

# Doing Better Than Sexual Consent

## Abstract

If sex is consensual, sex is permissible, and there moral interests end. Or so common thinking goes. I argue that moral interests extend further. Sex should be not merely permissible, but also acceptable: wanted, enjoyed, just. I argue further that consent is not apt for securing acceptable sex. For one thing, it is concerned with permission alone, not with the other conditions of acceptability. For another, the permission-getting practices that consent suggests are inimical to the satisfaction of those other conditions. So, another concept should be used to sort acceptable from unacceptable sex. I outline a strategy for finding such a concept, and some desiderata for it; I advance enthusiasm as a candidate, and answer some objections to its candidacy.

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Sex should be good. It should be enjoyable, fulfilling, fun. The sex we have should be the sex we want. Sex sometimes falls short of these standards, but standards they nonetheless are: ones that we can meet, and that we should meet more often than not. But if this is how we think sex should be, we should consider carefully whether we should treat consent as “the only rule of the sex game”.<sup>1</sup> I wish to argue that we should not.

The problem, in brief, is that consent fundamentally concerns permission. So treating consensuality as the only rule of sexual encounters has two effects. First, we valorize only the permissibility of sex, to the exclusion of other relevant normative considerations. Second, we suggest that sexual encounters should focus on the giving and getting of permission. But permission-getting practices are inimical to the attainment of reasonable standards of good sex. So we should adopt a different rule: we should demand enthusiasm. Acceptable sex is sex about which everyone involved is enthusiastic.

A schematic advertisement of the argument will be helpful before I begin. In the paper’s first section, I distinguish between permissible and acceptable sex, sketching an account of the latter. The second section addresses consent. I outline a simple account of consent. This account can lead to, or provide excuses for, heinous wrongdoing in sexual contexts. I then argue that affirmative consent, while an improvement on the simple account, is nonetheless problematic. Since it is still a standard of consent, it is still fundamentally concerned with permission, it is asymmetric, and it has a contractual character. All these things militate against acceptable sex. Furthermore, given the limitations of projects of conceptual revision, no revision of standards of consent can address these problems. So, to promote acceptable sex, we need to do better than consent.

In the paper’s third section, I consider the question of how to do so. I first explain a

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<sup>1</sup>The phrase is from David Archard (1998, p. 6). He explores this common view, without wholeheartedly endorsing it.

strategy that involves identifying what the replacement should do, and how it should do it, and then shaping a concept to meet those desiderata. I next set out five such desiderata, derived from the discussion of consent. I then argue that enthusiasm satisfies the desiderata, and so is credible candidate to replace consent. I round out the case for enthusiasm by considering some possible objections.

I'm afraid that my discussion is phrased entirely in terms of two-party, heterosexual, vanilla sex. While this is a limitation, the great majority of discussion and concern about sex is about such sex, perhaps because it is so fraught with gendered troubles. And so I likewise treat such sex as my primary concern. Most of what I say should apply equally to sex involving more than two people. Some of what I say, such as the issues I raise concerning the gendered aspects of consent, will not easily generalize beyond heterosexual contexts. However, some of it will; for example, other problems I raise concerning permission-getting practices, and the account of acceptable sex. Finally, as with any discussion of consent, thorough consideration of BDSM practices would complicate matters enormously. I don't have space for that consideration.

On vocabulary: I will sometimes be discussing sex narrowly, and sometimes sexual encounters more broadly. It will generally be obvious from context which is at issue, but to be clear, I mean "sexual encounter" to encompass engagement in paradigmatic sexual activity ("sex"), and also the lead-up to such activity, or to its non-occurrence. This may include flirtation, conversation, discussion; it may stretch over a long evening or happen all at once. One can have a sexual encounter in which no sex occurs. It is hard to definitively say when an encounter is, or becomes, sexual. But an intuitive idea is good enough for present purposes. Not just sex, but sexual encounters, should be good.

# 1 Permissible and acceptable sex

Sex can fulfill numerous ends, in numerous ways. Some of those ends and ways should not be prescribed as universally desirable. For example, for some people at some times, conception is an important end of sex, but we should not demand that all sex has conception among its ends, nor that all sex has features that tend towards conception.<sup>2</sup> Nonetheless, without being overly prescriptive, we can articulate a minimal account of what good sex is: permitted, wanted, enjoyable, and just.<sup>3</sup> Sex that meets just the first condition is *permissible*; Sex that meets them all is *acceptable*.

While I will argue later that concentrating on permission is infelicitous, it is nonetheless necessary for a sexual encounter to be morally acceptable that any sex it encompasses be *permitted* by everyone involved: all have to agree to allow whatever sex happens to happen.<sup>4</sup> Sexual behavior in the absence of permission is clearly and seriously morally wrong.

It is very, very uncommon to find anyone denying that non-permitted sexual behavior is seriously morally wrong. There is less consensus concerning the nature of that wrong. This question need not be settled here, but one credible answer is that it involves violation of victims' autonomy.<sup>5</sup> To respect someone's autonomy, speaking roughly, is to respect their

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<sup>2</sup>Some say that we should, but I'm not going to argue the point here.

<sup>3</sup>The features I describe are necessary for acceptable sex, but might not be sufficient. For example, I omit the notion that sex should be "meaningful". I am unsure what this means, and insofar as I have an idea, I do not think acceptable sex requires it. There is surprisingly little literature directly addressing the question of what good and bad sex are (there is more discussing "natural" versus "unnatural" sex, or "normal" versus "perverted"). A very minimal account, "permissible plus enjoyable", is often assumed; for example, Igor Primoratz (1999, p. 55) distinguishes "good, i.e. pleasurable, and poor or bad sex, i.e. sex devoid of pleasure". Sara Ann Ketchum (1980) gives a replete account consonant with mine, but more theory-laden than is desirable for present purposes.

<sup>4</sup>And they must be capable of giving permission: conscious, appropriately aged, properly informed, and so forth.

<sup>5</sup>Archard argues that we have fundamental human interests in our "sexual bodily integrity", and that rape

decisions about important matters in their own lives, and to respect their capacity to make those decisions. The demand that one's autonomy be respected bulks large and important in sexual contexts, perhaps because the decisions we make about sex are importantly connected with our senses of selfhood and agency. So, in sexual encounters, people's autonomy should be respected.<sup>6</sup>

In sexual encounters, treating someone as autonomous means respecting their desire (or absence of) for sex, their choices and preferences concerning sexual activity, and their reasons for wanting to engage in that activity. If all these things are respected, the sex one has will be sex that is *wanted*. The sex that someone has should be sex they actively desire, and it should have the features they want it to have; both intrinsic features such as particular sex acts, and extrinsic features such as significance, or lack of, for an ongoing relationship.

Sex that is permissible might not be wanted.<sup>7</sup> For example, someone might permit sex they do not in itself desire to achieve some further end, such as the continuation of a relationship.<sup>8</sup> Or they might permit a particular sexual act they do not enjoy because it gratifies violates those interests and thus dehumanizes the victim (Archard 2007b). He also criticizes the view that non-consensual in general is wrong because it violates autonomy (Archard 2008). However, he agrees that respecting autonomy, including sexual autonomy, is important.

<sup>6</sup>I take it for granted that autonomy should be respected. Martha Nussbaum argues that, insofar as gratifying sex might involve objectifying of one's lovers, it might involve violating their autonomy (Nussbaum 1995). However, if a sexual encounter encompasses more than sexual acts, the autonomy of those involved is respected if, at relevant points of the encounter, they are treated as autonomous, even if they are objectified at other points.

<sup>7</sup>Permissibility plausibly depends on how strong one's preferences are. Strong preferences can be conditions on consent, what Tom Dougherty calls "deal-breakers", and sex that does not meet such conditions is impermissible as well as unwanted (Dougherty 2013).

<sup>8</sup>Compare Archard (2007a, p. 215): "[I]magine a traditional wife who loathes sex with her husband and takes measures to avoid it wherever and whenever she can. Nevertheless she agrees to it when avoidance is no longer possible. She has sex out of a sense of conjugal duty and does so—sad as it is to admit as much—willingly. The

their partner. Such sex is permissible. But it is not good. Acceptable sex is wanted.

The idea that sex ought to be wanted shouldn't be controversial, and nor should the idea that sex ought to be *enjoyable*. There can be permissible sex that is unenjoyable. Someone might not enjoy sex at all, but might really want to conceive "naturally", and have permissible sex to meet that end. But that sex *should* be enjoyable, that sex that is not enjoyable is badly lacking—surely this is so. *Why* sex should be enjoyable is a different question. Perhaps sexual pleasure is valuable in itself. Perhaps sexual pleasure is valuable for other reasons. Whatever the answer to that question, it can be asserted that that acceptable sex is enjoyable.

My last condition might be more controversial. I contend that sexual encounters should be *just*. Specifically, they should promote, or at least not frustrate, gender justice: social equality between men and women.<sup>9</sup>

Heterosexual sexual encounters are, obviously, gendered contexts. Insofar as the ways in which gender roles play out in gendered contexts are relevant to social justice, sexual encounters are relevant to social justice. Actions, behavior, and practices are unjust to the extent that they reify unequal gender roles, and reflect or reinforce the deleterious consequences for individuals of unequal roles. They are just if, at minimum, they do not reify such roles or reinforce such consequences. Preferably, they should contribute positively to the dismantling of such roles, and work against such reinforcement.

We can rightfully insist that behavior in a wide range of contexts and spheres be just. It is reasonable to demand that the ways in which people behave at work, at home, in public spaces and in private ones, are just. It is reasonable to hold individuals, institutions, media organizations and corporations to account for justice and injustice of their actions and inactions. The question of whether all this can be demanded of sexual behavior and of sexual sex is awful but nevertheless consensual." The "wanted" condition captures why this situation is "sad".

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<sup>9</sup>They should also be racially just, and just along other dimensions. Space precludes exploring this.

encounters, therefore, is a question of whether sexual contexts are somehow special, a sphere in which considerations of justice are not normative.

I do not see why this should be so. Sex is special and distinctive in various ways, but none of them exclude sexual behavior and sexual encounters from the demands of justice. Perhaps sex is the most intimate activity we can engage in, but intimacy does not insulate from justice. Family life is intimate, but nonetheless should be just. Perhaps sex is the most private activity we can engage in, but private actions, likewise, should be just. And so forth, I should think, for all the ways in which sex is special.<sup>10</sup>

It might be said against this that sexual desire is ineffable. We can't explain, justify, or change what or who we desire. If we can't change our desires, we cannot be expected to accommodate them to the ends of justice. So contexts in which sexual desire is at work are contexts in which justice gets no purchase. However, this reasoning fails on several counts. First, our desires are neither immutable or ineffable; they can be interrogated and amended. Second, and related, a growing body of literature argues that who we desire is indeed tied up with concerns of justice; our desires can be criticized according to such concerns, and we can be expected to change them as justice demands (e.g. P. C. Taylor (2015, ch. 4); Lintott and Irvin (2016)). Finally, my concern is not sexual desire itself, but what we do with our desires and with other people's. Even if desires themselves are not accountable to the demands of justice, the ways in which we behave as we seek to satisfy desires are so accountable. The alleged ineffability of desire provides no reason to think that sexual contexts are insulated from the demands of justice. We should behave in ways that are just. Acceptable sexual encounters are just.<sup>11</sup>

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<sup>10</sup>Compare Jonathan Webber's argument that "the morality of sex is no different from morality in general" (Webber 2009, p. 233).

<sup>11</sup>In much of my discussion, justice will be thematic, not focal. For example, that simple consent standards

The demands that sex and sexual encounters be permitted, wanted, enjoyable, and just form a minimal account of acceptable sex. It might be queried whether the overtly normative label “acceptable” is warranted. However, all but one of the conditions are grounded in plausible, morally normative ends: respect for autonomy, respect for justice, respect for others. And enjoyment, the one that is not, is a plausible normative end in itself, if not a moral one. So a normative appellation is appropriate for the account. Further, given that any sexual encounter lacking one of these features falls short of a reasonable standard, “acceptable” seems apposite. I will now argue that treating consent as the only rule applicable to sexual encounters militates against acceptable sex.

## 2 Consent is not enough

I should first be more precise about what it means to treat consent as “the only rule of the sex game”. Archard’s canonical statement of this rule refers only to the permissibility of practices (1998, p. 1), but his informal statement is more revealing:

Consent makes a difference to whether some sexual activity is seen as immoral or not. Indeed it will be said to make all the difference between the permissibility and impermissibility of some practice or activity. On the one hand, a sexual practice which is not consented to is immoral ... On the other hand, a sexual practice which is consented to is permissible. Whatever people do sexually as “consenting adults” should be allowed.<sup>12</sup>

(Archard 1998, p. 2)

In this quotation, “(im)moral” and “(im)permissible” are interchangeable. To treat consent as the only rule of the sex game is to think that the moral questions concerning sex start

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make rape hard to prosecute is an issue of justice. Sometimes, justice will itself be the focus.

<sup>12</sup>Again, Archard’s aim is to explore this view, not to endorse it.

and end with the question of whether everyone involved consents. Nothing else is of moral interest, even if it is of some other sort of normative concern. So discussions of how people should behave in sexual encounters should emphasize that the giving and getting of consent is the prime concern.

The quotation suggests that consent is only concerned with permission. If this is so, it already seems likely that treating consensuality as the only salient normative concern will lead to sexual encounters falling short of the standard of acceptability, since the standard demands more than mere permissibility. One way to address this failing, while retaining the idea that consent is the only rule, is to expand the ambit of consent, so that it governs more than permission. This is one motivation for affirmative conceptions of consent. I will argue shortly that such conceptions cannot address the failing. But it will be illuminating to see why an affirmative conception of sexual consent is nonetheless an improvement on a “simple” conception.

## 2.1 Simple consent

The simple conception of sexual consent originates in an undifferentiated, general account of consent, as it is used in numerous contexts. Participants consent to medical research; patients consent to medical treatment; parents sign consent forms when children go on school trips; sportspeople consent to the rules and risks of the game; citizens consent to the state’s sovereignty.<sup>13</sup> In all these contexts, consent has the same basic function and the same ontology.<sup>14</sup>

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<sup>13</sup>Even if consent doesn’t govern the state-citizen relation, discourse about whether it does contributes to characterizations of consent.

<sup>14</sup>A full account of consent might also address the conditions under which someone can (not) validly consent, and the reasons why we consent. The conditions of valid consent are important in sexual contexts, but are not

Consent's essential function is to create permissions. By consenting, you permit a researcher to experiment on you, or a doctor to treat you, or a teacher to stand *in loco parentis*, or a government to maintain a monopoly of legitimate force. However, the creation of permissions is not uniquely a function of consent. For example, when a friendship is formed, certain actions become permitted. According to David Owens, consent's specific power is the creation of permission *via indemnity* (Owens 2012, ch. 7). In consenting, you permit another person to do something that would otherwise be forbidden, by absolving them from blame for the action and its foreseeable consequences. For example, by consenting to surgery, you allow the doctor to cut you and undertake not to sue them for assault.

This conception of consent's function reflects the common idea that the "magic of consent" is the transmutation of the culpable into the permissible (Hurd 1996). Consent turns theft into borrowing, assault into boxing, and so on. These transformations are important in part because they mark essential differences between actions, not merely notational ones. For example, one way to describe the difference between theft and borrowing is to say that both involve a common action, *taking*, and that each is a variant of taking: taking with consent, and taking without consent. But this is misleading: theft and borrowing are essentially different actions, even if all that distinguishes them is the presence or absence of permission.<sup>15</sup>

The idea that consenting is fundamentally about permitting enjoys near-universal philosophical and legal agreement.<sup>16</sup> There is less consensus over the ontological question of central to my arguments. Nor is the reasons question. Consent is obviously used instrumentally. Owens argues that using consent is also valuable for deontic reasons (Owens 2012, e.g. pp. 17–21). My focus is on the instrumental uses of consent to secure ends such as permissibility.

<sup>15</sup>Archard makes this point using examples derived from Susan J. Brison (Brison 2002; Archard 2007b, pp. 383–384).

<sup>16</sup>Exceptionally, John Kleinig argues that consent is "a form of co-operation with the initiative of another" (Kleinig 1982, p. 92).

whether consent consists wholly in a state of mind, such as an intention, or at least partially in a communicative act.<sup>17</sup> People taking the former position think that you can validly consent without communicating; people taking the latter position think that valid consent necessarily involves communication. But even those who think that consent consists in a state of mind alone tend to think that it is usually communicated, and usually for the best; the debate, as Tom Dougherty points out, often revolves around intuitive responses to tricky cases in which communication is impossible (Dougherty 2015, §1). For the purposes of the present paper, these tricky cases need not be re-legislated; agreement that consent should be communicated if possible is enough. For concision's sake, I will speak as if communication is essential, but rephrasing in terms of the importance and desirability of communication is possible with no loss of force.

So, on the simple conception, consent is essentially the communication of permission: you consent when you let someone know that they are allowed to do something they otherwise would not be, and that they are indemnified against liability for the reasonably foreseeable consequences of that action.

## 2.2 The problem with simple consent

The simple conception is unproblematic in many contexts, but not sexual ones. The problem is that communication happens in many ways: explicit, tacit, verbal, gestural. Likewise, consent can be communicated in many ways (Archard 1998, pp. 7–14; Dougherty 2015, p. 230). You give explicit consent to the medical researcher. You give tacit consent when you perform an action that is generally understood as conveying consent in a given context, such as

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<sup>17</sup>State of mind only: Hurd (1996); Westen (2003); Alexander (2014). Communication too: Archard (1998, pp. 3–4); Wertheimer (2003, 144–152); McGregor (2005, pp. 116–131); Kleinig (2010, pp. 9–12); Dougherty (2015).

running onto a football field. You can give consent by saying, directly, “I consent to ...”, or by signing a document. You can give consent indirectly, employing circumlocutions and so on. In some circumstances, like a committee meeting, you can give consent passively or by silence (Simmons 1976, pp. 278–279). Whether a particular form of words, gesture, or behavior counts as consenting depends on context, circumstance, and convention.

If consent, in general, can be communicated in various ways, it might be thought that sexual consent can likewise be communicated by various means. This is not a corollary of the simple conception, since it does not imply that, in all contexts, all modes of communication are valid. But common behavior in sexual encounters demonstrates the prevalence of the idea that sexual consent can be communicated in various ways. For example, Terry Humphreys and Mélanie Brousseau claim that “[n]umerous studies have demonstrated that the preferred approach to signal consent for both women and men tends to be non-verbal instead of verbal”; perhaps by touch or gesture, or, as Susan Hickman and Charlene Muehlenhard put it, “by the semi-mystical appearance of a condom” (Humphreys and Brousseau 2010, p. 421; Hickman and Muehlenhard 1999).<sup>18</sup> Even when communication is verbal, consent is usually sought and expressed through indirect speech; for example, asking “are you ready?” rather than “do you want to have sex?” (Humphreys and Brousseau 2010, p. 420).<sup>19</sup> This illustrates the ideas that consent can be communicated verbally, non-verbally, directly, or indirectly.

Perhaps these forms of communication are not problematic. But the trouble is that allowing that sexual consent can be communicated in various ways creates space for the belief that it can be communicated passively or tacitly: that a lack of resistance, a failure to explicitly

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<sup>18</sup>Humphreys and Brousseau cite as examples O’Sullivan and Byers (1992); Hall (1998); Humphreys (2004).

<sup>19</sup>Throughout, I cite sociological and psychological studies, primarily concerning young people, in support of claims about consent. My citations don’t deliver a comprehensive, authoritative statement of how everyone thinks about consent, but they do demonstrate that my claims are not philosophers’ fictions.

say “no”, can count as consent to sex—or, more accurately, that an absence of resistance can lead to a reasonable belief that consent has been granted. The existence and persistence of this belief is apparent in practice in the bedroom and the courtroom, and has been noted by philosophers (e.g. Pineau 1989), legal scholars (e.g. Buchhandler-Raphael 2011, p. 165) and psychologists (e.g. Hall 1998). Melanie Anne Beres’ interviews with 18–30-year-olds in Canada and New Zealand are illustrative:

Tim and Colin ... [both] suggested that in order to have sex, it is necessary to remove a woman’s clothing and it is easy to tell when a woman does not want her clothes removed, so consent is getting her clothes off. Gary, while talking about casual sex said that the absence of a negative behaviour is consent. Several women gave similar representations of consent ... [e.g.]

Stacey: Well one way people consent, and I don’t know if this is politically correct or not, is by not saying no. You know what I mean? Like you know just stop.

(Beres 2014, p. 381)

Beres’ interviewees think that absence of resistance or refusal can reasonably be construed as consent.<sup>20</sup> This belief is problematic for two reasons. First, if it is thought that passivity can communicate consent, there is a desperately wide scope for the assumption of consent where none is intended. So applying the simple conception of consent to sex can lead to sexual activity that is not permitted. This is a large and serious problem, given the enormity of the wrongs at stake.

Second, the belief that sexual consent can be given passively makes prosecuting such wrongs very difficult (Pineau 1989; Baker 1999; Tuerkheimer 2012). Prosecuting rape and

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<sup>20</sup>See also Humphreys (2004, p. 217), concerning college students in Canada, and Coy et al. (2013, pp. 59-60), concerning young people in the UK.

sexual assault cases involves proving that the defendant did not have a reasonable belief that consent was given. As Lois Pineau argues, if it is thought that consent can be given passively, lack of such belief is very hard to prove, because it's easy for defendants to claim that they interpreted a lack of resistance as consent (Pineau 1989).<sup>21</sup> This is evinced by Susan Ehrlich's examination of the defenses offered by young men accused of rape in the USA:

[I]f the complainant did not resist each of the defendant's advances as soon as it was initiated and if these signals of resistance did not take particular (strong) forms, the defendant interpreted the complainant's behaviour as conveying consent.... [For example, Matt acknowledges] that Marg has expressed lack of consent at some point during the course of their encounter. However, because Matt defines "consent" as the absence of vehement expressions of resistance in the wake of every sexual advance, he contends that his escalating sexual aggression is justified.

(Ehrlich 2001, pp. 123, 127)

There is, perhaps, room for debate over whether Matt, and defendants generally, are appealing to a notion of passive consent as an exculpatory strategy once they're accused, or whether that this was their understanding of consent all along.<sup>22</sup> And it might seem that

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<sup>21</sup>Pineau also suggests that, since women as well as men often think that they consent if they don't resist, they can be unhappily confused about whether or not they did, after all, "technically" consent to sex that they didn't want (Pineau 1989, p. 233). Compare this quotation from one of Beres' subjects:

Anne: And she didn't know ... how to say no, kind of like, so it was consensual, but it was still like fucking rape a lot of the time, like it was not, like she didn't want it, but she couldn't, she just didn't know how to say no.

(Beres 2014, p. 381)

<sup>22</sup>Some argue that there is little evidence that miscommunication occurs, and that appeals to it are excuses

Matt is an extreme example. His definition of consent involves the absence of “vehement” resistance, and he acknowledges that Marg expressed dissent “at some point”. But in fact, the idea that “token” resistance doesn’t count—is somehow part of “seduction”—has a long and unsavory pedigree, in the courts and in culture (Pineau 1989; Philadelphoff-Puren 2005). If one thinks that “token” resistance can be ignored, one will have something like “vehement” resistance in mind as the requisite standard.

The problem with the simple conception of consent in sexual contexts, then, is that it makes room for the belief that consent can be given passively, by the absence of resistance. This belief, allied with some hideous ideas about “normal” seduction, leads to wrongdoing, and makes it difficult to prosecute wrongdoing.

### **2.3 Affirmative consent**

To address this problem, scholars, courts, jurisdictions, and institutions have often turned to “affirmative” or “communicative” conceptions of consent. On such a conception, sexual consent is not validly given unless it is communicated by clear, explicit declaration: “positive willingness, clearly communicated” (Schulhofer 1998, p. 271). Affirmative consent informs college and university policies on rape and sexual assault; it is applied in some form as a legal standard in Canada, in several US states, in some parts of Australia, and elsewhere; non-profits promote it as essential for preventing and prosecuting rape and sexual assault.<sup>23</sup> Call

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(O’Byrne, Rapley, and Hansen 2006; Burkett and Hamilton 2012). On the other hand, Anastasia Powell, whose work focuses on Australians aged 14–24, says that “there are cultural rules for the subtle, often bodily communication of consent embedded in the field of sexual encounters that are not verbally articulated, and can be variably understood as well as easily misunderstood by both young men and young women.” (Powell 2010, p. 100)

<sup>23</sup>The State University of New York is an example of a college system adopting affirmative consent (<https://perma.cc/9YB2-FY9F>). Affirmativeconsent.com is an example of a non-profit dedicated to affirmative

this the “affirmative consent movement”.

Affirmative consent improves on the simple conception of consent. But perhaps it does not improve enough. For one thing, it is not clear that adopting affirmative consent achieves the aims of reducing wrongdoing and facilitating prosecution. Analyzing cases in Victoria, Australia, where an affirmative consent criterion was adopted via jury directions in 1997, Powell et al. argue that

social discourses of what constitutes normative female sexuality and behaviour continue to infiltrate the courtroom discourse ... simplistic and out-dated notions of sex, consent and rape continue to be expressed, accepted and tolerated. (Powell, Henry, Flynn, and Henderson 2013, pp. 467, 472)

So, even when affirmative consent is explicitly adopted, it remains easy to turn courtroom attention to notions of sex, sexuality, and consent that allow reasonable belief in consent to be claimed on flimsy and dubious grounds. Similarly, Michelle Anderson argues that affirmative consent does not successfully address the problems attendant on assumptions about passive or implicit communication of consent Anderson 2005.

But whether or not it can assuage problems of permission and prosecution, affirmative consent is likely to militate against acceptable sex. This is because it is still, overtly and exclusively, a standard of consent, and is intended to be the only rule of the sex game. The first problem with this is that, since consent is essentially concerned with permission, treating affirmative consent as the only rule still suggests that permissibility is the the primary, perhaps only, normative consideration relevant to sex.<sup>24</sup> Now, perhaps affirmative consent is intended to shift the focus from permission. I will argue soon that reconceptualizations consent (<https://perma.cc/PS8E-HRSV>).

<sup>24</sup>See, e.g. Schulhofer (1995, p. 2181): “Consent ... should mean in sexual interactions what it means in every other context—affirmative permission clearly signalled by words or conduct.”

of consent cannot do this. But grant for now that affirmative consent is still fundamentally concerned with permission. The second, deeper problem is that using consent to give and get permission in sexual contexts replicates two features of practices of consensual permitting in other contexts. Consent is asymmetric and quasi-contractual. Insofar as affirmative consent is still about consent, it is likewise asymmetric and quasi-contractual. These two features may be unproblematic in other contexts, but they are troublesome when it comes to sex.

### 2.3.1 Asymmetry

Consent in general involves asymmetries, both before and after it is given. One person seeks consent, and another gives it; then one person does something, and the other has it done to them. In both cases, the consent-seeker has a more active role, and the consent-giver a more passive one. Furthermore, the asymmetry usually reflects or reinforces an imbalance of power: the active consent-seeker and act-doer is more powerful than the giver (Humphreys 2004, p. 214; Anderson 2005, p. 1408; Powell 2010, p. 96).<sup>25</sup>

In many contexts, the allocation of power is determined by features of the relationship between two parties. In medical treatment, for example, the doctor takes the roles of seeker and doer, because they have the greater knowledge and expertise, and because both parties positively want that there be two different roles, doer and done-to, once consent is given (the doctor doesn't want their patient to treat them too).<sup>26</sup> In sexual contexts, there is no principled reason why one person or another should take the role of seeker or giver. But since gender roles involve a dynamic of power, and since heterosexual sexual encounters are

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<sup>25</sup>Note how this differs from, e.g., friendship as a way of establishing permissions: the process of forming a friendship and the relationship established afterwards involve symmetric roles for both parties.

<sup>26</sup>Dominic Sisti and Joseph Stramondo (2015) argue that the imbalance of power in medicine is problematic, and that the notion of consent applied there should be revised to give more power to patients.

gendered contexts, the active, powerful, seeking role is usually taken by men, and the passive giving role accorded to women.<sup>27</sup>

Affirmative consent recapitulates this asymmetry. Insisting that consent be affirmatively communicated still incorporates the idea that one person is meant to elicit such an active declaration from the other. And there are at least three ways in which asymmetry can militate against acceptable sex. First, it suggests that men should actively seek consent from passive women. Such active solicitation can easily become borderline coercive. There is a large, vague area between consent-once-persuaded and consent-under-coercion (which is not, in fact, consent, since it is not freely given). Physical violence is coercion. Is persistent nagging? Perhaps so, perhaps not; I'm tempted to think so.<sup>28</sup> Wherever the line is drawn, there is something queasy about persuasion. The issue is not just that the sexual activity that ensues might not be permitted; it is, further, that the sex seems most unlikely to be wanted (Powell 2007; Beres 2014, p. 380). Sex you are persuaded to have might be consensual, and hence permissible, but it is likely not wanted, and thus not acceptable.

Second, the fact that men and women are encouraged by the asymmetry of consent to assume, respectively, active and passive roles reinforces the idea that women are, in general, passive, and men active. The gender roles and dynamics prevalent in our culture and institutions consistently favor men, in part by according them active, powerful, autonomous roles,

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<sup>27</sup>“Young men describe a set of social norms that emphasize expectations that men’s sexuality is active, desiring, even aggressive; while women’s sexuality is situated as passive, as just ‘sitting back’ and allowing things to happen.” (Powell 2007, p. 12) See also Coy et al. (2013, p. 68); Humphreys (2007, p. 308).

<sup>28</sup>On the “spectrum” of “choice to pressure to coercion to force”, see Kelly (1987), Powell (2007, p. 10). Powell argues that affirmative consent is flawed insofar as it allows that consent can be validly given under pressure. Catherine MacKinnon argues that heterosexual sex always involves coercion: since relations between men and women encode an imbalance of power, a degree of (implicit) coercion is always present (MacKinnon 1989, ch. 9). For discussion, see Archard (1998, ch. 6); West (1996); West (2006); Buchhandler-Raphael (2011).

and according women passive, weak, and dependent roles. Any cultural practice or institution that perpetuates these unequal roles is therefore contributory to injustice. Owing to its asymmetry, sexual consent manifests and perpetuates these gendered roles; it is therefore contributory to injustice. Since acceptable sexual encounters are just, this means that consent militates against acceptable encounters.<sup>29</sup>

Third, asymmetries militate against sex being enjoyable. This is intimated by, for example, Coy et al.'s statement that "young women are positioned as sexual gatekeepers [which] means that they are simultaneously blamed for victimisation, yet also denied the possibility of actively desiring sex." (Coy et al. 2013, p. 68). Plausibly, denying this leads to unenjoyable sex. The worry, again, derives from the fact that the consent-give is passive and submitting. They are conceived of as inert, as having things done to them; they have little chance to be active and assertive about what they want to happen. Sex in which one party is passive and unable to communicate desires and preferences is more likely to be unenjoyable. So the asymmetry of consent militates against enjoyable sex, and therefore against acceptable sex.

### 2.3.2 Contractualism

The second problematic feature of consent is its quasi-contractual nature. Given that, as Peter H. Schuck says, "consent is the master concept that defines the law of contracts in the United States", it is perhaps unsurprising that consent has some of the character of a formal contractual agreement (Schuck 1994, p. 900). This is apparent in many everyday uses of consent; most obviously, those where consenting involves signing a document, as in medical research or school trip, but in others besides. For example, Sisti and Stramondo argue that the

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<sup>29</sup>The injustice is mostly against women, but Powell suggests that "gendered expectations are not necessarily always beneficial for men either, similarly limiting men's opportunity to express alternative masculinities" (Powell 2007, p. 11).

prevalent understanding of consent in medical treatment is contractual (Sisti and Stramondo 2015). Pineau, meanwhile, argues that common conceptions of sexual consent involve the notion of a “sexual contract”. In both cases, it is argued that the contractual understanding is bad; Sisti and Stramondo argue that medical consent ought to be discursive, and Pineau argues that the notion of enforceable sexual contracts is confused.<sup>30</sup> But in both cases, it is argued that the contractual understanding is prevalent; this underscores the point that consent is often conceptualized as contractual. I wish to focus on two aspects of this notion, as they figure in sexual contexts: that consent is enduring, and that consent is separate.

By “enduring”, I mean the idea that consent given in one sexual encounter can imply permission in subsequent encounters, just as contracts can establish ongoing permissions. Humphreys says that:

Some students suggested that asking for consent may only occur the first time the couple engages in sexual activity, and then it can be assumed afterwards. ... Research on the expectations regarding sexual activity indicate that women and men are more likely to perceive a resisting woman as obligated to have sex if the couple has had sexual intercourse as little as 10 times before the current event.<sup>31</sup>

(Humphreys 2004, p. 222)

Note the slide from the belief that consent may be *assumed* following a single sexual encounter to the stronger, and shocking, idea that a woman might be *obliged* to have sex if she has consented a number of times before.<sup>32</sup>

<sup>30</sup>Not everyone agrees that contractual understandings of consent are infelicitous. Katharine K. Baker, for example, argues that “contract doctrine may be an entirely appropriate place to look for help” in reforming rape laws, because “[t]o find assent, contract doctrine looks to words. So should rape law. Silence almost never means assent in contract law. Neither should it in rape law” (Baker 1999, pp. 688–689). See also Spence (2003-2004).

<sup>31</sup>Humphreys cites Shotland and Goodstein (1992).

<sup>32</sup>Again, for similar ideas, see Coy et al. (2013, p. 61); Beres (2014, p. 383).

By “separate”, I mean that consent is generally understood as a preliminary, distinct from that which is consented to. Just as one signs a contract and then enforces it, one consents (or gets consent) and then moves on to the separate activity for which consent has been given. Beres, for example, says that:

[P]articipants described consent ... as a discrete event that occurs once during a sexual encounter, generally for intercourse. ... [One] participant discussing his experiences of casual sex said, “consent is the butt lift”. The “butt lift” is when a woman lifts her butt and allows her partner to remove her underwear. This version of consent, one where consent was a discrete event granting permission for a particular activity, was the dominant version.

(Beres 2014, p. 382)

Affirmative consent, again, does nothing to suggest that consent is not quasi-contractual. An affirmatively given permission may just as well be assumed to endure, and is a separate preliminary to sex. But both these quasi-contractual features of sexual consent are problematic. The problem with consent’s assumed endurance is perhaps obvious; if consent can be assumed, there is clearly scope for sexual behavior that is not permitted, not wanted, and quite probably not enjoyable. But the separateness of consent is also problematic, perhaps more insidiously so. First, treating consent as the only rule of the game, and thinking of it as separate from sex, suggests that no more rules apply once consent is given. Normative interests have been satisfied in the preliminaries, and sex itself is free of moral weight. But the account of acceptable sex above incorporates standards that should apply to sex itself, not just to preliminaries. Second, if consenting happens before sex, one’s agency to say what one wants and doesn’t want to do is exhausted in the act of consenting. One has permitted something to happen, and it may now happen. This, again, situates the consenter passively, unable

to articulate wants and desires as sex progresses. And, again, this positioning can plausibly lead to sex that is not wanted, and that is not enjoyable. Attention to wants, desires, and preferences should to persist throughout, but if the normative rule for sex is satisfied before sex actually happens, this persistent attention is discouraged.

## **2.4 Affirmation and amelioration**

I have argued that, however much affirmative consent improves on simple consent, treating it as the only rule applicable to sexual encounters is still problematic. Because it is still a standard of consent, it still suggests that permission is the only important criterion of acceptable sex. Further, it recapitulates two features of permission-getting by consent in general: its asymmetry, and its quasi-contractual nature. Both features militate against acceptable sex. So affirmative consent militates against acceptable sex.

But perhaps this misrepresents affirmative consent. It might be said that affirmative consent is intended precisely to move beyond treating permission as the overriding normative interest when it comes to sex, to eradicate asymmetries, and so forth. I will now argue that, given the kind of project affirmative consent is, achieving these laudable aims require moving beyond consent entirely. When people stop talking about permission, they stop talking about consent; to the extent that affirmative consent is not about permission, it is not about consent, either.

The affirmative consent movement crucially depends on the assumption that the concept of consent is malleable: that collective decisions can change what counts as consent. This is consistent with the idea that consent consists at least partially in communication. Since communication is constituted by practice and governed by convention, consent is similarly constituted and governed. Exactly what counts as consenting, and what doesn't, are products

of how consent is actually used, and social developments can change the meaning of the concept.

Such developments include changes in law. For example, in England and Wales, the 1956 Sexual Offences Act instructed juries to take “consent” as having its “ordinary meaning”. Subsequent case law refined the concept, mostly by exploration of the circumstances under which consent cannot be given.<sup>33</sup> The 2003 Sexual Offences Act explicitly says that someone gives their consent “if he agrees by choice, and has the freedom and capacity to make that choice”.<sup>34</sup> But the process of refining the content of the concept has continued. In particular, the idea of “conditional consent” has been developed. For example, Julian Assange’s case established that consent is vitiated if one agrees to use a condom, and then does not. Another case established that consent is vitiated if an agreement to avoid ejaculating inside one’s partner is broken. A third case established that consent is vitiated if one is misled about the gender of one’s partner.<sup>35</sup> All these cases nuance the idea that sexual consent is not valid if one is deceived, or if one consents on certain conditions that are not subsequently met.<sup>36</sup> In so doing, they add to and revise the meaning of consent.

To say that consent’s meaning is malleable is not to say that it is not “real”. It should be considered a social kind, just as as races and genders often are (Mills 1998; Haslanger 2012a; Jenkins 2016; Barnes 2017). The extension and signification of social kinds is dictated by social practice: to whom we choose to apply them, and why. This means that such kinds are malleable. We can choose what we want them to be, rather than accepting what they

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<sup>33</sup>The notion of informed consent in medicine has undergone a similar developmental process; for a history, see Faden and Tom L. Beauchamp, in collaboration with Nancy M. P. King (1986).

<sup>34</sup>Sexual Offences Act 2003, s74, <https://perma.cc/T7P8-Y2BL>.

<sup>35</sup>Crown Prosecution Service legal guidance, under “conditional consent” at <https://perma.cc/8778-2BED>.

<sup>36</sup>Compare Dougherty’s argument that consent is not valid if one lies about something that is a “deal-breaker” for one’s prospective partner (Dougherty 2013).

are, and enforce our choices by applying gender and race concepts in particular ways. But, nonetheless, races and genders are real; being racialized or gendered one way or another has concrete consequences for people's lives. The same is true of consent. It is defined by social practice, and its definition can be altered by changes in such practices. That makes it malleable, but not unreal or insubstantial.

Against this background, the affirmative consent movement is usefully construed as what Sally Haslanger calls an "ameliorative project", an exercise in revisionary conceptual analysis.<sup>37</sup> Rather than trying to describe how a concept is typically used, or used by experts, an ameliorative project starts by establishing what work we want the concept to do for us (Haslanger 2012c, p. 367). We can then try to carve out a concept that is responsive to ordinary usage, but revised so as to do its work better. Often, the work required is normative or ethical; Haslanger herself is primarily concerned with concepts of races and genders, and the work she wants concepts like *woman* to do is to help ameliorate the problems of patriarchy. Similarly, the affirmative consent movement starts with the normative aim of mitigating the problems attendant on the assumption that consent can be given passively, and proceeds by revising the concept of sexual consent such that it can no longer, by definition, be communicated passively.

This is all to the good, but the question is whether this ameliorative project can be carried further, to meet more ambitious normative aims. That is: can the meaning of sexual consent be revised such that consenting is no longer asymmetric, no longer quasi-contractual, no longer fundamentally about permission; and, thus, better suited to the promotion of acceptable sex?

The reason for saying no is simple, but significant. Ameliorative projects have to be

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<sup>37</sup>See papers collected in Haslanger (2012b), especially Haslanger (2012a); Haslanger (2012c).

responsive to general use: a concept cannot be revised so far that it is wrenched entirely from its ordinary meaning. So a revision of the concept of consent still needs to recognizably be a concept of consent. And consent is not only used in sexual contexts. As I have suggested throughout, the features of consent that cause problems in sexual encounters are general features of the concept that are not problematic elsewhere: the fact that it is fundamentally concerned with permission, the fact that it is asymmetric, the fact that it has contractual character. This generates two problems for ameliorative projects centered on consent. There is a conceptual difficulty: a concept of “consent” that is not, fundamentally, a concept of an asymmetric permission-getting practice is arguably not a concept of consent at all. To revise away the things that make consent troublesome in sexual contexts, we need to revise away the things that make it consent. And there is a pragmatic difficulty: because sex is one among many contexts where consent is commonly applied, defining a special sub-concept of sexual consent that deprecates certain features of the common conception will likely prove difficult; the common conception, and all its aspects, will interfere with and infect the specialized conception.<sup>38</sup>

So the project of revising the meaning of consent to address the problems with it can only

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<sup>38</sup>Asher Flynn and Nicola Henry, discussing the impact of the affirmative consent standard in Victoria, suggest something similar:

[J]urors have an unreasonable expectation placed upon them to understand increasingly complex concepts. As such, jurors may inform their decisions based on what they can easily understand, and may resort back to their preconceptions about rape victims and consent (Finch and Munro 2005; N. Taylor 2007; N. Taylor and Joudo 2005). As Taylor (2007, p. 3) notes, “the divide between legal definitions and how juries interpret and make decisions about consent is large”.

(Flynn and Henry 2012–2013)

go so far, and not far enough. The problematic things about consent are so fundamental to it that no “revised” concept lacking them counts still as a version of consent. This presents both a problem and an opportunity. A problem, because it now seems that promoting acceptable sex requires finding a new concept to use as the rule for sexual encounters; an opportunity, because we can choose afresh what that concept might be.

Arguably, some work that is commonly considered part of the affirmative consent movement is in fact an attempt to seize this opportunity: arguments that something besides consent should sort acceptable and unacceptable sex. Take Pineau’s work. She is often described as advocating something like affirmative consent (e.g. Dixon (2001); Powell (2007, p. 9)). This is understandable, given her emphasis on communication. But the interpretation underplays her proposal’s radical nature. She argues that we should “reformulate the criterion of consent” (Pineau 1989, p. 217). To decide whether someone could reasonably believe that a woman (or anyone) had consented, we should ask whether it would be reasonable for her to do so. It is only reasonable to consent to sex that one expects to be enjoyable, and enjoyable sex involves ongoing, explicit, active, mutual communication of desires and preferences; it should be “conversational”, on equal terms. So in deciding whether sex was consensual, we should look to see if the encounter was conversational.

Pineau apparently aims to eradicate the ideas that consent can be given tacitly or passively; that permission is the paramount normative consideration applicable to sex; that acceptable sexual encounters involve asymmetrical roles; that sexual encounters have a contractual character. But if your new criterion of consent encompasses none of these things, it is not really a criterion of consent. Pineau’s position is a version of the proposal that something besides consent can serve to sort acceptable and unacceptable sex. Generally, the less that proposals for affirmative consent standards emphasize permission, and the more they focus on enjoy-

ment, desire, and justice, the further they get from consent. We should acknowledge this explicitly, and talk openly about how to replace, not revise, consent.

### **3 Beyond consent**

I have argued thus far that treating the giving and getting of consent as the overwhelmingly important normative consideration in sexual encounters militates against acceptable sex, and that this problem cannot be addressed by revising the concept of consent. Instead, we should apply a different normative concept to sexual encounters. I will now argue that enthusiasm is a plausible candidate concept. We should inculcate the rule that acceptable sex is sex about which everyone involved is enthusiastic.

The argument is somewhat indirect. I will first set out a strategy for finding a replacement for consent. I will then offer a set of desiderata for the new concept, derived from my discussion of consent. I will then argue that enthusiasm meets those desiderata, and so is a plausible candidate. I finally answer some putative objections to the proposal of enthusiasm. This argumentative approach allows the reader to disembark the train of thought at various points, having still got somewhere. One might like the strategy, but question the desiderata; one might like the desiderata, but be dubious that enthusiasm meets them; one might think that another candidate is better. In each of these cases, I genuinely encourage the dubious reader to do better. My aim is to contribute to a conversation, not to end it.

#### **3.1 Making normative tools**

Consent can be thought of as a “normative tool”, to use David Owens’ helpful phrase (Owens 2012). We use normative tools, such as friendship, forgiveness, and promising, to “shape the normative landscape”; they create or modify such things as obligations, duties, permissions,

and prohibitions.

Consent's fundamental function is the creation of permissions, but other tools, such as friendship, can also make permissions. And if consent is a social kind, we can make collective choices about whether, and when, to apply the concept. So we can ask whether consent is the tool that should be used for creating permissions in particular circumstances. For example, there is no *a priori* reason why consent must be the tool used as the tool that permits doctors to treat patients. As Schuck says, "the doctrine requiring physicians to obtain a patient's informed consent before undertaking treatment is relatively young, having first appeared in a recognizable, relatively robust form only in 1957" (Schuck 1994, p. 900). Similarly, it is not *a priori* that consent should be the tool used to shape the normative landscape surrounding sex.

Indeed, for much of history, consent has not been that tool. As both Maria Eriksson and Louise du Toit document, legal codifications of sexual crimes from Ancient times through to at least the 15th century were explicitly grounded in property rights: who could do what to a woman (always a woman) depended on whose property she was (Du Toit 2009, ch. 2; Eriksson 2011, ch. 2). This legal principle was based on common-law conceptions of when sex was and wasn't permissible—widely accepted, societal conceptions. It is debatable when, exactly, legal and common law understandings shifted decisively to the idea that sexual impermissibility is determined by a lack of consent. Certainly, by the end of the 19th century, the formal legal principles governing marriage in Anglo-American law were no longer those of property and ownership, and appeared instead to reflect the notion that marriage is a consensual contract, with the permissibility of sex within marriage established by continuing consent inferred from that contract (Hasday 2000, pt. I §A.2). But, arguably, the idea that sexual permissions are grounded in ownership continued to shape common and codified law

for rather longer than this suggests. The persistence of marital rape exemptions in many jurisdictions until the late 20th century may be one residual marker of this, and du Toit argues persuasively that the idea of rape as a property crime continues to distort understandings of rape (Du Toit 2009, ch. 2).<sup>39</sup> Whatever the exact chronology, the point is that consent has not always been, and need not always be, the tool used to create sexual permissions. Consent is unquestionably an improvement on ownership, but perhaps we can do better still.

The first step to doing better is clarifying what exactly it means for a tool to supersede consent. I have argued that consent is problematic because it is so focused on permission. Nonetheless, the permissibility of sex is vitally important. So, a tool that supersedes consent needs to be one that encompasses permission, but does more besides.

Here is an analogy. The most basic standard of adequacy for a diet is that it includes enough food, and enough of the right kinds, to avoid malnutrition. Horrifically, such basic nutritional adequacy is the only salient dietary concern for many millions of people. Nonetheless, many other millions can more or less take it for granted that their diets will meet the basic standard. The standard still exists; it is still important; but it is not a salient concern. People in such a privileged situation can apply more exacting standards. They can choose a diet that accords with an ethical imperative, such as animal welfare or environmental sustainability; they can choose one that brings them the most pleasure or one that encourages weight loss or muscle gain. In each of these cases, the diets do not abandon the basic nutritional standard. They aim to incorporate and meet it by way of meeting a more exacting standard. It is still possible to assess the extent to which they meet the basic standard.

The analogy is imperfect, but the crucial point holds. Moving beyond consent means finding a tool that creates permissions in the course of doing more. When we try to determine

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<sup>39</sup>On marital rape exemptions, see Rush (1997); Hasday (2000); Reitan (2001).

whether sex is permissible, we look to see if consent was used to create permissions. By looking to see if our new tool was used in a sexual encounter, we should still be able to tell whether the sex was permissible, and we should also be able to tell more: whether the encounter was likely to be wanted, enjoyable, and just.

A second strategic point follows, concerning the relation between the new tool and that used in law to separate illegal and legal sexual behavior. Education about consent, and efforts to revise notions of it, are often predicated on the idea that what determines permissibility in the courtroom should also determine acceptability in the bedroom (Pineau is, again, an exemplar). But the two can come apart. It is not necessary for the social standard that defines morally acceptable behavior to be the same standard codified in law as that which sorts criminal from permissible behavior. There are many contexts in which the bar for something being morally acceptable is rather higher than the bar for legal permissibility; we frown on much that we do not prosecute.

So, we might have a legal definition of rape that is separate from, though related to, the standard for acceptable sex. Further, the project of finding a way to demarcate acceptable sex may be distinguished from the project of changing the legal standard of permissibility. Several suggestions have been made for new legal definitions of rape that do not refer to consent. Catherine MacKinnon argues that forced sex, or sex by compulsion, should be the legal definition of the crime (MacKinnon 1989, p. 245). Buchhandler-Raphael suggests sexual abuse of power (Buchhandler-Raphael 2011). Both these proposed definitions set a standard of permissibility that is quite different from the standard of acceptability (surely sex that is neither forced nor an abuse of power can nonetheless be unacceptable).<sup>40</sup> But our new tool

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<sup>40</sup>Other suggestions might tie the two standards closer together. Anderson proposes that courts should look for mutuality and negotiation; Schulhofer suggests that the normative grounds of rape law should be respect for autonomy (Anderson 2005; Schulhofer 1998).

need not be servicable as a legal standard for permissibility. Perhaps consent should continue to serve as that standard; perhaps something else should; either way, the new tool need not do so.

Thus far, I have talked rather vaguely of “finding” a new tool. But it would be better to speak of making a tool. Recall the idea of an ameliorative project. I argued above that efforts to revise the concept of consent constitute such a project, and that such efforts are likely to fail. However, approaching the task of making a new tool in the spirit of amelioration is a useful strategic steer. The general strategy of an ameliorative project is to consider carefully the normative ends that a concept should help with meet, consider how the concept could help with them, and then revise the concept accordingly. Now, I set out at the start of this paper a normative conception of acceptable sex. In the course of discussing consent, I identified several ways in which consent and permission-based practices militate against acceptable sex. We can use this discussion to identify features in virtue of which a normative tool could promote acceptable sex. With those features acting as desiderata, we can then look for a tool that meets them, or that does so closely, and then revise it appropriately.

These last two clauses are important. An ameliorative project involves revising a concept to meet ends. Similarly, our tool-making project can proceed by identifying a concept that conforms closely to the desiderata, and then revising it to meet them. We need not look for a chimera, the perfect pre-existing tool that does everything we want already, but nor do we need to start from scratch. Something that can be bent in the right ways, that fits closely enough that it can be revised rightly, will do. Furthermore, the tool we settle on need not be a normative tool already. A stone remains a stone until it is picked up and used; at that point, it becomes a tool. Our strategy, then, should be to identify our desiderata, find a concept that more or less meets them, and then revise that concept until it does so fully.

## 3.2 Desiderata

The first desideratum is that the tool be *communicative*: a means by which permissions and desires can be conveyed. This is because it is hard to know what someone permits, wants, and enjoys without communication. “Instinct” and “intuition” are not adequate means for discerning another’s desires—at the very least, they are unreliable, and more probably entirely dysfunctional, if not mythical. Sexual desire is complex and various, and none of us has a psychic understanding of what others might enjoy. So, given that sex should be permitted, wanted, and enjoyable, sexual encounters should be communicative.

The second desideratum is that the tool be *affirmative*. While I have argued that affirmative consent is not a panacea for the problems with consent, it would be remiss to overlook its improvement on simple consent. To avoid the problems with the idea that consent can be communicated passively, tacitly, or by absence of resistance, the new tool should manifest a clear affirmation. Not only that, this affirmation should communicate more than mere permission. Since acceptable sex is wanted by all concerned, the affirmation should convey, or at least strongly suggest, that the affirmer positively wants to engage in the particular sexual activities in prospect.

But affirmative communication is not enough. We can communicate in all sorts of ways, and we can affirm lies, things we are uncertain about, things that can be misconstrued, and so forth. All of these tend towards sex that does not meet the standards of acceptability. So more needs saying about what sort of communication is desirable. I suggest, third, that the new tool should be *expressive*. An expressive form or mode of communication is one where what is communicated is genuinely reflective of the thoughts, feelings, and desires of the communicator. I am attracted, but not committed, to the suggestion that expression is genuinely reflective of such things in virtue of being partially constitutive of them: in true expression,

there is no gap between the thought and its communication.<sup>41</sup> Whether or not the link is so close as to be constitutive, expression involves a tight association between thought, feeling, or desire, and their conveyance to others. True expression accurately articulates the contents of one's thoughts, desires and so forth. Expression can be achieved through a variety of means: language, most obviously, but gesture, action, even perhaps style or dress can be expressive. Genuine expression can be recognized by confidence, spontaneity, and naturalness.<sup>42</sup>

The communicative tool should be expressive because acceptable sex is wanted and enjoyable. Expressiveness secures the first condition: if someone genuinely expresses a desire for sex, they really want it. Expressiveness cannot *secure* the second condition, but nor could any normative tool. However, tools can tend towards securing it. If sexual encounters in which people get to say what their desires and preferences are tend towards the enjoyable, and ones where they don't get to do so tend towards the disagreeable, the normative tool should secure the free and open chance to say what one wants. By insisting that the tool be expressive, we insist that genuine wants are communicated: this tends towards sex that is wanted and enjoyed.

There are other possible elaborations of the mode of communication appropriate for sexual encounters. For example, it is sometimes suggested that they should be conversational or dialogic: potential partners should mutually negotiate and explore their desires and preferences before having sex. While I am sympathetic to this idea, I have four related reservations and reasons for preferring expression. First, the demand for prior negotiation seems to somewhat prescriptively dictate that sex cannot be wanted, agreed upon, and happen quite sponta-

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<sup>41</sup>This idea of expression is well-developed in aesthetics; see Collingwood (1938) for a classic example, and Riggle (2015) as an example of a recent application of ideas about expression.

<sup>42</sup>Compare Lintott and Irvin's suggestions for how we might identify genuine expressions of sexual being (Lintott and Irvin 2016).

neously, without need for extensive conversation. Expression can, though need not, quickly convey desires. Second, the conversational suggestion seems to risk over-intellectualizing sexual encounters. Acceptable sex should not be the preserve of the articulate and sophisticated. One can be expressive without being especially conversational. Third, lovers long accustomed to each others' preferences and desires may not need to discuss every time what they want to do. An expression of desire could well be sufficient, communicating, effectively, "I want the same again, please". Fourth, to the extent that conversation and negotiation are prior to and separate from sex itself, the suggestion risks replicating one of the problematic aspects of the contractual nature of consent. It is easier to see how expressions of desire, rather than conversations about desire, can be continuous with sex itself.

Against all this, it might be said that a less literal idea of "conversational" is intended and negotiation. For example, Pineau (on one reading) advances "conversational" as a metaphorical description of how both sexual preliminaries and how sex itself should be: in the act, one should be (metaphorically) listening, responsive, and so forth (Pineau 1989, pp. 233–237). Now, one worry with this suggestion is that it seems to prescribe what sorts of sex people should want, and this is not a road we should travel (Schulhofer 1998, pp. 70–88). But, in general, my sense is that the less literally "conversational" is intended, the closer the idea actually intended comes to that of expression. So I think that expression is the best description of the mode of communication that our normative tool should employ.

The fourth desideratum is that the tool should be *symmetrical*. I argued above that the use of consent to generate permissions establishes or reinforces an asymmetric relationship between the consent-giver and the consent-getter, and this militates against acceptable sex, on all four grounds: permission, wantedness, enjoyment, and justice. Accordingly, the new tool should be such that any relation it generates between those involved is symmetrical,

neither casting them in unequal roles as active and passive, nor reflecting nor reinforcing an imbalance of power. What each gives and takes, so should the other be able.

The final desideratum is that the tool should be *continuous* and coterminous with sex. I argued above that consent's contractual character is problematic. This character has two problematic aspects: first, consent is (seen to) endure and carry over into the future; second, consent is (seen as) a separate preliminary to sex; So our new tool should be such that it is somehow capable of being part of sex, carried on through it, rather than happening beforehand; and it should also be such that, when the sexual encounter ends, so do the permissions and agreements established by its use.

I am not supremely confident that these five desiderata form a complete set. Plausibly, I have overlooked desiderata that should be on the list. Nor am I entirely sure that those on my list are all presented and explained as best they could be. For example, I am certain that *something* like the expression desideratum should figure, but I am not certain that expression is quite the way to put it. But if the desiderata are plausible enough, jointly and severally, to guide the manufacture of a new tool, they serve their purpose in the present paper well enough, for all that they could be improved upon. I will now argue that enthusiasm is a promising candidate for meeting the desiderata. In so doing, I will describe how enthusiasm should be understood in sexual contexts. In accord with the strategy outlined above, some of this description is more specific than, and somewhat revisionary of, an everyday understanding of enthusiasm. The point is that enthusiasm can easily be bent into shape to meet the desiderata.

### 3.3 The case for enthusiasm

Enthusiasm, in general, is a state of being happily excited about some activity or event, and eager for it to happen. It is not just a mental state: while part of being enthusiastic about something is being mentally well-disposed towards it, enthusiasm is always manifested. If one is enthusiastic, one can't help but show it. Enthusiasm's manifestations are generally natural, relatively spontaneous, and genuine. Enthusiasm is always directed towards something: one cannot be enthusiastic about nothing in particular (though the object of one's enthusiasm need not be precise). Enthusiasm involves a spontaneous expression of desire for, or pro-feelings towards, a given object, event, or activity.

People can be enthusiastic about sex, within sexual encounters (or, indeed, about sexual encounters). People can be happily excited about or eager for sex. If they are enthusiastic, their enthusiasm is manifest. They say or do things, in a natural, spontaneous, genuine manner, that demonstrate a pro-attitude towards the sex in prospect or in progress. Since people can be enthusiastic about sex, we can make the presence or absence of enthusiasm normative: we can demand that enthusiasm be displayed by all involved in a sexual encounter. This makes enthusiasm a possible normative tool for shaping behavior in such encounters. I will now argue that it is a plausible normative tool, in that it meets all five desiderata.

First, enthusiasm is *communicative*. When you are enthusiastic about something, you manifest your enthusiasm. This communicates your excitement about it. Second, enthusiasm is *affirmative*. You are enthusiastic when you positively want or desire an activity or an event. So being enthusiastic about something means being firmly, affirmatively in favor of it, not passively accepting it. This ensure that enthusiasm both incorporates and goes beyond permission. If you are enthusiastic about something, you want it to happen; your permission for it to happen is encapsulated by your wanting. In sexual encounters, this means that

enthusiasm communicates affirmative desire for sex.

Third, enthusiasm is *expressive*. The ways in which enthusiasm can be manifested, and the relation of those manifestations to your enthusiasm, reflect neatly the description of expressive communication given above. When you are enthusiastic about something, the manifestations of your enthusiasm are natural and spontaneous: they genuinely reflect your enthusiasm, perhaps indeed are part of it. Of course, enthusiasm *can* be faked, but it is hard; spotting feigned enthusiasm is usually not difficult. In sexual contexts, enthusiasm can be displayed by natural, spontaneous actions and words expressing pro-attitudes towards sex in general, and towards specific sexual acts and actions.

Fourth, enthusiasm is *symmetrical*. It does not generate or reflect an asymmetric relation between two people. There is no sense in which one person “gets” enthusiasm from another; a demand that everyone involved in a sexual encounter be enthusiastic does not position either party as active or passive. Rather, the normative demand requires that all involved actively express their enthusiasm.

Enthusiasm avoids asymmetry because it does not generate or reflect a relationship between those involved in the same way that consent does. Consent is a relational concept: there needs to be someone giving, and someone getting, consent. Enthusiasm is not relational in that sense: you are enthusiastic for something to happen, you don’t grant enthusiasm to someone. The demand for mutual enthusiasm, then, places all parties in the same relationship to the sex in prospect: they all, symmetrically, express desire for the same thing.

Fifth, enthusiasm is, or can be, *continuous*. The demand for enthusiasm should include an insistence that people are not just enthusiastic before sex, but continue to be enthusiastic during it: they continue to genuinely express pro-attitudes towards what is happening as it develops. Since this is something of a stipulation, going beyond the ordinary meaning of

enthusiasm, one might think that the same could be stipulated of, say, consent. But the point is that the ordinary use of consent is such that the concept more or less essentially includes the idea that it is a separate preliminary. While we could insist that consent should be continuous with sex, it is hard to revise the concept such that this is actually its content. This is much less of a problem with enthusiasm. A fairly natural extension of saying that people should be enthusiastic for sex, is to say that their enthusiasm should be continuous with the sex they are having. So the stipulation is one that can reasonably be made.

The other aspect of the continuity desideratum was that the new normative tool should be coterminous with the sex it permits. This is the case with enthusiasm. Enthusiasm is an occurrent state. When you stop being enthusiastic for something, your enthusiasm obviously ceases to exist. Furthermore, once the thing you are enthusiastic about ceases to be, you can no longer be enthusiastic about it.<sup>43</sup> This means that enthusiasm for sex ends when the sex ends, and cannot be taken for granted in future sexual encounters with the same person.

If all this is right, enthusiasm seems to be a plausible candidate as a normative tool applicable to sexual encounters. A demand that everyone involved in an encounter be enthusiastic about the sex in prospect and in progress is a demand that they expressively communicate affirmative pro-attitudes towards it, and that they do so in a way that is symmetrical, equal, and continuous and coterminous with the encounter. All this militates in favor of permitted, wanted, enjoyable, just sex, in exactly the ways that consent does not.

Before considering some objections to the proposal of enthusiasm, I will make one further point in its favor: it is a fairly easy norm to inculcate. Much of the worry about consent concerns how young people are educated about sex; the fact that sex education fails to equip

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<sup>43</sup>Provided you know that it has ceased to be. You could be enthusiastic about a fictitious prospect. But you know when sex you are having ceases, so the point in the main text applies.

them for successful navigation of sexual encounters has been often noted and discussed.<sup>44</sup> As the content of the concept of consent has become richer and more detailed, so the process of equipping young people with an adequate understanding of it has become more complex; and, again, there is the problem of trying to inculcate a specific notion of sexual consent against a background of a more general notion embedding features problematic in sexual contexts. Enthusiasm is not a slippery concept. Telling people that they should look for enthusiasm provides a straightforward, easily understood rule for establishing whether sex is acceptable.

I suggest, then, that we should promulgate this rule: acceptable sex is sex that everyone involved is enthusiastic about. If, in the course of a sexual encounter, everyone is enthusiastic about what is happening, then the encounter is acceptable—or, more accurately, likely to be acceptable. Enthusiasm cannot guarantee acceptability. Its presence indicates that the conditions of acceptable sex are likely to be fulfilled, but does not guarantee this. In particular, it might guarantee that sex is permitted and wanted, but cannot guarantee that it is enjoyable or just.

But this is not a problem with the proposal. The temptation to think that it is stems from an observation about what consent does, and a feeling that any successor tool should do the same. Because consent is so closely linked with permission, its presence or absence does not merely *indicate* the presence or absence of permission; whether consent is given *determines* whether sex is permissible. Likewise, working with an expanded conception of good sex encompassing more than mere permission, it is tempting to hope for a concept that stands in the same relation to that set of criteria as consent does to permission: a tool whose use guarantees those standards are met, because its use is precisely the criterion for establishing whether they have been met.

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<sup>44</sup>For excellent summary and discussion, see Anderson (2010).

I do not think this is a thing we can reasonably demand of any normative tool relative to the account of acceptable sex I adumbrated. It is reasonable to think, for example, that acceptable sex is enjoyable, no normative tool can guarantee this. The most a tool can do is shape behavior, and hence shape sexual encounters, in ways that tend towards enjoyment; it can, for example, encourage open expression of desires and wants, and discourage persistence in the face of displeasure. So, in talking about enthusiasm as a normative tool, I am not suggesting that sex is or is not acceptable *because* those involved are or are not enthusiastic; rather, the fact that they are enthusiastic is an indication that the standards of acceptability are likely to be met.

For all that I have given an argument in its favor, I advance enthusiasm as a suggestion; I am not sure that it is the best replacement for consent. But I do think it is a promising candidate, and its promise illustrates the point that going beyond consent is far from impossible. Potential tools are ready to hand. To round out the case for enthusiasm, I will now consider some putative objections to the suggestion, and in so doing further revise and polish the concept of enthusiasm so that it does the work required of it.

### 3.4 Objections and replies

*Objection: enthusiasm is not a normative concept.* Perhaps we do not have deontic reasons to be enthusiastic. But I argued above that the tool we settle on need not be normative in itself. If enthusiasm is used as I suggest, it will become normative in the relevant sense. The presence or absence of enthusiasm will become the indicator of acceptable sex.

*Objection: enthusiasm is vague.* This objection might be taken three ways. On one reading, the objection is that the definition of enthusiasm is so vague that it cannot properly serve as a normative standard. This would be problematic if the proposal was to codify enthusiasm

as a legal standard for the permissibility of sexual acts, but I have argued that this need not be demanded of the new normative tool. While the account of enthusiasm offered is somewhat imprecise, the common conception of enthusiasm it reflects is adequately well-understood and well-defined for the task I am asking it to do.

On another reading, the objection might be that the signs of enthusiasm are so vague, or so ambiguous, that one can be mistaken or unsure whether someone else is enthusiastic. So enthusiasm does not meet the desiderata concerned with expressive, affirmative communication. This objection rests on a misunderstanding of what enthusiasm is. Enthusiasm is strongly and powerfully expressive. Properly understood, it is unambiguous and almost unmistakable. If one is unsure whether another is enthusiastic, this is a strong sign that they are not enthusiastic, and an indication that one should check very carefully that they are.

Third, the objection might be that one can be vaguely enthusiastic for sex, without being specifically enthusiastic about particular sexual acts. But the specific expression of preferences tends towards wanted, enjoyable sex. So the normative tool should promote practices where specific expression of particular preferences are encouraged. Enthusiasm is not the right tool for encouraging that practice.

There are two things to be said in response. First, I suggested above that making new normative tools sometimes requires a degree of stipulation and revision. This is one point at which such stipulation is necessary. In sexual contexts, it should be stipulated that one needs to be enthusiastic about exactly the sex that is under consideration. Part of this, of course, is being clear about what exactly the sex under consideration is. One can be enthusiastic for sex, without being particularly concerned about the details of what sex will happen, or one can be enthusiastic only for highly specific sex. If the latter is the case, it is important to convey that *this* is the precise sex one is enthusiastic about. Stipulating this ensures that exact

desires are expressed, without much deviation from the ordinary idea of enthusiasm.

Second, when discussing the continuity desideratum, I said that enthusiasm should be continuous with sex. One can communicate precise wants or desires before sex happens, but one can also communicate them during it, by being enthusiastic or not about particular actions, moves, touches. One can be enthusiastic about them by word or by deed of one's own. In fact, one might think that a common and acceptable course of sexual encounters incorporates a general enthusiasm for some sort of sex that develops in the act into a specific enthusiasm for certain things. So "the sex under consideration" can mean both sex that is proposed, and sex that is happening.

*Objection: some people are not capable of enthusiasm.* Two things might be meant. One is that some people are not capable of enthusiasm about sex because they do not want sex, or desire it strongly enough. Well, then, sex with such people is not acceptable. It might be permissible: such people might consent to sex they don't really want or enjoy, because, for example, they want to conceive "naturally". But such sex falls short of the standard of acceptability.

The second thing is that some people are just not, by nature, very effusive, and thus may be incapable of the kind of affirmative expression that using enthusiasm as a normative tool seems to demand. This, I concede, is a tricky point to negotiate. The first thing to say is that expression of enthusiasm need not be effusive. While effusiveness is a natural co-concept of enthusiasm, a firm, positive, clear, quiet set of words can convey enthusiasm. The second thing to say is that, since different people express enthusiasm in different ways, the better one knows one's partner, the better one will learn how they show it, and whether their enthusiasm tends to the restrained. But the normative tool should not be such that those inclined towards casual sex are penalized, and so it should not be stipulated that one needs to know one's partner's modes of expression inside out before one has sex with them. So the

further third thing to say is that the more one doubts that enthusiasm is present, the more one should seek assurance that it is. It is easy enough to spot when someone is being effusively enthusiastic about something; conversely, it is easy enough to spot when they are not, and then it is time to check more solicitously whether they really are enthusiastic. The less well one knows one's partner, the more one might be able to doubt that they are enthusiastic, and the more it will be incumbent on one to ensure that they are. This does still put more of a burden on those engaged in casual encounters than it does on those having sex within a context of long acquaintance, but casual encounters will, I think, always demand more care around issues of permission, desire, and enjoyment; casual sex is a context where things can go wrong more easily, and so is a context where things need to be checked on more often.<sup>45</sup>

*Objection: various intuitively acceptable sexual acts will count as unacceptable if enthusiasm is the normative standard.* I can only think that this objection is motivated by a different understanding of what constitutes acceptable sex, perhaps one that is closer to what I have called permissible sex. I can only reiterate that I think the criteria of acceptability are reasonable: they portray a standard that can and should be met more often than not. Again, dutiful partners, those concerned only with conception, or those engaged with prostitution are perhaps doing something permissible, but sex in those situations is nonetheless somehow lacking. The lack of enthusiasm of one or more of those involved is a marker of the fact that they are unacceptable.

*People who shouldn't be having sex can be enthusiastic about it.* This objection envisages, say, someone who is under the legal age of consent being enthusiastic about sex. But, just as someone can display all the right manifestations of consent without in fact consenting, because they are (say) underage and so cannot validly consent, so someone can be enthusiastic

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<sup>45</sup>For discussion of some moral issues specifically pertinent to casual sex, see Rocha (2016) and Wolf (2016).

without that enthusiasm being valid. This stipulated sense of the conditions of valid enthusiasm can be more or less identical to those attached to consent, ruling out, for example, valid permission for sex given by underage people.

The objection may be further assuaged by reiteration of the point that legal and social standards can come apart. Even if enthusiasm is adopted as a social standard for acceptable sex, consent can remain that which determines permissibility, with all that that entails. Worries about, say, enthusiastic children, are really worries about permissibility, not the other elements of acceptable sex. So in such cases, appeal can be made to the legal standard of permissibility, separate from the social standard of acceptability.

*Objection: other candidates are better.* I have advanced enthusiasm as a plausible candidate to supersede consent. I do so because I cannot think of a better candidate. But there might well be a better candidate, and I would be delighted if one were found.

## 4 Conclusion

The present paper can fulfil most of its objectives without, in the end, convincing you that enthusiasm is the best candidate for superseding consent. I have given an account of what acceptable sex is, an argument that consent militates against it, an account of how consent might be replaced as a normative tool, and some desiderata for its replacement. If you buy all of that, then, whether or not you think enthusiasm is the best replacement, you are at least convinced of this: we can, and should, do better than sexual consent.

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