Not Just Academic: Critiquing and Reforming the Law of Deceptive Sex

Chloë Kennedy*

Reading the articles that have generously been prepared for this Special Issue, I am reminded of how often writing *Inducing Intimacy* pushed me outside my comfort zones. In terms of subject matter, it required me to work on several areas of law that were completely new to me. In terms of ambition, it provoked two desires that were not easy to reconcile. On the one hand, I wanted to critique contemporary efforts to criminalize deceptive sex and the ideal on which these rest, i.e., thin sexual autonomy. On the other, I wanted to suggest an alternative way forward that would reflect contemporary mores but be immune from my own critiques. Apart from the difficulty of squaring these two ambitions, my decision to ground them both in original historical research presented additional challenges. Chief among these was attempting to convey the nuance and complexity of the empirical data while simultaneously cutting through enough of the detail to arrive at some semi-generalizable insights.

Prompted by these memories, in what follows I offer some post-publication reflections on the book while at the same time engaging with the points and arguments made by my interlocutors. I have organized my comments around the two goals I had when writing *Inducing Intimacy* which—by my reading—broadly align with the goals of the articles written by my colleagues. Although it is simplifying for the sake of discussion, it seems to me that half of the articles aim to offer solutions to the question of how law ought to treat deceptive sex (or sexual "misconduct" more generally) and the other half critique such solutions. Naturally, I do not attempt to respond to all of the issues raised in the articles, but the richness and depth of analysis they display highlights the importance—and challenge—of grappling with the legal regulation of deceptive sex, deceptive intimate relationships,[1] and indeed intimacy more generally.

I. Offering Solutions

Four of the articles in this Special Issue are primarily concerned with how to "solve" the problem of whether and how to criminalize deceptive sex. What is immediately noticeable when reading them en masse is that all of the authors seek to defend and build on the ideal

* Professor of Law and History, University of Edinburgh School of Law. Thanks to Markus Dubber for planning and organizing this Special Issue.

[1] The focus of this Special Issue is sex but *Inducing Intimacy* also deals with deceptive intimate relationships. In recent work, I have been thinking more about the relationship side of the project.

ISSN 2819-3636

of autonomy, rejecting my suggestion to prefer authenticity. As I described the difference between these ideals in *Inducing Intimacy*, "while autonomy valorises an ideal of freedom that is maximally self-determining, authenticity emphasises the importance of deciding in accordance with one's values but recognises the significance of external horizons of meaning, including for the ability to hold these values at all."[2]

One criticism of my portraying autonomy in this way presented in the articles is that I risk implying that autonomy is an unqualified right when it might be balanced against other values, most conspicuously privacy. In light of this criticism, I should perhaps have been clearer that what I reject is what I describe as a thin conception of autonomy that tends—among other things—to crowd out considerations beyond protecting unhindered individual choice.[3] Versions of autonomy that pay serious attention to the structures and values that shape individual choice, and affect the way it is protected in law, are not my target. Moa Bladini is therefore correct, I think, to suggest that there is synergy between my articulation of authenticity and the concept of relational autonomy she and her colleagues endorse.

Turning to the way autonomy is deployed in the solutions put forward in these four articles, Beatriz Corrêa Camargo and Tatiana Badaró both draw on the purported distinction between positive and negative sexual autonomy to try to identify when deceptive sex should be punished; Cristina Valega Chipoco advances a multi-faceted account of sexual autonomy that is designed to do the same; and Nora Scheidegger wants to hold on to sexual autonomy while preserving the traditional distinction between fraud in the factum, which has sometimes been treated as precluding consent, and fraud in the inducement, which has sometimes been treated as vitiating consent. She also suggests that focusing on reproductive autonomy, alongside sexual autonomy, can help us decide whether deception about fertility or the use of contraception should be a crime.

The decision to invoke a distinction between positive and negative sexual autonomy is an interesting one. Though there are differences between the way Badaró[4] and Corrêa Camargo define these two strands of autonomy, they both portray negative sexual autonomy as concerned with the ability to reject unwanted sex and positive sexual autonomy as concerned with the ability to pursue desired sex.[5] They also suggest that deceptions infringing negative sexual autonomy are more justifiably criminalized than those infringing positive sexual autonomy. Yet as Corrêa Camargo notes, it is not always clear how the two strands of autonomy come apart in the context of deception. Indeed, Matthew

[2] Chloë Kennedy, Inducing Intimacy: Deception, Consent and the Law 13 (2024); see also id. ch. 8.

[3] Id. at 202.

[4] In this article, I follow the convention of most UK scholarship, which is to avoid titles and to refer to authors by full names and then surnames only on subsequent occasions.

[5] Badaró describes negative sexual autonomy as the right not to take part in sexual acts against one's will or without one's consent and positive sexual autonomy as the right to fulfil one's sexual needs and desires as one pleases. Corrêa Camargo describes negative sexual autonomy as freedom against unwanted sexual acts and positive sexual autonomy as freedom to perform sexual acts that are desired.

Gibson has argued that deceptive sex of all kinds invariably violates *both* strands, given that the deception—at least where it is material to the deceived person—simultaneously frustrates their attempt to choose sex they prefer *and* to avoid sex they do not want.[6] In view of this argument, it would have been good to hear more about why Badaró and Corrêa Camargo think that only the traditional categories of deception (i.e., deception about the act or about the identity of one's sexual partner (both narrowly construed)) infringe negative sexual autonomy.

It would have been especially good to hear more about this from Corrêa Camargo, who argues that negative sexual autonomy is concerned with the ability to impose boundaries (sometimes described as barriers) in relation to sexual activity. For the reasons offered by Gibson, it seems that whenever deception is used to circumvent whichever boundaries are important to the person who set them—whether these track traditional legal distinctions or not—both strands of sexual autonomy are violated. This means that a potentially limitless number of deceptions can be said to infringe negative sexual autonomy, but it also means that it is difficult to argue that the traditional categories of deception *always* do. As I pointed out in *Inducing Intimacy*, when thin sexual autonomy came to be the organizing principle of sex offences, the question arose of whether the identity of one's partner might *not* in fact be a condition of sexual consent in some cases.[7]

Furthermore, examining how the traditional categories of deception have been applied in practice[8] shows just how malleable and potentially capacious they are. Attempts to use them to secure legal certainty and predictability are therefore likely to be limited in their success, particularly when the subject-matter of deception engages issues that are contested and controversial, as Rachel Tolley's discussion of gender deception and transgender defendants shows. Challenges also arise, as the contribution by Valega Chipoco shows, when the relevant sexual activity is mediated by technology. In this context, new opportunities for deception arise and new interpretations of what constitutes "the act" must be provided—interpretations that inevitably call into question the significance of bodily contact.

On this point, I found the discussion of "stealthing" (i.e., the non-consensual and surreptitious removal of condoms during sex) in the articles by Scheidegger and Aya Gruber thought-provoking. Scheidegger is interested in a wider range of fertility and contraception-related deceptions, in relation to which I thought her arguments about reproductive autonomy were insightful,[9] but she also sets out what makes stealthing—on her view—non-consensual sex. She and Gruber both note that the reasons for punishing stealthing

---

[6] Matthew Gibson, Deceptive Sexual Relations: A Theory of Criminal Liability, 40 Oxford J. Legal Stud. 82 (2020).

[7] Kennedy, supra note 2, at 176.

[8] Id. chs. 2 & 7.

[9] In recent work I have also been considering interferences with reproductive decision-making that stem from deception, but my focus has been deceptive intimate relationships and the "lost chances" to have children they can cause.

extend beyond those I endorse in my own work (which relate to elevated risks of pregnancy and disease transmission, where such risks exist, and the impact of these potential outcomes on self-construction)[10] to include the difference that skin-to-skin contact makes.

Yet where Scheidegger appears to accept that skin-to-skin contact is morally and legally significant at least in part because it appears to be significant according to social convention, Gruber is interested in asking how and why this social convention has come about. In particular, she associates it with long-standing and gendered chastity norms that encourage women to fear and/or feel shame about much sexual activity in which they engage. Alongside the possibility that campaigns to proscribe stealthing have actually helped *generate* the harms of stealthing, this association with chastity norms gives Gruber reason to reject the idea that stealthing should be considered rape.

In these respects, Gruber's analysis of stealthing exemplifies her wider body of work, in which she explores why people have come to view—or at least treat—sex as something exceptional. She also traces how this "sex exceptionalism" has led to the expansion of sex offences with various, often negative, consequences. These points underscore the fact that we should not derive much solace from normative coherence or consistency[11] when the norm in question (in this case, sexual autonomy) is infused with, and produces, unjust or otherwise undesirable social, political, and cultural conditions. This is why I believe it is crucial to pay attention to the assumptions and commitments that undergird moral and legal norms and give them flesh. It is also essential to interrogate how these norms are used in practice and to what effect. In short, in my view it is necessary to critique solutions from a standpoint that is both socio-legal and historically-informed.

II. Critiquing Solutions

Given my views on critiquing solutions, it is perhaps not surprising that I found much of value in the four articles that appear to share my sensibilities. Bladini's reflections on the way gendered stereotypes have endured Sweden's transition from a coercion-based to a consent-based model of sex offences is a valuable reminder of the fact that social and cultural norms can pervade and animate ostensibly incompatible concepts. Preeti Dash's research into feminist-driven law reform and prosecution, policing, and judicial practices in India imparts a similar lesson, alongside skepticism about the extent to which the state can be trusted to secure meaningful justice for women. In this respect, her work aligns with Gruber's anti-carceral sentiments. Yet rather than lament the failure of state authorities to

[10] It is essential to note that my in-principle view that stealthing might justifiably be punished when it carries these risks is subject to countervailing considerations, including privacy interests and the fact that criminalisation has been shown to stymie public health efforts.

[11] All four of the authors I discuss in this section prize these values (Scheidegger refers to conceptual clarity, Valega Chipoco to normative coherence, and Corrêa Camargo and Badaró to consistency). The way these terms are used implies that they refer to internal coherence, i.e., adherence to the notion of autonomy endorsed by the relevant author.

properly implement progressive change, Gruber questions whether the change was progressive in the first place.

By Gruber's account, the prominence now enjoyed by liberal notions of autonomy must be read as part of a long history of promoting female chastity and thereby limiting women's sexual freedom. As with chastity regimes of the past, the view encouraged by contemporary advocates of thin autonomy is that sex is an inherently serious—indeed, dangerous—undertaking for women. I agree with this critique and would add that it is for this reason ironic that critics of alternatives to thin autonomy, including my own alternative of authenticity, sometimes condemn them on the ground that they are moralistic.[12] Based on the account provided in her article, it seems clear that Gruber's forthcoming work on chastity and sex exceptionalism will be important and enlightening.

Another aspect of the contributions from Dash and Gruber that I found valuable is their attention to *who* is targeted by criminal laws against sexual misconduct. Regrettably, the sources I used to write *Inducing Intimacy* did not allow for much population-specific analysis beyond noting the near-ubiquitous importance of gender and the significance of class disparities in litigation concerning the existence of marital promises and consent. But as Dash and others[13] have shown, ethnicity, race, and religion have also been important. More specifically, members of less privileged groups in society have been perceived to deceptively occupy more desirable, and desired, identities and, in doing so, threaten a more privileged population.

It is possible that this description might apply to the prosecution of transgender people who "deceive" their partners about their gender—a phenomenon discussed by Tolley. Whether or not that is the case, there are certainly, as Tolley shows, a host of difficulties that affect attempts to rationalize these prosecutions. There is not much I can add to her discussion, but I would like to reiterate that it very clearly shows how difficult it is to sustain the boundaries—between different acts, and between identity and attributes—that are required by traditional approaches to delineating the range of punishable deceptions. Furthermore, it shows how the difficulty is especially pronounced as societies become more pluralistic. In such circumstances, it can be hard to agree on how to describe a single act or person, never mind explain how it/they are different from another act or person and whether and why this difference should matter.[14] Once again, it is only by taking a socially- and culturally-informed view of these disagreements that we can appreciate their nature and extent.

The question then arises of what do with this knowledge. Of course, it is not incumbent on everyone who critiques a law or its application to suggest an alternative. To be sure, such critics have the advantage of first-hand understanding of whatever problem(s)

---

[12] Kennedy, supra note 2, at 141, 197.

[13] E.g., Aeyal Gross, Rape by Deception and the Policing of Gender and Nationality Borders, 24 Tulane J.L. & Sexuality 1 (2015).

[14] Similar issues affect interpretations of the purpose of sexual acts. Kennedy, supra note 2, at 182.

they have identified. The process of uncovering and analyzing that problem might also, as in my case, have provided inspiration for suggested solutions. Yet even if the critic has no desire to propose changes, others might wish to do so, so I would like to share some of my own thoughts on where the critiques I've outlined in this section might lead.

Beginning with patterns of prosecution and punishment, one reason these vary across demographics is likely to be sexual preference: certain attributes are likely to be perceived as undesirable and therefore significant to potential sexual partners and, as a consequence, are more likely to be hidden. Insofar as sexual preference can be described as a matter of individual choice,[15] a thin autonomy perspective is not likely to provide many resources for altering these preferences when they are thought to be problematically discriminatory.[16] As Tom Dougherty puts it, "[w]e can all agree that racist prejudice is a morally abhorrent reason for any action. Nonetheless, when racists only decide to have sex with people of their own race on the basis of this prejudice, then they are consenting only to sex with people of their own race. When it comes to consent, we must respect other people's wills as they actually are, not as they ought to be."[17] Dougherty is not writing about law but some who are have adopted a similar perspective, including by suggesting that the privacy interests of, for example, trans people, should be "subservient to the right to sexual integrity of their partner."[18]

I have already mentioned that, in my view, privacy interests must be factored in to all-things-considered assessments of the desirability of punishing deceptive intimacy, but there are other issues to think about too. One such issue is the possibility that, where objective limits are set by the state on the range of deceptions that are punishable, then this should be done in a way that does not countenance prejudicial attitudes.[19] Another issue is standing to blame. Elsewhere, I have argued that the state might lack standing to blame defendants whose deception can be explained by the disadvantage they face when the state itself is partly to blame for helping generate that disadvantage by failing to recognize the identity of that defendant. This might be the case when, for example, members of disenfranchised nationalities deceive their sexual partners about their nationality.[20] Tolley has suggested in her contribution to this Special Issue that this line of thinking might be extended to argue that non-disclosure, and perhaps also deception, about sex assigned at

[15] For a recent discussion of the relationships between the personal and political in this context, see Amia Srinivasan, The Right to Sex (2021).

[16] Online dating, with the option of screening out potential matches on the basis of a range of characteristics, may be encouraging discrimination. See Tim de Jonge & Frederik J. Zuiderveen Borgesius, Digital Discrimination in Dating Apps and the Dutch Breeze Case, 2025 Tech. & Regul. 214 (https://perma.cc/P7SD-7N4D).

[17] Tom Dougherty, Sex, Lies, and Consent, 124 Ethics 717, 736 (2013).

[18] Jonathan Herring, Mistaken Sex, Crim. L. Rev. 511, 523 (2005).

[19] For a short discussion, see Chloë Kennedy, Criminalising Deceptive Sex: Sex, Identity and Recognition, 41 Legal Stud. 91, 106 (2021).

[20] Id. at 104.

birth could be analyzed through the lens of a defense-based rationale. This is an interesting idea and it would be good to see the reasoning set out more fully, perhaps in future work.[21]

Thinking more generally about gender norms that are inculcated—whether intentionally or not—via punishing sexual behaviors, here I would agree with Gruber that criminalizing conduct has the potential to generate the very harms to which the criminal law is designed to respond. For example, in relation to deceptive sex, I have suggested that using the criminal law to try to secure against all (culpable) "interferences" with decision-making in an effort to reduce vulnerability might, perversely, increase feelings of vulnerability.[22] In other words, events that might otherwise have been shrugged off can be experienced as more damaging when the law "says" that they are damaging. Yet if there is a pre-legal harm to which the criminal law could aim to respond then, in a world where criminal law is often used to try to effect social and cultural change,[23] deciding *not* to criminalize signals that the harm is relatively insignificant.

Examining the way that such potentially "progressive" laws can be co-opted by authorities—as Dash has done in the context of India—might bolster the case against criminalization, but it is worth remembering that any attempt to impose norms in a quasi-authoritative way, even when this is done via social or educational means, is susceptible to co-option. Similarly, in societies marked by political and social conflict, concerns about legitimacy and authority affect these softer options just as they affect punishment.[24]

III. Concluding Thoughts

I am very grateful to all the contributors to this Special Issue for their engagement with my work and for sharing their own perspectives on many of the issues it addresses. As the doctrinally-confusing and normatively-unattractive state of the English criminal law concerning deceptive sex reminds us,[25] these issues are not academic in the pejorative sense of the word; lawyers and judges are struggling with them and the consequences are serious. What, if anything, academic work might contribute to alleviating this situation depends on the nature of the insights it provides. These might primarily be critical—elucidating the drivers and effects of specific legal solutions—or constructive—attempting to formulate and defend new solutions.

---

[21] In my own work, I suggested that the lack of standing argument would not have interpersonal application and so would not apply in the context of a civil action.

[22] Kennedy, supra note 19, at 93.

[23] Benjamin Levin, Carceral Progressivism and Animal Victims, in Carceral Logics: Human Incarceration and Animal Confinement 87 (Lori Gruen & Justin Marceau eds., 2022).

[24] For some discussion, see Chloë Kennedy, Alan Norrie, *Crime, Reason and History* (1993), in Leading Works in Criminal Law 220, 235-37 (Chloë Kennedy & Lindsay Farmer eds., 2023).

[25] Jonathan Rogers, Deceptions that Induce Sexual Activity: The Need for Reform, Crim. L. Rev. 1 (2026) (noting that the Law Commission for England and Wales has put sexual consent on its agenda). The announcement of this development notes that "[f]aced with unusual fact patterns, the courts have, for example, struggled to achieve a consistent answer to questions about the effect of deceit on consent." Law Commission, Consent in the Criminal Law (https://perma.cc/6PF5-XBCF).

In my own work, I have tried to show that hyper-subjectivist legal responses to deceptive sex impede legal clarity and certainty and do not exclude social, political and cultural norms,[26] though this is one of their purported "benefits." They are also underpinned by a decidedly sex-negative ethic that is not always apparent when sexual autonomy is presented as an ostensibly value-neutral ideal or its ascendance is portrayed as an uncomplicated feminist win.[27] I have also tried to show how traditional, objectivist legal responses are unlikely to be able to dispel the allure of hyper-subjectivism. Alongside these more critical contributions I have offered a two-track model for legal responses to deceptive sex that is not fully subjective but which attempts to take seriously the desire to respect individual agency that sexual autonomy embodies. As such, it offers a list of "objectively" significant issues in relation to which deception might, in principle, justifiably be criminalized[28] that is supplemented by the suggestion that idiosyncratic "deal-breakers" that have been explicitly communicated in advance might also, in principle, justifiably be criminalized.

Reflecting on the contributions to this Special Issue, I can see how this proposal is not particularly critical of the insight on which it is based, i.e., that sex and intimate relationships are important to the way people construct their sense of self under late modern conditions. In other words, it does not engage very much with the question of whether this is "a good thing."[29] It also provides limited internal resources for pushing back against carceral creep. Yet what it shows is that outside (but perhaps alongside?) more radical critiques of our continued tendency to ascribe special significance to sex, and our associated impulse to punish accordingly, there is scope to think critically about how to design and implement laws that embody this impulse. Beyond this, the proposal's grounding in a genealogy of intimacy might encourage within other scholarship and reform efforts what this historical method takes to be essential: a frank and contextually-informed account of the values and interests that are served by law that does not shy away from the fact that the burdens of punishment are unlikely to fall randomly or evenly.

[26] Kennedy, supra note 2, at 115-16, 167, 198.

[27] See supra note 14.

[28] The list comprises information that is likely to be important to individuals' processes of self-construction and might be implicated in deceptions carried out in the context of sex; the scare quotes indicate the crucial role of social and cultural scripts in this process.

[29] For some interesting reflections on this point, see Michael Plaxton, Deceptive Sex Part Two, Substack (Feb. 13, 2026) (https://perma.cc/5S9G-7R8A).