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Coercion and Sexual Consent: A Discussion on Legitimacy

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Introduction

In this paper, I argue that pressure to have sex that falls short of actual, or threatened, physical force (that is, psychological pressure to have sex) vitiates sexual consent when it is coercive. This is a view shared by Sarah Conly (2004), who provides four necessary conditions for coercion. I motivate the first three of Conly's conditions, but note that the fourth condition – *illegitimacy* – stands out as suspect. According to this condition, the harm the coercer threatens to inflict upon their victim must be illegitimate (i.e. not within the coercer's rights to inflict) in order for coercion to take place. I argue that this is not the case. I present a case of coercion ('Deportation') in which this condition is not satisfied, but the other three conditions are satisfied. I accept, therefore, only three of Conly's necessary conditions for coercion. Deportation might lead one to think, however, that illegitimacy needs to be in the picture *somewhere* for coercion to take place. This is because although the harm threatened in this case is legitimate, one of the *consequences* of that harm is illegitimate. I argue that this is not the case either: I present a case of coercion ('Police Force') in which the harm threatened is legitimate, and in which there is no mention of illegitimate consequences. Indeed, there is no mention of any consequences of the harm whatsoever. Armed with the conclusion that illegitimacy does not need to be in the picture for coercion to take place, I turn my attention to a case ('Sam/Kim') where there is psychological pressure to have sex. I note that 'Sam/Kim' is analogous to 'Police Force' (it satisfies the three necessary conditions for coercion and there is no illegitimacy present), and so must also be a case of coercion. 'Sam/Kim' serves, therefore, as one example of when psychological pressure to have sex vitiates sexual consent. I conclude that (i) psychological pressure to have sex vitiates sexual consent when it is coercive, and (ii) psychological pressure is coercive when it satisfies three conditions: *intent*, *choice*, and *harm*.

§1 Coercion as Vitiating Sexual Consent

The 2003 Sexual Offences Act provides us with the legal definition of consent: an individual consents if she "agrees by choice, and has the freedom and capacity to make that choice" (Sexual Offences Act, 2003:74). From this, we can say that an individual consents to sex if (1) they make the choice to have sex, (2) they have the freedom to make the choice to have sex, and (3) they have the capacity to make the choice to have sex. I'll put aside the question of what it means to have capacity here, for it is the question of what it means to have freedom that is relevant to the topic of being pressured into sex. One very sensible way of cashing out the notion of 'freedom' is in terms of coercion, or rather, the absence of it: freedom (to choose) is just the absence of coercion (to make a particular choice). So, if an individual is coerced into choosing to have sex, then their choice to have sex is not a free one, and this means that condition (2) is not satisfied. If condition (2) is not satisfied, then the individual has not consented to sex. So, psychological pressure to have sex vitiates sexual consent when it is *coercive*. The next question to ask, then, is: when is psychological pressure to have sex coercive?

§2 Conly's Necessary Conditions for Coercion

In answering this question, Conly thinks that we should first consider the conditions we take to be necessary for an act to be coercive in general, and then see whether these conditions are met in cases where

there is psychological pressure placed on an individual to have sex. If one of the conditions is not met, then there is no coercion, and the sexual consent of the relevant individual is not vitiated.

Conly provides the following necessary conditions for coercion:

- (1) the coercer intends to coerce their victim;
- (2) the choice the coercer provides their victim with is unfree;
- (3) the degree of pain the coercer threatens to inflict upon their victim is great;
- (4) the choice the coercer provides their victim with is constrained illegitimately.

(2004:104-110)

Following Conly, let us call conditions (1) *intent*, (2) *choice*, and (3) *harm*. Let us call condition (4) *illegitimacy*, as opposed to *legitimacy*, for the purpose of clarity. I will briefly expand on these conditions here, starting with *intent*, before noting a particular implication of them.

Conly suggests that the intent to coerce is necessary for coercion because it is conceptually impossible for someone to be coercive without intending to be: “Accidentally doing something which causes another to decide to have sex with you can’t be considered coercive” (Conly, 2004:104). On reflection, this seems plausible. This is because coercion is something that takes place to fulfil a particular purpose – namely, to get another individual to behave in the way one wants – and so if one does not want another individual to act in a particular way, or if this is not on their mind at the time, then it does not seem as though they can be coercing that individual. They may be *pressuring* that individual, but they will not be coercing that individual. When it comes to the practicalities of determining whether coercion took place, we can say that if the coercer knew that they obtained their partner’s consent only through the pressure that they placed upon them, then *intent* has been satisfied (2004:105).

With regards to *choice*, it is important for Conly to establish what she means when she says that the choice the coercer provides their victim with is unfree. Conly takes the same approach that I do, explaining the lack of freedom in terms of the presence of coercion, making it clear why *choice* is a necessary condition: “... to say that the choice is not free is to say that she is placed under coercive pressure” (2004:105). She notes that to be placed under “coercive pressure” is to be put in a situation where you have no reasonable choice between picking the option that the coercer wants you to pick, and the other option(s) they have provided you with (2004:106).

One way to judge whether an individual has no reasonable choice between the options provided by the coercer is to consider the harm threatened in one (or more) of the options. This takes us onto *harm*. This is perhaps the most obvious condition of the ones that Conly provides, for the threat of harm is normally used to control the behaviour of others (e.g. legal punishments) and controlling the behaviour of others is precisely the aim of coercion. Conly recognises that it is difficult to determine the threshold at which the harm threatened is great enough for the choice between the available options to be unfree, but she notes that the harm threatened must be great enough to affect the decision process of the individual making the choice between the options. Importantly, the degree of harm threatened is normally a good indicator of whether an intent to coerce is present, with a high degree of harm suggesting an intent to coerce, and a low degree of harm suggesting a lack of intent to coerce.

Lastly, for coercion to take place, Conly states that the choice the coercer provides their victim with must be constrained illegitimately. A choice is constrained illegitimately when the harm threatened by the coercer in one of the options is not one they have a right to inflict upon the specific victim (2004:107). We can determine whether the coercer has a right to inflict a particular harm by considering their

relationship with the victim. When it comes to sex, then, whether or not the psychological harm threatened is legitimate will depend on the relationship between the two individuals in question. As Conly notes, in some relationships it is never legitimate to place psychological pressure on an individual to have sex (as in the case of teachers and children, parents and children, etc.), but that such pressure is legitimate in some relationships – specifically, adult relationships in which there is no authority being extended beyond its normal boundaries (2004:108).

An implication of these four conditions is that it is not coercive for an (adult) individual to say to their (adult) partner “If you don’t have sex with me, then I’ll break up with you”, even if they have the intention to motivate their partner, despite being aware of their reluctance (2004:108). This is not a case of coercion because although it may satisfy *intent*, *choice* and *harm*, it does not satisfy *illegitimacy*. It does not satisfy *illegitimacy* because it is within every individual’s rights to end a romantic relationship if they want to. That is, ending a romantic relationship with another person is a harm that every individual has the right to inflict on another (2004:110).

Whereas *intent*, *choice*, and *harm* are plausible conditions for coercion that are easy to motivate, *illegitimacy* does not strike me as plausible. This is because although the most *obvious* cases of coercion involve an illegitimately constrained choice, it is not clear that an illegitimately constrained choice is present in *all* cases of coercion. In what follows, I object to the claim that *illegitimacy* is a necessary condition for coercion.

§3 Objecting to Illegitimacy

Consider the following case:

A citizen and an immigrant are in a romantic relationship. The citizen says to the immigrant “If you don’t have sex with me, then I’ll break up with you”, intending to coerce them into choosing to have sex. The termination of the relationship will result in the deportation of the immigrant (let us suppose this is illegitimate), and this is something that both the citizen and the immigrant are aware of. The immigrant chooses to have sex with the citizen¹.

Call this case ‘Deportation’. I presume that most people would take Deportation to be a case of coercion. Importantly, the first three of Conly’s conditions are satisfied here: the citizen intended to coerce the immigrant into choosing to have sex (*intent*); the choice provided was unfree because ‘having sex’ was the only reasonable option available (*choice*); and the harm threatened (i.e. the termination of the relationship) was great, since it would result in the deportation of the immigrant (*harm*). *Illegitimacy*, however, is not satisfied. This is because, as noted, it is within every individual’s rights to end a romantic relationship if they want to. What we have, then, is a case of coercion in which *intent*, *choice*, and *harm* are satisfied, but *illegitimacy* is not satisfied. That is, we have a counter-example to the claim that *illegitimacy* is a necessary condition for coercion. Going forward, I will take only Conly’s *intent*, *choice*, and *harm* conditions as necessary conditions for coercion.

§4 Is Illegitimacy Still Required?

In Deportation, the harm threatened by the citizen was legitimate, but a consequence of the harm (i.e. the deportation) was illegitimate. This might lead one to think that illegitimacy needs to be in the picture

¹ Thank you to Katharine Jenkins for providing me with this example.

somewhere for coercion to take place. However, the following is a clear case of coercion in which there is no illegitimacy present:

A member of the public walks into a shopping centre with some knives, and they wave the knives around with the intention of causing harm. A scared civilian calls the police, and the police turn up a short while later armed with guns. They corner the knife-wielding individual, and one of them says: “Put down your weapons, or we’ll shoot!” The individual then puts down their knives.

Call this case ‘Police Force’. In Police Force, *intent*, *choice*, and *harm* are all satisfied: the police officer intended to coerce the individual into putting down the knives, and this is signalled by the degree of harm she threatened to inflict, as well as the fact that she was there to keep the public safe from the specific individual (*intent*); the choice provided was unfree because ‘putting down the knives’ was the only reasonable option available to the individual (*choice*); and the harm threatened (i.e. the shooting) was significant, since it would likely result in painful physical injury to the individual (*harm*). The harm threatened, however, is one that the police officer has a right to inflict for the purpose of public safety and protection (at least, this seems to be a right afforded to police officers in some countries – the United States, for example). So, like in Deportation, *illegitimacy* is not satisfied. However, unlike in Deportation, there are no illegitimate consequences. (Indeed, no consequences of the shooting are even mentioned.) This means that there is no illegitimacy in the picture in Police Force. Since Police Force is clearly a case of coercion, we can conclude that illegitimacy does not need to be present for coercion to take place.

§5 Returning to Cases of Psychological Pressure

Armed with this conclusion, I will consider a case where there is psychological pressure applied to an individual to have sex.

Sam and Kim are in a romantic relationship. Sam says to Kim “If you don’t have sex with me, then I’ll break up with you”, intending to coerce Kim into choosing to have sex. Kim is currently living in Sam’s house, and is also financially dependent on Sam. This is because Kim is struggling to find a job; she has few qualifications and little work experience, and there is currently an economic recession. If the relationship were to end, Kim would have to go back to live with her mother in small flat in a remote town, where jobs are even more difficult to come by. In short, the termination of the relationship would reduce – to a relatively large extent – Kim’s quality of life, as well as her potential for getting a job. Kim is also in love with Sam, and really does not want her relationship with him to end. Kim chooses to have sex with Sam.

Call this case ‘Sam/Kim’. In Sam/Kim, *intent*, *choice*, and *harm* are all satisfied: Sam had the intention to coerce Kim into choosing to have sex (*intent*); the choice was unfree because ‘having sex’ was the only reasonable option, given a number of background factors (*choice*); and the harm threatened (i.e. the termination of the relationship) was great, since it would result in large costs to Kim’s current (and future) quality of life (*harm*). However, the harm threatened is legitimate and the consequences that would result from the harm are legitimate, for Kim would not be treated in a way that she has a right not to be treated were the relationship to end. Kim would not, for example, become destitute upon separation from Sam. Destitution would be an illegitimate consequence because the state would not be treating Kim how it ought to, for it would not be providing for those in vulnerable positions in society. So, there is no illegitimacy in the picture in Sam/Kim. Importantly, Sam/Kim is analogous to Police Force, for *intent*, *choice*, and *harm* are all satisfied and there is no illegitimacy in the picture. This means that if Police Force is a case of

coercion, then Sam/Kim is also a case of coercion. Sam/Kim, therefore, serves as one example of when psychological pressure to have sex vitiates an individual's sexual consent.

One might disagree with the conclusion that Sam/Kim is an example of coercion. However, the burden is on them to show that there is something different about sex, or about psychological pressure, when it comes to matters of coercion that explains why Sam/Kim is not a case of coercion and Police Force is. I imagine that most people *would* find there to be a difference between Sam/Kim and Police Force, but that this difference is to do with how morally troubling the cases are. Most people would find the coercion in Sam/Kim (and also Deportation) to be very morally troubling (the coercion in these cases is *morally wrong*), but not the coercion in Police Force, and this will be (at least in part) because the coercion in Sam/Kim (and Deportation) vitiates consent where consent needs to be present and valid for ensuing actions to be morally correct.

Concluding Remarks

In this paper, I have argued that pressure to have sex that falls short of actual, or threatened, physical force vitiates sexual consent when it is coercive. I motivated Conly's *intent*, *choice*, and *harm* conditions as necessary conditions for coercion, and I rejected *illegitimacy* as a necessary condition. I also rejected the potential claim that illegitimacy needs to be in the picture *somewhere* for there to be coercion. I contend that psychological pressure to have sex is coercive, then, when it satisfies *intent*, *choice*, and *harm*.

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