Rape as an Essentially Contested Concept

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Because “rape” has such a powerful appraisive meaning, how one defines the term has normative significance. Those who define rape rigidly so as to exclude contemporary feminist understandings are therefore seeking to silence some moral perspectives “by definition.” I argue that understanding rape as an essentially contested concept allows the concept sufficient flexibility to permit open moral discourse, while at the same time preserving a core meaning that can frame the discourse.

INTRODUCTION

In recent years there has been considerable public controversy over how “rape” ought to be defined, a controversy that cannot be reduced to a mere difference of terminological preferences. “Rape” is a potent word, a word laden with emotive and evaluative significance. To call a sexual act “rape” is to attach to it the harshest sort of condemnation. In the wake of sustained critiques of a patriarchal system that has understood rape primarily as a violation of the property rights of men, feminist scholars have proposed alternative definitions that reconceive rape according to the experience of women (who are, after all, its chief victims). If, historically, the concept of “rape” has served to protect a man’s right to exclusive sexual access to “his” women, and hence has been part of the larger ideological framework that disempowers women, then feminist re-definitions of rape for the purposes of empowering women to assert control over their own bodies constitute a challenge to the historic extension of male privilege. As “rape” acquires a broader scope of meaning, there is a concomitant truncation of male authority to control the sexual domain. It is therefore not surprising that feminist redefinitions of “rape” have met with varying degrees of resistance, especially from men who recognize that, under these new definitions, their own sexual behaviors might qualify as rape. An excellent example of such
resistance is offered by Norman Podhoretz, editor of Commentary magazine, who writes that “the definition of rape, which has in the past always been understood to mean the use of violence or the threat of it to force sex upon an unwilling woman, is now being broadened to include a whole range of sexual relations that have never before in all of human experience been regarded as rape” (1992, 6–7). Podhoretz accuses feminist thinkers of engaging in “a brazen campaign to redefine seduction as a form of rape, and more slyly to identify practically all men as rapists” (1991, 30). His reasons for attributing such intentions to feminist thinkers are his observations that, first, “everyone has always understood that it was rape when a man used a weapon and/or physical violence or the threat of it to force a woman into sex” (1991, 30); and second, feminist thinkers have extended the concept so that the use of “verbal and psychological” means to overcome a woman’s resistance constitutes rape. But, Podhoretz says, “overcoming a woman’s resistance by ‘verbal and psychological’ means has in the past been universally known as seduction” (1991, 30).

The definition of rape offered by Lois Pineau (1989) is a good example of just the sort of definition that Podhoretz is attacking. Pineau is specifically concerned with defining a subclass of rape which has come to be called “date rape.” She says that “Date rape is nonaggravated sexual assault, nonconsensual sex that does not involve physical injury or the explicit threat of physical injury. Because it does not involve physical injury, and because physical injury is often the only criterion that is accepted as evidence that the actus reus is nonconsensual, what is really sexual assault is often mistaken for seduction” (1989, 217).

It is interesting to note that Pineau explicitly acknowledges that what she calls date rape is routinely taken to be a form of seduction. Thus, on one level, Pineau is in agreement with Podhoretz: both agree that what is called rape by some is called seduction by others. However, while Podhoretz thinks that it is the feminists who are in error, by calling rape what has traditionally been called seduction, Pineau is inclined to locate the error in the traditional view. For her, the extension of the concept of rape to include acts that in the past have been classed as forms of seduction is not an objectionable expansion of the concept. Rather, it is the correction of a (long-standing) mistake.

Keith Burgess-Jackson (1995) has noted that the charge leveled by Podhoretz can best be understood in the following way: feminists have redefined rape beyond its ordinary range of use, but have preserved its traditional emotive meaning, thus attaching to instances of non-rape the same sort of negative connotation that has been traditionally reserved for rape. In other words, Podhoretz is accusing feminist thinkers of offering illegitimate persuasive definitions (PDs) of rape.

Burgess-Jackson (1995, 430–34) responds to Podhoretz by arguing that the
new definitions of rape emerging in feminist philosophy are not illegitimate persuasive definitions. Burgess-Jackson points out that "rape" is a vague concept which admits of borderline cases; he then argues that the feminists who are re-defining rape are extending the definition beyond the clear cases of rape to include some or all of the borderline cases, but they are not extending their definition beyond the borderline cases. Burgess-Jackson finds nothing wrong with such a redefinition: either it is not a PD at all, since it falls within the gray area of the concept; or if it is a PD, then it is not an objectionable sort, since feminists who engage in this sort of precise definition are not (as Podhoreutz charges) extending the definition to include "a whole range of sexual relations which have never before in all of human experience been regarded as rape" (Podhoreutz 1992, 7).

Burgess-Jackson's argument is lucid and persuasive, but it strikes me as insufficient to treat adequately the accusation leveled by Podhoreutz. Feminist definitions of rape are not merely "precising definitions." While Pineau's definition of date rape may be seen to address the status of borderline cases—that is, cases that fall within the gray area of the concept—this is only because the work of Pineau and other feminist scholars has created the gray area. Traditional patriarchal definitions of rape did not struggle with the status of sex acts that took place during a date and did not involve violence or overt threats. These were not seen as cases of rape, even in a borderline sense. They were, at most, cases of male over-eagerness and female impropriety.

What I wish to argue is that feminist thinkers have extended the meaning of "rape" to include "a whole range of sexual relations which have never before in all of [male] human experience been regarded as rape," but that they are not thereby engaged in anything objectionable.¹

What I will suggest is that the vagueness that the concept of rape has acquired can best be understood in terms of essential contestability, in something like W. B. Gallie's sense (1956), and that once we understand rape as an essentially contested concept, we will see that extending the boundaries of the concept is part of the proper use of the term. Thus, formulating definitions that widen the concept's scope of meaning can be a legitimate linguistic move in the language game of rape.

My focus here is on the public discourse about rape. While this discourse is framed by competing normative claims about various sorts of sex acts, my aim is not to resolve these normative disputes. Rather, my goal is to respond to the charge that at least one kind of feminist voice in this discourse is illegitimate. Podhoreetz's attempt to silence this voice, whatever its motives, cannot be justified on the grounds he offers. The notion of essential contestability acknowledges that human language must make room for multiple perspectives: no single ideology can fix the language of discourse (and thereby fix the normative assumptions which are attached to terms like "rape"). While this
point does not solve the difficult moral questions surrounding rape and date rape, my own conviction is that such questions can best be answered when competing perspectives are able to enter into the debate and contribute to defining the terms of the debate. As such, refuting Podhoretz's charge constitutes an important step towards providing the framework within which disputes about rape can be resolved.

VAGUENESS AND THE CONCEPT OF RAPE

One of the key moves in Burgess-Jackson's argument is his observation that "rape" is a vague concept, in that it admits of borderline cases (1995). This observation is surely right, at least as the term is used today. But, as noted above, the vagueness of the concept is in part an outcome of feminist critiques of older, patriarchal definitions of rape. As such, Burgess-Jackson's response to Podhoretz is not entirely sufficient. To formulate a fully satisfying response, we need to consider a bit more carefully what it means to say that "rape" is vague. In so doing, we will begin to see how a concept like rape can come to acquire borderline cases, and why feminist expansions of the concept are not illegitimate.

According to Max Black (1949), a concept is vague just in case there are borderline cases or individuals

to which it seems impossible either to apply or not apply the term. Thus a word's vagueness is usually indicated, more or less explicitly, by some statement that situations are conceivable in which its application is "doubtful" or "ill-defined," in which "nobody would know how to use it," or in which it is "impossible" either to assert or deny its application. (Black 1949, 30)

While this account is helpful in giving us a rough idea of what we mean when we say that a concept is vague, it is itself open to at least two alternative interpretations. We need to become clear on which interpretation is the right one if we are to know what sorts of linguistic moves are appropriate with respect to vague concepts. In particular, this account of vagueness can be understood as making an epistemic point (there are unclear cases because we do not know whether the concept extends to them or not), or as making an ontic point (there are unclear cases because the concept as a matter of fact neither extends to them nor fails to extend to them).

The former interpretation seems implausible, especially with respect to the concept "rape": the gray area does not result from ignorance about the concept, since it is part of the concept (such that we do not properly understand the concept unless we recognize that it has a gray area); nor does the gray area result from ignorance about the borderline cases—we may know everything
there is to know about these cases and still not agree on whether they are cases of rape.

Hence, vagueness is best understood as an ontic property of concepts. Such an understanding, however, is not without its difficulties. If the vagueness of a concept is ontic, then the vagueness cannot be resolved through greater understanding of either the concept or the borderline objects, because the vagueness is not due to any epistemological consideration: it is, instead, an essential vagueness. The concept is vague because there are some cases to which the concept neither extends nor fails to extend. The problem with understanding vagueness as essential to the concept, however, is this: if we are forced to say that when a concept is vague, it neither applies nor fails to apply to certain borderline cases, then we seem to be violating the law of excluded middle.

One way to avoid this sort of problem is to understand the vague concept as designating a characteristic whose possession is a matter of degrees. Thus, in the case of baldness, we might say that baldness is not a matter of all-or-nothing, but a matter of more-or-less. The heads that are "clearly bald" are simply those that admit of a sufficiently high degree of baldness. Those that are "clearly not bald" admit of no degree of baldness. The gray area comes into existence because some heads have an intermediate degree of baldness. In effect, this move attempts to treat vagueness as emerging out of the elliptical use of language. There really are no "bald" heads; there are only heads that have varying degrees of baldness. To say that a head is "neither bald nor not bald" is to speak imprecisely, and such a statement can be reformulated more precisely in terms of degrees of baldness; such a reformulation does not violate the law of excluded middle.

Whatever one thinks of this solution to the problem, it will not work for the concept "rape." There really are people who have been raped. And whether they have been raped is an all-or-nothing thing—they either have been or they haven't. While the severity of the rape may be a matter of degrees (so that one rape may be more pernicious than another), whether it is rape at all is not.

Fortunately, Gallie's notion of essentially contested concepts gives us a way to understand vagueness as an ontic property of the concept of rape, while avoiding the violation of the law of excluded middle. I wish to suggest that when we say that "rape" is a vague concept, we mean that it is an essentially contested concept; and once we see "rape" as essentially contested, we will see that fluctuations in the gray area of the concept—most notably expansions of that gray area—are to be expected, and may even be required, when new voices enter the moral discourse which the concept helps to frame. Thus, even if Podhoretz is right that feminists have broadened the meaning of "rape" to included "a whole range of sexual relations that have never before in all of human experience been regarded as rape" (1992, 6–7), he is wrong to believe
that they have therefore done something objectionable. On the contrary, I will argue that the feminist expansion of the concept “rape” is an important moral achievement.

RAPE AS AN ESSENTIALLY CONTESTED CONCEPT

Gallie does not explicitly connect essentially contested and vague concepts. What he says about essentially contested concepts does, however, provide a foundation for resolving the problem with understanding the vagueness of “rape.” In brief, an essentially contested concept is, for Gallie, a concept that is used to make an appraisal of an object—for Gallie, a positive appraisal of an achievement. In other words, there is a common value judgment that attaches to all objects that fall within the concept’s extension: to be such an object is to have achieved something significant (consider the concept “art”). Furthermore, the achievement is not a simple one, such as the achievement of scoring the most points in a game. Rather, the appraisal is based on a complex set of characteristics that the object will contain to varying degrees. This set of characteristics is drawn from some original exemplars or paradigms, which everyone agrees fall within the concept’s extension. But while everyone agrees that objects must bear a resemblance to the paradigms in order for the concept to apply properly, there is no similar agreement over which characteristics of the paradigms count the most, or how these various characteristics figure into the appraisal. What is it about the paradigms that makes them worthy of the positive appraisal? There are competing answers to this question, and hence competing understandings or descriptions of what is to fall within the scope of the concept. Adherents to each rival understanding of the concept are aware of other understandings, and maintain their understanding in the face of these rivals (Gallie 1956, 168–81).

In short, what Gallie suggests is that some concepts are intensionally complex, in that the concepts are adequately captured not by a single intensional characterization (or definition), but rather by a number of competing intensional characterizations unified by a common appraisive meaning and a shared set of complex paradigms, and differing according to which elements of those complex paradigms are regarded as most salient or fundamental for determining the concept’s extension.

Newton Garver (1988, 220) has suggested that the kind of appraisal which an essentially contested concept embodies need not be positive. He extends the idea of essential contestability to violence, demonstrating that the concept of violence fits easily within the parameters of essential contestability as Gallie spells them out, with one exception: the appraisal is strongly negative. We can make the same move here with respect to rape.

In doing so, we are afforded a way to understand the essential vagueness of
concepts such as rape without violating the law of excluded middle. Understood in terms of essential contestability, a concept is essentially vague when the borderline cases are those objects that are included in some but not all of the competing intensional characterizations of the concept.

That rape can be understood as an essentially contested concept is clear. There is no question that rape has a strong appraising character. There are also clear paradigm cases of rape (that is, examples which everyone agrees fall within the extension of the concept): the standard paradigm is of a stranger using physical force to overpower and vaginally penetrate a resisting woman. That these paradigms have a complex array of characteristics, all of which are regarded as significant features of the cases, is also clear: the paradigms involve, on the part of the perpetrator, physical violence, coercion, control, disregard for the woman’s wishes, a clear intent to overmaster the woman’s will, a divorce of the sexual act from feelings of intimacy, the objectification of the woman, etc.; on the part of the victim the paradigms involve active resistance, the lack of desire, the lack of consent, powerlessness, suffering, a feeling of violation and dehumanization, etc. It is also clear that different theorists emphasize different aspects of the paradigms as being significant or essential, such that while they agree that the paradigms are instances of rape, they disagree about what makes them rape. Is it the presence of violence? Coercion? Absence of consent? Power differentials? The degradation and objectification of the victim? There are competing answers to these questions. Hence, rape seems to fit the requirements for an essentially contested concept.

But why should concepts come to be used in this way at all?

The reason why a concept might come to be used in an essentially contested fashion has to do with the appraising character of the concept. What unifies the various competing intentional characterizations in an essentially contested concept, in addition to the agreed paradigms, is its appraising character—what Burgess Jackson (1995, 421) calls its “emotive meaning.” It is precisely because of this appraising character that the use of the concept is contested. Gallie demonstrates this point through the use of, first, an artificial example, and then several live examples such as “Christian” and “art” (1956, 181–86). Since my concern here is with rape, let me illustrate the point at hand using rape as my example: I will show how the appraising character of rape can not only lead to, but justify, its being used in a contested way.

The concept of rape is universally regarded as an appraising one and a strongly negative one: there is strong condemnation attached to any act that is labeled as rape. Given this fact, it becomes clear why one might be resistant to any given stipulative definition of rape: whatever falls under that definition, if the definition is accepted, will be regarded as wrong (at least prima facie). If one wishes certain kinds of acts to be subject to such negative appraisal, one might formulate a definition such that the acts in question become part of
the extension of rape; if one wishes to preserve some acts from such negative appraisal, one would in turn define rape so as to exclude these acts from the extension of the concept. In short, which definition of rape one accepts has significant normative import. This fact makes the debate over definitions an important one: the definitional debate is, in effect, a debate over which of the borderline cases of rape ought to be subjected to the same sort of negative appraisal as the paradigms.

But the debate is more than this. It seems that the debate determines or delineates the gray area of borderline cases—not the other way around. There is no pre-set gray area that limits the domain of legitimate debate, so that disagreement is allowed only within those confines. The gray area is itself subject to flux, because it is shaped by the debate. This is not to say that any definition of rape is acceptable. There are limits on what can count as a legitimate contending definition in the debate, but these limits are set by the agreed paradigms and by the appraisive or emotive meaning of the concept.

More will be said about these limiting factors in what follows. For now, it is enough to note that the debate (among those definitions which adequately acknowledge the paradigms and appraisive meaning of rape) is what determines the gray area of the concept. The borderline cases are simply those that fall within the extension of some of these definitions but not of others. Thus, as the debate expands to include new voices or new perspectives, the gray area of borderline cases should also be expected to expand.

This point makes sense when we see that Gallie provides as the fundamental justification for a concept being used in an essentially contested way that the debate itself has a realistic possibility of advancing and perpetuating the kind of achievement exemplified by the paradigm cases (1956, 180). The example of rape highlights the point, already mentioned, that the kind of appraisal which an essentially contested concept embodies could as well be negative. In such a case, the justification for using the concept in an essentially contested way would be that doing so has a realistic possibility of discouraging the kind of pernicious achievement exemplified by the paradigms.

But the justification runs deeper than this as well. Essentially contested concepts are concepts that frame public discourse about normatively significant matters. It is no mystery that the conceptual scheme we bring to bear on the analysis of a problem has implications for the kinds of solutions we will consider acceptable. Thus, if any one party has the power to unilaterally determine the conceptual framework that will be used in assessing a normative problem, that party will be able to preemptively silence certain dissenting voices.

The essential contestability of key concepts in a normative discourse protects the integrity of the discourse by ensuring that no single voice can, "by definition," exclude other voices. If rape is understood purely as a violation of a man's property rights, then concerns about women's feelings of violation...
are simply irrelevant for determining whether or not rape has occurred. When rape is understood as necessarily involving overt violence, then the fact that women often feel equally violated by aggressive sexual advances that lack overt violence has no bearing on the matter. Hence, the woman’s perspective on rape is dismissed from the discussion by definition. The essential contestability of such discourse-framing concepts as rape prevents this sort of linguistic domination.

My suggestion, then, is that we understand rape as an essentially contested concept—such that competing definitions are unified by the agreed paradigms and the apprissive character of the concept, and the debate is fueled by the interest in extending the sort of condemnation associated with the concept to all relevantly similar actions deserving that sort of condemnation. As new voices enter the debate—in this case, as women’s voices enter the debate—we should expect that the new perspectives brought to bear by these voices would have an impact on the extension of the concept and its gray area.

The Positive Contribution of Feminist Definitions of Rape

Feminism can, at least in one sense, be understood as that enterprise which takes women’s experiences seriously, and gives women’s experiences and voices a place in public discourse. A feminist definition of rape can then be understood as one that introduces women’s experiences of rape into the definitional debate that shapes the concept’s extension and gray area.

One of the things that feminist thinkers have noticed about older understandings of rape is that they have been understood from a primarily male perspective in terms of traditional patriarchal schemes. The negative apprissive meaning of rape has been understood as the violation of a man’s property rights: what is wrong with rape is that a man is taking a woman “who does not belong to him.” A woman is raped when a man who has no legitimate sexual access to her forces sex upon her. Rape is in this sense territorially defined: to know whether a woman has been raped, one must first determine whether the man has a “right” to the woman.

Thus, marital rape has in the past not been acknowledged at all. In fact, Black’s Law Dictionary, 6th ed., still included, as one definition of rape, “the act of sexual intercourse committed by a man with a woman not his wife and without her consent, committed when the woman’s resistance is overcome by force or fear, or under prohibitive conditions” (italics added). The same sort of proprietary dimension of rape can be seen in the difficulty associated with winning convictions in date rape cases; in these cases, sexual intercourse occurs between a man and a woman who are in the kind of setting or context in which the woman falls under the man’s purview—she is his “date.” Convictions in date rape cases are therefore easiest to secure when the woman clearly
“belongs” to someone else (for example, she is married) or if she is virginal (which implies that she is “saving herself” for a future husband, to whom sexual access properly belongs); if the woman is sexually liberal she becomes almost “common property.”

So long as women’s experiences do not enter into the understanding of rape, the definition can preserve this narrow extension. But the violation that women experience as the victims of rape is far different from the sort of territorial violation a man feels; and while the territorial violation of male experience may be lacking in cases of forced sex within marriage, from the perspective of women the sense of violation is no less profound just because the perpetrator is her husband or boyfriend. In fact, in some cases the sense of violation may be compounded by the shattered trust that these cases involve.

We should therefore expect that in a context where the diverse perspectives and experiences of women are lacking, the understanding of rape will be quite different than in a context where these perspectives are given voice. In fact, we might expect that when women’s perspectives are introduced into a context where they had previously been missing, there would emerge definitions of rape that extended not only to existing borderline cases of rape, but beyond such borderline cases to include “a whole range of sexual relations that have never before in all of [male] human experience been regarded as rape” (Podhoretz 1992, 6–7).

And this would be not only acceptable, but, it seems, quite laudable. If the justification for a concept’s being used in an essentially contested way is that this sort of use has the propensity to encourage or discourage the kind of positive or negative achievement embodied in the agreed paradigms, then one should welcome the introduction into the debate of a perspective that provides normatively relevant insights into the reasons for attaching to the concept its appraisive character. In the case of rape, there is no question that the experience of women, who are the chief victims of rape, should figure prominently in our appraisal of rape paradigms. Insofar as women’s voices have been left out of the understanding of rape, that understanding has been unjustifiably (and artificially) narrow. The introduction of women’s experience and women’s voices into the discussion of rape’s extension therefore is an important advance.

Understanding rape as essentially contested facilitates this introduction of women’s voices into the discussion. When rape is viewed as essentially contested, the normative discourse about rape is framed by the appraisive meaning and agreed paradigms rather than by a fixed definition. As noted above, the agreed paradigms are characterized by a complex array of features. Viewing rape as essentially contested allows for disagreement over which of these features justifies the negative appraisal, and hence over what other acts are equally subject to being called “rape.” Hence, even though the feature that
has been historically singled out as most significant has been the fact that the perpetrator lacks a socially sanctioned "right" to sexual access, this feature need not be taken as essential for warranting the negative appraisal of rape. In fact, this feature might even be regarded as irrelevant, as a distraction from what really matters. It is possible to say, for example, that an act is rape regardless of whether the perpetrator has a patriarchal "right" to sexual access (he is the victim's husband, for example), because what justifies the negative appraisal is not that sex is taking place in the absence of such a right, but rather that sex is taking place in the absence of the full consent of the victim (a different feature of the agreed paradigms). The idea here is that women's normative experience—in particular, their experience that forced sex in and outside of marriage is equally bad, and hence equally deserving of the condemnatory label "rape"—is not silenced by appeal to a fixed definition.

Imagine, if you will, that the use of the term "art" (one of Gallie's examples of an essentially contested concept) was determined entirely by non-artists, and when artists tried to share their views on art and what qualified as art they were dismissed or ignored. There would doubtless still be debate over the extension of the term, and the term would still therefore be vague, admitting of borderline cases. If, abruptly, those in the business of painting and sculpting and making music were admitted into the dialogue, we might well expect to see new definitions of art emerge, definitions whose extensions reached beyond the existing borderline cases. The concept would still be contested, still admit of borderline cases—but some of those borderline cases would now be outside the earlier borders of the concept. If the purpose of the essential contestability of art is to frame a debate designed to promote the kind of achievement embodied in the paradigms of art, then the introduction of actual artists into that debate would clearly further the purpose of this sort of concept—simply because artists have a uniquely intimate perspective on the nature of art. We might even say that the meaning of "art" becomes truer once the voices of artists are included in the definitional debate. Likewise, with rape, we can say that the introduction of women's voices and perspectives into the definitional debate would further the purpose of the concept of rape, because women have a unique and intimate perspective on the nature of rape. And again, we might say that the meaning of "rape" becomes truer, or at least less false, once the voices of women are introduced into the definitional debate.

While all of this seems right, some cautions are necessary. First, the new definitions of "rape" that emerge when women enter public discourse are not necessarily better than older definitions. My argument here is not intended to resolve the difficult moral issues pertaining to rape by a kind of linguistic sleight-of-hand. My point is that these difficult moral issues are best resolved in open discourse where alternative perspectives are allowed equal access to the debate. Insofar as fixed definitions of rape may exclude new perspectives,
it is necessary that rape be understood as essentially contested in order that the difficult moral issues pertaining to rape not be resolved through a linguistic sleight-of-hand.

Second, to call a definition "legitimate" is not to say that it is correct—after all, an essentially contested concept is one which admits of rival definitions, each incompatible with the others and yet each legitimate. To say that a definition is legitimate is simply to say that it embodies a perspective that ought to be heard and considered carefully in the normative discourse framed by the concept. Hence, to say that feminist definitions—plural, for there may be more than one—of rape are legitimate is not to say that they constitute the final word or the one correct moral appraisal of sex acts. This would be to illegitimately exclude non-feminist perspectives, which also need a place in the discussion.

Third, while the introduction of women's voices into the definitional debate is a positive achievement, it does not follow that every definition proposed by a woman is legitimate simply by virtue of its source. While an artist might bring a unique and important perspective to the debate over what constitutes art, it does not follow that whatever definition an artist happens to give for art has legitimacy and should be part of the complex intensional characterization of art simply because the definition's proponent is an artist. Even if art is properly understood as essentially contested, there are parameters within which a contending understanding of "art" must fall if it is going to have any role in defining the extension of the concept. As noted above, these parameters are set by the appraisee character of the concept and by the agreed paradigms of art.

Likewise, even if rape is understood as an essentially contested concept, it does not follow that a speaker, male or female, is warranted in defining rape in any way whatever. Definitions must reflect the particular appraisee character of rape, and therefore cannot legitimately extend to actions that are from every perspective morally innocuous (much less laudable). Definitions must also include all the paradigms of rape. Finally, I would add a third criterion that is not explicitly addressed by Gallie, but seems to me implicit: legitimate definitions must exclude the paradigms of any contrary concepts—that is, concepts that are related to rape in the sense of excluding it. Particularly salient here is the concept of good sex—by which I mean, roughly, "good-for-everyone-involved" sex, not "good-for-me" sex. While we might imagine a rapist identifying his act as "good sex" by disregarding or discounting his victim's experience, we could not imagine his victim doing likewise. Hence, paradigms of good sex (being paradigmatic in the sense that everyone, regardless of gender or biological sex, would call them good sex) would need to be excluded from a legitimate definition of rape, since good sex (in the appropriate sense) is incompatible with the violation and degradation intrinsic to the idea of rape.
When it comes to essentially contested concepts, it is these parameters, rather than some pre-established gray area, which set the limits on legitimate definitions. And this brings us back to Burgess-Jackson’s point about the vagueness of rape. Burgess-Jackson argues that, given the vagueness of rape, a persuasive definition that extends beyond the agreed cases to borderline cases is entirely unobjectionable. My point is that, insofar as the vagueness of “rape” is the result of its essential contestability, the parameters for an acceptable definition are more precisely set in the manner articulated above than by any pre-existing gray area. Persuasive definitions of rape that extend beyond the gray area may be perfectly legitimate. More: excluding them may be an illegitimate attempt to exclude an important moral perspective.

Feminist thinkers have offered definitions of rape that have broadened the scope of rape beyond the existing gray area. Most obviously, they have extended the concept to include acts of forced sex within the confines of marriage. Prior to the introduction of women’s voices into the discussion about the nature of rape, all marital intercourse clearly fell outside even the gray area of the concept.

But defining rape to include forced sex in marriage is not the only way that feminist thinkers have changed the concept. In the final section I will look at two examples of recent feminist definitions of rape. The first, offered by Pineau (1989), extends the boundaries of rape to include what have come to be called “date rape” cases. The second, offered by Sharon Deevey (1975), extends the boundaries to include all heterosexual intercourse in a patriarchal context. Both of these definitions are of the sort that Podhoretz would doubtless find objectionable, insofar as they extend the concept to include acts that no one in the past would have called rape. I will argue that the first example is a legitimate definition, given the parameters set by the notion of essential contestability. The second example, on the other hand, falls outside these parameters and therefore is indeed unacceptable—but a more moderate version of the same kind of definition, of the sort offered by MacKinnon (1989), is not likewise objectionable.

Of course, marital rape, date rape, and heterosexual sex in a patriarchal context are not the only difficult cases that have come to be included in the expanded gray area of rape. Other difficult cases abound—for example, sexual relations between an adult and a minor, especially difficult when the age difference is relatively small (consider a 19-year-old male and a 15-year-old female) or when the adult is a female and the minor a male; or ongoing sexual relations between two men in a prison context, where one of the men has chosen to allow the other sexual access in exchange for protection from the predations of others. In each of these difficult cases, there are features shared in common with the paradigms of rape as well as important points of difference. Take, for example, sex between an adult and a minor. A sexual encounter
between an adult and a minor may very well lack explicit coercion, and the minor may even actively express consent—and in these respects may be very unlike the paradigms of rape. Nevertheless, one can argue that the minor, by virtue of immaturity, lacks the relevant capacity to autonomously choose to participate in a sexual encounter. This lack of autonomy by one party to the sexual encounter is a characteristic that is shared (albeit in a different form) with the paradigms, and may serve as a basis for (contestably) calling all such incidents rape.¹¹

It is beyond the scope of this essay to treat all such difficult cases in detail. My hope is that, by focusing attention on two examples, I can illuminate how the idea of essential contestability can serve as a useful tool for discriminating between legitimate and illegitimate definitions of rape, even when these definitions fall outside previously established conceptual borders.

Before turning to these detailed examples, however, I wish to clear up a possible objection to my thesis based on another way in which feminist voices have transformed our conceptual understanding of rape. In particular, feminists have not only broadened the extension of the concept to create new gray areas, but have argued that some of the new gray area cases are more central, more important for our understanding of rape, than the traditional paradigms. For example, date rape seems to be far more common, and far less idiosyncratic, that the classic example of resisted, coercive stranger-rape. Shouldn’t we therefore treat date rape cases as the “real” paradigms of rape, in place of the traditional patriarchy-infected paradigms? But if discourse about rape is mediated by the traditional paradigms, as would be the case were “rape” treated as an essentially contested concept, then this feminist move towards new paradigms would seem to be disallowed. Hence, the objection concludes, understanding rape as an essentially contested concept does not do enough to allow for non-traditional voices to participate in the normative debate.¹²

This objection turns on a confusion about what Gallie means by “paradigm.” Sometimes, “paradigm” is used to refer to an example that somehow captures the “essence” of the concept in a way that other examples do not. When Gallie uses the term “paradigm,” it is fairly clear that he does not mean to use the term in this sense. All he means to denote by the term is an example that everyone agrees falls within the scope of the concept. After all, part of what it means for a concept to be essentially contested is that there is no general agreement about what is essential. While everyone agrees that the paradigms contain what is essential, there is disagreement over which of the features of the paradigms constitute this essential element (for example, whether it is the fact that the rapist lacks a patriarchal right of sexual access, or the fact that the victim did not give genuine consent, or some other factor). Thus, parties to the debate may hold that some of the borderline cases (for example, all those in which genuine consent is lacking) are equally exemplary of what is essential
to the concept. They might even argue that because these borderline cases are free from certain other characteristics that distract attention from what is essential (for example, characteristics that are significant only assuming a patriarchal ideology), these borderline cases are better examples than the paradigms. Treating rape as an essentially contested concept does not rule out such a move. What the paradigms provide is a starting point for the normative debate—and their value as a starting point rests not in their being the best examples (such a normative judgment of the paradigms runs counter to Gallie's intent), but in the existence of general agreement about them. Finally, it should be pointed out that there is nothing about viewing rape as essentially contested that rules out the emergence of new paradigms—that is, new points of agreement. Indeed, one would hope that the discourse about rape would lead to new points of agreement. But one cannot hope to reach new agreement from points of disagreement. Instead, one needs to start from points of agreement. This is what the paradigms help to do. And if the discourse does lead to new points of agreement—new paradigms—there would be nothing intrinsic to the concept of essential contestability that would rule out these new paradigms serving a mediating function in subsequent normative discourse.

Two Examples: Pineau and Deevey

In her essay "Date Rape: A Feminist Analysis," Lois Pineau (1989) describes an interesting and complex incident, one which she wants to classify as an instance of rape. She acknowledges up front, however, that the "prevailing cultural assessment" of the incident would not be to call it rape at all, but rather "an incident of ordinary seduction" (1989, 224). The case, furthermore, is one that she acknowledges would never be condemned as rape in court given the current state of rape laws. In short, it seems that Pineau, in wanting to classify her incident as one of rape, is knowingly and unapologetically doing what Podhoretz (1992) is charging feminist thinkers of doing: extending the concept of rape to apply to sexual relations that had not before been regarded as rape. If we view rape as an essentially contested concept, however, we will see that Pineau is not thereby doing anything objectionable. Her desire to include her incident among rape cases, while contestable, is not an illegitimate move in the language game of rape.

To see this, let us look carefully at Pineau's incident. For the sake of this examination, it will be useful to reproduce here a significant part of Pineau's account. The incident occurs in the course of a date that the woman has fully consented to. The man begins to pressure her to have sex with him:

He uses the myth of "so hard to control" male desire as a rhetorical tactic, telling her how frustrated she will leave him. He
becomes overbearing. She resists, voicing her disinclination. He alternates between telling her how desirable she is and taking a hostile stance, charging her with misleading him, and being coy, in short of being deceitful, all the time engaging in rather aggressive body contact. It is late at night, she is tired and a bit queasy from too many drinks, and he is reaffirming her suspicion that perhaps she has misled him. She is having trouble disengaging her body from hers, and wishes he would just go away. She does not adopt a strident angry stance, partly because she thinks he is acting normally and does not deserve it, partly because she feels she is partly to blame, and partly because there is always the danger that her anger will make him angry, possibly violent. It seems that the only thing to do, given his aggression, and her queasy fatigue, is to go along with him and get it over with, but this decision is so entangled with the events in process it is hard to know if it is not simply a recognition of what is actually happening. . . . Later she feels that she has been raped, but paradoxically tells herself that she let herself be raped. (1989, 222–23)

Clearly, this incident does not fall within the confines of the definition of rape set out by Podhoretz, namely, “the use of violence or the threat of it to force sex upon an unwilling woman” (1992, 6–7). In this incident, the threat of violence is implicit at best—perhaps hinted at by the aggressive posture and harsh words of the man, but hardly overt enough to qualify as an explicit threat. The man is not saying, “Have sex with me or I will physically hurt you.” Nor does his body language and behavior unambiguously imply this. His stance and posture and behavior at most suggest that violence is not out of the question. What is more immediately the cause of the woman’s acquiescence in this case is the manipulative tactics used by the man: tactics designed to feed off a variety of myths about human sexuality and to work on the woman’s insecurities—tactics ultimately supported by the endemic patriarchy in society that serves as a backdrop to the case. There is a sense here that the woman is “supposed” to submit, that the man has a “right” to sexual access, and that to deny him this right is a cruelty akin to breaking a promise. The man is using social conventions pertaining to female subordination as a tool to gain sexual access, and is entirely dismissive of the woman’s disinclination.13

To call this act rape is to broaden the scope of the concept to include acts that do not involve violence or the threat of violence. Furthermore, in the case at hand, the woman finally does give in—she says, in effect, “Okay, go ahead and get it over with.” Isn’t this consent? And isn’t rape sex that occurs without
consent? One of the points Burgess-Jackson makes, following Pineau, is that there is a difference between genuine consent and "giving in"—and in a social context permeated with forces designed to subordinate women to men, it becomes uniquely difficult to distinguish genuine consent from acquiescence that results from an overarching social context that trumps the woman's will (Burgess-Jackson 1995, 451).

Clearly, prior to feminist inquiry into the patterns of human sexuality, no one would have called a sexual encounter rape just because the prevailing social norms made refusal nearly impossible. The coercive power of such social norms emerged only in the light of sustained feminist critique. Thus, it is quite apparent that in including her incident within the extension of "rape," Pineau is offering an understanding of rape that is broader in scope than anything which preceded the emergence of sustained feminist scholarship.

Central to Pineau's understanding of rape here is her account of communicative sexuality. Pineau (1989, 233) observes that the problem with the current understanding of consent is that it "sets up sexual encounters as contractual events in which sexual aggression is presumed to be consented to unless there is some vigorous act of refusal" (presumably a vigorous act that can be overcome by the rapist only through force or the threat of force). Pineau puts forward an alternative understanding of consent, based on "a presumption in favor of the connection between sex and sexual enjoyment," such that when a man initiates a sexual encounter with a woman "he has an obligation to ensure that the encounter is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment" (233). This obligation plays itself out in terms of sexual interactions that involve sensitive and responsive communication. "They will," Pineau says, "like good conversationalists, be intuitive, sympathetic, and charitable" (234). She goes on to note that "[c]ommunicative sexual partners will not overwhelm each other with the barrage of their own desires. They will treat negative, bored, or angry responses as a sign that the erotic ground needs to be either cleared or abandoned" (236).

What Pineau is doing here is spelling out a model of good sex and, implicitly, an understanding of rape based on this model. For Pineau, a sexual act is rape if (a) it does not correspond to the model of good sex, and either (b) the man has made no effort to know the reasons why the woman would want to continue the encounter in spite of her lack of enjoyment, or (c) the man has made such an effort and has learned that there are no such reasons.

Note how different this understanding of rape is from the more traditional understanding. Under this understanding, it would seem that a man who overcomes his wife's disinclination to having sex by taking advantage of her indoctrination into a patriarchal value system, commanding her to submit to
his sexual advances (demanding that she “do her duty”), would be raping her, even though her submission is immediate and unquestioning. This seems a clear extension of the concept of rape beyond its traditional boundaries.

Insofar as rape is an essentially contested concept, however, this account of rape is perfectly legitimate. It falls clearly within the boundaries set by the emotive meaning of the term: there is something morally objectionable about the man who willfully ignores the wants of a woman, taking advantage of social myths or patriarchal traditions to manipulate a woman into sexual submission. There is a clear violation of the human integrity of the woman in such cases: she has been objectified or dehumanized. This account of rape also falls within the boundaries set by the paradigms of rape: none of these paradigms are excluded (since all rapists who attack strangers, using violence or its threat to force sex, are willfully dismissing the needs of the woman in their pursuit of sex), and the definition incorporates key characteristics of these paradigms (most notably the willful dismissal of the woman’s needs on the part of the perpetrator, and the experience of objectification on the part of the victim). Finally, this account of rape takes into account quite explicitly the paradigms of good sex, and in so doing does not extend the definition of rape to any of these paradigms.

None of this is to say that Pineau’s definition of rape is better than Podhoretz’s definition (any such conclusion would have to consider explicitly the moral judgments implicit in each definition). But given the framework set by the essential contestability of “rape,” Podhoretz has no right to call her definition illegitimate.

Let us consider another, more radical, feminist account of rape, by way of contrast. In particular, let us consider the view that all heterosexual sex that occurs within the context of a patriarchal society is an act of rape. While few feminist thinkers have endorsed this view in an unqualified way, there are articulations of the view in the literature. Consider Sharon Deevey’s harsh assertion: “Every fuck is a rape even if it feels nice because every man has power and privilege over women, whether he uses it blatantly or subtly” (Deevey 1975, 24). Alison Jaggar comments on Deevey’s view, and while she does not endorse it she does note that “[t]he social inequality between women and men is reflected inevitably in heterosexual relations, even if the man decides not to utilize his male privileges and so makes the most conscientious efforts to participate in an egalitarian relationship with a woman” (Jaggar 1988, 266).

The reasoning here is similar to Catharine MacKinnon’s reason (1989, 178) for being suspicious of sexual encounters where consent is normally thought to have been given. In an environment of patriarchy and female subordination, the differential of power between men and women may be a key factor in securing consent. To the extent that this is so, we have a problem in assessing whether consent has occurred. As Burgess-Jackson puts it, “[c]onsent under
conditions of inequality (of which patriarchy is but one manifestation) is worthless, a sham, and should not provide the touchstone for what distinguishes intercourse and rape" (1995, 451). While these are important concerns in assessing sexual encounters in a patriarchal context, Deevey goes further than MacKinnon. For MacKinnon, patriarchy gives us a basis for significant skepticism: how can we know when consent has not been effectively induced by the inequalities of power? In Deevey’s bold claim we find a move from skepticism to something far stronger: all female consent to heterosexual intercourse is intractably contaminated by patriarchy, such that all heterosexual sex is without consent and therefore rape.

The problem with this account of rape is that it does not take into account the possibility of good heterosexual sex within a context of patriarchy. While it is true that in a context of patriarchy a man has access to male privilege which could be used to pressure a woman into sexual submission, or to exploit her economic or psychological vulnerability, it seems unjustifiably cynical to suppose that the mere possibility of the man asserting male privilege is always a meaningful factor in a woman’s decision to participate in heterosexual sex. This assumption is unjustifiable for two reasons. First, it supposes that no woman can ever have enough trust in the integrity of a man to be confident that he will not resort to power tactics to coerce sex. Second, even in a context of patriarchy, a woman may have sufficient reasons for entering into a heterosexual encounter which have nothing to do with the patriarchal context, such that there is decisive evidence to believe that she would freely choose the encounter even were the patriarchal context absent.

For example, a woman might be in a relationship with a man who is particularly aware of the problems of patriarchy, and unusually sensitive both to the woman’s need to preserve her autonomy and to the ease with which patriarchy might undermine that autonomy in their relationship. The woman is aware of this sensitivity, understands it to be genuine, and is attracted to the man partly because of it. The woman might also be very sexually attracted to the man, and she may love him for reasons having to do with their mutual respect for each other, his kindness, their mutual interests, and the like—reasons which could very well serve as sufficient reasons for engaging in a sexual relationship with the man even in the absence of a patriarchal social context. If we imagine that this couple has sex according to the communicative model spelled out by Pineau, and that, furthermore, it is the woman who initiates the sexual encounter, it would be absurd—and insulting—to say that in this context the woman has not given her consent simply because patriarchy is the prevalent social norm.

In fact, if a heterosexual couple is able to express such mutual respect in their sexual relations despite the patriarchal context—a context that has a tendency to trap both parties into a dysfunctional oppressor-oppressed duality—then
their sexual relationship constitutes a normatively praiseworthy achievement worthy of respect, a respect that cannot be accorded if all heterosexual sex in patriarchal societies is considered rape.

Put in other words, the identification of rape with all heterosexual sex in patriarchal societies takes into account neither the first parameter of an acceptable definition of rape (namely, that the definition reflect the appraisive meaning of the term) nor the third (namely, that the definition exclude the paradigms of good sex). Sex that occurs between two persons who are sensitive to each other, trusting of each other, who communicate at each stage of the encounter and focus attention on each others' needs and interests throughout—such sex is paradigmatic of good sex even when it occurs in a patriarchal context between a man and a woman. To say otherwise is to assert that individual human beings are entirely incapable of transcending (even in isolated encounters) the prevailing social norms. Surely such a claim is far too cynical to be acceptable, for it denies the possibility of autonomous agency in oppressive circumstances. Agency may be difficult in such circumstances, but it is not impossible.

It may be useful here to distinguish between the context of patriarchal hierarchy and other hierarchical contexts—such as that between an adult and a child. Like sex between an adult and a child, sex between a man and a woman in a patriarchal society is sex between persons with different amounts of social power. But in the case of the adult and the child, it seems impossible to set aside these power differences—in part because the child is not sufficiently mature to participate in the subtle and difficult task of abstracting all power dynamics from the decision to have sex, and in part because part of the basis for the power difference in this case is that the child simply lacks the resources to be an autonomous agent. It may well be the case that in many cases of heterosexual sex, it is likewise impossible to set aside power differences—especially if the power differences resulting from patriarchy are compounded by other power differences (such as those between teachers and students or bosses and subordinates, or those between a privileged class and a disempowered minority). But to say that this is so in all case of heterosexual sex seems unacceptable, for the reasons noted above.

These criticisms of Deevey's position do not extend likewise to MacKinnon's less extreme view. MacKinnon does not assert that all heterosexual sex in a patriarchal context is necessarily rape, but rather than the forces of patriarchy are sufficiently ubiquitous that seemingly routine acts of heterosexual sex may turn out to be so infected by differences in social power that genuine consent is lacking. To classify such routine sex acts as rape is not to violate the parameters for a legitimate understanding of rape—but it is to expand the scope of the concept to include potentially very many sexual activities that would not have been viewed as rape in the past.
We see, then, that understanding rape as an essentially contested concept does not mean that anything goes in defining rape. Viewing the concept of rape in this way opens up the door for new, broadened understandings, but it does not exclude the possibility of criticizing or even rejecting many definitions.

Conclusion

I have argued that rape should be viewed as an essentially contested concept, and that in viewing rape in this way we must understand the borderline cases of the concept as being determined by the debate or disagreement about the concept's extension, a debate that takes place within the parameters set by the appraisive meaning of the concept, the paradigms of rape, and the paradigms of good sex. When considering a concept such as this, we should expect that as our cultural appreciation of diverse perspectives evolves, the extension of the concept will expand to reflect the deepened understanding of the moral landscape that accompanies the introduction of new perspectives. As women's experiences come to be taken seriously, and as their experiences of sexuality and violation acquire a stronger voice in the debate about how far to extend the evaluative meaning of "rape," we should expect to see the gray area of the concept expand.

Thus, persuasive definitions, understood as those that extend the application of a concept beyond existing borders, can be legitimate so long as they take seriously the appraisive meaning and the relevant paradigmatic cases. Feminists do seem to be in the business of expanding the concept of rape beyond existing boundaries, but not all of them, and maybe very few of them, are thereby doing anything improper. What is improper is trying to prohibit or silence such alternative definitions—and, along with them, the theoretical and experiential perspectives that these definitions express. Any moral advances we make in the domain of human sexual relations will depend on our capacity to admit alternative voices into the discussion. An approach to understanding "rape" that does not permit changes in meaning over time is illegitimately going to exclude important perspectives, and hence will stifle rather than facilitate open discourse. At the same time, an approach to understanding "rape" that allows any definition whatever will undermine the usefulness of the concept for facilitating open discourse. The best way to avoid these errors, and hence to maximize our capacity to make meaningful progress in our moral debates about human sexuality, is to treat "rape" as an essentially contested concept.
Notes

1. Burgess-Jackson, I should point out, leaves open the possibility that redefining terms to extend beyond even the borderline cases might be justifiable (1995, 433). This paper can be seen as following up on this possibility as it applies to rape.

2. We have already seen that Podhoretz emphasizes physical violence or the threat of it, whereas Pineau emphasizes nonconsent. Burgess-Jackson (1996, 53–54) sees radical feminists as stressing degradation as the most central feature. More recently, Burgess-Jackson (1999, 93) has himself stressed the element of coercion. Penetration (of either vagina or anus) has long been taken as a central feature of rape—see, for example, the Model Penal Code, sec. 213.0(2). MacKinnon (1989, 172) is critical of this emphasis.

3. It does seem that some rapists are explicitly boastful of their actions, a fact that might call into question the universality of rape's negative appraisable character. But even the boastful rapist would object to being raped himself (and would presumably oppose the rape of, say, his mother). It is not that the boastful rapist fails to acknowledge the negative appraisable character of rape, but rather that he sees his own acts of rape as "justified" (perhaps by the perceived need to put his victim "in her place")—that is, he sees the prima facie wrongness of rape in general as overcome in his case by other considerations.

4. Here and throughout, I refer to "women's experiences" in the plural in order to make clear that there is no single monolithic women's experience of rape. That women may experience rape differently depending on their cultural and ethnic backgrounds is revealed by, among others, Kimberlé Crenshaw (1991).

5. Catharine MacKinnon (1983, 186) discusses this understanding of rape in "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence"; illuminating this view of rape is also a central theme in Susan Brownmiller's Against Our Will: Men, Women, and Rape (1976). This view is also discussed with some care by Burgess-Jackson (1995, 443–46).

6. For an extended discussion of marital rape, see Burgess-Jackson (1998, 1–22).

7. The way in which this proprietary dimension of traditional understandings of rape affects assessments of date rape is reflected in the Model Penal Code, which grades rape according to whether the victim was "a voluntary social companion of the actor upon the occasion of the crime" (section 213.1).

8. MacKinnon, for example, maintains that women's experience "does not so clearly distinguish the normal, everyday things from those abuses from which they have been defined by distinction. . . . What we are saying is that sexuality in these normal forms often does violate us" (1987, 86).

9. It may, however, be inappropriate to refer to them as "persuasive" definitions, since this term typically carries with it the implication that something illegitimate is being done—specifically, that value judgments are being inappropriately "smuggled into" a definition. Gallie's point seems to be that some concepts are so inextricably connected with normative judgments that conceptual debates are normative debates, and should be treated as such (1956).

10. James Gilligan (1996, 163–82) discusses rape in men's prisons in detail, suggesting that the number of such rapes each year in the U.S. is astronomical (perhaps as high as 9,000,000)—at least if one includes as "rape" the routine sexual relations of an
“old man” and his “wife” (where the “wife” is a physically weaker and younger inmate who put himself under the protection of his old man in order to avoid repeated violent gang rape). To treat such acts as rape is to take seriously the idea raised by MacKinnon (1989, 178) and others that “consent” given in a context of hierarchy and oppression may not be genuine consent.

11. For a detailed discussion of some of the complexities associated with “statutory rape,” see Burgess-Jackson (1996, 163–80). Among other things, he addresses the issue of whether age is a satisfactory measure of someone’s maturity or capacity for autonomous choice.

12. I am indebted to one of Hypatia’s anonymous reviewers for pointing out this line of objection.

13. Pineau spells out carefully the “rape myths” which make this sort of dismissal possible (1989, 225–29).

References


