and student, doctor and patient or family members may also be relevant. The crux of the freedom to negotiate framework is that it focuses on the complainant’s power to negotiate relative to the defendant. It asks whether the parties to the sexual encounter had the space to express their wishes knowing they

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10 Sexual Offences Act 2003 ss. 75-6
would be respected, and whether they were mutually engaged in setting the terms of the encounter. While the model I propose therefore lacks the simplicity of Anderson’s requirement of explicit verbal agreement, I believe it incorporates the flexibility needed to respond to the reality of real life sexual encounters and relationships.