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# The Legality of Love-bites

## Introduction

In a series of high-profile cases, defendants accused of murdering women have tried to mitigate their murder charge on the basis that the killing was not intentional but rather was an accidental outcome of consensual 'rough sex'. Activists, academics and the popular press have presented this as a form of victim blaming and calls have been made to ban the so called 'rough sex defence'(Keene, 2019; North, 2019, Christopholus, 2020). The UK government recently introduced provisions in the Domestic Abuse Act 2021 in response to these concerns. In this chapter some of the overarching difficulties with creating legislation to tackle this issue, especially in terms of how to sufficiently define 'rough sex' for legal purposes, will be explored. The first two sections will provide some necessary background information. Section One gives a very brief overview of the rough sex defence and why it sparks controversy while Section Two briefly covers the current law on consent as a defence in offences against the person cases. Section Three considers the difficulties the court faces in drawing clear boundaries when it comes to the issue of rough sex. It discusses some of the inherent risks of sexual activity and how these can be seen as harmful. It highlights the issue of love-bites as a clear example of the potential problem. It also briefly discusses the case-law on horseplay to demonstrate how the courts have struggled to clearly delimit boundaries in other areas where some risk seems inherent in the activity. It considers why some proposals limited new provisions on the rough sex defence to domestic abuse cases. The final section covers the new provision that was introduced in the 2021 Act and briefly outlines why it may be insufficient to tackle the issues presented by the use of the rough sex defence.

## Section One: The Rough Sex Defence Controversy

In recent years campaigners argue that there has been an increased reliance on the 'rough sex defence' (We Can't Consent to This, 2019 and see this collection). This term refers to when a defendant charged with violent offences, including murder, argues that the action leading to harm was consensually carried out for sexual gratification and that, in essence. the violent offence was a result of a consensual 'sex game gone wrong' (Yardley, 2020). The organisation We Can't Consent to This (2019) claim that since 2010 there has been a 90% increase in the

number of cases where these defences have been used in the UK, which amounts to approximately 67 cases in about 10 years. This phenomenon is not confined to the UK, with cases also appearing across the world in Canada, Italy, German, USA and Russia (The Economist, 2020). Several high-profile cases across the common-law systems have grabbed public attention, including the recent New Zealand case prosecuting the killer of Grace Millane, a 22-year- old British tourist (Kempson v R, 2020). In this case the victim had been strangled to death, which is the most common cause of death in rough sex defence cases (Bows & Herring, 2020). Despite taking 'trophy' pictures with the body, watching pornography immediately after her death and hiding and burying the body, the defendant tried to argue that Grace had consented to being choked and that her death had been purely accidental in the course of a consensual sexual act intended to give sexual pleasure to the victim. These claims were unsuccessful at mitigating a charge of murder and the defendant was convicted (Kempson v R, 2020).

The guilty verdict notwithstanding, the case (re)ignited much public outrage and controversy over the use of this line of argument. It was compared to the problematic use of sexual history evidence in rape and sexual offence cases where the defence team introduce evidence of the victim's sexual behaviour and preferences (Keene, 2019; North, 2019). The evidence of sexual behaviour and preferences are often drawn from other time periods outside the incident in question and sometimes with people other than the defendant – in other words, their sexual history. The defence do this so as to create a narrative that implies the victim would likely have been consenting at the time of the alleged offence (McGlynn, 2017). This creates a system of 'secondary victimisation' which is a term used to describe a phenomenon where the victim is victimised again, on top of the original crime, by their experience of the criminal justice system (Patterson, 2011). This often takes the form of the victim feeling that it is them, rather than the defendant, that appears to be on trial. This is obviously linked to the oft criticised culture of victim blaming when it comes to sexual offences (Brown and Walklate, 2012) where the victim is essentially blamed for the actions of the defendant through the defence implying that either by their behaviour or words the victim was 'asking for it.' Unsurprisingly, rough sex defence cases may be argued to take this to the explicit extreme, as the victim is often portrayed as literally asking the defendant for the violence in order to obtain sexual gratification.

The above problematic issues are all evident in the Grace Millane case. Sexual history evidence and speculation was used extensively in this case (Kempson v R, 2020). Some of the media

coverage of the case focused heavily on an uncritical account of the defendant's claims as to what she wanted, her use of a BDSM dating website, her contact with men on that website and her previous sexual activity with other men – all of which was also used as evidence in the trial itself (Christopholus, 2020). In terms of 'secondary victimisation' and victim blaming, this was experienced indirectly by the family of the deceased and was made worse for the fact that the deceased could not in any manner speak for herself. A family member described that 'it felt like Grace was on trial, yet not able to defend herself' (Jones, 2020). The rough sex defence then is an unsurprisingly controversial issue and there have been calls to reform the law to prevent this practice in the UK and other parts of the world (Christopholus, 2020).

Section Two: The Rough Sex 'Defence' and the Current Law on Consent to Violence

The current English law on violent offences against the person is covered by the common law and the Offences Against the Person Act 1861. There are four main categories of offences. The first is the common law offences of common assault and battery (contained in section 39 Criminal Justice Act 1988). The second is assault occasioning actual bodily harm covered by s.47 of the 1861 Act. The third is causing grievous bodily harm or malicious wounding covered by s.20 of the 1861 Act. The fourth is intentionally causing grievous bodily harm or malicious wounding which is covered by s.18 of the 1861 Act. These different types of assaults carry different sentences depending on severity with s.18 offences carrying a potential life sentence.

The common law principle on consent when it comes to violent harm is that consent cannot be used as a defence for harms beyond common assault and battery. Thus, it is not an available defence to harms covered by s.47, s.20 or s.18 in the 1861 Act. This was the principle laid down in the high-profile R v Brown case in 1993. R v Brown was a controversial decision which also concerned rough sex practices. The defendants in Brown were sadomasochists who had consensually inflicted serious violence against one another for sexual pleasure and were charged with actual bodily harm and grievous bodily harm under the Offences Against the Person Act 1861. They tried to rely on the fact that the victims had consented as a defence. They were unsuccessful. The House of Lords established the rule that consent cannot be a defence to injury beyond common assault and battery. There are exceptions for activities which are deemed to be in the public interest (such as sport or surgery) or where it would be unreasonable for the court to criminalise the behaviour now (such as tattoos or piercing). On

this last point the judiciary are very wary of creating new exceptions as can be seen in recent the judgment in R v BM (2018, para 4) on body modification art where it was explicitly stated:

> *'New exceptions should not be recognised on a case by case basis, save perhaps where there is a close analogy with an existing exception to the general rule established in the Brown case. The recognition of an entirely new exception would involve a value judgement which is policy laden, and on which there may be powerful conflicting views in society. The criminal trial process is inapt to enable a wide-ranging inquiry into the underlying policy issues, which are much better explored in the political environment.'*

The law thus, in theory at least, prevents consent being used as a defence when it comes to most offences against the person. However, the law is presented with various complications in trying to cover the issue of rough sex in this way. Many sexual activities are inherently risky or potentially harmful making it not easy to create clear boundaries as to what is and is not rough sex.

## Section Three: Creating Clear Boundaries

A significant difficulty that is presented by rough sex cases is that they require us to distinguish between what is a purely sexual activity and what is an offence against the person. This distinction is not always easily clear cut. As scholars such as Herring and Madden Dempsey (2007) have pointed out, sexual penetration itself requires a use of force and it carries with it many associated risks of physical and psychological harm. Physical harm such as 'abrasions, lacerations, tearing or chafing of tissues' (Wall, 2015, p. 783) occurs regularly as part of sexual intercourse and of course the risk of sexually transmitted disease and unwanted pregnancy is present. Yet, sexual activities are not considered harmful unless they occur without consent whereas offences against the person are generally considered harmful regardless of consent. Jess Wall (2015) gives the example of two scenarios to illustrate the difference between how the law treats offences against the person and sexual activity. She sets out that in scenario A two people go into a room and one comes out with bruising around the eye socket and in scenario B two people go into a room and one comes out with bruising around the vagina or anus. The law treats these two scenarios quite differently. In scenario A an offence is presumed to have taken place and the law only allows for limited defences (including consent if the conduct falls within a limited number of permitted contexts, such as regulated sport). Whereas in scenario B, whether the activity was consensual is central to the question of whether an

offence took place at all. The difficulty is that rough sex cases appear to be a combination of these activities: the harm arises as a result of what is alleged to be sexual activity. R v Brown (1993) appeared to clarify that these harms are offences against the person, yet distinguishing between which harms are part of regular sexual activity and which constitute rough sex beyond that activity is not straightforward. Take for example, the practice of 'love-bites'. Love-bites are also called 'hickeys' and 'love-bruises' and come about 'from sometimes ambiguous physical/sexual force from the lips, usually of another person' (Hearn & Jones, 2008, p.56). Love-bites are an excellent example which demonstrates the complexity of the line between physical violence and sexual practices: 'The meaning of a 'love-bite' is context-bound, often ambiguous; in the absence of another context, consent is usually assumed and pleasure implied. The love-bite alone does not necessarily signify a violent relationship nor does it represent victim status. Without other signs of violence a 'love-bite' is, or at least can be, considered erotic… In a violent relationship love-bites may be used as a means of control and (sexual) possession rather than for specifically erotic purposes' (Hearn & Jones, 2008, p.65). The study by Hearn and Jones (2008) found that when asked about experience of men's violence, women volunteered discussions of love-bites whereas men did not, indicating potentially different perceptions of the behaviour.

The issue of love-bites is not purely one of theory. After R v Brown the CPS raised concerns about the uncertainty of the applicability of the ruling to issues such as 'the rupturing the hymen during sexual intercourse and love-bites' (Law Commission, 1995, p.16) and their inability to effectively enforce such as law. Likewise, an attempt to challenge Brown was taken to the European Commission of Human Rights in 1995 (V, W, X, Y and Z v UK, 1995) and love-bites was one of the various practices regularly engaged in and cited by some of the applicants. The case was ruled inadmissible so was never heard and likewise the CPS concerns where waived off with reference to the ruling in R v Boyea (1992) that 'trifling and transient' injuries as an acceptable part of sexual intercourse needed to be interpreted in light of modern-day practices (Law Commission, 1995, p.16). No clear answer as to how to distinguish between what is a harm covered by offences against the person and what is simply part of sexual activity has thus been given.

This difficulty of distinguishing between behaviours which could be construed as violent or not violent and which seems to be heavily context and consent dependent is also shown in the case-law on horseplay. In cases such as R v Jones (1987), R v Aitken (1992) and R v

Richardson and Irwin (1999) the courts have accepted that the question of consent and belief in consent, even if mistaken or unreasonable, was very relevant to cases concerning offences against the person. In these cases, the injuries could not be said to be minor. In R v Jones two schoolboys were seriously injured after being thrown in the air with one suffering a broken arm and another a ruptured spleen. In R v Aitken the victim suffered life-threatening burns after drunk RAF officers coated a fire-resistant suit in white spirit and set fire to it. In both cases the courts held that a belief in consent, even if mistaken and due to voluntary intoxication, was a defence. In R v A (2005) the courts took the application of this defence a step further. R v A concerned the death of a university student after his fellow drunk students dropped him off a bridge into a river where he drowned. The court upheld the 'notion of the availability of consent as a defence in horseplay, even in a case resulting in death' (Fafinski, 2005, p.396). Although it is important to note that in R v A the defence was unsuccessful because the defendant's belief in consent was not believed in court due to other witness statements, the availability of the defence in theory demonstrates the difficulty that the courts have had in drawing boundaries in this area. Lord Mustill in R v Brown (1993, p.77) when considering the R v Jones precedent stated: *'*Once again it appears to me that as a matter of policy the courts have decided that the criminal law does not concern itself with these activities [horseplay], provided that they do not go too far …'

What 'too far' means in relation to horseplay has not been defined and R v A indicates it is not down to the severity of the injury. The reason why it is acceptable as a defence is also unclear. The broad public interest reasoning that is invoked to explain the exceptions for medical interventions, games and sports etc does not easily transfer over to horseplay. Barrister Lynne Knapman has speculated '…the decision recognises that boys always have indulged in rough and undisciplined play among themselves, and probably always will, and that it is not appropriate for the criminal law to intervene where there is consent' (R v Jones, 1987, p.123). The concept of horseplay itself does not seem to have been clearly defined and it would likely be difficult to do so. Similar to the concept of rough sex, drawing the conceptual boundary between what is and is not horseplay (or in other words what is a consensual 'joke' and what is assault) is difficult to discern. In the court's conception of horseplay in R v A it is clear that consent is the important distinction between horseplay and not-horseplay and the seriousness of injury does not seem decisive. This case-law thus seems indicative of the approach that the courts have thus far taken to the rough sex defence and the difficulty that judges and commentators will have in creating consistent boundaries. As Jess Wall (2015) has pointed out

when it comes to sex there is a huge diversity in what that means, who it involves and the activities it covers and so making 'general rules' is very difficult which is why we end up looking to consent to make the distinction.

This difficulty of making 'general rules' where there is a significant diversity in contexts and relationships involved is relevant to the rough sex defence debate. There is an argument that sexual practices involving bondage, domination and sadomasochism (BDSM) have been normalised (though not without controversy) as part of mainstream culture (Weiss, 2006; Yardley, 2020). How widespread these practices actually are is tricky to uncover. A systematic review of the literature on BDSM (Barker, Brown and Rahman, 2020) demonstrated the difficulty of assessing the prevalence of this behaviour, with some studies indicating its prevalence could be as low as 2% of the population and some finding almost 70% with a BDSM interest. The study did conclude that the literature seems to show that fantasy about BDSM was higher than actual practice of BDSM, which they estimated to usually be about 20-30% of the population. Looking specifically at the UK, a YouGov survey in 2015 found that 12% of the overall British population say they have taken part in BDSM and that the prevalence was much higher in younger age groups with one in five (19%) of 18-39 year olds saying they have participated in BDSM and 27% of that age group said they would like to try it. The same poll found that in the UK there was a significant level of tolerance towards these activities. Only 13% said that as a society we should discourage such activities and 71% said they should be free to engage in it privately so long as it is consensual.

Although BDSM involves the infliction of pain and/or some sort of power exchange between partners for sexual pleasure, advocates say it is premised on the idea of all parties giving genuine consent and being able to withdraw consent throughout (Barker, Brown and Rahman, 2020). The normalisation of this practice and it's positioning as part of female sexual liberation thus implies an equal balance of power in decisions as to its use. This may well true for some cases but not for others. Some commentators have argued against any presumption that the women involved in BDSM had given genuine consent with reference to the idea 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' (Edwards, 2020, p.302).

This issue of the equal balance of power when it comes to consent seemed to play a big part in the initial discussion around specific law on the rough sex defence. Many of the suggestions to make a specific criminal offence or rule on this issue suggested limiting the provision to the particular context of domestic abuse. For example, MP Jess Phillips argued for a clause which prohibited discussion of the victim's sexual history evidence in domestic homicide trials (House of Commons, 2020, p. 16):

*If at trial a person is charged with an offence of homicide in which domestic abuse was involved then a) no evidence may be adduced and b) no question may be asked in cross-examination, by or on behalf of any accused at trial, about any sexual behaviour of the deceased.*

Another proposed amendment to the Domestic Abuse Bill was put forward by Harriet Harman (House of Commons, 2020, p.12) focused similarly focused on CPS charging decisions in domestic homicide cases where domestic abuse was present:

*(1). In any homicide case in which all or any of the injuries involved in the death, whether or not they are the proximate cause of it, were inflicted in the course of domestic abuse, the Crown Prosecution Service may not, in respect of the death*
*a. charge a person with manslaughter or any other offence less than the charge of murder, or*
*b. accept a plea of guilty to manslaughter or any other lesser offence without the consent of the Director of Public Prosecutions.*
*(2). Before deciding whether or not to give consent for the purposes of subsection (1), the Director of Public Prosecutions must consult the immediate family of the deceased.*

Other similar amendments focusing on the domestic abuse context were also proposed (House of Commons, 2020, p.11). There are some aspects of the use of the rough sex 'defence' that indicate there is a link between it and domestic abuse. For example, Yardley examined 43 cases of homicide in Great Britain from 2000 to 2018 where a woman had been killed by a man in an alleged 'sex game gone wrong' (SGGW) and the man had been convicted of a homicide offence. She found that out of 40 cases where data was available, 75% of the perpetrators had engaged in behaviour which could be described as domestic abuse, coercive control or stalking of the victim (Yardley, 2020). She argues this challenges a narrative that

‘SGGW femicides are unfortunate accidents in which an otherwise “normal” man of good character kills a female partner. The femicides explored in this research are not one-off, isolated incidents, but they were the culmination of entrenched and well- evidenced patterns of abusive and coercively controlling behavior toward women’ (Yardley 2020, p18).

Strangulation or asphyxiation is the most common cause of death in rough sex defence cases (Bows & Herring, 2020). This is a behaviour which has strong links to domestic violence and domestic homicide. Strangulation and asphyxiation are a common cause of homicide for women and female victims of homicide are likely to have been killed by a partner or ex-partner (Yardley, 2020). Strangulation is particularly associated with domestic homicides as opposed to non-domestic homicides (Edwards, 2015). There are of course limitations to linking any specific legislation on the rough sex defence to domestic abuse. Many cases of ‘rough sex gone wrong’ will fall outside the remit of domestic abuse definitions. It is very likely, for example, that the case of Grace Millane would not be considered a domestic abuse case as she was only on her first date with her killer when she was murdered. In order to have been considered a domestic abuse case, she and her killer would have had to have been ‘personally connected’. This is currently defined as they are in an intimate personal relationship; or they live together and are either members of the same family or have previously been in an intimate personal relationship with each other (Serious Crimes Act 2015, s76). It is debateable whether, given it was their first date, they could be said to be in an intimate personal relationship. However, Yardley (2020) has found in her research that the consent defence in rough sex cases seems to be the most persuasive when it is used against the backdrop of an intimate relationship which may indicate that this is the area most in need of direct legislation.

## Section Four: The New Legislation

As it stands the government opted not to confine the new provisions on rough sex to domestic abuse situations. Section 71 of the Domestic Abuse Act 2021 states:

*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)).*

*(1)In this section—*

- *“relevant offence” means an offence under section 18, 20 or 47 of the Offences Against the Person Act 1861 (“the 1861 Act”);*

- *"serious harm" means—*

  *(a)grievous bodily harm, within the meaning of section 18 of the 1861 Act,*
  *(b)wounding, within the meaning of that section, or*
  *(c)actual bodily harm, within the meaning of section 47 of the 1861 Act.*

*(3)Subsection (2) does not apply in the case of an offence under section 20 or 47 of the 1861 Act where—*

*(a)the serious harm consists of, or is a result of, the infection of V with a sexually transmitted infection in the course of sexual activity, and*

*(b)V consented to the sexual activity in the knowledge or belief that D had the sexually transmitted infection.*

*(4)For the purposes of this section it does not matter whether the harm was inflicted for the purposes of obtaining sexual gratification for D, V or some other person.*

*(5)Nothing in this section affects any enactment or rule of law relating to other circumstances in which a person's consent to the infliction of serious harm may, or may not, be a defence to a relevant offence.*

It is not clear how much this new provision will do to actually address the concerns raised by campaigners such as We Can't Consent to This. The new law is confined to saying that consent to serious harm for the purposes of obtaining sexual gratification is not a defence to offences against the person charges. But in the consultation for the Bill, We Can't Consent to This (2020) raised evidence where consent to assault appeared to influence sentencing rather than conviction (also see Chapter X, this collection). There is nothing in this new law which will prevent this from happening. The clause proposed by Jess Phillips MP which would ban the use of sexual history evidence in homicide cases (albeit she limited it to domestic abuse cases) seems to come closest to tackling the issue that campaigners are most concerned about. The We Can't Consent to This campaign, the critique from commentators and much of the public debate has centred on cases where the defendant attempts to plead down from a murder charge to manslaughter or the Crown Prosecution Service made the decision to charge with manslaughter rather than murder.

This is part of the difficulty with the majority of the high-profile rough sex cases: they do not concern 'pure' offences against the person - they concern whether a murder charge should be reduced to manslaughter. The difference between these two charges hangs on the intention of the defendant. This is because in order to be convicted of murder the defendant must be found to have the requisite intention to kill or inflict grievous bodily harm on the victim. Thus, the

consent to the sexual activity is used to paint a broader picture of the circumstances surrounding the death and to provide a narrative where the defendant was lacking intention to inflict the level of harm that eventually occurred (Yardley, 2020). What is particularly problematic is that the victim in these cases is unable to speak for herself and there is likely to be a lack of evidence to challenge any narrative put forward by the defendant (Bows & Herring, 2020). This was what was controversial about the Grace Millane case – that there was nothing to prevent the killer reframing the narrative of her death around Grace's sexual behaviours. Unlike in rape cases then, where the arguments around sexual history etc are used to achieve a not guilty verdict, the consensual rough sex defence in most high-profile cases is used to argue that the murder charge should be reduced to manslaughter or seems to influence the charging decision of the Crown Prosecution Service (see We Can't Consent to This, 2020 and Edwards, 2020 for an extensive discussion of the case-law in this area). The rough sex 'defence' then is at best a 'partial defence'. There is evidence that some success has been found with this 'partial defence' (see Chapter X, this collection). Although as stated by Bows and Herring (2020) these outcomes actually might not be that unusual as it broadly tracks with patterns in the national data on homicide convictions. It is not clear that the new legislation will tackle this issue.

As discussed above, the problems with the rough sex defence then appear to be similar to that of the use of sexual history evidence in rape and sexual offences trials. There have been previous legislative attempts to seriously limit the use of sexual history evidence in such trials. However past experience of attempting to prohibit the use of evidence referring to sexual behaviour should demonstrate that it is unlikely to be a straightforward endeavour. In the early 2000s the Youth Justice and Criminal Evidence Act 1999 was passed which attempted to significantly limit the circumstances in which sexual history evidence could be introduced in rape trials (Youth Justice and Criminal Evidence Act 1999, s41). These limitations were subsequently significantly undermined in the case R v A (2001) where the House of Lords found that sexual history evidence could be admitted where it was deemed so relevant that it may prejudice the trial to not include it. In doing so, they reintroduced a high level of judicial discretion in allowing sexual history evidence meaning it's use and the critique of evidence in rape trials continues to the present day (McGlynn, 2017).

Likewise, legislation was passed in order to counter a similar problematic issue in homicide cases where the defendant argued for the partial defence of loss of control on the basis of sexual infidelity of the victim. The Coroners and Justice Act 2009 attempted to prohibit a similar

narrative where evidence of sexual infidelity was used to justify the loss of control which led to the homicide. Section 55(6(c)) of the Act explicitly states: '"[t]he fact that a thing done or said [which led to the loss of control] constituted sexual infidelity is to be disregarded.' In the case of R v Clinton (2012) however the Court of Appeal found that while the sexual infidelity itself may not be a trigger, it will be important to consider it as part of the wider context of the loss of control situation. This decision has been similarly controversial (Parsons, 2015). The new law relevant to the rough sex defence does not directly touch on the issue of sexual history evidence nor the consent argument being presented in court to mitigate a murder charge nor does it touch on sentencing either. The new law may have a symbolic function and perhaps the aim is to send a message to the judiciary that this is not acceptable reasoning but, especially given the context of prior attempts to limit such evidence, there is no guarantee that such a message will be well-received or necessarily interpreted strictly.

## Conclusion

In conclusion, the rough sex defence presents a difficult challenge for law. The use of this defence brings up well-worn issues of sexual history evidence and victim blaming from sexual offences trials which are arguably even more problematic in these cases given the victim is often deceased and thus completely unable to challenge this narrative. Unsurprisingly this line of legal argument has sparked much outrage over its use. However, as this chapter has demonstrated this will not necessarily be an easy issue to tackle. The law already provides that consent is not a defence to offences against the person but that is insufficient to cover all eventualities. Like the case-law on horseplay, creating clear boundaries in this area will be difficult. As with horseplay, the inherent physical riskiness of sex means harm is potentially inherent in the activity. The example of love-bite demonstrates how a sexual activity which does result in physical harm can be coded as purely erotic or as violent and aggressive depending on the circumstances. Moreover, 'rough sex' cases bring together the law on offences against the person with the law on sexual offences where consent is central to whether an offence took place, adding to the struggle in clearly separating out the issues. Given the difficulty in creating a general rule to cover all rough sex cases, there were several proposals to limit any legislation specifically targeting the rough sex defence to cases of domestic abuse. However, the government in the new Domestic Abuse Act 2021 opted not to limit the provision in this way and the provision adopted seems to largely be a restatement of the current law on

consent to harm contained in case-law. It is doubtful whether it will be enough to really tackle the issue.

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