

Should the Legal Response to Deceptive Sex Worry About Authenticity Rather than Autonomy? A Debate Around the “Gender Deception” and “Explicit Conditions” Examples

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Introduction

In Brazilian law, rape (*estupro*) is not generally described as nonconsensual sex. Rather, the offense is legally characterized by the use of violence or serious threat to compel someone into sexual penetration or any other sexual act.¹ The law also employs the term rape (more specifically, rape of a vulnerable person) to describe the practice of any sexual act with: (i) individuals under the age of fourteen; (ii) individuals who, due to mental illness or incapacity, lack the cognitive ability to consent; and (iii) individuals who, for any other reason, are unable to resist.² Consent—or, more precisely, the absence of consent—figures explicitly in the legal definition of the separate offense of sexual molestation, which criminalizes the imposition of a sexual act on someone without their consent.³ In addition to violence, serious threats and incompetence, fraud may also vitiate sexual consent, giving rise to liability for sexual violation through fraud, defined as engaging in a sexual act using fraud or other means that hinders the expression of the victim’s free will.⁴

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¹ Brazilian Penal Code (CPB) art. 213 (“To constrain someone, through violence or serious threat, to have sexual intercourse or to perform or allow another to perform with them any other sexual act. Penalty—imprisonment from six to ten years.”).

² CPB art. 217-A (“To have sexual intercourse or to engage in another sexual act with a person under fourteen years of age. Penalty—imprisonment from eight to fifteen years. §1. The same penalty applies to anyone who engages in the conduct described in the *caput* with a person who, due to illness or mental disability, does not have the necessary discernment to perform the act, or who, for any other reason, cannot offer resistance.”).

³ CPB art. 215-A (“To perform a sexual act against someone and without their consent, with the purpose of satisfying one’s own lust or that of a third party. Penalty—imprisonment from one to five years, if the act does not constitute a more serious offense.”).

⁴ CPB art. 215 (“To have sexual intercourse or to engage in another sexual act with someone, by means of fraud or any other method that prevents or hinders the free expression of the victim’s will. Penalty—imprisonment from two to six years.”).

The Brazilian legal description of sexual fraud is not circumscribed to the practice of a sexual act through a certain type of fraudulent behavior. Therefore, at least from a literal interpretation, our law seems to be broad enough to impose punishment whenever fraud constitutes a condition without which sexual consent would not have been granted. At first glance, this criminal offense could be thought to cover situations involving fraudulent medical procedures, spouse impersonation, “gender deception,” and even misrepresentations regarding personal circumstances—such as marital status, wealth, religion, ethnicity, or occupation—aimed at securing sexual consent.⁵ However, a number of scholars contend that the legal description of the criminal offense should be interpreted narrowly, targeting only the more serious forms of sexual fraud, specifically those that amount to violations of a person’s sexual autonomy.⁶

In her book, Professor Kennedy argues that the legal response to deceptively induced intimacy—having already moved away from the protection of collective interests (such as marriage and morality) to an emphasis on individual choice—should now shift focus from autonomy to authenticity.⁷ In her view, it is both practical and conceptually “preferable to concentrate on what makes certain deceptions wrongful and harmful, rather than on whether they preclude or vitiate consent.”⁸ The law of rape, she suggests, has in fact been operating according to this logic, insofar as deception is treated as vitiating consent because it is seen as immoral, and not the other way around. A framework based on authenticity, as proposed by Kennedy, seeks to locate the value of sex and intimate relationships in processes of self-construction, while also recognizing that intimacy and identity are socially constructed and culturally informed. By providing a more nuanced approach that acknowledges the complexities of self-construction in modern relationships, authenticity, she argues, offers a more appropriate governing principle than autonomy for determining the range of deceptions that might qualify for a legal response.

I align myself with those who believe that sexual autonomy should remain the core value of rape laws, including rape-by-fraud laws. To support this position, I will examine two sets of cases in which an authenticity-based and an autonomy-based framework may lead to divergent outcomes: cases involving “gender deception” and cases involving explicit conditional consent. My primary aim is to contrast Professor Kennedy’s view, grounded in authenticity, with my own perspective, grounded in autonomy. I begin by outlining

⁵ Even if one can argue that such conduct fulfills the statutory elements of a criminal offense, I am not aware of any case in which criminal prosecution has been pursued for misrepresenting personal attributes (such as age, marital status, or financial situation) to obtain sexual consent, although it is reasonable to assume that such behavior does occur in real life.

⁶ See, e.g., Renato Kramer & Moritz Denzel, *A Punibilidade da Fraude Sexual à Luz do Direito Penal Alemão* (§ 177 Abs. 1 StGB), 18 *Revista de Estudos Criminais* 107, 123 (2019). Even Nelson Hungria, often regarded as the “father” of our Penal Code, maintained that not every form of fraud amounts to the offense at stake, since not every act of deception is capable of undermining sexual freedom. See 8 Nelson Hungria, *Comentários ao Código Penal* 139-40 (5th ed. 1981).

⁷ Chloë Kennedy, *Inducing Intimacy: Deception, Consent and the Law* 201-02 (2024).

⁸ *Id.* at 196.

Kennedy's case for shifting from autonomy to authenticity, noting both points of convergence and divergence between our views (Part I). I then develop my understanding of the right to sexual autonomy and show how this framework shapes my legal analysis on so-called "gender deception" cases (Part II). Finally, I turn to cases of explicit conditional consent to illustrate how an autonomy-based interpretation of the law can help distinguish between forms of deception in sexual relations that should, and those that should not, fall within the scope of criminal law (Part III).

I. Professor Kennedy's Case Against Autonomy in *Inducing Intimacy*

Professor Kennedy's work offers a handful of reasons to abandon the ideal of autonomy as the governing principle of legal response to deceptively induced intimacy. According to the author, "[w]hen individual choice is the main, or even the sole, interest underpinning the law, other considerations can appear subservient or else disappear from view."⁹ This is especially true, Kennedy argues, of more contemporary views that prioritize autonomy over collective interests—which were traditionally seen as the mainly pursued value by any form of public law, including criminal law—but it is also often assumed that autonomy should trump other individual interests, such as privacy. If the legal existence of a wrong depends strongly on what the person potentially wronged thought or believed, the tendency is to pay less attention to the wrongdoer's behavior and to submit the victim instead to undue scrutiny.¹⁰ Both the disregard for collective interests and the focus on the wronged person rather than the wrongful conduct contribute to a loss in terms of clarity and predictability, which is particularly regrettable in the realm of public law.

A better alternative, Professor Kennedy suggests, is to work with the ideal of authenticity, which is "concerned with deciding in accordance with one's own values," and recognizes "the significance of certain shared norms and horizons of meaning."¹¹ According to this framework, there will be wrongfully deceptive sex or intimacy when the missing information is "*generally-speaking* important to people in self-constructing terms, as this process *generally-speaking* occurs via sex and intimate relationships."¹² Therefore, the law should consider not only "the meaning that actions and institutions hold" for a particular individual, but also "the social meaning that actions and institutions carry."¹³ To withhold (or to lie about) information that is socially seen as crucial to one's self-construction process is a wrongful act that may deserve criminal punishment.¹⁴

Like Professor Kennedy, I believe that it is desirable to limit the range of deceptions that should attract a legal response, especially from criminal law. The mere fact that a

⁹ Id. at 202.

¹⁰ Id. at 212.

¹¹ Id. at 213.

¹² Id. (emphasis in original).

¹³ Id.

¹⁴ Id. at 214.

person, who was mistaken or ignorant regarding some aspect of the sexual or intimate relation, would not have consented to sex had they known the truth—because it was a personal “deal-breaker”¹⁵—is not sufficient to conclude that their rights were violated in a way that should be censured by criminal law. The role of the law is not to ensure perfect voluntariness in human choices, but rather to secure a threshold of voluntariness sufficient for those choices to be regarded as genuine expressions of autonomy, properly attributable to the decision-maker as a self-responsible agent.

I also agree with Professor Kennedy that the traditional distinction between fraud in the factum and fraud in the inducement offers little guidance in determining which forms of deception may impair consent.¹⁶ There are two main reasons for this. First, the line between the two forms of fraud remains obscure: for instance, it is still unclear why deceptions concerning the identity of a sexual partner should be treated as relating to the sexual act itself rather than to its motivations.¹⁷ Second, the distinction lacks a solid foundation, since both types of deceptions may affect the level of voluntariness of sexual consent. Consider, for example, cases of condom removal without the partner’s permission (“stealthing”) or situations in which an uninformed partner is exposed to the risk of HIV transmission. These are often classified as fraud in the inducement,¹⁸ yet many would agree that they involve a relevant disrespect for others’ sexual autonomy. For those concerned with protecting sexual autonomy, it is difficult to explain why the distinction should matter for the validity of consent, given that both *what* one consents to and the *reason or purposes* for which one consents are all relevant to the decision-making process.

Unlike Professor Kennedy, I sustain that sexual autonomy makes a better framework for governing rape-by-fraud laws than authenticity, although other values besides individual choice must also play a part in determining whether a particular conduct is not just wrong, but the kind of wrong that criminal law should have a say in. From my perspective, many of the factors that Professor Kennedy points out, at the end of her book, as “likely to be important to self-construction” are fairly crucial to sexual autonomy too. For instance, Kennedy argues that one’s lover’s identity qualifies as information which is

¹⁵ For the view that any form of deception concerning a feature of the sexual encounter regarded by the sexual partner as a personal pre-condition of their consent invalidates that consent, and that deceiving another person into sex is always seriously wrong, see Tom Dougherty, *Sex, Lies, and Consent*, 123 *Ethics* 717, 731 (2013); Jonathan Herring, *Mistaken Sex*, *Crim. L. Rev.* 511 (2005).

¹⁶ Kennedy, *supra* note 7, at 204-05, 212-13.

¹⁷ See Jeremy Horder, *Consent, Threats and Deception in Criminal Law*, 10 *King’s L.J.* 104, 104-05 (1999). One traditional argument for classifying deceptions as to the identity of the sexual partner as fraud in the factum is that it converts a marital sexual relation into an act of adultery. For precedents on this point, see Stuart P. Green, *Lies, Rape, and Statutory Rape*, in *Law and Lies: Deception and Truth-Telling in the American Legal System* 194 (Austin Sarat ed., 2015). Such an argument is, however, no longer sustainable—if it ever was—particularly given that deception concerning the identity of the sexual partner vitiates consent even where the victim is not married to the person being impersonated (as will be discussed further below).

¹⁸ See Alan Reed, *An Analysis of Fraud Vitiating Consent in Rape Cases*, 59 *J. Crim. L.* 310, 312 (1995); Lauren Harter, *Statutory Solutions for Stealthing: How States Should Amend Their Laws to Address Nonconsensual Condom Removal*, 59 *Ga. L. Rev.* 291, 315 (2024).

required for the process of decision-making regarding sexual activity that aligns with one's sense of self.¹⁹ Similarly, I maintain that one's consent to the sexual relation can only be efficient if one knows that they are having sex with A and not with B or otherwise they will not have enough information to exercise a minimum control over their decision to have or not have sex.²⁰ Given the intimate nature of sexual relations, the identity of the sexual partner is uniquely sensitive for purposes of sexual consent in a way that, for example, the identity of the surgeon is not for medical consent (typically, a patient does not mind much whether Doctor A or Doctor B performs the surgery, provided that both are equally qualified).

Therefore, in many cases, Professor Kennedy and I arrive at similar conclusions, albeit by different routes. In other instances, however, an autonomy-based framework offers a distinct—and, I will argue, more consistent—account of what should and should not be regarded as deceptive sex under criminal law, when contrasted with an authenticity-based approach. The following sections will examine two problematic examples that illustrate this divergence: cases involving “gender deception” and explicit conditional consent.

II. Negative and Positive Sexual Autonomy

Sexual autonomy should not be treated as a single and monolithic right, but as a comprehensive right that encompasses more specific ones.²¹ As many scholars have already suggested, sexual autonomy has both a negative and a positive dimension.²² The negative dimension might be described, in general terms, as one's right not to take part in sexual activities against one's will or without one's consent. In my opinion, there are three essential pieces of information that every individual must possess to ensure a minimum degree of freedom when expressing sexual consent: they should know that they are engaging in a sexual act, what type of sexual act they are consenting to, and with whom they are engaging in it.²³ If an individual does not know they are taking part in a sexual act, is misled about the type of sexual act being performed, or thinks they are having sex with A when as a matter of fact they are having sex with B, the negative dimension of their right to sexual autonomy is violated.²⁴

¹⁹ Kennedy, *supra* note 7, at 215.

²⁰ See also Victor Tadros, *Wrongs and Crimes* 205 (2016).

²¹ Green, *supra* note 17, at 194, 207.

²² See Tatjana Hörnle, *Rape as Non-Consensual Sex*, in *The Routledge Handbook of the Ethics of Consent* 235, 236-37 (Andreas Müller & Peter Schaber eds., 2018).

²³ Tatiana Badaró, *A mentira que invalida o consentimento sexual: limites à criminalização do estupro mediante fraude*, 8 *Revista do Instituto de Ciências Penais* 390, 411-15 (2023).

²⁴ See also Green, *supra* note 17, at 164, 195-96; Hörnle, *supra* note 22, at 235, 241; Ivó Coca Vila, *El stealthing como delito de violación: Comentario a las STSJ-Andalucía 186/2021, de 1 de julio y SAP-Sevilla 375/2020, de 29 de octubre, 2022 InDret* 294, 304-05 (<https://perma.cc/GSP6-XU9M>).

Information other than that related to these three aspects of a sexual encounter, if relevant, would pertain only to the positive dimension of sexual autonomy. The positive dimension is concerned with a person's right to fulfill their personal needs and desires regarding their sex lives as they please (for example, only having sex with people they are in love with or with people of a specific religion, ethnicity, gender, age, or financial status). Positive sexual autonomy should not, however, be protected by law to the same extent as negative sexual autonomy. The reason is that the legal recognition of positive rights comes with the imposition to others of positive duties that might conflict with their own well-established rights.²⁵ If A has a right to know a particular piece of B's personal information before deciding whether to have sex with B, then B has a positive duty to disclose this information. Nevertheless, the existence of a duty like this might be hard to justify in the face of B's own right to privacy.

This issue is particularly relevant in so-called "gender deception" cases. As I understand Professor Kennedy's view, the biological sex of one's sexual partner constitutes information relevant to self-construction "because of the way that the gender of one's sexual partner is related to one's sexual identity (and possibly gender identity)."²⁶ On this interpretation, a transgender person who does not disclose their gender history to a sexual partner may be seen as disregarding that partner's process of authentic self-identity construction and, consequently, committing a wrongful deception.

Matters will be seen differently if approached from an autonomy-based perspective that separates the negative and positive dimensions of autonomy. First, the negative dimension of one's sexual autonomy does not include the right to know someone else's gender history before deciding whether to have or not sex with them. As said, everyone has a minimum right to know beforehand that they are having sex, which kind of sexual act they are taking part in, and whom they are having sex with. However, it is sufficient that they know they are having sex with the person B (their long-time friend, their current love affair, or someone they just met at a bar). This basic right to know who your sexual partner is does not include the right to know any specific piece of their personal information, not even their real name, profession, marital status, address, religion, financial status, place of birth, or biological sex.²⁷ This is all private information that one has a right not to share with a sexual partner.

It is true that people have the positive right to experience their sexuality according to their own desires and preferences and the state must not pass judgment on which kind

²⁵ Badaró, *supra* note 23, at 411-15.

²⁶ Kennedy, *supra* note 7, at 216.

²⁷ I concede that the difference between identity and attribute can sometimes be difficult to discern. Consider, for example, an individual who takes advantage of his resemblance to a rock star to convince a devoted fan he met at a bar that he is her idol and, through this deception, engages in sexual activity with her. I would classify this as deception regarding a mere attribute, rather than the identity of the sexual partner, though reasonable people might disagree. While some controversy may be inevitable, I believe it is worth preserving this distinction, which remains unequivocal in a considerable number of cases.

of self-oriented choices are valuable enough to deserve legal protection. From a liberal perspective, criminal law should not have a say on whether there are good or bad reasons to decide when to have or not have sex.²⁸ However, from the fact that the law must stay neutral regarding one's decision to only have sex with cisgender people it does not follow that one has a *valid claim*²⁹ to know someone else's gender history.³⁰ One's right to sexual autonomy includes a *right to informational privacy* that hinders others from demanding that they disclose sensitive information such as whether their gender identity matches the type of sexual organs they were born with. To preserve one's privacy, one even has the right to lie about it.³¹

Professor Kennedy concedes that "criminal prosecution might be inappropriate" in the case of "gender deception." According to the author, "the sensitivities regarding the potential for transgender people to be liable for failing to disclose their gender history might count against a legal response based on gender deception."³² She argues that transgender people might be deceptive about their gender history because of "the disadvantage they face and the state is partially responsible for generating that disadvantage."³³ In this context, "if the state's failings and the deceiver's wrong are of a similar kind, then it could be argued that the state loses its moral standing to blame."³⁴

Therefore, at the end of the day, an autonomy-based and an authenticity-based framework might both conclude that a transgender person that fails to disclose their gender history to an ignorant sexual partner should not be punished. However, from an authenticity-based perspective, this person has still behaved wrongfully, although the fact that they face a disadvantage that is partially the state's fault countervails the initial reason to punish them. Conversely, from an autonomy-based perspective, no wrong has been committed, given that transgender people have no positive duty to disclose their gender history to a sexual partner. As argued, the positive dimension of one's right to sexual autonomy can only go as far as it does not collide with others' own negative right to sexual autonomy, which includes the right to informational privacy. I believe that this view fits

²⁸ Dougherty, *supra* note 15, at 730.

²⁹ The idea of moral rights as valid claims is found in Joel Feinberg, *In Defence of Moral Rights*, 12 *Oxford J. Legal Stud.* 149 (1992).

³⁰ See Alex Sharpe, *Sexual Intimacy and Gender Identity "Fraud": Reframing the Legal & Ethical Debate* 66, 76 (2018); Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 *Yale L. & Pol'y Rev.* 407, 459 (2017); Matthew Gibson, *Deceptive Sexual Relations: A Theory of Criminal Liability*, 40 *Oxford J. Legal Stud.* 82, 90 (2020); Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 *Tulane J.L. & Sexuality* 1 (2015); Florence Ashley, *Genderfucking Non-Disclosure: Sexual Fraud, Transgender Bodies and Messy Identities*, 41 *Dalhousie L.J.* 339 (2018).

³¹ See Hugh Lazenby & Iason Gabriel, *Permissible Secrets*, 68 *Phil. Q.* 265, 275 (2018).

³² Kennedy, *supra* note 7, at 217.

³³ *Id.*

³⁴ *Id.* For a different critical analysis of Kennedy's position on this topic, see Alex Sharpe, *Deceptive Sex: Rethinking Consent from the Gender Margins*, 88 *Mod. L. Rev.* 689, 694-98 (2025).

better with contemporary remarks on the dynamic between rights and duties and general understanding of what it means to wrong others.

III. Merely Moral and Non-Merely Moral Wrongs

Professor Kennedy's list of deceptions that should qualify for a legal response against deceptive sex and intimacy also includes "deception relating to an issue that someone has expressly described as important to them, such as when they give explicit conditional consent to sex."³⁵ On her view, "the requirement for explicit conditionality would avoid the problems relating to certainty, predictability and undue focus on the person wronged."³⁶ At the same time, the law would be respecting the value of authenticity in identity self-construction by acknowledging that "each individual generates their own narrative under which their life has value."³⁷

One concern with this perspective is that it risks extending the reach of criminal law to situations where deception, though arguably morally troubling, does not appear to constitute the kind of wrong that justifies public condemnation through state intervention. Consider the following example: A has set for himself a strict rule according to which he must only have sex with women with natural blonde hair. A is attracted to B, who has blonde hair and has also shown interest in him. A tells B that he would like to have sex with her, but only if she assures being naturally blonde. However, B's natural hair color is actually brown. Since B also desires to have sex with A, she lies and tells him that blonde is her true hair color, even showing him the photo of a blonde child and claiming that is her as a young girl. Following this conversation, A and B have sex. In this case, B engaged in a sexual act with A after lying about something that A has explicitly described as a material condition of his sexual consent. According to Professor Kennedy's framework, B has wronged A in a way that is *prima facie* relevant to criminal law. But should that really be the case?

Lying and deceiving to obtain sex is morally wrong, but sometimes not more than that. "Don't lie or deceive others" may be generally prescribed by norms of morality, but not by norms supported by the state's coercive power.³⁸ Only in special situations will a moral duty to tell the truth qualify as a legal duty. I may have a legal duty to tell a revenue agent the truth about how much money I have in the bank, but I do not have a legal duty to keep my grandmother informed on my financial situation, even though lying about it when asked if I could loan her some money for a medical emergency seems quite shameful. In the context of sexual relations, the existence of a non-merely moral duty not to lie or deceive is easy to justify when the information in question is crucial for the negative dimension of others' right to sexual autonomy (as mentioned, that is the case of information

³⁵ Kennedy, *supra* note 7, at 216.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Vera Bergelson, Sex, Lies and Law: Rethinking Rape-by-Fraud, in *Legal Perspectives on State Power: Consent and Control* 152, 164 (Chris Ashford et al. eds., 2016).

regarding the fact that they are taking part in a sexual act, what kind of sexual act, and who else is participating in it).

However, things are different when only the positive dimension of the right to sexual autonomy is affected by the missing information. As seen above, while the negative dimension of the right to sexual autonomy is concerned with one's minimal control over the decision to take part or not in a sexual act, the positive dimension deals with one's interest in shaping their sexual experience according to their own desires and preferences. The aspects of this positive dimension that should be protected by criminal law must be identified through a normative judgment about when it is fair and appropriate to threaten people with criminal punishment to obligate them to comply with a correlated positive duty. Individuals are not burdened by law with a *duty to cooperate* with others in their pursuit of sexual fulfilment, since a general obligation of this kind would likely conflict with their own negative sexual freedom.³⁹ The law has good reasons to establish positive duties to assist and cooperate with others in multiple fields (easy rescues, environmental protection, funding of public services),⁴⁰ but that is not generally the case when it comes to sexual intimacy. The "fake blonde" B, for instance, has no legal duty to cooperate with A's sexual idiosyncrasy and, as a consequence, has no legal duty to disclose to him her natural hair color. The fact that B intentionally lied about it to fulfill her own personal desire and even went the extra mile to persuade A of something that is not true might be considered morally wrong, but not more than that.

In my view, A having communicated an explicit condition for his sexual consent is not sufficient to turn B's merely moral duty to tell the truth into a legally binding one. A legal duty to cooperate with A's positive sexual freedom requires normative grounds that go beyond A's expressed desires. In other words, besides the disregard for A's positive right to sexual autonomy, an additional component is necessary to boost the wrongfulness of the conduct in a way that provides a reasonable explanation for the state's coercive intervention in the matter. I can point out two groups of cases where this condition is met. First, when someone exploits a position of trust or authority to deceive a person to whom they hold a special duty of assistance, orientation or protection into consenting to a sexual act. For example, a religious guru who convinces a disciple that having sex with them will strengthen the disciple's relationship with the divine, or a doctor who tells a patient that to perform a sexual act with them will cure the patient's health problems. In cases like this, the informational inequality between those involved and the special obligations that come with the position of trust or authority justify the existence of a non-merely moral duty to disclose truthful information to the vulnerable part in the relation.⁴¹

³⁹ Beatriz Corrêa Camargo, *Sexuelle Selbstbestimmung als Schutzgegenstand des Strafrechts*, 134 *Zeitschrift für die gesamte Strafrechtswissenschaft* 351, 383-84 (2022).

⁴⁰ John Rawls, *A Theory of Justice* 126-30 (1971 [1999]); Richard J. Arneson, *Principle of Fairness and Free-Rider Problems*, 92 *Ethics* 616, 622-23 (1982).

⁴¹ Badaró, *supra* note 23, at 415-16.

A second example of sexual deception that deserves the attention of criminal law, despite only interfering with the positive sexual autonomy of others, is found in cases where the agent knows that the deception has potential to cause non-trivial harm to the deceived, particularly harm to legal interests beyond sexual autonomy, but equally safeguarded by criminal law. To illustrate this scenario, shall we imagine that A has a sexually transmitted disease that A's sexual partner B is not aware of. A has a *prima facie* negative duty not to cause physical harm to B. Due to this non-merely moral duty, A has a derivative negative duty not to have unprotected sex with B without B's consent to the risk of transmission of the disease. Note that A does not have a positive duty to disclose their health condition to B, given that A's own right to privacy precludes the existence of such a positive obligation. However, the general duty we all bear to not harm others requires A to refrain from creating risks to B's health, at least not without B's informed consent. In such cases, if A has unprotected sex with B without previously disclosing their health status, the deception will merit public condemnation by criminal law, regardless of whether B explicitly conditioned their consent on A being free from a sexually transmitted disease.

Once again, an autonomy-based framework, especially one that recognizes the difference between negative and positive right to sexual autonomy and its correlation with negative and positive duties, presents a more plausible account of what instances of deceptive sex should qualify for a legal response by criminal law. Conversely, an authenticity-based framework, as proposed by Professor Kennedy, might lead the legislature to pinpoint the existence of a wrong even when the deception in question is reprehensible from a merely moral perspective and, therefore, the kind of wrongful behavior criminal law has no business with.

Conclusion

There is much to be commended in Professor Kennedy's work. Her careful, original, and insightful analysis will undoubtedly enrich and sharpen future conversations on the regulation of deceptive sex. Although some of my conclusions differ from those advanced in her book, I regard our shared viewpoints as more significant than our disagreements. The fact that we arrive at similar conclusions on certain instances of sexual deception, despite departing from different theoretical premises and legal traditions, should be taken as strong evidence of the soundness of those conclusions.

I hope the arguments presented in this paper help reinvigorate the view that regulations in the field of sexual crimes should be primarily concerned with responding to violations of sexual autonomy, particularly its negative dimension. As shown, there is some basic information that every individual must possess to exercise their negative right not to engage in a sexual act against their will or without their consent: they should know they are engaging in a sexual act, which kind of sexual act it is, and with whom they are engaging. While the state should remain neutral regarding the ways in which individuals decide to shape their sexual experience according to their preferences and desires, criminal law should only intervene in conduct that solely disregards the positive dimension of another's sexual

autonomy in the presence of additional grounds to establish a legal—and not merely moral—duty to disclose or refrain from misrepresenting information before engaging in a sexual act.