

# **'Rough Sex' and the Criminal Law**

# Feminist Developments in Violence and Abuse

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# 'Rough Sex' and the Criminal Law: Global Perspectives

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# Introduction

*Hannah Bows and Jonathan Herring*

## Abstract

This introductory chapter will provide the context for the collection, introducing the topic(s) of sex, consent, the law and the wider ongoing debates concerning the use of consensual ‘rough’ sex and/or bondage, discipline, sadism and/or masochism as a defence in homicide cases. An overview of the book will also be provided.

*Keywords:* Rough sex; murder; defences to murder; consent; BDSM; violence against women

At the time of editing this collection, violence against women and girls is receiving significant public and policy attention as a result of the two major news stories of the age. First, the Russian invasion on Ukraine has brought to the public attention again that war brings with it extensive sexual violence against women and girls (Council of Europe, 2022). Second, the social and economic effects of the COVID-19 pandemic have exacerbated gender (alongside other) inequalities (Flor et al., 2022). Perhaps unsurprisingly, emerging data from across the globe have shown that violence against women and girls has intensified recently (UN Women, 2021a), described as the ‘shadow pandemic’ (Fogstad et al., 2021). However, whilst these issues may have been exacerbated by COVID-19, violence against women and girls was already recognized as a global public health epidemic (World Health Organisation, 2021). It is a widely cited statistic that at least 1 in 3 women worldwide will experience domestic or sexual violence in their life (World Health Organisation, 2021). Almost all women report experiencing sexual harassment in public places (UN Women, 2021b), and high levels of sexual assault and harassment are reported within institutions including education, religion, and social care (Keywood & Flynn, 2022).

Feminists have generally positioned sexual harassment and violence as consequences of a patriarchal society, which privileges (white, heterosexual) men and creates structured inequalities which position women as inferior and subordinate to men. Women’s bodies are regulated and their access to space is controlled and

restricted, and they are excluded from full participation in political and economic life (Nash, 2009). It is argued that this patriarchal framework produces a ‘rape culture’. The concept of ‘rape culture’ was first introduced by Brownmiller (1975) and expanded by Buchwald et al. (1993, p. vii) who define it as the

complex of beliefs that encourages male sexual aggression and supports violence against women. It is a society where violence is seen as sexy and sexuality as violent. In a rape culture women perceive a continuum of threatened violence that ranges from sexual remarks to sexual touching to rape itself. A rape culture condones physical and emotional terrorism against women as the norm.

Patriarchy produces, and reproduces, a set of gender norms and associated myths about women, sexuality and agency. These are used to normalize, justify and enable violence against women. At the same time violence against women reinforces patriarchy, by reducing women’s ability to access public spaces and limiting their power. As the preamble to the Istanbul Convention (Council of Europe, 2011, p. 1) recognizes, ‘violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men’. There is, then, a symbiotic relationship between patriarchy and violence against women (Herring, 2021).

Indeed, it has long been a claim of more radical feminists that women are presented in patriarchy as enjoying rape and sexual violence. Andrea Dworkin quoted Weekes (2017, p. 172) writes:

We have a double standard, which is to say, a man can show how much he cares by being violent – see, he’s jealous, he cares – a woman shows how much she cares by how much she’s willing to be hurt; by how much she will take; how much she will endure.

The irony is, as Dworkin well recognized, that the social norms mean that the assumption that women enjoy violent sex are so strong that it is enormously difficult for women to make it clear they do not want to be hurt. Men’s violence is normalized and if something ‘goes wrong’ the responsibility for that lies with women.

These concerns have been reignited in recent years as a result of several high-profile cases of fatal violence against women where the defence has claimed that the death was an accidental result of consensual rough sex. Colloquially referred to as the ‘rough sex defence’, these cases have illuminated how narratives are built by men which rely on gendered norms, myths and stereotypes about (heteronormative) sex. Hence, we see multiple routes by which women are responsible if ‘rough sex’ goes wrong. The woman who resists is labelled ‘vanilla’ and a boring sexual partner; a woman who appears reluctant to engage in ‘rough sex’ is labelled as sending conflicting and confusing messages; whilst the woman who consents, was such a ‘good sexual partner’ (whilst at the same time, engaging in risky behaviour and therefore responsible for the consequences) the man was overcome with passion and did not notice he was killing his partner. As Romito (2008) argued,

these narratives rely on various tactics to responsabilize and blame the victim for her victimization, whilst simultaneously presenting men's violence as normal and legitimate.

These tactics are in themselves not particularly new. Extensive research over the last few decades has documented how these myths and stereotypes are relied on by those accused of sexual offences. In their extensive review [Larissa Johnson and Anthony Beech \(2017, p. 21\)](#) write:

High levels of rape myth acceptance (RMA) are strongly associated with rape proclivity – one's likelihood or tendency to choose to rape .... There is evidence of RMA amongst convicted rapists, using myths to rationalize their behaviours.

What is different about the 'rough sex' cases in recent years, however, is that we see these tropes and stereotypes being used in *other* contexts – namely, in cases that primarily concern violent offences rather than sexual offences. As we have written about elsewhere, homicide cases where the defence relies on the 'rough sex gone wrong' argument present conceptual and legal challenges as they combine multiple, contradicting principles in law ([Bows & Herring, 2020](#); [Herring & Bows, 2021](#)).

The 'success' of the defence, even in cases where it seems highly unlikely there was consent, has led to campaigns and lobbying for legal reform and a surge in both academic, and activist, attention in relation to 'rough sex' and wider, intersecting topics. These often involve competing narratives, with some emphasizing the importance of respecting autonomy and privacy, especially given the long history of discrimination against those whose sexuality is perceived to be 'deviant', a history with a powerful lesson about the dangers of not respecting differences in sexualities. This is all the more so with debates around sex, gender and sexualities being a marker of identity so that restrictions in sexual expression are seen as having a particularly profound impact on the self. But there are others who emphasize the breadth of male violence against women and the fact there appears to be no end of the ways in which it is normalized and justified. From such a perspective rough sex, or much rough sex, needs to be challenged in the name of protecting the autonomy and sexual rights of women. Contributors to the debates over rough sex, whichever approach they are taken, often draw on the language of privacy, autonomy and identity, albeit to reach different conclusions. This edited collection brings a range of perspectives on several of these issues.

## Conceptual and Legal Debates

Conceptually, there has been little attention paid to the definition of rough sex and the behaviours which may be captured within this term. One of the fundamental issues that is a central theme throughout the collection is that the lack of agreed understandings and conceptualizations of rough sex have left the boundaries of what might fall within the definition porous and open to (much) debate.

The first chapter in this collection by Gallagher and colleagues provides a review of existing research on rough sex within a broader examination of research concerning aggression and violence during sex. The chapter explores the tensions amongst the works seeking to define aggression and violence during sex, both consensual and nonconsensual, and approaches to examining the extent, nature and contexts in which it occurs. Ultimately, they find a lack of consistency in definitions and approaches hinders knowledge in this area.

The issue of 'rough sex' transcends multiple debates, including sexual autonomy and privacy, sexual offences, physical harm, consent and the role of the state in regulating and determining what conduct should be criminalized. How do we balance respect for private encounters, paradigmatically sexual ones, with protection from harm? This is a complex issue. It is not simply a matter of balancing respect for the intimate and protection from harm, because there is much to debate about what kinds of conduct are intimate and what should count as harm. There is a further difficulty in moving between the theoretical and the practical. The law tends to operate by way of generalized rules of wide application which works less well in cases where nuanced, but fundamental distinctions exist between abusive and beneficial behaviour. The theme of this collection is a fine example of this dilemma. Does 'rough sex' fall into the category of 'intimate life' and so deserving of respect; or is it a form of abuse, requiring the protection of the state? Is it possible for courts bound by rules of evidence to distinguish cases from rough sex and cases of non-consensual abuse? To many the answer will depend on whether there is consent. But that is far too simplistic an answer. As this collection demonstrates, the issue of 'rough sex' is far more complex than that. The second chapter is provided by one of the editors of this collection – Herring – who unpacks the meaning(s) underpinning the term 'rough sex', the overlaps and intersections between rough sex and bondage, discipline, sadism and/or masochism (BDSM), domestic abuse and coercive control and broader gender inequalities. Herring argues that rough sex is ultimately a manifestation of violence against women and the features of rough sex are hallmarks of other forms of violence and harm men perpetrate against women. As such, although individual right to privacy and intimate relations away from state interference is important, the broader risks and harms posed by men's violence against women warrants careful scrutiny and state intervention to prevent and protect women and girls.

Arguably, the lack of academic consideration of what constitutes 'rough sex' has left a gap which is filled by other (mis) understandings, much of which rely on harmful myths and assumptions. This is the central argument of both Herring's chapter and the third chapter in this collection, which examines the role pornography plays in constructing understandings of rough sex. Through an analysis of the way 'rough sex' is defined on popular pornography websites, Keene considers how such definitions and understandings shape wider cultural and social understandings of what rough sex is and how it is performed. She observes that these representations rely on traditional heterosexual scripts that position (rough) sex as something that is done by men, to women, in legitimate pursuit of pleasure. The

lack of comprehensive and nuanced understandings about what rough sex is, and how it is performed has, she argued, provided space for external sources such as mainstream pornography to become a default authority for such learning.

The absence of agreed definitions has implications for wider society, including in the criminal justice system, where understandings similarly rely on gendered tropes and narratives in the operationalization of rough sex. This is the focus of the fourth chapter, which explores how BDSM is represented and constructed in criminal cases involving sexual activity and physical harm. Alexandra Fanghanel notes in her chapter that there are tensions between different scholars and practitioners concerning the role that BDSM plays in relation to violence against women, with one side of the debate arguing BDSM is entirely separate and based on consent, respect and mutual pleasure whereas others argue it is rooted in misogynistic and patriarchal gender norms and unequal power relations and reflects the broader normalization of violence against women and the pornification of society. Fanghanel explores these debates in more detail, navigating the line between the two sides and exploring the legal imaginary – how BDSM is perceived and interpreted in the courts. Through an analysis of three cases where sexualized acts of violence have been defended on the basis of consent and reference has been made in some way to BDSM, this chapter illuminates how tropes of troubled (yet lascivious, promiscuous) women are mobilized within a narrative that positions the (male) defendant as an innocent participant who was led by the victim into a situation not of his making. In doing so, the victim is blamed and held responsible for their own victimization.

In the next chapter, Amanda Spalding examines some of the difficulties with creating legislation to tackle the issue of ‘rough sex’, drawing on the UK context and the recently enacted Domestic Abuse Act. This chapter considers the current law on consent and how it applies in criminal offences involving sexual activity and physical harm. As she points out, the law in this area appears straightforward at first glance, but a closer look reveals inconsistencies and complexities, not least around the concept of rough sex itself which is poorly defined. For example, the boundaries between what she describes as pure sexual activity and offences against the person are unclear. Using the example of love bites, Spalding illustrates how the meaning is context bound – on the one hand, it can be viewed as an indicator of consensual passion and pleasure, but in a violent relationship or any situation where consent is not present, they may be signs of control, and of an assault. This creates uncertainty, something which the law has previously failed to address. Whilst the Domestic Abuse Act 2020 sought to bring such clarity, Spalding argues that the relevant provisions largely repeat the previous, unclear law, and that rather than introducing more law, we should be addressing the procedural practices, in particular the use of a victim’s sexual history, which often rely on rape myths and gendered tropes to produce defence narratives that blame the victim (see also [Bows & Herring, 2020](#); [Herring & Bows, 2021](#)).

Similarly concerned with role of rape myths and tropes in the court room, the sixth chapter by Susan Leahy explores the challenges associated with providing

an absence of consent in rape cases involving non-violent sexual coercion. Leahy argues that myths and stereotypes surrounding what constitutes ‘real rape’ continue to influence jurors’ understandings of rape, with jurors believing rape typically involves physical violence and/or injury. She suggests that whilst the introduction of coercive control offences in England and Wales and Ireland has improved acknowledgment of the existence and impact of coercive environments in relationships, this ‘has not yet filtered to understandings of consent within sexual offences law’, creating a tension between approaches. Leahy argues legal reform of sexual offences law and associated guidance in relation to consent and/or the introduction of specific offences to address sexual coercion may remedy the disconnect and improve criminal justice outcomes for victims.

Burgin and Crowe are also concerned about consent is understood in criminal trials and the how such (mis)understandings are relied on by those accused of rape through the ‘defence’ of rough sex gone wrong. Through analysis of several cases, the authors trace how the ‘defence’ has been used by the accused to build narratives which rely upon false and harmful myths to avoid accountability for their actions, and that a model of ‘implied consent’ underpins the ‘rough sex defence’ narrative. This, they argue, fundamentally undermines, and contradicts, broader movements within Australia to adopt an affirmative consent standard. They conclude that the solution to these issues lies in a holistic and complete embracing of the affirmative consent standard in Australian rape law – that is, a complete shift to the position of no consent in all situations where positive and reasonable steps to ascertain consent do not occur.

## **Women’s Experience of Rough Sex**

There have been a number of surveys – primarily conducted by market research organizations and/or media channels – examining the prevalence of non-consensual violence during sex, but little research has examined these experiences in more detail. The eighth chapter in this collection presents data from an online survey of 84 women subjected to non-consensual violence and interviews with eight women. Echoing some of the conceptual concerns raised in earlier chapters in this collection, Snow reports that these non-consensual acts typically occurred in relationships characterized by coercion and abuse and that the (male) perpetrators relied on narratives of sexual freedom, (women’s sexual) liberation and ‘progressive’ frameworks to normalize and legitimize their violence. These narratives rely on broader heteronormative frameworks and gendered constructions of sex and sexuality, where women are the gatekeepers to, and responsible for, men’s sexual interests, desires and entitlements. It is men who set the expectations and boundaries of what sex is, and how it should be experienced, informed and restricted by limiting definitions of male sexuality and pleasure.

The next chapter is provided by Fiona Mackenzie, founder of the campaign and lobbying organization *We Can’t Consent to This* (WCCTT). Throughout this

collection, and broader work on the rough sex defence, WCCTT are extensively quoted as they have filled a gap in evidence, producing data on rough sex killings through analysis of court cases and media coverage. In this chapter, Mackenzie presents findings from this ongoing research involving analysis of both non-fatal and fatal cases in England and Wales involving violence which the accused has claimed was consensual. In particular, this chapter shows how powerful the defence narrative can be, such that even in cases where the victim claims they did not consent, the defence of consensual rough sex has often prevailed. Consistent with the other chapters in this book, Mackenzie calls for a holistic change in attitudes within the criminal justice system alongside legal reform to address the injustice many women experience.

Emily Bradley's chapter has a different angle to others in this collection. She is concerned with section 71 Domestic Abuse Act 2021, which makes it clear that consent is not a defence to sado-masochism involving actual bodily harm, or worse. She argues this conflates sado-masochism with domestic abuse. In particular she is concerned that 'for the first time the legal treatment of sadomasochistic sex became interwoven with, and inflected by, legislation seeking to target abuse'. This conflation leaves no room for sadomasochism as a legitimate form of sexual expression. Bradley analogises the criminalization of same-sex sexual activity with the criminalization of sado-masochism. This, however, raises the issue mentioned above of whether it is possible (or at least whether it is possible for the law) to distinguish the 'legitimate form of sexual expression' from the abuse. It is perhaps here an interesting contrast between Herring's chapter which suggests the burden on demonstrating that the sadomasochism is consensual lies on those engaging in the behaviour, whilst Bradley places the burden on the state to ensure there is space so that people can exercise their sexual autonomy.

The complexity in drawing the distinction Bradley claims is so important to draw is brought out in the next chapter from Ray Harris. They note that feminists have 'sought to detach sex from violence, and envision a sexuality that was restorative and egalitarian'. The rich analysis of sadism presented in this chapter shows that it cannot be side-lined as a 'perversion' but rather be acknowledged as 'an unremarkable facet of sexual culture and practice'. This is the context within which the difficulty arises in finding a way of acknowledging that much contemporary heterosexual sexual activity reflects 'male sexual entitlement and female self-repudiation' leading to abuse and debasement, whilst at the same time seeking to make room for legitimate 'rough sex'.

As Harris's chapter demonstrates the issues raised in this collection should not be dismissed as a few controversial court cases or as concerning the sexual tastes of a tiny minority (Burch & Salmon, 2019). The links between sex and violence are complex (Boyle, 2020). Ever has it been so. The 'rough sex' killings are a particularly dramatic expression of failings in heterosexuality, patriarchal society and a pornographic culture. They demonstrate the assumptions and lies that are widely accepted around women's sexuality and the nature of consent; reflected and reinforced in the law (Jolles, 2015). The solutions to these issues are not to be found in statutory reforms or judicial education, at least not alone. They require

rather a deeper and prolonged conversation of the place of sex and violence in our intimate and public lives. The difficulty is the intersection of sex and violence is uncomfortable and something people avoid talking about. We hope that this collection will open up more conversations about these crucial issues.

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