Introduction

Historically, in order to prove an allegation of rape it was necessary to show that sexual intercourse had been obtained by force and that the complainant had resisted the efforts of her attacker to the utmost. The requirements of force and resistance have long since been replaced by the consent standard with common law jurisdictions now typically defining rape as sexual intercourse without consent. However, as Munro points out, despite the formal abolition of the force requirement, in practice evidence of physical injury or at least the threat thereof (e.g. use of a weapon, words of violence) makes a conviction for rape more likely than when these features are absent. In her view, the use of force by the defendant, together with physical resistance and the suffering of non-trivial injuries by the victim, remain crucial evidential preoccupations, particularly in scenarios of acquaintance or intimate rape allegations, to the extent that securing a conviction in their absence is often difficult, if not impossible.

Thus, a gap between principle and practice seems to have emerged in this area of rape law. In principle, where a complainant submits to sexual intercourse as a result of a threat of non-violent harm such as job loss, this should be sufficient for a charge of rape to be brought. In practice, it remains difficult for such cases to result in a conviction. Consequently, the absence of force and resistance in many experiences of rape ‘ensures that a large share of

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sexual violence perpetrated upon women is never brought to the attention of, or is summarily dismissed by, the criminal justice system’.³

This article begins by highlighting the harm of non-violent sexual coercion. The current English law relating to sexual coercion is then examined with a view to considering, from a purely legal perspective, why it is difficult to obtain a conviction for sexual coercion which does not involve physical violence or threats thereof. Although it is argued that the current law is problematic, it is also posited that societal attitudes about rape are influential in the difficulties of recognising sexual coercion short of physical violence as a serious criminal offence. These attitudes are explored in order to ascertain the types of intervention which might make it more likely that non-violent sexual coercion would be recognised as a criminal harm. The article concludes by exploring the benefits of the introduction of a specific offence of obtaining sexual activity by threats.

**Understanding the Harm of Non-Violent Sexual Coercion**

At a principled level, it indisputable that sexual intercourse without consent is wrongful and should be recognised as rape. For consent to work its ‘moral magic’⁴ and separate sexual intercourse from a wrongful criminal act, it must be freely given by an individual with sufficient legal capacity to exercise sexual choice. For the purposes of this article, the requirement that consent must be freely given must be assessed with reference to the absence of coercion.⁵ To contextualise the discussion of sexual coercion, it is necessary to examine the spectrum of behaviour which could interfere with an individual’s ability to freely choose to engage in sexual activity. The clearest case of sexual coercion is where physical violence or threats thereof are used. If a woman is physically held down, restrained, and sexually violated, then, beyond any possible doubt, she does not consent to sex.⁶ Similarly, where such force is threatened, an individual cannot exercise a free choice. However, the threat or use of

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⁵ This requirement could also be assessed with reference to deception.
this type of physical compulsion represents but one end of a ‘continuum of coercion’.\(^7\) Threats of less egregious harms may be further along the continuum and yet be sufficient to undermine an individual’s ability to choose freely.\(^8\) Obviously, not all forms of coercive behaviour along this continuum will be serious enough to warrant the attention of the criminal law. For example, no-one would seriously suggest that a threat to discontinue a romantic relationship or to not take the complainant to a concert should be sufficient to vitiate an apparent consent to sex. Drawing a line between the types of threats which would negate consent will, of course, be a question of fact for the jury to decide. Nonetheless, it is worth engaging in a normative assessment of the types of sexual coercion which should be seen as worthy of the attention of the criminal law.

Schulhofer asserts that any conduct that forces a person to choose between her\(^9\) sexual autonomy and any of her other legally protected entitlements - rights to property, privacy and to reputation - is by definition improper and deserves to be treated as a serious criminal offence.\(^10\) Thus, as a general proposition, any threat to interfere with something which the complainant is legally entitled to should be sufficient to vitiate her consent to sexual activity. Since an individual has a right not to be subjected to physical violence, a threat to inflict such harm will vitiate consent but there are other legal entitlements which the defendant may threaten to interfere with which may be as compelling and wrongful as threats of violence. Similarly, there are some passive forms of coercion. This may arise where, for example, a relationship entails an inherent imbalance of power or where there is an on-going atmosphere of coercion where the threat is not expressly articulated but the defendant is taking advantage of his more powerful position in order to coerce the complainant into sexual activity.


\(^{8}\) Ibid.

\(^{9}\) In this article complainants and defendants are referred to, respectively, in the feminine and masculine gender. This is not done to deny either the reality of male rape or the fact that women may also commit sexual offences. Rather, this approach to terminology is chosen largely for simplicity and is in the author’s view, justified on the basis that, in general, the majority of adult sexual offences are committed by men upon women. See: Ministry for Justice, Home Office & the Office for National Statistics, *An Overview of Sexual Offending in England and Wales* (Ministry for Justice, Home Office & the Office for National Statistics, 2013), chapter 2.

A good example of non-violent sexual coercion is the threat of job loss. Consider a scenario where an employer or superior threatens an employee that he will dismiss her if she does not have sexual intercourse with him. Certainly, the employer or the superior may be censured under sexual harassment provisions.\textsuperscript{11} However, ‘quid pro quo harassment’ (i.e. threatening an employee with dismissal unless she has sex with her employer) should be seen as more than just discrimination, but as a criminal harm as well.\textsuperscript{12} If the threat of job loss has coerced the employee into submitting to sexual intercourse against her will then it is rape in the same way that submission in the face of a threat of physical harm is. As McGregor notes, at least in some such cases, the employee who is threatened may have no viable alternative but to acquiesce because the loss of her job would constitute a serious, undeserved evil.\textsuperscript{13} Certainly, the complainant could ‘just say no’ or, alternatively, leave her job but it may not be that straightforward. As Schulhofer points out, in a situation like this, should the employee refuse and stay in her current employment, she may fear future retaliation from the employer and usually she cannot ‘just quit’ because she may have invested months or years developing skills and personal contacts that cannot be easily transferred to another firm.\textsuperscript{14} Indeed, depending upon the industry or profession involved, or, the prevailing economic climate, an individual may experience difficulties in finding another job. In a complex situation like this, it cannot be said that the employee who submits to her employer’s request has freely consented to sexual activity.

Blackmail is another means whereby an individual may be deprived of her freedom to choose to engage in sexual activity as a result of a threat to interfere with one of her legal entitlements (i.e. her right to privacy). Where an individual submits to sexual activity because of a threat that a secret will otherwise be revealed, this cannot be said to be an autonomous choice. Of course, whether the blackmail involved is sufficiently serious to warrant the attention of the criminal law will largely depend on the nature of the secret which the defendant has threatened to reveal and/or the nature of the relationship between the complainant and the defendant. A threat to reveal a clandestine extra-marital affair may be viewed as sufficient to vitiate an apparent consent to sexual activity, whereas a threat to

\textsuperscript{11} Section 26(2) of the Equality Act 2010 provides for sexual harassment which is recognised as discrimination which the employer may be held liable for.
\textsuperscript{12} See McGregor, above n. 7 at 70.
\textsuperscript{13} Ibid, at 165.
\textsuperscript{14} See Schulhofer, above n. 10 at 184.
reveal the fact that the complainant dyes her hair or has had plastic surgery probably would not. Where the blackmail involved is sufficiently egregious (e.g. where it involves abuse of a position of trust\textsuperscript{15}) it should be recognised as a form of sexual coercion which the blackmailer should potentially be held criminally liable for.

Sexual coercion does not necessarily need to involve overt threats. A threat may be implied or the nature of the relationship may be inherently coercive so that an individual’s capacity to freely agree to sexual activity is negated. An example of the latter scenario arises where professionals who hold a position of power relative to clients abuse this in order to gain inappropriate sexual access to them. Most individuals who seek help from medical professionals, mental health professionals or even lawyers\textsuperscript{16} ‘do so in an admitted position of vulnerability, coping with a physical or psychological problem, a threatening legal matter, or perhaps simply the vulnerability intrinsic to lack of knowledge’.\textsuperscript{17} In this context, threatening to withdraw services or to reveal personal information could be highly coercive.\textsuperscript{18} Indeed, within such a relationship, where sexual activity is proposed by the stronger party, the threat may not even need to be expressly articulated. The implication that support may be withdrawn or secrets revealed could be enough to overcome the will of the weaker party.

Admittedly, conduct like this is prohibited by the codes of conduct of the majority of professionals and those who make such direct or indirect threats to clients could be liable for professional censure if a formal complaint is made to their professional body. Indeed, there is considerable evidence of censure of doctors for engaging in sexual relationships with their patients. A recent Australian study on removal of doctors from practice for professional misconduct\textsuperscript{19} has found ‘near zero tolerance’ for sexual relationships between doctors and

\textsuperscript{15} Abuse of trust within special relationships of trust and confidence is discussed below.

\textsuperscript{16} The potentially coercive nature of lawyer-client sexual relationships is not, perhaps readily apparent. However, ‘vulnerability to abuse of power or trust is especially acute when a client’s legal problem is emotionally charged’ such as in divorce cases, child custody cases and in many criminal cases: See Schulhofer, above n. 10 at 248.


\textsuperscript{18} For a full discussion of the potential for coercion inherent in professional-client relationships, see Schulhofer, above n. 10, chapters 10 and 11.

In England, a number of newspaper reports have highlighted doctors being censured for engaging in sexual relationships with patients. There have also been reports of other members of the caring professions (including a social worker and nurses) being struck off their professional registers for engaging in sexual relationships with those in their care. Whilst professional censure is an important consequence of such abuse of authority, where professionals obtain sexual intercourse by coercive means this should also be recognised as a criminal offence.

Abusive intimate relationships also provide a setting where there is potential for non-violent sexual coercion. Obviously, in these relationships sexual activity may be obtained by violence or threats thereof but the threat could also be an implied unspoken threat of a future escalation in violence or other abusive behaviour in the event of a refusal of sexual advances. Although there may be no violence directly involved or threatened in this scenario, it is hardly true to say that the complainant has freely consented to sexual activity.

All of the scenarios listed here are ‘non-violent’. There is no violence extrinsic to the sexual act itself and no threats of physical harm such as beating or assaulting with a weapon. In some examples the threat is implicit and hails from the coercive nature of the relationship or the circumstances the complainant finds herself in. Nonetheless, it cannot be said that any of these situations provide an opportunity to exercise genuine sexual choice. Rather, these are examples of coerced sexual activity which should be recognised as serious offences. In all of these examples, the defendant has interfered with what Feinberg refers to as the

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20 Ibid. at 1031.
22 For the report of the decision of the Scottish social services council see: [http://www.sssc.uk.com/Protecting-the-Public/conduct-hearings.html](http://www.sssc.uk.com/Protecting-the-Public/conduct-hearings.html) (Last accessed: 26th November 2013).
complainant’s ‘option-network’. The defendant has ‘close[d] tight the conjunctive option that consists of [the complainant’s] non-compliance with the demand and [the complainant’s] avoidance of the threatened unwelcome consequences’. This behaviour should attract the attention of the criminal law. Despite the wrongful nature of the sexual coercion in all of these scenarios, the capacity of English sexual offences legislation to recognise these harms is limited.

The Current Law on Sexual Coercion

Section 74 of the Sexual Offences Act 2003 provides that ‘…a person consents if he agrees by choice and has the freedom and capacity to make that choice’. Sections 75 and 76 contain a list of situations which, respectively, give rise to evidential and conclusive presumptions that consent is absent. The situations listed in section 75 include those where any person was using violence against the complainant or causing the complainant to fear that immediate violence would be used against him or against another person. Although the statutory clarification of consent provided in the 2003 Act is to be welcomed, it does not really improve the prospects of obtaining a conviction for sexual coercion without extrinsic physical violence. Section 75 is limited to situations where ‘violence is being used against’ or where ‘threats of immediate violence’ are made against the complainant. In this context, ‘violence’ has been interpreted as being restricted to acts of physical harm. The immediacy requirement seems to imply a fairly strict temporal limitation on the validity of a threat and has been criticised. It is unclear why a threat of future violence undermines sexual autonomy in much the same way as a more immediate risk. A threat of future violence may be distant in time but such that one can do nothing between now and then to avoid it. Immediacy is not essential for a threat to infringe an individual’s ability to freely choose to engage in sexual activity.

25 These provisions also apply to the defendant’s mens rea regarding consent, raising conclusive and rebuttable presumptions about the defendant’s belief in consent. A discussion of the mens rea aspect of these provisions is outside the scope of this article.
26 The violence does not have to have been used or threatened by the defendant.
27 Sexual Offences Act 2003, ss 75(2)(a) and (b).
28 Ormerod notes that it is clear from the parliamentary debates that ‘violence’ was intended to be limited only to violence to the person: D. Ormerod, Smith & Hogan Criminal Law, 13th edn (Oxford: Oxford University Press, 2011) 728.
30 See Archard, above n. 6 at 51.
Obviously, threats of harm other than physical violence may be dealt with under the general definition of consent in section 74. Unfortunately, to date, there has been no comprehensive judicial discussion of the types of coercion which are incompatible with a free agreement to engage in sexual activity as per section 74. Some indication of the likely interpretation of freedom can be gleaned from existing judgments. Fitzpatrick comments that the decision in *R v Jheeta*31 provides an indication of the types of pressures which may invalidate an apparent consent to sexual activity. The defendant sent text messages to the complainant, pretending to be the police and told her that she should continue to have sexual intercourse with the defendant or else she would have to pay a fine for causing him distress. In Fitzpatrick’s view, the decision accepts that the pressures in that case (i.e. threatening the complainant with a fine if she does not consent to sexual activity) are capable of vitiating consent.32 Whilst Fitzpatrick makes an interesting point, the court’s focus in *R v Jheeta* was on deception.33 Since there was no express discussion of threats, any conclusion on the relevance of the court’s decision for possible future interpretations of ‘freedom’ should be treated with caution.

A more relevant guide to the court’s possible understanding of ‘freedom’ may be found in *R v Kirk*.34 This case involved a fourteen-year-old girl who had run away from home. She went to the place of work of a man who had previously abused her and agreed to sexual intercourse in order to obtain the money to buy food because she needed to eat. The trial judge explained to the jury that the prosecution case was that the appellant had taken advantage of a hungry and vulnerable child whom he knew had been abused by his brother and to a lesser extent himself, which meant she was submitting because her will was overcome by hunger and desperation, and that did not represent a true consent.35 The defendant was convicted of rape. Although *R v Kirk* was decided before the introduction of the Sexual Offences Act 2003, Rook and Ward argue that the result would have been the same had the defendant been charged with rape under the current law.36 Nonetheless, they concede that it is ‘perhaps

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31 [2007] EWCA Crim 1699.
33 The Court of Appeal commented that the defendant ‘created a bizarre and fictitious fantasy which, because it was real enough to [the complainant], pressurised her to have intercourse with him more frequently than she would otherwise have done’: [2007] EWCA Crim 1699, para 28.
34 [2008] EWCA Crim 434.
36 Ibid.
debatable whether the case could properly have been left to the jury if there had been no prior history of abuse between the parties, which must have left the complainant in a psychologically vulnerable state’. 37 The latter view would seem to be more correct. The broad interpretation of coercion adopted here might owe largely to the complainant’s age and vulnerability. 38 It remains unclear what stance the courts are likely to take towards threats of adverse consequences other than physical violence under the 2003 Act. Much uncertainty persists as to whether the types of non-violent sexual coercion discussed in this article are incompatible with freedom to exercise sexual choice as per section 74.

An attempt to curb some of this uncertainty can be found in the Crown Court Bench Book 39 which provides an illustration for judges who wish to instruct jurors on the absence of force or the threat of force. The guidance makes clear that rape ‘may or may not be accompanied by force or the threat of force’ and clarifies ‘that it is no part of the prosecution’s obligation to prove that the defendant used force or the threat of force’. 40 The bench book also states that ‘submission achieved by persistent psychological coercion so that free choice was overborne will not amount to consent freely given’. 41 Whilst the availability of this type of instruction is beneficial and represents an important statement of principle, its impact is limited. First, the guidance is vague and should go further in explaining the types of non-violent coercion that might vitiate consent to sexual activity. Second, it is unclear how much jurors are influenced by this type of direction. It will be seen below in the discussion of mock jury research in this area that the ‘force requirement’ (i.e. the societal tendency to expect a genuine allegation of rape to involve acts of physical violence) is particularly tenacious and may continue to operate in jurors’ minds even after they have been directed that any form of coercion is capable of eliminating the potential for genuine sexual choice. 42 Finally, and perhaps most notably, the bench book guidance here is of limited effect as it is only operative when a case actually gets to trial. Prosecutors will not bring a case to court unless there is a

37 Ibid.
38 It is noteworthy that, despite the complainant being under the age of consent at the time of the alleged incident, the defendant was not charged with a statutory rape offence.
40 Ibid, at 358.
41 Ibid.
42 The mock jury research which supports this contention is discussed in the next section.
reasonable prospect that it will result in conviction.\textsuperscript{43} Without legal clarity on when non-violent sexual coercion is criminally liable, prosecutors may be reluctant to bring such cases to court. Thus, although the bench book guidance is worthwhile, it does not go far enough to dispel the uncertainty in this area.

Unfortunately, in rape law, ‘flexibility almost inevitably means under-enforcement and non-compliance’.\textsuperscript{44} Without more overt guidance on coercion, it is likely to be difficult for prosecuting counsel to convince a jury beyond reasonable doubt that consent to sexual activity is absent in a case involving non-violent threats. Of course, the problems in this area are not entirely legal. The absence of more specific legal guidance on this issue is regrettable but part of the reason why this lack of clarity is problematic is the space it creates for jurors to rely on their own attitudes about sexual offences in order to determine whether a criminal offence has occurred. It will be seen below that these attitudes may be influenced by rape myths which persist in society. Most relevant in this respect is the ‘real rape’ stereotype which creates an expectation that a genuine allegation of rape involves physical compulsion.

\textbf{Jurors’ Perceptions of Non-Violent Sexual Coercion}

Mock jury research published by Ellison and Munro\textsuperscript{45} has demonstrated that the ‘real rape’ stereotype of the violent attack by a stranger continues to hold some prominence within society and creates an expectation that a genuine allegation of rape will involve a certain degree of physical force which is substantiated by evidence of physical injury. Although there are no studies which address jurors’ reactions to threats other than those of physical violence, the level of physical violence and injury expected by participants in these mock jury studies suggests that non-violent coercive sexual practices are not likely to be seen as rape by jurors.

\textsuperscript{43} The CPS operates will not bring a case to court unless there is a ‘reasonable prospect of conviction’ against the accused: Crown Prosecution Service, \textit{Prosecutions: The decision to prosecute}, available at: http://www.cps.gov.uk/publications/docs/decision_prosecute_2013.pdf (Last accessed: 11\textsuperscript{th} December 2013).

\textsuperscript{44} See Schulhofer, above n. 10 at 31.

Ellison and Munro found that in mock jury studies involving a rape scenario where the complainant showed no signs of physical injury, jurors ‘routinely emphasized the significance of this to their not guilty verdicts’. Indeed, they noted that the jurors’ ‘commitment to the belief that a “normal” response to sexual attack would be to struggle physically was in many cases unshakeable’. Significantly, jurors expected high levels of physical injury in order to be convinced that the complainant did not consent. According to the researchers:

…there were many participants who, in order to be convinced of the complainant’s account, would rather unrealistically require her to exhibit injuries that were not only severe but unambiguously attributable to the deliberate infliction of unwanted violence.

Thus, more minor injuries such as bruising or scratches that could be attributed to ‘rough sex’ or perhaps alternatively explained were not seen by juries as sufficiently corroborative of the complainant’s account of non-consensual sex. Jurors were also disinclined to believe that a complainant might freeze in the face of a defendant’s threats and thus be unable to fight back or offer resistance. Even in studies where the mock jurors received guidance on victim reactions to rape which informed them that it is a normal reaction to freeze during a sexual attack, ‘most jurors continued to expect the complainant to offer some sort of resistance, even if it was only to slap, scratch or knee her alleged assailant- and to have sustained some injury as a result’.

Subsequent research by Ellison and Munro reveals similar results. The researchers noted that in this study there was an expectation ‘and indeed a de facto’ requirement that the complainant physically resist and/or use force where it was clear that her verbal protestations

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47 Ibid. at 286.
48 Ibid. at 287.
49 For example, one juror sought to explain minor injuries as owing to activities such as aerobics or sailing prior to the incident. Some jurors even went so far as to suggest that the bruising could have been deliberately self-inflicted to support a fabricated rape allegation: Ibid. at 286.
50 While some jurors were willing to accept that an individual might freeze during an attack, for many, this was only believable where the perpetrator was known to the victim. In addition where jurors accepted that a complainant might freeze, a level of internal injury such as vaginal trauma was expected: Ibid.
were not being taken on board by a defendant’. As with the earlier study, jurors ‘exhibited a strong and, in many cases, unshakeable expectation that a genuine victim of rape would engage in vigorous physical resistance against her attacker, and that, as a result, there would be corroborative evidence of injury on the body of either’. While some jurors accepted that a woman could freeze during a sexual attack as a result of fear or shock, ‘for the vast majority of participants, this type of “freezing” response was only really considered plausible in the context of a surprise attack by an unknown assailant’.

The foregoing suggests that jurors expect physical violence to form part of a ‘real rape’. The jurors in Ellison and Munro’s studies were only willing to accept that a complainant was coerced into sex if she was subjected to physical compulsion and they sought evidence of this in the form of physical injury. This indicates a narrow understanding of coercion which is confined to physical force with a corresponding lack of appreciation of the coercive effect of other forms of non-violent threats. Consequently, an allegation where a complainant has submitted to sexual intercourse because of threats of adverse consequences such as job loss or damage to reputation seems unlikely to be viewed as sufficiently grave to contra-indicate consent.

Of course, it would be imprudent to accept the findings of this research without question and there are some concerns which may be raised about the method of mock jury research. It is also necessary to acknowledge other factors which may contribute to the difficulties of proof in rape cases involving non-violent coercion. With regard to methodology, questions might be posed about the ‘mock’ or artificial nature of research like Ellison and Munro’s. First, it is questionable whether the sampling method provides a mock jury which replicates a real jury. There is an element of self-selection in a voluntary study which is not reflective of reality where jurors are chosen at random from the electoral register. Self-selection obviously influences the composition of a mock jury and it may be dangerous to assume that the deliberations and views expressed are representative of real juries. Those who volunteer to take part in studies like these ‘may display a particular disposition towards community

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53 Ibid. at 315.
54 Ibid, at 315.
activities, etc. that may influence their thinking, or a particular sensitivity to, or concern about, the specific subject-matter’. However, in Ellison and Munro’s most recent study, when participants were asked whether sexual offences were a particular concern to them, ‘the vast majority answered negatively’. Hence, self-selection might not generate a sample that is unrepresentative of the composition and deliberations of a real jury. In addition, in this study, Ellison and Munro paid participants in an attempt to further off-set any potential bias caused by self-selection.

The second potential limitation of mock jury research is that trial simulations may be inadequate or unrealistic, particularly if they rely on brief vignettes or even written transcripts of trials. Certainly this is a restriction and there can be no substitute for a full-length trial. Nevertheless, Ellison and Munro sought to maximise the realism of the mock trials which their participants viewed. The simulations lasted approximately seventy-five minutes and jurors deliberated for approximately ninety minutes. Actors played the roles of complainant, judge and barristers and were scripted in order to reflect, as far as possible, a real trial. Although an abbreviated simulation is substantially different to a real trial, the studies discussed here have sought to minimise this limitation as much as possible. The final concern about mock jury studies is the artificial nature of the deliberations. Participants know that their verdict does not impact upon the fate of a real defendant. However, Finch and Munro note that there is ‘ample evidence that mock jurors, despite their “pretend” role, do become highly involved in the deliberation process, often taking their task as jurors very seriously indeed’. In Ellison and Munro’s most recent study, they found ‘considerable evidence…that suggested that participants genuinely engaged with the task in hand, taking their deliberations seriously, commenting at times upon the implications of their verdict for the defendant or complainant, and remarking at the close of discussions on the stress the

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55 Ibid. at 306.
56 Ibid. at 306.
57 Ibid.
deliberations had caused them’. Thus, although there are limitations, the studies discussed here have off-set them as far as possible. In any event, since research with real juries is prohibited, mock jury studies offer the only available insight into jury deliberations. Whilst it is true that ‘generalisations to real-life situations and conclusions about policy implications need to be made with caution’, the findings of these studies are still both valuable and telling.

It is also necessary to acknowledge that juror reluctance to find a defendant guilty of rape where there is no evidence of force is not solely the result of stereotypical attitudes about rape. The desire to see physical injury in order to be convinced that sex was non-consensual must be considered in light of the ‘oath against oath’ nature of rape cases. Physical injury is highly probative. In cases where it is lacking, it is simply the complainant’s word against the defendant’s. Such cases may often be seen as ‘too close to call’ and for jurors who must be sure beyond reasonable doubt that the defendant is guilty, the only option is to acquit. In Ellison and Munro’s research, it was found that even where jurors did not see force as a constituent element of the act of rape it was required to ‘act as a necessary corroboration of the complainant’s account, without which it was often felt that the conviction would be unsafe’. Nonetheless, the study demonstrates a general reluctance to recognise sexual coercion without physical violence that cannot be entirely explained by the requirement of certainty beyond reasonable doubt of the defendant’s guilt in ‘hard cases’ where the level of coercion and its effect on the complainant is more difficult to adjudicate upon. The level of scepticism regarding the likelihood of a complainant’s will being overborne by coercive forces other than physical violence can only be attributed to a continued degree of attachment to the force requirement on the part of jurors. It is clear then that there is a societal expectation that a ‘real’ allegation of rape will involve a certain degree of force and the current legal guidance on sexual coercion is not sufficiently comprehensive to counter this. It

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61 See Ellison and Munro, above n. 59 at 206. Similar outcomes were witnessed in their 2013 study: above n. 52 at 303.
62 Contempt of Court Act 1981, s. 8.
64 Temkin and Krahé note that, ‘despite its artificial nature, the mock jury paradigm has generated findings relevant to understanding the process of jury decision-making in the real world’: Ibid.
65 See Ellison & Munro, above n. 59 at 206.
is necessary to consider how the law can send a message that non-violent sexual coercion should be recognised as a crime.

The Possibility of Introducing an Offence of Obtaining Sex by Threats

One means of increasing certainty regarding the criminal nature of non-violent sexual coercion is to introduce a specific offence of obtaining sex by threats. Previously, such an offence was to be found in section 2 of the Sexual Offences Act 1956 which provided that procuring sexual intercourse with a woman through threats or intimidation was an offence punishable by a maximum penalty of two years’ imprisonment. This offence was probably intended to deal with the individual who procured the woman to have intercourse with a third party but it was also capable of applying to someone who caused the woman to have intercourse with himself. Threats and intimidation were not defined in the Act. The offence covered circumstances where the consent of the victim was induced by threats which were ‘insufficiently serious to negative consent for the purpose of rape’. An example of a case where this offence was used is *R v Harold*. The defendant was found guilty of obtaining sex by threats where he threatened to disclose to the complainant’s employers that she had previously worked as a prostitute unless she agreed to have sexual intercourse with him. This suggests that the offence provided a viable means of punishing the types of non-violent sexual coercion which have been considered here.

Section 2 of the 1956 Act has been repealed. The Sex Offences Review had recommended that the offence be retained in a modernised form. Although the Review noted that the offence was very rarely used, possibly because the maximum penalty was only two years

66 S 2(1) of the Sexual Offences Act 1956 provides that: ‘It is an offence for a person to procure a woman, by false pretences or false representations, to have sexual intercourse in any part of the world’. English law also included the offence of procuring sexual intercourse by false pretences which was also punishable by two years’ imprisonment: Sexual Offences Act 1956, s. 3.

67 As the offence refers to a ‘person’ threatening or intimidating a woman, a female or a male could have been guilty of this offence. The female defendant could not be guilty of procuring another woman to commit an act of sexual intercourse with herself, but could be liable where, by her threats, she procured the victim to have sexual intercourse with a man.: D. Selfe & V. Burke, Perspectives on Sex, Crime and Society, 2nd edn (London: Cavendish Publishing Ltd., 2001) 116.


69 See Selfe & Burke, above n. 67 at 117.


71 See Selfe & Burke, above n. 67 at 117.

72 Sexual Offences Act 2003, s. 140 (read in conjunction with Schedule 7).
imprisonment, it was suggested that this was not in itself sufficient reason to say that it was no longer needed. The Review recommended that the offence be retained in a gender-neutral format (i.e. that it could be committed by a man or a woman upon a man or a woman). This recommendation has since been echoed by Ormerod who suggests that a broader gender-neutral version of causing sexual activity by threats would have provided a useful backstop offence for cases in which the threats are non-violent so that the jury were not sure there was a lack of consent, but considered the conduct blameworthy.

Given the difficulties of obtaining a conviction for sexual coercion without extrinsic violence, it is worth considering the re-introduction of this offence in a gender neutral format with a higher penalty which properly reflects the gravity of the harm involved. The availability of such an offence would make it more feasible for prosecutors to bring charges in cases involving threats of job loss, blackmail or abuse of a position of authority. While a jury is likely to be reluctant to recognise such a situation as a rape, they may be more willing to find the defendant guilty of this lesser offence. The stigma attached to the label ‘rape’, alongside the maximum sentence of life imprisonment contributes to jurors’ reluctance to return a guilty verdict in anything but the most egregious and clear cases of rape. The availability of a lesser offence avoids these two obstacles to a guilty verdict and increases the likelihood of non-violent sexual coercion being recognised as a serious offence. As Dripps notes, when the law seeks to change social attitudes, lighter penalties increase the probability that juries will convict. The creation of this lesser offence offers a conduit to bypass stereotypical attitudes by offering an alternative offence which allows for circumvention of juror debates as to whether the incident is a ‘real rape’. However, whilst the re-introduction of this offence has advantages, there are a number of potential problems with such a move which must be addressed.

74 Ibid. at para. 2.18.7. The Review recommended that this offence should also include obtaining sex by deception. A discussion of this latter aspect of the recommendation is outside the scope of this article.
75 See Ormerod, above n. 28 at 728.
76 Commenting whilst the original offence was still in force in English law, Smith suggested that an appropriate maximum punishment for such an offence would be five years imprisonment: See Smith, above n. 68 at 464. A more substantial sentence of ten years is probably more appropriate in order to full reflect the gravity of sexual coercion. However, the most suitable sentence for the proposed offence is best decided with reference to criminal justice stakeholders and the views of participants in mock jury research.
Perhaps the most serious concern raised by this offence relates to labelling. English law currently makes clear that any non-consensual sexual intercourse is rape. It does not matter whether consent was vitiated by force or another form of non-violent coercion—as long as sex is non-consensual, it is rape. The introduction of this lesser offence would effectively depart from this position by stating that where sexual intercourse is obtained by what might be seen as a more minor threat, this amounts to a lesser offence. Thus, it is necessary to consider the symbolic message sent to complainants and to society more generally if obtaining sexual intercourse by non-violent threats is recognised as a lesser offence than rape. In addition, as the defendant will be liable for a more minimal punishment there may be concerns that this suggests that this type of conduct attracts less opprobrium than obtaining sexual intercourse by force (which would be punished as rape). These are certainly highly sensitive issues which must be given full and frank consideration in consultation with victims’ groups and other interested criminal justice system stakeholders. However, when addressing these concerns, it is necessary to balance labelling and symbolism with the pragmatic goal of punishing sexual violence effectively.

At the moment, the types of coercion considered here are not being punished by the criminal justice system at all. Even though it is not ideal from a labelling perspective that this activity would be charged and punished through the medium of an offence other than rape, it is important to balance this against the potential for this behaviour to avoid any form of censure and go unpunished. It must be questioned whether it is more important to have the appropriate label on the offence or to have the harm visited upon the complainant formally recognised and the defendant appropriately punished. Symbolism is enormously important, as is the normative message which the law sends about appropriate sexual behaviour. At the same time, the present situation is that many forms of sexual coercion can be performed with impunity. This also sends a message and results in certain forms of sexual violence occurring without sanction meaning that there is a potential for re-offending and further victimisation. There is undoubtedly an important choice to be made here and it must of course involve consultation with victims groups and other criminal justice stakeholders. However, arguably it is more important that the harm of non-violent sexual coercion is formally recognised and punished rather than the label which is attached to the charge. Symbolism is important, but so is formally recognising and punishing all forms of sexual violence.
A concern that is linked closely to labelling is gradation, that is, by creating this new offence we are effectively creating a hierarchy of non-consensual sexual intercourse with the traditional form (rape) being viewed as more serious than the new offence. The problem here is the message sent about the relative gravity of these offences, as well as the opportunities for plea-bargaining created.\textsuperscript{78} Undeniably, the introduction of an offence of obtaining sexual intercourse by threats would result in a form of gradation. However, gradation of offences is a feature of all of our criminal law and English law already contains a number of non-consensual sexual offences against adults which are subject to varying punishments.\textsuperscript{79} The existence of these offences already results in a significant level of gradation and the creation of one more offence does not substantially increase the degree of gradation which already exists in this area. Related to concerns about gradation is the potential for plea-bargaining. This is not a formally recognised practice in England. Even if plea-bargaining occurs on an informal basis, there is already ample opportunity for this practice under the current laws.\textsuperscript{80} For example, a defendant might plead guilty to sexual assault or a statutory rape offence in order to avoid a charge of rape. Whilst of course there is a risk that a defendant might plead guilty to this lesser offence in order to avoid a rape charge, the potential for this to occur will not be a new prospect. Moreover, if some form of bargaining is to occur in a case involving non-violent sexual coercion, it would be more accurate for a defendant to plead guilty to the proposed offence rather than one of, for example, sexual assault as the former more accurately encapsulates the harm done to the complainant.

The final objection which might be made to the creation of this offence is that it adds another layer of complexity to an already knotty area of the law. Related to this objection are two potential and divergent undesirable consequences, namely, that the offence will be over-used and result in unnecessary net-widening of criminal liability or alternatively that the offence will be rarely used. As regards complexity, English sexual offences law is at times difficult to navigate and contains a large number of offences. The addition of one more offence is unlikely to result an excessive increase in complexity. This offence existed previously so there is precedent for its position on the statute books. Related anxieties about over or under-use are also relatively easy to dispel. Certainly, line-drawing will be necessary to ensure that

\textsuperscript{78} J. Temkin, Rape and the Legal Process, 2\textsuperscript{nd} edn (Oxford: Oxford University Press, 2002) 152.

\textsuperscript{79} That is rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent: ss 1-4 of the Sexual Offences Acts, respectively.

\textsuperscript{80} See Temkin, above n. 78 at 152
the offence is not used to punish trivial forms of coercion which should not attract the attention of the criminal law. There is no reason to suspect that sensible prosecutorial policy would not be sufficient to ensure that such lines are appropriately drawn. The precedent for sensible use of such an offence has been set by previous version in the 1956 Act. Admittedly, the previous legislation has shown the potential for the offence to be rarely used but this is not a reason not to implement it. If it can produce justice in even a handful of cases, it is worth having. Sensible prosecutorial policy will again be critical here. The modernisation of the offence may also increase its usage. The limited use of the original incarnation of this offence has been attributed to the low penalty, as well as the archaic connotations of the original offence which was introduced due to concerns about what is referred to as the ‘white slave trade’ (i.e. concerns about women being forced into prostitution as a result of dire financial circumstances). A revised and modernised version of the offence with an increased penalty may contribute to prosecutors being more willing to use the offence to aid them in punishing offenders where they might otherwise be reluctant to bring a case.

Ultimately, the primary concerns are principled ones regarding gradation and labelling. Both issues cut both ways. Labelling and gradation lie at the root of the current difficulties in obtaining convictions for non-violent sexual coercion. The label ‘rape’ and its accompanying maximum punishment of life imprisonment contribute to jurors’ reluctance to find a defendant guilty where sexual activity is obtained as a result of non-violent coercion. As Kalven and Zeisel suggest, often when juries do not convict in a rape case, their ‘stance is not so much that involuntary intercourse under these circumstances is no crime at all, but rather does not have the gravity of rape’. The introduction of the offence suggested here offers a new alternative for jurors who might be unwilling to recognise non-violent sexual coercion as rape with its attendant severe penalties. As McGregor points out, when offences are distinguished and their seriousness graded, ‘we can preserve the intuition that one is more serious than the other without denying altogether that the lesser, unaggravated rape is still a crime.’ In this way, non-violent sexual coercion can be recognised by jurors without concerns that the conduct is not serious enough to warrant a conviction for rape or exposure to a maximum sentence of life imprisonment. At the same time, this conduct is acknowledged as a crime which has an appropriate punishment. Problems of proof will still be an issue as

81 See Home Office, above n. 73 at para. 2.18.2.
83 See McGregor, above n. 7 at 69.
trials for this offence will still be an ‘oath against oath’ contest. Despite this, the focus on force as a requirement will be largely obviated, especially in light of the reduced severity of punishment in the proposed offence and the removal of the stigma attached to the label ‘rape’. It will still be the word of the complainant against the defendant but a lot of the background obstacles related to recognising obtaining sexual intercourse by non-violent threats as rape will be removed. This should improve the prospect of the jury accepting that a criminal harm has occurred.

There is a strong case for at least contemplating the introduction of a modernised offence of obtaining sexual intercourse by threats. Naturally, it is necessary to carefully consider whether an offence like this can fit in a modern scheme of sexual offences and whether its potential benefits are outweighed by concerns about fair labelling and gradation. The best way of determining whether such an offence is workable is to conduct mock jury research and engage in public consultation with criminal justice stakeholders including judges, prosecutors, legal professionals and representatives of victims’ groups. It would also be necessary to consult about what the appropriate punishment for an offence like this should be. Without support from criminal justice stakeholders, the offence proposed here would be likely to meet the same fate as its original incarnation. However, if there is a willingness to implement an offence like this, it could provide a valuable mechanism for punishing a form of sexual abuse which has heretofore gone largely unrecognised by the criminal justice system.

**Conclusion**

The problem of sexual coercion is both simple and complex. In principle, it is simple. Any form of coercion which negates one’s capacity to freely choose to engage in sexual activity is serious enough to ground a conviction for rape. In practice, sexual coercion is a far more complex issue. The potential for punishing non-violent sexual coercion is stymied by the

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84 Commenting whilst the original offence was still in force in English law, Smith suggested that an appropriate maximum punishment for such an offence would be five years imprisonment: See Smith, above n. 68 at 464. A more substantial sentence of ten years is probably more appropriate in order to fully reflect the gravity of sexual coercion. However, the most suitable sentence for the proposed offence is best decided with reference to criminal justice stakeholders and the views of participants in mock jury study research.
societal expectation that a ‘real rape’ involves some degree of force and resultant physical injury. Hence there is a very clear gap between the ‘law in the books’ and what this law is capable of achieving in practice. The result is that a lot of sexually coercive practices go unrecognised and unpunished. In light of the entrenched linkage between force and rape in the societal consciousness, the introduction of an offence of obtaining sexual intercourse by threats offers a practicable means of acknowledging that non-violent sexual coercion is worthy of the attention of the criminal law. At a minimum, it is at least worth exploring its potential to yield a more realistic prospect of justice for victims of non-violent sexual coercion.