**Regulating intimate violence: Rough sex, consent and death.**

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## Abstract

In this paper we highlight the inadequacies of the current legal response to killings in the course of alleged rough sex. The issues we identify demonstrate the thinness of the legal conceptions of "consent" "violence" and "intent" that have led to the controversial outcomes in some such cases. If the law struggles to find an effective response to domestic abuse and sexual violence in cases where the victim has died, then this shows the severity of the challenges in dealing with them in non-fatal cases. We will critically consider some of the reform proposals that have been enacted in response to these cases and suggest that on their own they are highly unlikely to be effective. We need a more radical rethinking of the law's approach to consent, sex and violence; to the use of evidence in these cases; and a shift in society's understanding of consent to sex and violence.

## Introduction

If people were asked to list the topics where the current legal response is inadequate it is likely that domestic abuse and sexual violence would be very prominent. Both topics have become the centre of considerable public debate. In this article we discuss an issue where these topics intersect: killings which are said by the defendant to have occurred in the course of "rough sex gone wrong". In a surprising number of cases this argument has been successfully deployed leading to the defendant being acquitted of murder.[1]

The fact that the law has struggled to deal adequately with such cases is highly revealing. If in such dramatic circumstances the law fails adequately to protect women from domestic abuse or sexual violence then the failings of the legal responses to violence against women are laid bare. If even in cases where a woman is killed by her partner, the law is able to present this as consensual, or just "sex play that got a bit out of hand", it is of little surprise that domestic abuse and sexual assault where the outcome is not fatal, are even more easily misrepresented.[2] The cases reveal how easily the male narrative is enabled by cultural script around sexual relations, women's consent, and violence in intimate lives.

In this article we will outline the kind of cases under discussion and explore how the law has responded to them. We then look at the reforms in the Domestic Abuse Act 2021 that were intended to deal with them and explain why we doubt they will be of any effect. We then turn to the broader issues illustrated by these cases, which reflect the wider concerns with cases of

[1] See also H Bows, and J Herring, 'Getting away with murder? A review of the 'rough sex defence.' (2020) 84(6) *The Journal of Criminal Law* 525.

[2] See R Durham, R Lawson, A. Lord and V. Baird, *The Northumbria Court Observers Panel. Report on 30 rape trials 2015-16*. Available from: https://archive.northumbria-pcc.gov.uk/v2/wp-content/uploads/2014/08/Seeing-is-Believing.pdf; O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths*(Palgrave Macmillan, 2018); A. Williams, *Analysis Of The Cross-Examination of Complainants and Defendants within Rape Trials* (University of West of England, 2020).

violence against women. At the end we will explore how a more effective response may be found.

**The "Rough Sex" Murder cases**

The Campaign Group, *We Can't Consent to This* (WCCTT) claim to have found 67 cases of people killed where the defendant has claimed the death was as a result of "rough sex" or a "sex game" gone wrong.[3] In the vast majority of cases (60) the victims were women and in two thirds they were strangled. In all cases the perpetrators were men.[4]

Of course, WCCTT accept there may be many more cases which have not been uncovered. It is striking that at least a third of cases the perpetrator had previous convictions for violence against women. Yet, only 62% of the cases where a woman was killed resulted in a murder conviction, despite it being clear who had caused the death. In 28% a manslaughter conviction followed. In 10% there was no conviction because, for example, the defendant was acquitted, or no charge was brought. This has led to campaigners arguing that a 'rough sex defence' to murder has emerged[5] and is being used with increasing frequency. WCCTT emphasise that there has been a 90% increase in cases where the "rough sex gone wrong" defence is raised since 2010.[6]

To illustrate the issues of the kind of case we considering, we consider one case in detail. Natalie Conolly[7] was killed by her partner, John Broadhurst. She was found to have suffered over forty injuries, including internal trauma, a fractured eye socket and wounds to the face, buttocks and breasts. She suffered 'lacerations of the vagina which resulted in arterial and venous haemorrhage'. The latter was caused by the insertion of a bottle of carpet cleaner into her vagina. Broadhurst sprayed bleach on her face because he "didn't want her to look a mess". He claimed that all of these injuries occurred as a result of consensual "rough sex". He accepted Natalie was very drunk, indeed the expert at the trial stated she was at the highest level of intoxication, the symptoms of which were "near or complete unconsciousness; coma; anaesthesia; depressed or abolished reflexes; subnormal temperature; impairment of circulation and respiration; and possible death."[8] Broadhurst waited until the morning after her death to have breakfast, text a friend, wash his car and then call the emergency services.[9] His argument was accepted by the jury and he was convicted of manslaughter and cleared of murder.[10] He was convicted for gross negligence based on his failure to summon help for her in the morning, rather than having caused the injuries.[11] He was sentenced to 3 years 8 months imprisonment,

[3] We Can't Consent To This *What Can be Consented to? Briefing on the Use of "Rough Sex" Defences to Violence* (WCCTT, 2019) <https://wecantconsenttothis.uk> accessed 26.7.21
[4] https://wecantconsenttothis.uk/blog/2019/7/3/who-uses-this-defence
[5] Bows and Herring (n1)
[6] We explore some possible explanations for this below.
[7] https://www.bbc.co.uk/news/uk-england-46591150 accessed 16.7.21
[8] Courts and Tribunals Judiciary, 'R v John Broadhurst: Sentencing Remarks of Mr Justice Julian Knowles', 17 December 2018, Para 13
[9] We Can't Consent to This (n.3).
[10] It seems at the trial the prosecution focussed on the manslaughter charge.
[11] Courts and Tribunals Judiciary, 'R v John Broadhurst: Sentencing Remarks of Mr Justice Julian Knowles', 17 December 2018, para 21.

rather than the mandatory life sentence which would have followed a murder conviction. He was released after serving less than two years.[12]

As Jess Phillips MP highlighted the trail was dominated by Broadhurst's account of what happened:

> "'Not only did Mr Broadhurst kill Natalie, but he was able to entirely shape the narrative around her death, as she was not there to speak for herself."[13]

Harriet Harman MP develops this point explaining that in doing so, Broadhurst was able to draw on some contemporary myths about female sexuality:

> "'I think 30-or 40 years ago if a defence barrister said 'Yes my client did strangle this woman, but it's part of rough sex gone wrong' a jury wouldn't have believed it. Women were submissive, they were not seen as sexual and that defence would not have run. But with the women's liberation moment, women wanting to own their sexuality and to define themselves as sexual beings, encapsulated by the 50 Shades books, the idea became normalised that some women want pain inflicted on them in sex"[14]

The popularisation and glamourisation of 'rough sex' in pornography, where 'sex acts that most women do not enjoy and may experience as degrading, painful, or violating'[15] have been normalised has also contributed to the mainstreaming of sexual violence.

We will now set out some of the legal reasons that can explain why such cases often do not lead to a murder conviction.

**The Current Law**

At first sight it seems surprising that there is any hope of a legal defence in a case of this kind. Every law student is familiar with the decision *R v Brown*.[16] This clearly states that for offences of violence, where actual bodily harm (or worse), is involved consent does not operate as a defence, unless the case falls within the category of exceptional cases. Sado-masochist sex is not included in the list of exceptional cases which is limited to issues such as surgery, sport and tattooing. While the reasoning in the decision has been subject to considerable criticism, much of it very convincing, the case still represents the law. In effect, if in the course of rough sex causes one partner a bruise or a cut, it is illegal, however enthusiastic the "victim" was for the activity to take place. Of course, that is all the more so where the activity involves death.[17]

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[12] J Bufton, 'Worcestershire woman's killer to walk free after just 2 years' 5 October 2020, Worcester News, https://www.worcesternews.co.uk/news/18770884.worcestershire-womans-killer-walk-free-just-2-years/, accessed 26.7.21

[13] Quoted in R Guttridge, 'Rough-sex' defence set to be banned as death of Kinver woman highlighted' 17 June 2020 Express and Star https://www.expressandstar.com/news/crime/2020/06/17/rough-sex-defence-set-to-be-banned-as-death-of-kinver-woman-highlighted/ accessed 26.7.21

[14] G Greep, 'MP Harriet Harman says ban on 'Fifty Shades rough sex defence' will force men to 'take responsibility' after killers used the 'grizzly opportunity' to 'twist women's empowerment' 22 July 2020 Daily Mail. https://www.dailymail.co.uk/femail/article-8548813/Harriet-Harman-opens-abolition-Fifty-Shades-Grey-defence.html, accessed 26.7.21.

[15] L Harrison and D Ollis, 'Young People, Pleasure, and the Normalization of Pornography: Sexual Health and Well-Being in a Time of Proliferation?' in J Wyn and H Cahill (eds) *Handbook of Children and Youth Studies* (Springer, 2015), 155.

[16] [1993] UKHL 19. J. Herring, "*R v Brown* (1993)" in P. Handler, H. Mares and I. Williams (eds) *Landmark Cases in Criminal Law* (Hart, 2017).

[17] *R v Wacker* [2002] EWCA Crim 1944.

The reason why defendants have been able to use the so-called "rough sex defence" is to present their defence not as a one of consent, but a denial of the *mens rea* (mental state) requirement for a murder conviction. Murder requires proof that the defendant intended to cause death or grievous bodily harm. If the defendant were to deny they intended to cause death or grievous bodily harm ("I was intending light strangulation and not to cause death or grievous injury) then, if believed, they could not be guilty of murder. Not because they were engaging in "rough sex", nor because they behaviour was consensual, but because they would lack the mental element (*the mens rea*) for the offence. The sexual motivation and any consent is used as evidence to support a claim for no *mens rea.* Indeed, it is notable the defendant does not even need to show the "rough sex" was consensual or even believed to be consensual, for the defence to work. The crux of the claim is that the act was not done with the intent to cause death or grievous bodily harm, but for sexual purposes.

This has led some to question whether campaign groups such as WCCTT are misrepresenting these cases as ones where the is a "rough sex defence" and rather they are just standard cases of "no intent".[18] That may however be to oversimply the issue. Normally a defendant who is strangling someone or punching them would face an uphill task persuading a jury that they were not intending to cause grievous bodily harm. It is the claim that they were acting to generate sexual pleasure (for themselves or their partner or both) and with the consent of their partner, that makes the claim plausible. Indeed, the defendant might add that even if the jury were to think it obvious that serious injury would occur in the heightened sexual pleasure of the encounter they did not intend it because they were focussed on the sexual activity. So, while technically, the defence is not a "rough sex defence"; that background is integral to the success of the defence. In any other context the act would be seen as act of violence and the claim of *mens rea* doomed to failure. The "rough sex" arguments transform it into one where the defence has success in many cases. It also enables the defendant to recategorize the act. Rather than being strangulation it becomes "pressure to the neck" or "breath play" or "erotic asphyxiation" or over enthusiastic love making" making it less likely the jury will reason "you clearly intended to strangle; strangulation is grievous bodily harm; and so the *mens rea* for murder is present". This presentation of the story can be sufficient for the jury to determine that they are not sure beyond reasonable doubt that the case is one of murder; consequently, they will consider manslaughter as an alternative verdict.

Where the "rough sex" defence succeeds in relation to murder, it is unsurprising that the defendant is then usually convicted of manslaughter. The most common form of manslaughter used in this context will be constructive manslaughter. In outline, this requires proof that the defendant caused death through a criminal offence, which was dangerous (in the sense that it was likely to cause some harm). In the context of manslaughter, the "no intent" argument is less effective. There are two reasons for that. The first is that there only needs to be proof of a criminal offence, an assault occasioning actual bodily harm being the most likely here. The *mens rea* for that offence is low (intention or recklessness as to touching the victim).[19] The second is that the dangerousness requirement is objective and does not require proof the defendant foresaw the act as being dangerous.[20] Actual bodily harm requires proof of harm

[18] J Rogers "Abolition" of the "Rough Sex" Defence: Hurried Legislation and Missed Opportunities' at http://www.clrnn.co.uk/blog/law-reform-general/ accessed 26.7.21.
[19] See J Herring, *Criminal Law: Text, Cases and Materials* (Oxford University Press, 2021), chapter 7 for a detailed description of the law.
[20] *R v Dawson* (1985) 81 Cr App R 150.

which is more than transitory and trifling.[21] These elements will easily be apparent in the kinds of cases under discussion.

Although the primary charge in prosecuted cases is murder or manslaughter, in several cases, sexual offences are also charged. For example, in *Broadhurst*,[22] D was charged with assault by penetration alongside murder and GBH with intent[23]. Where such joint charges are brought this can create considerable confusion for juries. That is because consent in the context of the offences against violence can have different legal and conceptual differences for sexual offences and offences against the person. The issue is complex but in short in sexual offences lack of consent and lack of reasonable belief consent is part of the actus reus and so must be provided by the prosecution. However, in terms of offences against the person, consent is a defence and the defendant must establish that there was effective consent. Confusion abounds when it is recalled that consent cannot be a defence for an assault occasioning actual bodily harm but can be for a sexual offence (even where serious injuries are concerned). Much more could be said on the complexities that can result.[24] But it seems fair to conclude that the complexity of the law does nothing to facilitate prosecutions in this area. Much more could be said about the technical complexities, but it does reveal the striking differences between the understanding of consent in the context of offences of violence and sexual offences.[25]

**Legal Reforms**

As a result of the concerns over the law[26] we have seen two major reforms in the Domestic Abuse Act 2021. The first dealing with the issue of rough sex and murder; and the second creating a new offence of strangulation.

Consent and serious harm

In Section 71 Domestic Abuse Act 2021 the Government sought to make it clear that consent to rough sex, where actual bodily harm or worse is performed, is no defence to a criminal charge. Section 71 reads:

(1) This section applies for the purposes of determining whether a person ("D") who inflicts serious harm on another person ("V") is guilty of a relevant offence.

(2) It is not a defence that V consented to the infliction of the serious harm for the purposes of obtaining sexual gratification (but see subsection (4)).

[21] *T v DPP* [2003] EWHC 266 (Admin).
[22] Courts and Tribunals Judiciary, 'R v John Broadhurst: Sentencing Remarks of Mr Justice Julian Knowles', 17 December 2018.
[23] Offences Against the Person Act 1861, s. 18.
[24] See Bows and Herring (n 1).
[25] Note also that under section 75(2)(a) in the context of sexual offences a threat or use of violence immediately before a sexual act creates a presumption that there is no consent.
[26] See Bows and Herring (n.1) for a review of concerns.

Sub-section (3) explains that serious harm includes grievous bodily harm, wounding and actual bodily harm and that a relevant offence is one under sections 18, 20 or 47 of the Offences Against the Person Act 1861.[27]

It seems widely accepted by both the academic lawyers and practicing legal community that this provision does little more than restate the common law as set out in Brown.[28] Indeed, that is what the Government claimed they were doing.[29] The primary message, that in the context of sexual relationships consent is not a defence where actual bodily harm or more is caused, is precisely what the law had already said. Does that mean the legislation was not worth enacting?

There are some reasons for which it might be thought useful. Harriet Harman suggested that it was helpful to have the common law put into statute because 'Statute law is much more under the noses of the judiciary and the prosecutors and the defence'.[30] Whether greater weight is attached in practice to statutory provisions rather than common law rules is open to debate, but if it is true it provides a reason in favour of the provision, although it really provides a reason for putting the whole of the criminal law into a criminal code.[31]

Perhaps a stronger justification is that, given the controversy surrounding *Brown* and the extensive criticism is has received for its reasoning,[32] a statutory confirmation of its standing would ensure the legal principle emerging from it still stands, despite any perceived shifts in cultural attitudes. Certainly, one Circuit Judge wrote an article in the Criminal Law Review indicating that changing attitudes to private sexual activity justifies finding ways of side-lining Brown.[33] The statute also makes it clear that the indication in *Wilson*[34] that that consensual sado-masochistic activity between husband and wife, in the privacy of their matrimonial home, was not a matter for criminal investigation or prosecution is not a legally effective argument. So, it might be said, there was sufficient uncertainty around Brown to recommend a clarification of the law. Of course, that presupposes that Brown was good law. Not everyone will agree. Jonathan Rogers notes the defence:

> applies as much to women who beat men, and to sex workers. Some might be surprised that the female dominatrix who offers to whip or tread on male clients is equally affected. There is reason to believe that those who work as such do not feel in the slightest exploited, and in some cases they may fell empowered. The argument for criminalising their trade too has never been made out, but [section 71] confirms it in any event.[35]

As he indicates the introduction of section 71 could be said to have forestalled a debate about what the law should be.[36] We don't see to deal with that issue here because it is outside the remit of the article.[37]

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[27] Sub-section (4) deals with the issue of transmission of sexually transmitted diseases.
[28] D Ormerod, 'The Domestic Abuse Bill 2021' [2021] *Criminal Law Review* 423.
[29] HM Government, *Consent to Serious Harm for Sexual Gratification not a Defence* (HM Government, 2021).
[30] <https://www.bbc.co.uk/news/uk-england-51151182> accessed 7 May 2020.
[31] Law Commission, *Legislating the Criminal Code* (Law Commission, 1989).
[32] See Herring n. 16 for details.
[33] P. Murphy 'Flogging live complainants and dead horses: we may no longer need to be in bondage to Brown' [2011] *Criminal Law Review* 758
[34] [1997] QB 47.
[35] Rogers, above n. 18
[36] Ibid.
[37] Herring (n. 19).

What, however, is not an argument in favour of the reform is that it will deal with the "rough sex defence". This is because, as argued above, the legal basis of the defence was not based on consent, but on a lack of *mens rea.* The statute says nothing about that and so will not be relevant in most of the "rough sex defence" cases.

Strangulation offence

The Domestic Abuse Act also created a new offence of strangulation, following a successful campaign by the Centre for Women's Justice and increasing evidence of the prevalence and risks[38]. This is found in section 70, which inserts a new section 75A into the Serious Crime Act 2015.

(1) A person ("A") commits an offence if—

(a) A intentionally strangles another person ("B"), or

(b) A does any other act to B that—

(i) affects B's ability to breathe, and

(ii) constitutes battery of B.

(2) It is a defence to an offence under this section for A to show that B consented to the strangulation or other act.

(3) But subsection (2) does not apply if—

(a) B suffers serious harm as a result of the strangulation or other act, and

(b) A either—

(i) intended to cause B serious harm, or

(ii) was reckless as to whether B would suffer serious harm.

[38] Centre for Women's Justice, *The Domestic Abuse Bill Must Make Strangulation a Stand Alone Offence* (CWJ, 2021).

(4) A is to be taken to have shown the fact mentioned in subsection (2) if—

(a) sufficient evidence of the fact is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt.

As with section 71 serious harm includes actual bodily harm a well as grievous bodily harm.[39]

Again, it might be argued that the new offence is of little practical effect. All instances of strangling under the new offence would have been covered by the law under offences involving grievous bodily harm or actual bodily harm in the 1861 Offences Against the Person Act 1861; or a battery under common law. Inevitably the question arises why we need a particular offence involving this particular method of causing harm, given we don't have a specific offence of stabbing or punching, for example.[40] We suggest two justifications.

One reason could be that there is a very particular form of harm done to the victim. It causes "primal fear" as Kelly and Ormerod[41] put it. It may be that which puts the experience of strangulation into a particular category, which is not adequately captured by the standard offences which relate to the physical harm done (i.e. battery or ABH). In a study by Catherine White and others, 36.6 per cent of individuals reporting a strangulation as part of a sexual assault stated that whilst being strangled they thought they were going to die.[42]

Yet, a report from the Centre for Women's Justice found strangling tends to be charged as a battery.[43] The psychological outcomes can be far greater than the mere degree of immediate touching (as per the *actus reus* of battery) might indicate. That seems to be clear undercharging in many instances. The new offence may make it clear that the offence should be treated seriously. It may be that the traditional approach with a focus on the degree of bodily injury to determine whether it is a battery, actual bodily harm or grievous bodily harm fails to capture the terror and complete loss of control over the body, which is really at the heart of the wrong.

A second argument, we suggest, is that strangulation has a very particular meaning and context in our society. It is a heavily gendered activity, most commonly committed by men against women[44]. There is a strong link with domestic abuse, with research indicating that in around 90 per cent of cases there is a history of domestic violence,[45] and (male) stalkers[46]. As Baroness

[39] Section 75A (6).
[40] S. Edwards, 'The strangulation of female partners' (2015) 12 *Criminal Law Review* 946, 949.
[41] R Kelly and D Ormerod, 'Non-fatal strangulation and suffocation' [2021] *Criminal Law Review* 532. **d**
[42] C White et al, "'I thought he was going to kill me': Analysis of 204 case files of adults reporting non-fatal strangulation as part of a sexual assault over a 3 year period" (2021) 79 *Journal of Forensic Legal Medicine* 102.
[43] Centre for Women's Justice (n )
[44] A Pritchard, A Reckdenwald, C Nordham, (2017) 'Nonfatal strangulation as part of domestic violence: A review of research' (2017) 18 *Trauma, Violence, & Abuse* 407.
[45] G Strack, G McClane, D Hawley, 'A review of 300 attempted strangulation cases Part I: Criminal legal issues' (2001) 21 *The Journal of Emergency Medicine* 303.
[46] E Stark, 'Coercive Control' in N Lombard, L McMillan, (eds.), *Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley 2013)

Newlove argued in the Parliamentary debates: "It is estimated that 20,000 women per year—or 55 women every day—who have been assessed as high risk and suffer physical abuse have experienced strangulation or attempted strangulation."[47] She noted research that has established that victims who had previously been strangled by their abusive partner were seven times more likely subsequently to be killed compared to victims who had not experienced nonfatal[48]. Strangulation is a very particular way to demonstrate control and dominance over another and is commonly used as a tactic as part of a broader strategy of coercive control[49]. Quite literally the defendant takes the victims life into their hands. As a method of killing, it requires no tools and so the potential for strangulation is present at all times the couple are together. As Bendlin and Sheridan note, 'restricting blood flow and ability to breathe with relatively little force shows the victim the ease with which the perpetrator can take their breath away, giving credibility to future threats'[50]. It therefore sends a powerful symbolic message not just about the defendant's control of the victim, but of male power over women generally.

There are grounds for concern over the defence of consent to the offence of strangulation. One welcome point to emphasise is that consent is seen as a defence in sub-section 2, rather than lack of consent being part of the actus reus. How consent operates in this context has been a matter of debate among criminal lawyers,[51] but it seems correct to say that strangulation is itself a wrong, which may be justified in some cases where there is consent. However, given that the statute states that consent operates as a defence it is then surprising that the defendant only has to introduce enough evidence to "raise an issue" about consent. It would seem that the defendant simply giving oral evidence that the victim did consent must "raise an issue" about consent. If that is sufficient to establish consent for sub-section (2) then it is almost as if the statute has created a presumption of consent to strangulation. This cannot be what the legislators intended, but there is a real danger that will be the interpretation adopted. Indeed, scholars examining approaches to criminalising non-fatal strangulation (NFS) in other jurisdictions warned that including victim consent as a defence to, or part of the actus reus of, the offence of NFS where other non-fatal offences do not recognise consent as a defence (as is the case in England and Wales for ABH and GBH offences) 'suggests a lower level of seriousness of the offence which is at odds with the literature about risks'[52] and is likely to cause significant obstacles for the prosecution.

However, the sub-section 3 states that the defence does not apply if it shown both (i) the act involves actual bodily harm or more serious harm (in line with the Brown ruling) but also (ii) that the defendant intended or was reckless as to there being such harm (which is not explicitly required in the Brown ruling). It is true that subsequent cases[53] have been somewhat ambiguous on whether the defence is available if the defendant did not foresee the harm or if it is enough to show the harm was foreseeable, but given the legislation was intended to repeat

[47] *Hansard, HL Vol.809, cols 20– 130 (5 January 2021)*.
[48] See N Glass, KLaughon, J Campbell, A Wolf Chair, C Block, G Hanson, E Taliaferro, 'Non-fatal strangulation is an important risk factor for homicide of women' (2008) 35 *Journal of Emergency Medicine* 329 and J Campbell, N Glass, P Sharps, K Laughon, T Bloom, 'Intimate partner homicide: Review and implications of research and policy' (2007) 8 *Trauma, Violence and Abuse* 246.
[49] K Thomas, M Joshi, S Sorenson, 'Do you know what it feels like to drown?" Strangulation as coercive control in intimate relationships' (2014) 38 *Psychology of Women Quarterly* 124.
[50] M Bendlin and L Sheridan, 'Nonfatal strangulation in a sample of domestically violent stalkers: the importance of recognizing coercively controlling behaviors' (2019) 46 *Criminal Justice and behavior* 1528.
[51] See Kelly and Ormerod, n. 41.
[52] H Douglas and R Fitzgerald, 'Women's stories of non-fatal strangulation: Informing the criminal justice response' (2020) *Criminology & Criminal Justice* 1, 11
[53] *R v Boyea* [1992] Crim L.R. 574; *R v Slingsby* [1995] Crim LR 570

the common law, it is surprising it has taken the interpretation which is more generous to the defendant in these cases. It also raises a potentially confusing situation where the defendant is tried for both a sexual offence and the strangulation defence. In the former any belief in consent must be reasonable, whereas in the latter it seems that an honest (albeit unreasonable) belief there was consent and that no serious harm would occur would provide a defence. This is all the more troubling as strangulation often leave minimal observable injury, making it all the easier for the defendant to claim they did not realise there was a risk of serious harm.

Again, although we see some good reasons for the creation of this offence,[54] it does not deal with the core problem of the "rough sex cases". It will not impact on the issues with the current law.

**The wider context**

We suggest that the legislative attempts to respond to the "rough sex" cases have failed to identify the root cause of the problem. They have not dealt with the "no *mens rea*" argument which is at the heart of these cases. Further they have not appreciated that the problem is not with the substantive law itself, but the way evidence is presented at trial and the broader social context within which these offences occur. The history of the law of male violence against women has been marked by excuses for the violence, often shifting the blame and focus of the attention on the woman and away from the accountability of the male behaviour. That history of killings in that context is littered with excuses such as "she had an affair" or "she kept nagging" or "she was just so annoying" or now "she enjoyed rough sex". So, there is a long history of the law enabling men to use stories to justify their abuse. The "rough sex defence" is the latest in a long line of these.

As our understanding of coercive control increases, so too should our scepticism that sexual relationships between partners is necessarily consensual.[55] This approach to domestic abuse recognises that the behaviour should best be understood as a course of behaviour designed to control the other party, limiting their decision-making ability[56]. Common coercive tactics including surveillance and monitoring of victims, manipulation, isolation, intimidation and degradation.[57] Mary Ann Dutton and Lisa Goodman explain:

> Abusive behaviour does not occur as a series of discrete events. Although a set of discrete abusive incidents can typically be identified within an abusive relationship, an understanding of the dynamic of power and control within an intimate relationship goes beyond these discrete incidents. To negate the impact of the time period between discrete episodes of serious violence — a time period during which the woman may never know when the next incident will occur, and may continue to live with on-going psychological abuse — is to fail to recognize what some battered woman experience as a continuing 'state of siege'.[58]

It is in the light of the prevalence of coercive control that "rough sex" needs to be considered. Coercive control takes many forms, which can, and often does, include sexual coercion and

[54] Kelly and Ormerod n. 41
[55] E Stark, *Coercive Control: How Men Entrap Women In Personal Life* (Oxford University Press, 2007).
[56] Ibid.
[57] Ibid.
[58] M Dutton and L Goodman, 'Coercion in Intimate Partner Violence' (2005) *Sex Roles* 473, 477

violence. Indeed, there is 'substantial evidence that women experience unwanted sex under nonviolent duress from partners'[59].

Mitchell and Raghavan's study of men who had been identified as perpetrators of aggression and used coercive controlling behaviours with their intimate partners reports these men were 3-6 times more likely to use sexually coercive tactics to obtain unwanted sex from a partner. The kinds of tactics that men used ranged from threatening to find another partner or to spread rumours about a partner's sexuality if refused sex, to ignoring or arguing to change verbal requests to stop sexual activity.[60] This is a powerful reason to counter any assumption that sexual relationships within a settled relationship must be consensual.

Broader concerns relate to consent in the context of bondage, dominance, and submission/sadomasochism (BDSM/SM) practices, and the way consent to BDSM among *some* individuals has led to the mobilisation of a sexual script that *all* women enjoy BDSM practice and so consent can be presumed. As scholars have recently noted, 'consent represents a central focus in the controversial realm of BDSM' and, for the BDSM community, explicit consent is what distinguishes the practice from abuse and delineates BDSM from coercive sex[61]. There is also a misconstruction in the public mind about what responsible BDSM involves. Community members support encouraging clear rules ensuring there is full and explict consent.[62] It has been said that the "Consent is the sine qua non of BDSM1 practice"[63] Although there is no doubt the issue of consent can be complex in BDSM communities, particularly where couples have an on-going dominant/submissive relationship, it is clear that responsible adherents emphasise the importance of effective consent. That said, in a recent review of the literature, Dunkley and Brotto note that most of the literature on BDSM is produced by researchers who are advocates of BDSM which may influence the research design and introduce potential biases to the data and/or results (including whether to publish them)[64]. Moreover, most research on BDSM recruit from BDSM communities and it is possible that those who volunteer for research may not always give truthful accounts, or may not recognise behaviour as abusive, or may experience difficulties disclosing abuse in part for fear of further stigmatising the BDSM community[65].

Our concern is that the legitimisation of BDSM practices on the basis of consent provides supports the broader sexual narrative that women enjoy 'rough sex' and routinely consent to these practices. This offers opportunities for perpetrators of sexual violence to claim the incident(s) of rape or assault was actually 'consensual' rough sex. Social-sexual scripts (fuelled by violent pornography and the popularisation of violent, coercive sex in film, TV and fiction) are enacted and weaponised to undermine victim's accounts. Because these behaviours are presented as normal and wanted by any women, victims may appear complicit in their own

[59] See J Mitchell and C Raghavan, 'The impact of coercive control on use of specific sexual coercion tactics' (2021) 27 *Violence against Women* 187 and K Basile, 'Histories of violent victimization among women who reported unwanted sex in marriages and intimate relationships: Findings from a qualitative study' (2008) 14 *Violence Against Women* 29.
[60] Ibid.
[61] C Dunkley and L Brotto, 'The role of consent in the context of BDSM' (2020) 32 *Sexual Abuse* 657, 657.
[62] Ibid.
[63] A Fanghanel, *'*Asking for it: BDSM sexual practice and the trouble of consent' (2020) 23 *Sexualities* 269.
[64] Dunkley and Brotto, n 61.
[65] N Haviv, 'Reporting sexual assaults to the police: The Israeli BDSM community' (2016) 13 *Sexuality Research and Social Policy* 276.

abuse[66]. Moreover, it is common to feign pleasure to end or escape from unwanted sex[67], which is typically misinterpreted by the defence to demonstrate consent despite the law recognising that acquiescence does not equal consent[68]. As Cheryl Hanna states:

> If consent were allowed as a defense in the S/M context, defense attorneys would have carte blanche to raise it in every sexual assault case where the victim is injured. This would essentially gut rape law jurisprudence as it now stands. So too could defense attorneys raise the S/M defense in many cases of domestic violence, undermining the slow and steady strides the law has made in sanctioning male violence.[69]

It is striking that while the novel *Fifty Shades of Grey*[70] has done more than anything to bring BDSM to the public attention, many are concerned at the way BDSM was portrayed in the book. Jacqueline Horen saw it as 'the tale of an abusive relationship in which a reluctant, inexperienced and infatuated young girl is controlled and beaten by a rich sadist'.[71] Amy Bonomi has condemned the novel as a 'glaring glamorization of violence against women' and identifies pervasive sexual violence throughout the book as well as emotional abuse which is 'present in nearly every interaction'[72]. As BDSM practitioners have highlighted[73] it does not depict the standards of negotiated consent and good practice promoted by responsible BDSM practitioners. Is *Fifty Shades* a tale of sexual experimental BDSM or a description of an abusive relationship? It would appear from the concerns raised by scholars it is the latter. Certainly, it has opened up a discourse where juries and public seem readily mistaking domestic abuse for consensual BDSM.

We will highlight three features of the response to the rough sex killings which reflect broader points about violence against women.

<u>Normalising and glamourising violence against women</u>

One of the features of domestic abuse which is well recorded are attempts by the abuser to justify their abuse and even present it in a positive way. Sexual possessiveness is explained as being "loving too much"[74]; preventing a partner working is "enabling her to be a good mother"; and economic abuse is "looking after the money".[75] Abusive behaviours as thus 'normalized in social scripts as acts of care and concern'[76]. This repackaging of the abuse is part of the grander scheme of coercive control used to downplay the abuse and make the victim believe

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[66] Mitchell and Raghavan (n 59).
[67] E Thomas, MStelzl and M LaFrance, 'Faking to finish: Women's accounts of feigning sexual pleasure to end unwanted sex' (2017) 20 *Sexualities* 281.
[68] R v Malone [1994] 2 Cr App Rep 447.
[69] C Hanna, 'Sex is Not a Sport: Consent and Violence in Criminal Law' (2001) 42 *Boston College Law Review* 239, 242.
[70] E James, *Fifty Shades of Grey* (London, Random House, 2012).
[71] J Horn, 'Fifty Shades of Oppression: Sadomasochism, Feminism, and the Law' (2015) 4 *DePaul Journal Women, Gender & Law* 1.
[72] A Bonomi, L Altenburger and N Walton "Double crap!" Abuse and harmed identity in Fifty Shades of Grey (2013) 22 *Journal of Women's Health* 733.
[73] E O'Toole, 'This Murder in Ireland Has Made Me Rethink My Sexual Practices' *The Guardian* (London , 31 March 2015).
[74] J Herring, 'John Eekelaar, Love and Family Law' in S Gilmore and J Scherpe. *Family Matters -Essays in Honour of John Eekelaar* (Intersentia, forthcoming).
[75] J Herring. *Domestic Abuse and Human Rights* (Intersentia, 2020).
[76] Mitchell and Raghavan (n 59) 188.

they are exaggerating the issues.[77] When this is done to victims this is referred to as gaslighting. As Paige Sweet[78] explains gaslighting is

> "a type of psychological abuse aimed at making victims seem or feel "crazy," creating a "surreal" interpersonal environment….gaslighting is effective when it is rooted in social inequalities, especially gender and sexuality, and executed in power-laden intimate relationships. When perpetrators mobilize gender-based stereotypes, structural inequalities, and institutional vulnerabilities against victims with whom they are in an intimate relationship, gaslighting becomes not only effective, but devastating."

In this context victims and juries are led to believe that "rough sex" is a normal part of heterosexual relations. A lack of interest in "rough sex" is presented by the abuser a sexual failing. Any concern about injuries caused by the results are downplayed.[79] The victim is told she should be proud of these love marks, not concerned about them. One form of this has been called 'euphemising' where male violence is presented in a 'misleading way such as to obscure the seriousness or responsibility of whoever has committed it'.[80] Susan Edwards[81] argues that the defendant is able to rely on the sexual consent narrative by manipulating and appropriating BDSM narratives 'to disguise what is essentially cruel and misogynist conduct'. Barbara Ellen[82] has written 'extreme violence against women by their partners, even when it results in death, remains so systemically downgraded in this country that trying for a guilty murder verdict could result in men such as Broadhurst walking free. It's as though we've been "groomed", en masse, as a society to keep accepting the historical fallacy of domestic violence as a non-serious issue.'

We see then a downgrading of "rough sex" as normal and "fun", reinforced by mainstream pornography, the content of which now commonly includes violent behaviours such as choking, gagging, slapping and spanking; at least 1 in 8 videos on mainstream pornography sites have titles that describe sexual activity which constitutes sexual violence and 'teen' was the most frequently occurring word[83]. Violent pornography has thus become the norm and, in turn, is informing contemporary understandings of appropriate and inappropriate sexual conduct, reinforced by social and legal narratives about gender, sexuality and consent[84]. This narrative needs to be challenged. In a recent study of women reporting a rape or sexual assault from a partner or ex-partner found that 18.9% of the cases there was non-fatal strangulation. 98% of the cases involve a male strangling a female. A third of those thought they were going

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[77] M Gathings and K Parrotta, 'The Use of Gendered Narratives in the Courtroom: Constructing an Identity Worthy of Leniency' (2013) 42 *Journal of Contemporary Ethnography* 668, 671; A Taslitz, 'Patriarchal Stories I: Cultural Rape Narratives in the Courtroom' (1995) 5 *South Carolina Law Review of Women's Studies* 387.
[78] P Sweet, 'The Sociology of Gaslighting' (2019) 84 *American Sociological Review* 851.
[79] M Gathings and K Parrotta, n. 78
[80] P Romito, *A Deafening Silence* (Policy Press, 2008), 45.
[81] S Edwards, 'Assault, Strangulation and Murder—Challenging the Sexual Libido Consent Defence Narrative' in A Reed, MBohlander, N Waje and E Snutg (eds), *Consent: Domestic and Comparative Perspective* (Routledge, 2016).
[82] B Ellen, 'Prosecutors thought no jury would accept Natalie Connolly was murdered. What does that say?' The Guardian 23 December 2013 https://www.theguardian.com/commentisfree/2018/dec/23/prosecutors-thought-no-jury-would-accept-natalie-connoolly-was-murdered?CMP=twt_gu
[83] F Vera-Gray, C McGlynn, I Kureshi, and K Butterby, 'Sexual violence as a sexual script in mainstream online pornography' (2021) 20 *The British Journal of Criminology*, 1.
[84] H Bows and C Giles, 'Consent, Sexual Violence and the Law' in A Maine and C Ashford (Eds) *Law, Gender, and Sexuality* (2022, forthcoming) Edward Elgar.

to die.[85] This is an important finding because it challenges the public linking of strangulation during sex to BDSM to finding it a standard feature of rape or sexual assault.

The assumptions that strangulation and rough sex are now mainstream and "fun" must be challenged. It is important to note that as Susan Edwards argues:

> As to the question of erotic asphyxia there is no evidence that it heightens women's sexual libido but there is evidence that men routinely use strangulation as a method of assault, that it is a trope and a reality in pornography, that women die in the course of it and that it is part of the misogyny narratives[86]

Louise Perry[87] has written of her experience after writing about concerns during rough sex:

> "After I wrote an article a couple of months ago titled "Women are being strangled, choked, slapped and spat on during sex — we need to stop pretending this is normal", I was inundated with tweets accusing me of "kink-shaming" people with unusual sexual tastes because I was "frigid" and "prudish". Some suggested that a bit of strangling would set me right. Many of these tweets were sent by women, angry that I had failed to recognise that being turned on by violent assault is a matter of personal choice. A strange kind of choice. The sort of choice where, if you choose the wrong option, then you're accused of being "boring", "vanilla", and a "massive virgin.""

Laura Tarzia has written from her extensive studies of women who have been abuse that "At the societal level, the women felt there was still significant social pressure on them to sexually service men. They felt obliged to "give" their partner sex and to try harder to be more sexually available and enthusiastic. This idea, they said, was bolstered by messages received from pornography and other media, but also from more "reputable" sources, like popular science."[88] It is notable that in heterosexual couples who report engaging in consensual rough sex that is initiated by men far more often than women. [89] WCCT report one woman saying:

> "During sex, which now I would identify as not completely consensual, my abuser would be quite aggressive, on occasion would strangle me, it felt completely demeaning. At the time I just thought this is what sex is, I didn't have a good sexual experience to reflect on. I remember the concept of rough sex being glorified and normalised, so I never thought that my experiences were negative. It is only now that I am in a long-term caring relationship that I understand." [90]

There is therefore a need to challenge the assumption that women who do not want to engage in "rough sex" are "vanilla" or boring. Rather there needs to be greater recognition that "rough sex" is often associated with abuse; it is closely associated with expressions of jealousy;[91] that it requires very careful and experienced practitioners; and is only permissible with explicit

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[85] White at al above n. 42
[86] Edwards, above n. 82.
[87] https://unherd.com/2020/04/what-sort-of-sex-do-women-really-want/
[88] L Tarzia *What drives Intimate Partner Sexual Violence?* (University of Melbourne, 2021).
[89] R Burch and C Salmon, 'The Rough Stuff: Understanding Aggressive Consensual Sex' (2019) 4 *Evolutionary Psychological Science* 383.
[90] We Can't Consent to This, *'I Thought This Was Normal' The Normalisation Of Violence Against Women In Sex (We Can't Consent To This, 2021)*
[91] Burch and Salmon, above n. 88.

consent, which can be withdrawn at any time. Helen Bichard, a practicing psychologist has written:

> "I am extremely concerned by the cultural normalisation of strangulation. Erotic asphyxiation should be as much of an oxymoron as erotic brain damage, because brain damage is the potential result. Much of the online advice is misguided; some of it is fatally wrong. When you compress the carotid artery you cut off oxygenated blood flow to the brain, and the brain therefore cannot function properly. Consciousness can be lost in as little as four seconds – a sign that the brain is being compromised. Any pressure to the artery can lead to dissection, in which blood clots can form and cause stroke, sometimes delayed by weeks. The law MUST send a strong signal that this is simply unacceptable. "[92]

Consent: context

One of the striking things about the "rough sex" cases is the readiness of courts to accept stories that abuse was consented to.[93] Returning to the facts of the Natalie Connolly case referred to earlier, it is impossible to believe a woman would consent to having her face sprayed with acid. In any event as mentioned earlier her intense intoxication makes it hard to believe there could have been effective consent, an issue not mentioned by the judge at all. It is the power of the normalisation of 'rough sex' that makes it seem unremarkable that a someone would wish to have carpet clearer inserted into their vagina.

A good example of how consent is presumed is *Wilson.*[94] The Court of Appeal allowed the appeal of a husband who had branded his initials on his wife's buttocks with a heated butter knife. The Court of Appeal explained: 'Consensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution.' We see here a powerful assumption that activities between a married couple can be presumed to be good. The decision is all the more striking because it offers no explanation as to why consensual harm is permissible between an opposite sex married couple, but not between same sex groups. It is interesting to note that while in *Brown* the immorality and many potential dangers were emphasised, the language of civility and privacy were used to describe Mr and Mrs Wilson's behaviour. The subsequent case law and most of the academic commentary on them, seem blind to the far more likely explanation that this was a case of domestic abuse.[95] It should be noted that Mrs Wilson went to see the doctor and showed them what had happened. The doctor notified the police, breaching patient confidentiality. One of the few reasons why a doctor would breach confidentiality in this way is in cases of domestic abuse. The branding of a man's name on his female partner s partner seems like the nadir for an abuser seeking the ultimate control over his spouse. It has all the hallmarks of coercive control. Yet it is normally presented in the legal literature as a case of consent.

Susan Edwards[96] presents a horrifying array of cases where rough sex is claimed to be consensual. One cases she refers to, involving Andy Anokye, involved four separated victims. Edwards explains

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[92] H Bichard, C Byrnem C Saville and R Coetzer, 'The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review' (2021) 12 *Neurobiological Rehabilitation* 1.
[93] S Edwards, 'The Strangulation of Female Partners' [2015] 12 *Criminal Law Review* 949.
[94] [1996] 3 WLR 125.
[95] See discussion in Herring, above, n. 16.
[96] Edwards above n. 94

> He waterboarded his victims, used weapons, threatened and subjected them to other forms of sadism, including putting bleach on one victim's face, telling another she would be shot and to another put her hand in water, and, bringing an electric toaster nearby, threatened her with electrocution. He said such acts were all 'rape games' and that it was just part of 'the sex I have' and blaming his victims, he said of one, 'she was a willing and enthusiastic participant in my sex games/role play'. His counsel presented the defence case as 'consensual sexual activity operating on a level playing field' and said his victims were 'independent, adult women'.[97]

In *Lock*[98], also portrayed as a BDSM case, the woman had the words 'Property of Steven Lock' tattooed around her genitals. Lock chained the women 'like a dog' to his bedroom floor and whipped her repeatedly with a rope. He said this was part of a sex game and he got the idea from *Fifty Shades of Grey*. Yet, this case has all the hallmarks of the coercive control model of domestic abuse mentioned earlier.

Even if someone were to think in cases like these it is possible that the victim did consent, however bizarre that may seem, that should at least require the most convincing of evidence that there was consent. It may be that we are seeing here the glamorizing of sex as inherently something that must be celebrated and good. As Hyman Gross[99] has suggested sex is "'one of nature's blessings'; 'a commonplace of life'; enjoyed no less than eating or sleeping'. Sadly, that is true for far too people. As Madden Dempsey and Herring[100] suggest a better starting place may be a sexual penetration is *prima facie* wrong, requiring a justification. The very fact that sounds counter-intuitive to many people is perhaps evidence of how the assumptions that anything sexual must be good. As Louise Perry mentioned in the quote above, it is almost as if as soon as an activity is given the label sexual, it become immune from criticism. It might be added too that as soon as the act is marked by any indication of consent in the sexual context it is presumed to be fully consented to. This ignores the power dynamics in opposite sex relationships. As Catharine MacKinnon[101] recognises:

> The problem with consent only approaches to criminal law reform is that sex, under conditions of inequality, can look consensual when it is not wanted at the time, because women know that sex that women want is the sex men want from women. Men in positions of power over women can thus secure sex that looks, even is, consensual without that sex ever being freely chosen, far less desired.

Trial evidence

A common theme of criminal trials involving sexual offences and domestic abuse is the difficulty in establishing the evidence as to what occurred and whether there was consent. The

[97] At p. 956.

[98] B Kendall, 'Gardener Cleared of Assault after *Fifty Shades of Grey* -Inspired Sadomasochistic Sex Session ' *The Independent* (22 January 2013 ) https://www.independent.co.uk/news/uk/crime/gardener-cleared-assault-after-fifty-shades-grey-inspired-sadomasochistic-sex-session-8461714.html

[99] H Gross, 'Rape, Moralism and Human Rights' [2008] *Criminal Law Review* 220.

[100] M Madden Dempsey and J Herring, 'Why sexual penetration requires justification' (2007) 27 *Oxford Journal of Legal Studies* 467.

[101] C MacKinnon, 'A sex equality approach to sexual assault' (2003) 989 *Annals of the New York Academy of Science* 265, 267

fact this is seen as problematic even in cases where the victim has died demonstrates the difficulty the courts have in finding non-consent.[102]

There is an extensive literature on the way that defendant in rape trials will seek to use evidence to demonstrate consent from the victim. In particular, the previous sexual and personal history of the victim is used to discredit them. The defendant will trawl through the victim's life to find something that could be used to present to put them in a bad life. While there have been statutory interventions designed to restrict the circumstances in which sexual history evidence (SHE) can be used is seems it is still commonly made available. This has multiple effects. It means that victims are reluctant to make complaints; or to be involved in prosecution.[103] It impacts on juries as mock jury studies indicate that victims are found less creditable and are found more likely to have consented when SHE is introduced.[104] It also alters the focus on the trial. As McGlynn points out, in the context of sexual offences cases, the complainant's sexual history 'contributes to shifting the focus of the trial from the defendant's actions to those of the complainant, thereby also shifting legal and moral blame and responsibility from the defendant to the complainant'.[105] Section 41 Youth Justice and Criminal Evidence Act 1999 is meant to make it harder to introduce such evidence. Nevertheless, McGlynn has found it is used in roughly a third of trials. Further, it does not apply in the context of homicide. So there are few limitations on the use of sexual or other history of the victim. As a result Susan Edwards[106] claims

> "The courtroom has been transformed into a theatre of pornography where pain is rearranged as pleasure and where the tropes of pornography reverberate with the message that no matter what you do to a woman she will like it. "

It reflects the ways that in family courts women who raise concerns about domestic abuse from their partners are presented as engaging in parental alienation.

**Alternative reforms**

This discussion reveals the challenges facing those seeking a more effective response to domestic abuse and sexual violence. The Government's response to the "rough sex defence" cases indicates a belief that changing some of the substantive rules will ensure that an effective legal response can be found. However, as we have seen, the problem lies not in the rules themselves, but the broader believes about sex; intimate relationships; and sexuality. They will find a way through to produce a defence, be that consent; belief in consent; or denial of intent. It might be easy at this point to give up on finding an effective solution because whatever legal rules are in place patriarchal beliefs will find a way of ensuring the abuse will have a defence. But we believe there are some steps that can be taken.

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[102] See, eg: J Temkin M Gray and J Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study' (2018) 13(2) *Feminist Criminology* 205; O Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Springer, 2018

[103] HMICFRS, *Evaluation of rape survivors' experience of the Police & other Criminal Justice Agencies 2021* (HMICFRS, 2021).

[104] L Ellison and V Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 *British Journal of Criminology* 202.

[105] C McGlynn, 'Rape trials and sexual history evidence: reforming the law on third-party evidence' (2017) 81 *Journal of Criminal Law* 367.

[106] S Edwards, 'Consent and the 'rough sex' defence in rape, murder, manslaughter and gross negligence (2020) 84 *Journal of Criminal Law* 293.

Changing Prosecution Practice

One of the issues that emerged from the WCCTT campaign are the number of cases where the prosecution charged manslaughter, rather than murder. This raises the question of whether there is a case for applying the presumption in favour of prosecution in any case where the killing has occurred in the course of rough sex/SM? It is not clear to us that such a change would lead to any greater conviction rate for murder. In part this is because juries will rely on a broad range of factors, in addition to the formal legal definitions, in determining whether a defendant is guilty of murder of manslaughter. In a review of homicide cases in England and Wales involving varying demographics and circumstances, Mitchell[107] found that even cases where it might be thought there was clear evidence of murder (premeditation; use of weapons) the jury still convicted of manslaughter. He concluded:

> It may be, then, that factors other than the strength of the evidence against the defendant may influence the jury's decision. It is always going to be difficult for the prosecution to prove what the defendant's exact state of mind was, whether he or she either directly intended to kill or cause grievous bodily harm, or whether he or she foresaw it as a virtual certainty.[108]

We therefore doubt any change in prosecution charging policy will change the outcome in these cases. This is not to argue against such a policy being adopted, indeed we would support it, but to accept it is unlikely to lead to significant changes in outcome. A better way may be to deal with the issue in sentencing, which we consider next

New Offences and/or Sentencing Guidance

If there are discrepancies in outcome, not just in "rough sex homicides" but more broadly, it may be that more can be done with sentencing. For example, sentencing guidelines could indicate that sexual activity, immediately before or during the commission of the offence, or strangulation could be seen an aggravating feature. This could apply to both murder and manslaughter convictions. The potential benefit of this approach is not only a sentencing uplift but also a symbolic message in manslaughter cases that although consent to rough sex may negate the *mens rea* for murder, it does not automatically follow that the defence can expect a significantly lower sentence.

Alison Cronin, Jamie Fletcher and Samuel Walker[109] have suggested creating an offence of "causing death by dangerous sexual activity". This offence they suggest would make it clear that consent is not a defence. They argue this "would satisfy the expressive function without destroying the very fabric of the criminal law and its conceptual underpinnings." As they note the offences involving Death by dangerous driving, appear to set a precedent for this kind of approach. This might be helpful to ensure appropriate levels of sentencing are attached.

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[107] B Mitchell, 'Distinguishing between murder and manslaughter in practice' (2007) 71 *Journal of Criminal Law* 318.

[108] Ibid, 329.

[109] A Cronin, J Fletcher and S Walker, 'Homicide and violence in sexual activity, moving from defence to offence' https://www.starsdorset.org/blog/homicide-and-violence-in-sexual-activity-moving-from-defence-to-offence, accessed 26.7.21

Changing Evidence Law

One primary difficulty is that in trials of "rough sex killings", obviously, the victim cannot present their account of what has happened. In nearly all of the cases the defendant is the only person able to give an "eye witness" account. The defendant will be able to present the story in their own terms and the prosecution will be left challenging that story and denying its veracity, but rarely will they be able to present an alternative account of what happened, at least save as speculation. In other words, the defendant gets to set the scene and present the facts. Unlike many criminal trials, the victim is not there to present a viable alternative story.

This means the "rough sex" killings are often presented to the jury by the defendant as one of common sexual desire, which "went wrong" leading to death. This can be particularly distressing for families and friends of the deceased where what they believe to a violent attack will be presented as a something that the victim actively participated in an enjoyed. While parents and friends may state the victim never said anything about enjoying "rough sex" the defendant will say that that is exactly what would be expected.

To bolster their case the defence will often try and find evidence that the victim was interested in "rough sex". At the trial of the murder of Grace Millaine the defendant sought to introduce evidence that Grace had consented to the "rough sex" during which she died. After the trial one of her friends is quoted as saying that Grace's image had been "tainted with twisted claims about her personal life and victim-blaming language…At times, it honestly felt like it was Grace on trial and not him."[110]

There is a strong case for putting in place restrictions on the use of victim character evidence, particularly in relation to SHE. At the very least the protections in s. 41 that apply to rape trials could be extended to cases of murder. This might do something to challenge the way the narrative is produced by the defence. As argued above the defendant is in a powerful position of presenting the facts in a particular way in these cases, which it can be possible for the prosecution to disprove. We might recognise in rough sex crimes in particular the defendant can create an image of the victim which the prosecution cannot rebut and rely on heavily on gendered constructions of women, sexuality and morality.[111] Tyson[112] argues 'there is an urgent need to ensure that insidious court narratives that portray the female victims of domestic homicide as to blame for their own deaths are no longer able simply to be deployed in the guise of other defences to homicide or at other stages of the legal process such as sentencing'. Harriet Harman had proposed the following:

> **"Prohibition of reference to sexual history of the deceased in domestic homicide trials**
>
> If at a trial a person is charged with an offence of homicide in which domestic abuse was involved, then—

[110] Quoted in New Zealand Herald, 'Grace Millane's friends back campaign to end rough sex defence' https://www.nzherald.co.nz/nz/grace-millanes-friends-back-campaign-to-end-rough-sex-defence/G4WXVKGYASBB2KAAI3AP5W2C7Y/

[111] K FitzGibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014), for a review of homicide laws in Australia and proposals for reform.

[112] D Tyson, *Sex, Culpability and the Defence of Provocation* (Routledge 2013).

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination, by or on behalf of any accused at the trial, about any sexual behaviour of the deceased."[113]

That proposal may need some modification to allow exceptions in limited cases.

Presumption of no consent

Section 76 Sexual Offences Act creates a rebuttable presumption that there as no consent in the following circumstances

(a)any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b)any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c)the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d)the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e)because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f)any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

It would be possible to extend this presumption to the use of violence in offences against the person. There are undoubtedly problems with the operation of 76, particularly because the presumption is so weak: "the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented." As simply stating on oath that the victim consented is evidence which raises an issue as to whether there was consent, the presumption is seen as little use in the context of rape. It could however be lifted to a presumption of fact, which can be rebutted only on the balance of probabilities.

It might be argued that such a presumption seems reasonable. In a study of undergraduates in the USA, 52% of women chocked during sex said they were not always asked for consent in advance.[114] A further 20.9% said they had never been asked for consent before being choked and 39% said they had been slapped during sex without their consent first being obtained. Of

[113] Rogers, n 18.

[114] D Herbenick, C Patterson, J Beckmeyer, Y Rosenstock, M Gonzales, M Luetke, L Guerra-Reyes, H Eastman-Mueller, D Valdivia and M Rosenberg, 'Diverse Sexual Behaviors in Undergraduate Students: Findings From a Campus Probability Survey' (2021) 18 *Journal of Sexual Medicine* 1024.

those performing slapping, choking, gagging or spitting during consensual sexual only a minority (37%) of men asked for consent before engaging in these behaviours. Others asked for consent during the activity (26%); while 21% relied on body language to indicated consent. 13% said they engaged in the behaviour unless the partner asked them to stop or demonstrated resistance. Strikingly, 57% of men who had used violence during sex said pornography had influenced them. [115] A survey for the BBC[116] found that 40% of men aged 18-24 said they had choked a woman. It also found that (N = 2,002) 38% of women under 40 had experienced strangulation during sex, with 42% of those saying it was unwanted, and that they had felt pressured, coerced, or forced. 38% of women under 40 had experienced strangulation during sex, with 42% of those saying it was unwanted, and that they had felt pressured, coerced, or forced.[117] A different UK study found most men in one UK survey relied on non-verbal behaviours, particularly a lack of resistance, as being sufficient for sent. A typical comment from one respondent was they would assume consent unless she was 'shying away from certain things or flinching' and another that he would assume consent if 'they hadn't told me otherwise'.[118] This all might be used to support the presumption of no consent, which requires clear proof of consent.

However, there are two reasons why this would not be the "silver bullet" that might be hoped for. First, we should recall that, as explained above, the consent itself is not doing the legal work in the trail, it is the lack of intent to cause death or grievous bodily harm. Nevertheless, the presumption may still have some benefit. While a defendant who is consensually using force against a victim may plausibly say "I did not intend grievous bodily harm; we were having rough sex"; that claims seems far less plausible if there is no consent. While on a narrow understanding of harm it might be said its severity does not depend on the consent of the victim; that does not necessarily follow. The psychological harm might be transformed by finding the act was non-consensual.

Second, the presumption is rebuttable. It is difficult to know how a jury will deal with a case where the defendant simply states that the couple discussed their sexual encounter and agreed it should be rough. It seems easy to do and given the context described above something juries will readily recall.

Render non-consensual and (some) consensual BDSM grievous bodily harm

A proposal that seeks to go to the heart of the *mens rea* claim may be to state that any non-consensual act, which is greater than a battery, is to be treated as grievous bodily harm. This may combat the claim that sexual pleasure was the intent, not grievous bodily harm. At first sight this seems to involve an unappealing legal fiction: that actual bodily harm is grievous bodily harm, in this context. However, we think the proposal is justifiable.

There certainly seems a strong case for this being the position for strangulation. Bichard et al[119], a team of neuropsychologists, write:

[115] H Bichard, C Byrnem C Saville and R Coetzer, 'The neuropsychological outcomes of non-fatal strangulation in domestic and sexual violence: A systematic review', 2021 12 *Neurobiological Rehabilitation* 1.
[116] Savanta/Com Res, BBC 5 Live, Women's Poll (Savanta/Com Res, 2019).
[117] H Bichard, C Byrnem C Saville and R Coetzer, above n 115
[118] L Wignall, J Stirling and R Scoats, 'UK university students' perceptions and negotiations of sexual consent' (2021) *Psychology & Sexuality* (forthcoming) DOI: 10.1080/19419899.2020.1859601
[119] Above n 115.

> waterboarding has now been internationally outlawed as a form of torture, correctly considered inhumane and unacceptably dangerous, even when its stated objective is to prevent multiple deaths. In waterboarding, however, it is only the airway which is occluded. Strangulation is more lethal: not only is breathing interrupted, but also blood flow to and from the brain. We have shown how it can carry all the consequences of hypoxic-ischaemic injury such as cardiac arrest, and more besides. There is something societally flawed about banning the waterboarding of terrorists, whilst ignoring the intimate terrorism of those millions of women around the world who are regular victims of strangulation.

More broadly we would argue that where there is no consent to actual bodily harm in the context of a sexual encounter it is appropriate to regard that as grievous bodily harm. That is because non-consensual injury in the context of a sexual encounter has a very particular meaning and very particular impact on the victim; and reinforces a very particular message being expressed about women. We recognise that rape is a particularly serious offence. This is not because of physical injuries that result, but because it shows a lack of respect for the dignity and integrity of the individual.[120]

Might that even extend to consensual actual bodily harm within a sexual relationship? That seems more questionable, particularly to label as grievous bodily harm what may be experienced as pleasurable. If a case is to be made for that, it seems most strongly applied in cases where the act is expressing hatred of women or particular racial groups. One feminist group writes:

> "We argue that BDSM is a sexual practice that hinges on degrading, humiliating, violating, and torturing people (usually women but it is unacceptable in any form). When performed against women it is a mirror of patriarchal violence against women which basically happens everywhere already, only now it is being praised and sexualized.
>
> We don't blame women who participate because women are raised and socialized in a system that encourages us to view ourselves as passive recipients, submissive, or even encourages us to view violence as sexuality. This socialization runs deep and begins from the time we are small children …
>
> We view BDSM as the legitimization of violence against women. Part of the problem is that no one can truly consent to violence done against them. We believe that the line for "she consented" being an acceptable answer is where violence begins. This has both legal and social implications."[121]

While not entirely unsympathetic to these claims, if there is a case for criminalising such conduct could be made, it seems the victims of such offences are better understood to be women or the minority group than an offence of violence against the consenting victim.

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[120] N Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11 *Canadian Journal of Law and Jurisprudence* 47.

[121] https://antipornfeminists.wordpress.com/2014/03/30/here-is-a-handy-explanation-of-what-radfems-think-of-bdsm/

Broader social change

Predictably, we conclude that until there is a shift in how society understands violence against women and misrepresentations about the nature of consent little progress can be made. As we said at the start of the article if women can be assumed on the basis of little evidence to consent to extreme violence leading to their deaths; if men who kill in fits of jealousy or anger or just for fun, are readily believed to be engaging in "sex games"; and if trials end up blaming women for minor or non-existent wrongs as a way of excusing men for the most serious of crimes, there is little hope for an effective legal response in any domestic abuse or sexual offence cases.

That is not, however, to give up on what the law can do. As we have indicated above, we believe the law can contribute to some wider messages. First, the law can make it clear that explicit consent is required for sex and violence during sex. Second, the law could make it clear that non-consensual force during sex is in its nature grievous bodily harm. Third, the law could make it clear the danger attached to certain activities by clarifying they will be grievous bodily harm, such as strangulation.

**Conclusion**

This article has explored the "rough sex" cases. In a way they are yet another example of how male violence against women is normalised, glamourised and even justified. It is, of course, a striking and shocking example of this. How even in cases of the most appalling injuries, leading to death, men are too easily able to present this as a "sex game", enjoyed by the victim until it "went wrong". These cases join the long litany of stories and excuses used by men to escape responsibility for violence against women. We see too the legislative interventions which believe tinkering with legislative provision can be an effective response, without challenging the underlying issues.