Consent, Threats, and Offers

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Millum and Garnett distinguish between two types of coercion. On the one hand, there is what they call "standard analysis (…): one person proposing to make another person worse off if he does not comply with her demand, with 'worse off' understood as worse off relative to his pre-existing moral entitlements. On this view, therefore, a proposal is coercive only if it constitutes a threat to violate the other's rights, or to fail to discharge some duty owed to the other" (Millum and Garnett 2019, 4-5). Millum and Garnett call such coercion *consent-undermining coercion* because "[o]n this understanding of coercion, it follows from the fact that a token of consent was coerced that it is not fully voluntary and so is invalid" (Millum and Garnett 2019, 2).

On the other hand, there is what they call *coercion as subjection.* Person B is coerced into doing x in this sense if B was subjected to another person's will. More precisely: "in doing x, B has been subjected to A's will if (1) B does x because it is her only way of avoiding an eventuality that she considers to be unacceptably bad; (2) A has gotten B to do x by helping to make it true that x is B's only way of avoiding this eventuality; and (3) it is not the case that, in getting B to do x, A is motivated only by a set of considerations that also effectively motivates B to do x" (Millum and Garnett 2019, 9). Millum and Garnett claim that "[t]he moral force of coercion as subjection, by contrast [to consent-undermining], is *not* that it undermines consent. Instead, it is that it constitutes a particular kind of harm" (Millum and Garnett 2019, 16), and emphasize: since coercion as subjection "does not violate (…) pre-existing rights, and is not a threat but an offer" (Millum and Garnett 2019, 12), "it is *therefore* not coercive in a sense that undermines the voluntariness or the validity of (…) consent." (Millum and Garnett 2019, 12)

In this paper, I will challenge Millum and Garnett's view that distinguishing between these two types of coercion helps to decide whether an influence on a person's decision-making vitiates that person's consent. I will identify two cases of invalid consent where there is only *coercion as subjection* but not *consent-undermining coercion,* and conclude that

evaluating the validity of consent requires going beyond labelling influences as types of coercion and even beyond the difference between threats and offers.

Blackmailing

The *standard analysis* offered a particular take on threats: proposing to violate another person's right or not discharging a duty that is owed to a person. However, a person can also be threatened in cases of blackmail, which no longer propose to violate a person's rights or fail to discharge a duty. The blackmailer proposes to do what is *per se* a legitimate act. What makes the blackmailing proposal a threat and problematic is, firstly, that the proposed action would still infringe the blackmailed person's interests and, secondly, that there is an undue connection between the proposed act and what is demanded from the blackmailed person.

Consider the following example *Blackmail***:** Clinical Investigator Roger threatens to turn Peter in to the police for his drug crimes if he does not consent to enrolling in his clinical trial.

If Roger reports the crimes he neither violates Peter's rights nor a duty owed to him. Roger is entitled or even obliged to report crimes. Hence, his proposal to Peter is not a threat in the narrow sense put forward by the *standard analysis,* and if we rely on this narrow sense of threats, there is no *consent-undermining coercion* in the example of *Blackmail.*

On the other hand, Roger's proposal satisfies the criteria of *coercion as subjection*. (1) Peter enrolls because it is his only way to avoid what seems unacceptably bad to him: criminal prosecution and the potential loss of freedom. (2) Roger made it so enrolling is Peter's only chance to avoid prosecution. (3) Peter does not share Roger's motivation to secure sufficient recruitment for the trial.

So, Millum and Garnett's analysis suggests Peter's consent can be valid. Yet, Peter's consent clearly seems invalid. Roger blackmailed Peter by misusing the instrument of reporting a crime to foster his own purposes. He does not use the report of an offence as intended by the State but converts it into an instrument of power and domination. Most legal systems recognize that the link between proposing to do something one has a right to do and obtaining consent can vitiate consent. The law claims that blackmailing vitiates consent because a person's "power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from [him]" (Williams v Baylay) and because "(a) the defendant has no reasonable grounds for making the demand and (b) the threat

would not be considered by reasonable and honest people to be a proper means of reinforcing the demand" (*Al Nehayan v Kent [2018] EWHC 333 (Comm),* at [191]). These arguments are not specifically legal and also provide support for considering consent invalid from a moral perspective. Informed consent purports to protect against abuses of power asymmetry and to enable the person to decide on the basis of considerations pertinent to the medical procedure at hand. Roger abused the power asymmetry and, from the perspective of a professional medical interaction, did not have any morally reasonable grounds for making such a proposal either.

Hence, *Blackmail* presents a case of invalid consent where there is only *coercion as subjection* but not *consent-undermining coercion.* Therefore, drawing the distinction between these two types of coercion failed to determine whether consent is invalid.

Threats and Offers

Millum and Garnett may respond that my previous example relied on a very narrow understanding of threats, which could be modified and integrated into the concept of *consent-undermining coercion.* One could specify the difference between the two types of coercion with reference to the difference between threats and offers. If there is a threat (i.e. standard or blackmail), there will be *consent-undermining coercion.* If there is an offer, only *coercion as subjection* would be possible. But even on this refined understanding, the distinction between the two types of coercion fails to determine when consent is valid.

Consider the following variation of *Blackmail*, which I call *Last Minute Rescue***:** The police have received an allegation of a drug crime and will investigate Peter. Clinical Investigator Roger happens to be able to destroy a critical piece of evidence against Peter and offers to do so if Peter enrolls in Roger's clinical trial. Roger had nothing to do with the police initiating the investigation and had no prior medical relation to Peter.

The difference between *Blackmail* and *Last Minute Rescue* is that, in the former, Roger proposes to make Peter worse off by his own acts whereas, in the latter, Roger simply proposes not to prevent the occurrence of harm that is already underway. Therefore, Roger makes a genuine offer: he proposes to make an option available which Peter would not otherwise have and is not entitled to have (i.e. not being prosecuted). But Roger also refrains from proposing to *make* Peter worse off if he declines. Roger would simply do nothing in that case. And doing nothing is what Roger has a right to do (and probably even a duty).

So, the difference between *Blackmail* and *Last Minute Rescue* explains why there is a threat in *Blackmail* but only an offer in *Last Minute Rescue.* But does it also show that consent is invalid in *Blackmail* but valid in *Last Minute Rescue*?

Last Minute Rescue is certainly an instance of *coercion as subjection:* (1) Peter can avoid harm only by enrolling, (2) Roger made it so enrolling is Peter's only chance to avoid harm, (3) and Peter does not share any motivation with Roger. But *Last Minute Rescue* is not an instance of *consent-undermining coercion:* there is no threat, let alone a threat to violate Peter's rights. Hence, Millum and Garnett's view seems to suggest that Peter's consent can still be valid.

However, considering consent to be valid in *Last Minute Rescue* is the wrong result. The arguments against valid consent in *Blackmail* also apply in *Last Minute Rescue.* Roger misuses his power and there are still "no reasonable grounds for making the demand and (…) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand" (*Al Nehayan v Kent [2018] EWHC 333 (Comm),* at [191]). Therefore, if we accept the arguments against valid consent in *Blackmail*, it seems that we must also accept that Peter's consent in *Last Minute Rescue* is invalid.

Hence, *Last Minute Rescue* presents another case of invalid consent where there is only *coercion as subjection* but not *consent-undermining coercion.* As a result, the distinction between these two types of coercion, even on the modified understanding, fails to determine whether consent is invalid. I therefore conclude that evaluating the validity of consent requires going beyond labelling influences as types of coercion and even beyond the difference between threats and offers.

References

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